



The Commonwealth of Massachusetts

DEPARTMENT OF PUBLIC UTILITIES

D.P.U. 11-59

July 22, 2014

Petition of Allco Renewable Energy Limited pursuant to 220 C.M.R. § 8.08(2) for an investigation by the Department of Public Utilities into Allco's offer to sell to Massachusetts Electric Company d/b/a National Grid, generation output from various qualifying facilities within the meaning of 220 C.M.R. § 8.02.

APPEARANCES: Thomas M. Melone, Esq.
Allco Renewable Energy Limited
14 Wall Street, 20th Floor
New York, New York 10005
FOR: ALLCO RENEWABLE ENERGY LIMITED
Petitioner

Brooke E. Skulley, Esq.
National Grid USA Service Company, Inc.
40 Sylvan Road
Waltham, Massachusetts 02451
FOR: MASSACHUSETTS ELECTRIC COMPANY
D/B/A NATIONAL GRID
Respondent

I. INTRODUCTION AND PROCEDURAL HISTORY

A. Procedural History

On August 4, 2011, pursuant to 220 C.M.R. § 8.08(2) Allco Renewable Energy Limited (“Allco”) filed a petition with the Department of Public Utilities (“Department”) requesting that the Department investigate the reasonableness of certain actions by Massachusetts Electric Company d/b/a National Grid (“National Grid”) concerning an offer by Allco to sell the entire generation output from eleven qualifying facilities (“QFs”) to National Grid (“QF Complaint”) (QF Complaint at 1). Allco also requests that the Department issue an order declaring that: (1) pursuant to the Public Utility Regulatory Policies Act of 1978 (“PURPA”)¹ and 220 C.M.R. § 17.00 et seq., a legally enforceable obligation exists between National Grid and Allco on the basis of Allco’s QF offer, (2) the rates to be paid by National Grid to Allco should be based on National Grid’s avoided costs over the specified term calculated at the time the obligation was incurred and be equal to the rates National Grid will pay pursuant to its long-term contract with Cape Wind Associates, LLC (“Cape Wind”). See Massachusetts Electric Company and Nantucket Electric Company, each d/b/a National Grid, D.P.U. 10-54, (2010).² Allco filed its QF Complaint pursuant to the Department’s regulations governing the sales of electricity by QFs to distribution companies (“QF Regulations”) and the Federal Energy Regulatory Commission’s (“FERC”) regulations implementing PURPA. 220 C.M.R. § 8.03(1)(c) and 18 C.F.R. § 292.301 et seq. The Department docketed this matter as D.P.U. 11-59.

¹ 16 U.S.C. § 824a-3 (2006); see generally 16 U.S.C. § 2601 et seq. (2006).

² In D.P.U. 10-54, the Department approved a long-term contract pursuant to St. 2008, c. 169, § 83 and 220 C.M.R. § 17.00 et seq., for National Grid to purchase 50 percent of the output from Cape Wind’s off-shore wind-energy generating facility.

On August 17, 2011, National Grid filed a motion to dismiss Allco's QF Complaint asserting that Allco fails to state any claim upon which relief can be granted ("Motion to Dismiss"). On August 19, 2011, Allco filed its answer to National Grid's Motion to Dismiss ("Opposition"). On September 20, 2011, Allco also filed a Motion for Expedited Action in this proceeding.³

On November 30, 2011, Allco filed a related complaint against National Grid with the Federal Energy Regulatory Commission pursuant to section 306 of the Federal Power Act ("FERC complaint"). In its FERC complaint, Allco alleged that National Grid failed to comply with section 292.301 of the Commission's regulations (18 C.F.R. § 292-301) and PURPA with respect to the determination of the avoided rate for purchases by National Grid. On February 20, 2014, FERC dismissed the Allco complaint as premature. See Docket No. EL-12-12 (February 20, 2014).

B. Background

Pursuant to section 210(a) of PURPA, FERC has prescribed rules requiring electric utilities to offer to purchase electric energy from QFs. 16 U.S.C. § 824a-3 (2006); see generally 16 U.S.C. § 2601 et seq.; 18 C.F.R. § 292.303 (2011). FERC's regulations provide that electric

³ On August 1, 2011, Allco filed a separate petition with the Department to amend the Department's regulations at 220 C.M.R. § 8.00 et seq. with respect to sales of electricity by a renewable energy qualifying facility. In its filing, Allco argued that the Department's regulations assigning a short-run rate for the purchase of QF power by distribution companies do not reflect the true avoided costs to the distribution companies. Allco further argued that the true avoided costs associated with renewable QFs were already determined by the Department in D.P.U. 10-54. In ruling on Allco's petition, the Department determined that its current regulations are consistent with applicable federal and state law and related regulatory requirements, and declined to open a rulemaking. Allco Letter Order, D.P.U. 11-57 (December 27, 2011).

