

120 FERC ¶ 61,098
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;
Sudeen G. Kelly, Marc Spitzer,
Philip D. Moeller, and Jon Wellinghoff.

Applicability of Federal Power Act
Section 215 to Qualifying Small Power
Production and Cogeneration Facilities

Docket No. RM07-11-002

ORDER DENYING REQUEST FOR REHEARING

(Issued July 27, 2007)

1. In this order, the Commission denies rehearing of its June 25, 2007 Order in this proceeding denying stay.¹

Background

Regulatory Background

2. On August 8, 2005, the Electricity Modernization Act of 2005, which is Title XII, Subtitle A, of the Energy Policy Act of 2005 (EPAct 2005), was enacted into law.² It added a new section 215 to the Federal Power Act (FPA), requiring a Commission-certified Electric Reliability Organization (ERO) to develop Reliability Standards which are subject to Commission review and approval. Once approved, the Reliability Standards become mandatory and may be enforced by the ERO, subject to Commission oversight.

¹ *Applicability of Federal Power Act Section 215 to Qualifying Small Power Production and Cogeneration Facilities*, 119 FERC ¶ 61,320 (2007) (June 25 Order).

² Energy Policy Act of 2005, Pub. L. No 109-58, Title XII, Subtitle A, 119 Stat. 594, 941 (2005).

3. In July 2006, the Commission issued an order certifying the North American Electric Reliability Corporation (NERC) as the ERO.³ In an April 2007 Order, the Commission approved delegation agreements between NERC and eight Regional Entities, including a delegation agreement between NERC and Florida Reliability Coordinating Council (FRCC).⁴ Pursuant to that delegation agreement, NERC delegated to FRCC the authority to enforce mandatory Reliability Standards within the FRCC region. Pursuant to Order No. 693, the Commission approved 83 Reliability Standards, which became effective on June 18, 2007.⁵ Further, in Order No. 693, the Commission approved NERC's compliance registry process, including NERC's Statement of Compliance Registry Criteria (NERC Registry Criteria), which describes how NERC and the Regional Entities will identify organizations that may be registered for compliance with mandatory Reliability Standards.⁶ However, NERC's Rules of Procedure provide that an entity registered by a Regional Entity may seek NERC review of the registration decision and, ultimately, may appeal the registration decision to the Commission.

4. In Order No. 696, the Commission revised its regulations governing QFs to eliminate the generic exemption of QFs from the requirements of FPA section 215.⁷ In Order No. 696, the Commission explained that Congress used broad language to ensure that all entities that could affect the reliability of the Bulk-Power System, including QFs, would be subject to mandatory Reliability Standards. The Commission also determined that, for reliability purposes, there is no meaningful distinction between QF and non-QF generators that would warrant generic exemption of QFs from mandatory Reliability Standards.

³ *North American Electric Reliability Corp.*, 116 FERC ¶ 61,062 (2006), *order on reh'g and compliance*, 117 FERC ¶ 61,126 (2006), *order on compliance*, 118 FERC ¶ 61,030 (2007), *order on clarification and reh'g*, 119 FERC ¶ 61,046 (2007).

⁴ *North American Electric Reliability Corp.*, 119 FERC ¶ 61,060 (2007).

⁵ *Mandatory Reliability Standards for the Bulk Power System*, Order No. 693, 72 Fed. Reg. 16,416 (April 4, 2007), FERC Stats. & Regs. ¶ 31,242 (2007), *order on reh'g*, Order No. 693-A, 120 FERC ¶ 61,053 (2007).

⁶ *Id.* at P 92-95.

⁷ *Applicability of Federal Power Act Section 215 to Qualifying Small Power Production and Cogeneration Facilities*, Order No. 696, 72 Fed. Reg. 29,056 (May 24, 2007), FERC Stats. & Regs. ¶ 31,248 (2007).

Motion for Stay of Order No. 696

5. On June 12, 2007, the City of Tampa, Florida (Tampa), the Solid Waste Authority of Palm Beach (SWA), Florida, and Mosaic Fertilizer, each a member of Florida Renewable Energy Producing QFs (Florida Renewable QFs), filed a joint motion for stay of Order No. 696. They stated that FRCC, the relevant Regional Entity under FPA section 215, registered them as responsible for compliance with mandatory Reliability Standards. They claimed that their inclusion in the registry is unsupported and there is a substantial probability that either NERC or the Commission will reverse the FRCC's determinations. Tampa, SWA and Mosaic Fertilizer stated that they were then seeking NERC review of FRCC's decision and would appeal to the Commission if unsuccessful before NERC. Tampa, SWA and Mosaic Fertilizer asked that the Commission grant a stay of FRCC's determinations pending the appeal process before NERC and the Commission. In addition, they asked the Commission to clarify that Order No. 696 does not apply to them while their appeal of the FRCC decision is pending.