utilities shall purchase any energy and capacity offered by a QF, and that nothing in those regulations requires any electric utility to pay more than its “avoided costs” for such purchases. 18 C.F.R. § 292.304(a)(2). FERC’s regulations also define avoided costs as “the incremental costs to an electric utility of electric energy or capacity or both which, but for the purchase from the qualifying facility or qualifying facilities, such utility would generate itself or purchase from another source.” 18 C.F.R. § 292.101(b)(6).

The Department’s regulations implementing PURPA establish, among other things, the rates, terms and conditions of sales of electricity by QFs to distribution companies. 220 C.M.R. § 8.00 et seq. The QF Regulations establish a distribution company’s avoided costs based on the competitive wholesale electricity market price. QF Rulemaking, D.T.E. 99-38 (1999).

Specifically, the QF Regulations require that QFs with a design capacity of one megawatt (“MW”)⁴ or greater

shall have their output metered and purchased at rates equal to the payments received by the Distribution Company from the ISO power exchange⁵ for such output for the hours in which the Qualifying Facility generated electricity in excess of its requirements.

220 C.M.R. § 8.05(2)(a).⁶ National Grid’s current Qualifying Facility Power Purchase Rate Tariff, M.D.T.E. No. 1032-C (“P-Rate Tariff”) states the same (see P-Rate Tariff, § 3). The Department approved National Grid’s P-Rate Tariff on June 7, 2001.

⁴ Each of Allco’s QFs is sized at one MW or greater (QF Complaint, Exh. A).

⁵ The “ISO power exchange” is the wholesale power exchange administered by ISO New England Inc. for the New England Region.

⁶ The Department adopted its QF Regulations in 1981. QF Rulemaking, D.P.U. 535, 535-A (1981). The Department amended its QF regulations in 1986. QF Rulemaking,

II. STANDARD OF REVIEW

Pursuant to QF Regulations § 8.03(1)(c), when a QF submits an offer to sell generation output to a Distribution Company, the Distribution Company must respond within 30 days. If within 90 days there is a failure to agree to terms, the QF may petition the Department to investigate the reasonableness of the Distribution Company's actions. In addition, pursuant to QF Regulations § 8.08, if at any time a QF is aggrieved by an action of a Distribution Company under the QF Regulations, the QF may petition the Department to investigate such action and the Department "may, at its discretion" open an investigation.⁷

III. POSITIONS OF THE PARTIES

A. Allco's Petition

Allco states that on March 28, 2011, Allco offered to sell the entire generation output from various QFs to National Grid at a price equal to National Grid's full avoided costs for a

D.P.U. 84-276-B (1986); 220 C.M.R. § 8.00 *et. seq.* In 1999, the Department further amended its QF Regulations to be consistent with the 1997 law relating to the restructuring of the electric utility industry, St. 1997, c. 164, § 193 ("Restructuring Act"). QF Rulemaking, Order Commencing Rulemaking, D.T.E. 99-38 (1999). The Restructuring Act introduced retail choice for generation products, thereby prohibiting Massachusetts electric utilities from providing generation service to their retail customers on a monopoly basis. D.P.U. 99-38, Order Adopting Regulations, at 2 (1999); See G.L. c. 164 § 1A. In addition, the Restructuring Act required distribution companies to provide a backstop for generation service for retail customers in the nature of default service. G.L. c. 164, § 1B(d). The Department concluded that distribution companies would purchase their basic service generation product based on New England wholesale electricity market rates and that these costs would serve as a distribution company's avoided costs. D.P.U. 99-38, at 4.

⁷ As noted above, National Grid filed a motion to dismiss Allco's petition. We decline to dismiss Allco's complaint outright, but instead have considered the information submitted by Allco and the parties' arguments in making our determination as to whether National Grid's actions were reasonable and whether to exercise our discretion to open an investigation to examine the issues further.

specified term of up to 25 years (QF Complaint at 17). Specifically, Allco offered to sell the QFs' output pursuant to 220 C.M.R. § 8.03(1(c)) and 18 C.F.R §§ 292.302, 292.304, at a specified rate that varies from National Grid's P-Rate Tariff (QF Complaint, Exh. B). Allco claims that National Grid's April 18, 2011 response states that National Grid was unwilling to negotiate a contract with Allco to purchase the QF output, but was willing to execute a Standard Power Purchase Rate Agreement ("PPA")⁸ at the rate specified in its P-Rate Tariff (QF Complaint, Exh. B).⁹

Allco argues that because of its offer, National Grid is subject to a legally enforceable obligation to negotiate the length of the specified term and the purchase rates; the purchase rates must be based on National Grid's avoided costs over the specified term calculated at the time the obligation was incurred; and National Grid's avoided costs are equal to those determined by the Department in D.P.U. 10-54 (QF Complaint at 1-2, 17 citing 18 C.F.R. § 292.304).

Specifically, Allco argues that FERC's ruling in California Public Utilities Commission ("CPUC")¹⁰ mandates that public utility commissions include environmental compliance and other avoided costs in the determination of what costs a utility is avoiding (Petition at 5). Allco asserts that the Department determined the costs that National Grid will avoid by purchasing power from a renewable QF in D.P.U. 10-54 (Petition at 10). Specifically, Allco asserts that the

⁸ National Grid's PPA is included as Schedule A to its P-Rate Tariff.

⁹ In its Motion to Dismiss, National Grid asserts these same facts as true (Motion to Dismiss at 4).

¹⁰ CPUC, 132 F.E.R.C. ¶ 61,047 (2010) clarified by CPUC, 133 F.E.R.C. ¶ 61,059 (2010) ("Clarification Order") denying rehearing, CPUC, 134 F.E.R.C. ¶ 61,044 (2011) ("Rehearing Order").

Department determined in D.P.U. 10-54 avoided costs related to market price suppression, long-term price stability, compliance with the Massachusetts Green Communities Act and Global Warming Solutions Act, enhanced reliability and moderation of peak load (Petition at 10-13; 18-19). Allco argues that the Department may not ignore its own findings in determining the avoided cost rate under PURPA (QF Complaint at 19, citing Plymouth Rock Energy Associates v. Department of Public Utilities, 420 Mass. 168, at 175 (1995)). Therefore, Allco claims, it is entitled to receive the full amount determined by the Department in D.P.U. 10-54 as the avoided costs that will be realized by National Grid as a result of the interconnection of a renewable energy generator (QF Complaint at 20).

B. Motion to Dismiss

1. National Grid

National Grid does not dispute that PURPA and the QF Regulations require National Grid to purchase the electrical output of Allco's QFs (Motion to Dismiss at 7). National Grid asserts that it did in fact offer to purchase the output, as evidenced by Allco's petition, within the 30-day period proscribed by the QF Regulations at the rates and on the terms set forth in the P-Rate Tariff (Motion to Dismiss at 6, citing QF Complaint, Exh. B). National Grid contends that Allco cannot and does not argue that National Grid did not offer to purchase Allco's QF output (Motion to Dismiss at 6). Further, National Grid claims, having been offered the correct tariff rate within the regulatory time period, Allco cannot argue that National Grid's actions were unreasonable (Motion to Dismiss at 6-7).

National Grid argues that Allco misunderstands both the QF Regulations and the Department's Order in D.P.U. 10-54 (Motion to Dismiss at 7, 9). With respect to the QF

Regulations, National Grid asserts that Section 8.03 pertains to the contractual arrangements pursuant to which a QF may sell its generation output to a distribution company, i.e., either a standard contract available to all QFs or a negotiated contract, not the price or rate at which such electric output must be purchased (Motion to Dismiss at 7). National Grid asserts that because Allco's QFs appear to have a design capacity of one MW or greater, QF Regulation Section 8.05(2)(a) specifies the price terms (Motion to Dismiss at 8).

With respect to the Department's Order in D.P.U. 10-54, National Grid claims that there is no legal basis to require National Grid to offer to Allco the rates established in D.P.U. 10-54 (Motion to Dismiss at 9). In fact, National Grid asserts that, contrary to Allco's argument, the Department made no findings or determinations with respect to "avoided costs" in its Order in D.P.U. 10-54 (Motion to Dismiss at 9). Further, National Grid contends that, as a matter of law and regulation, it may not offer any rate to a QF other than that set forth in its P-Rate Tariff (Motion to Dismiss at 8, citing Cambridge Electric Light Company, D.P.U. 94-101/95-36, at 19 (1995)). According to National Grid, in order to offer the rates requested by Allco in this proceeding, the Department would be required to revise its QF Regulations (Motion to Dismiss at 9).¹¹

National Grid contends that (1) because it was willing to purchase power from Allco's QFs under the standard contract terms at its approved P-Rate Tariff; and (2) because the QF Complaint is not the proper mechanism to seek the approval of new rates in any case, there is no

¹¹ As stated above, the Department has declined to revise or amend its QF Regulations at this time. D.P.U. 11-57.

relief available to Allco and its QF Complaint must be dismissed with prejudice (Motion to Dismiss at 7).