June 25 Order

6. The Commission found that Tampa, SWA and Mosaic Fertilizer had not met the standard for a stay.⁸ The Commission reasoned that it may stay its action when "justice so requires,"⁹ and that the key element in such an inquiry is whether there would be irreparable injury to the moving party.¹⁰ The Commission found that Tampa, SWA and Mosaic Fertilizer did not claim, much less substantiate, irreparable injury if they were required to abide by the reliability standards while their appeal of the FRCC registrations was pending appeal to NERC or this Commission. The Commission concluded that, under these circumstances, it would deny the requested stay and also clarified that "the movants are required to comply with Order No. 696 unless they successfully appeal the registration."¹¹

Request for Rehearing

7. On June 28, 2007 Tampa, SWA, and Mosaic Fertilizer jointly filed for rehearing of the June 25 Order. Tampa, SWA, and Mosaic Fertilizer claim that they will suffer

⁸ June 25 Order, 119 FERC ¶ 61,320 at P 7.

⁹ *Id.* at P 8; 5 U.S.C. § 705 (2000).

¹⁰ *CMS Midland, Inc.*, 56 FERC ¶ 61,177 at 61,631 (1991), *aff'd sub nom. Michigan Municipal Cooperative Group v. FERC*, 990 F.2d 1377 (D.C. Cir. 1993).

¹¹ June 25 Order, 119 FERC ¶ 61,320 at P 9.

irreparable harm if required to implement the reliability rules prior to disposition of their appeals. They claim that: (1) they will incur significant costs as a result of implementing and maintaining compliance with reliability standards, (2) these costs will run into “the many thousands of dollars,” and (3) the costs cannot be recouped. They claim that under these circumstances their harm is irreparable.

8. Tampa, SWA, and Mosaic Fertilizer also claim that the June 25 Order was silent as to its request to clarify whether they were subject to Order No. 696 during their appeals from the FRCC decisions and they ask the Commission to provide the requested clarification.

9. On July 2, 2007, Georgia-Pacific LLC filed an answer in support of Tampa, SWA, and Mosaic Fertilizer’s request for rehearing. Georgia-Pacific LLC states that it also owns a QF in Florida and that it has received a letter from NERC that it was registered as a generator owner and as a generator operator. Georgia-Pacific LLC states that it has challenged its registration with NERC. It urges the Commission to clarify that a QF that has challenged its inclusion on the NERC registry with NERC, or has appealed a NERC denial of a challenge to the Commission, will not be subject to mandatory Reliability Standards until the challenge or appeal has been resolved.

Discussion

10. Rule 713(d) of the Commission’s Rules of Practice and Procedure¹² provides that the Commission will not permit answers to requests for rehearing. Accordingly, we reject Georgia-Pacific LLC’s answer to the request for rehearing.

11. We deny rehearing of the June 25 Order. Tampa, SWA, and Mosaic Fertilizer claim that the costs of compliance with mandatory Reliability Standards, which they do not foresee recouping if their appeals of the registry decisions are successful, constitute irreparable harm. However, they fail to provide any financial information or documentation on their costs to support their claim. Moreover, as Tampa, SWA, and Mosaic Fertilizer pointed out in their original motion for stay, pecuniary injury does not in and of itself, constitute irreparable harm.¹³ Thus, Tampa, SWA, and Mosaic Fertilizer’s unsupported claims that they will have to incur financial costs that may not be recoverable is insufficient, both factually and legally, to demonstrate the need for a stay while they appeal the registration determinations.

¹² 18 C.F.R. § 385.713(d) (2007).

¹³ Motion for stay at 3; *accord, e.g., Wisconsin Gas Co. v. FERC*, 758 FERC F.2d 669, 674 (D.C. Cir. 1985) (it is well settled that economic loss, in and of itself, does not constitute irreparable harm).

12. As to Tampa, SWA, and Mosaic Fertilizer's claim that the Commission failed to address their request that we clarify whether Order No. 696 applies during the pendency of an appeal of a registry decision to NERC, or an appeal of a NERC decision to this Commission, we expressly "clarify[ied] that the movants are required to comply with Order No. 696 unless they successfully appeal the registration."¹⁴ *I.e.*, they must comply until such time as they may prevail. We see no need for further clarification.

The Commission orders:

(A) Georgia-Pacific LLC's answer to the request for rehearing is hereby rejected.

(B) The request for rehearing of the June 25 Order in this proceeding is hereby denied.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.

¹⁴ June 25 Order, 119 FERC ¶ 61,320 at P 9.