2. Allco

Allco claims that National Grid asks the Department to interpret its regulations at 220 C.M.R. § 8.03(1)(b)(2) and 220 C.M.R. § 8.05(2)(a) in a way that would directly conflict with PURPA (Opposition at 1). Allco states that because National Grid admits that an obligation exists, the remaining issue is the purchase rate and term (Opposition at 2).

Allco characterizes National Grid's interpretation of the regulations as strained, and states that National Grid is attempting to avoid its obligations under PURPA by misconstruing the regulatory language (Opposition at 3). Allco claims that National Grid incorrectly interprets a QF's eligibility to receive the short-run rates as meaning that a QF is only entitled to receive the short-run rate (Opposition at 4-5). Moreover, Allco argues that it is of no consequence that 220 C.M.R. § 8.05 only addresses the short-run rate (Opposition at 5).

Allco further argues that National Grid's P-Rate Tariff relates to the short-run rate only, and does not address the negotiated pricing option of 220 C.M.R. § 8.03(1)(b)(2) (Opposition at 6). Allco claims that even if National Grid's interpretation of the regulations were correct, to the extent that its filed rates are inconsistent with PURPA, National Grid remains subject to PURPA's requirements (Opposition at 6).

IV. ANALYSIS AND FINDINGS

Pursuant to QF Regulations §§ 8.03(1)(c) and 8.08, Allco may petition the Department to investigate the reasonableness of National Grid's actions [with respect to Allco's offer to sell generation output](#), and the Department has discretion in determining whether to investigate and

in setting the scope of any such investigation. As addressed further below, we decline to open an investigation to further examine the issues raised by Allco's petition because (1) we find that National Grid acted reasonably; and (2) even if we assume, without finding, that National Grid has not acted reasonably, any further investigation would be futile because the Department cannot grant the relief requested in Allco's petition.

Allco asserts that FERC's ruling in CPUC made it "mandatory that environmental compliance . . . costs be included in the determination of what costs the utility is avoiding" (Petition at 5 (emphasis added)). Allco misinterprets CPUC. In CPUC, FERC held that a state commission may, pursuant to PURPA, implement a multi-tiered avoided costs rate structure. FERC did not, however, require or mandate that state commissions do so. Instead, FERC clearly states that state public utility commissions may establish avoided costs consistent with PURPA through other methods. Rehearing Order, at P 36 ("we emphasize that, while the Commission provided guidance on the concept presented by the CPUC, a state may have other ways of establishing avoided cost rates that may be consistent with the Commission's PURPA regulations"). In addition, FERC made clear that it was not ruling on whether a particular rate was consistent with the avoided cost requirements of PURPA (the Commission "was not ruling on whether CPUC's actual offer price under its [program] is, in fact consistent with the avoided cost rate requirements of PURPA.") Rehearing Order at P 8 (2011) citing Clarification Order, 133 F.E.R.C. ¶ 61,059 at P 25.

Thus, we agree with Allco that pursuant to CPUC we could amend our QF Regulations to establish an alternative way of determining a utility's avoided costs and, in doing so, we would have the authority to determine the role environmental compliance costs play in a utility's

avoided cost. However, at this time, as Allco acknowledges, the applicable Massachusetts regulations do not provide for a multi-tiered avoided costs rate structure. Rather, for QFs over one MW, the QF Regulations provide for the purchase of a QF's output at rates equal to the payments received by the utility from the ISO-NE market for such output.

220 C.M.R. § 8.05(2)(a). Thus, we find that National Grid's offer to Allco of a QF rate that is consistent with the Department's current regulations and National Grid's tariff was reasonable.¹²

Even if we were to consider environmental compliance costs in the avoided cost calculation, we could not provide Allco the relief that it seeks. Allco seeks a declaration that its rates be "equal to the avoided costs determined by the Department in [D.P.U. 10-54]." In D.P.U. 10-54, the Department did not determine any PURPA avoided costs, *i.e.*, the Department did not determine the incremental costs to National Grid of capacity or energy, but for the purchase from a QF, that National Grid would purchase from another source.

18 C.F.R. §292.304(e) (2010). Rather, in D.P.U. 10-54, the Department approved a privately negotiated contract between National Grid and Cape Wind, executed pursuant to a state statute that did not involve a QF. The Department approved the contract in D.P.U. 10-54 pursuant to St. 2008, c. 169, § 83 and 220 C.M.R. § 17.00 *et seq.*, which govern the process for electric distribution companies to enter into long-term contracts with developers of renewable energy.

Nowhere in its Order in D.P.U. 10-54 does the Department consider PURPA or the requirements

¹² Allco's real complaint is with the Department's QF Regulations. We acknowledge the recent litigation regarding the use of market prices to determine avoided costs. *See e.g., Exelon Wind*, 140 F.E.R.C. ¶ 61,152 (2012); *Council of City of New Orleans*, 145 F.E.R.C. ¶ 61,057 (2013); *Occidental Chemical Corporation*, Docket Nos. EL 14-28 and EL 13-41. We are monitoring these cases and the cases involving Massachusetts utilities' requests for PURPA waivers and, at a later date, will determine whether to open a proceeding addressing possible QF Regulation amendments.

set forth in the FERC PURPA regulations. Rather, in reviewing the contract in D.P.U. 10-54, the Department considered whether the contract provided enhanced reliability within the Commonwealth, contributed to moderating peak load requirements, was cost effective (i.e., whether its benefits outweighed the costs), and whether the contract was in the public interest. D.P.U. 10-54, at 27-28.

Moreover, D.P.U. 10-54 involved an offshore, non-QF wind project, not a QF solar project as is involved here. Mr. Melone, Allco's President, testified in D.P.U. 10-54 that purchasing from a solar facility is far less costly to utilities than purchasing from an off-shore wind facility. Direct Testimony of Thomas Melone, D.P.U. 10-54, at 26-27. Specifically, Mr. Melone testified:

Compared to the Cape Wind proposal, [solar projects under 2 MW] would reduce the projected ratepayers' bills. That reduction would result from a combination of (i) a PPA rate that would be less than the Cape Wind proposed PPA rate; (ii) a much lower cost for SRECs applicable to the solar carve-out for those projects; and (iii) lower net demand during peak use/peak production periods."

Direct Testimony of Melone at 27.

In addition, in its petition to amend the Massachusetts regulations, Allco requests that the Department amend its regulations to establish separate long-run rates for onshore wind, offshore wind and solar. D.P.U. 11-57 Petition at 5, 19. Thus, while Allco asks the Department to rely on findings it made in D.P.U. 10-54 (involving an off-shore wind facility) to determine the avoided costs that would be realized by National Grid as a result of purchasing output from Allco's solar QFs, in other filings with the Department, Allco has indicated that a utility's avoided costs for purchasing output from an offshore wind facility would differ significantly from the purchase of output from a solar QF.

Thus, even if we accepted Allco's argument that despite our regulations to the contrary, FERC requires that we consider environmental compliance costs in determining avoided costs, which we do not, we still could not grant Allco the relief it seeks. We cannot issue a declaration that National Grid's avoided costs in purchasing from Allco's solar QFs is "equal to the avoided costs determined by the Department in [D.P.U. 10-54]." In D.P.U. 10-54 the Department did not undertake to "determine" any utility's avoided costs under PURPA in D.P.U. 10-54; and, even if the Department's findings in D.P.U. 10-54 could conceivably be construed as determining avoided costs under PURPA, Allco itself admits that a utility's avoided costs in purchasing from a solar QF would not be equal to the avoided costs from purchasing from a non-QF offshore wind facility.

V. CONCLUSION

After investigation of the information submitted by Allco and consideration of the parties' argument, we decline to investigate this matter further because (1) we find that National Grid's actions in offering Allco a QF rate that is consistent with our QF Regulations and National Grid's tariff were reasonable; and (2) even if we were to assume that National Grid's action was not reasonable, any further investigation would be futile because we cannot grant Allco the relief that it seeks.

VI. ORDER

Accordingly, after comment and due consideration, it is

ORDERED: That the Petition of Allco Renewable Energy Limited for an investigation by the Department of Public Utilities into Allco's offer to sell to Massachusetts Electric Company d/b/a National Grid generation output from various qualifying facilities within the meaning of 220 C.M.R. § 8.02 is hereby DENIED; and it is

FURTHER ORDERED: That the Motion for Expedited Action of Allco Renewable Energy is DENIED as moot.

By Order of the Department,

/s/ _____
Ann G. Berwick, Chair

/s/ _____
Jollette A. Westbrook, Commissioner

/s/ _____
Kate McKeever, Commissioner

An appeal as to matters of law from any final decision, order or ruling of the Commission may be taken to the Supreme Judicial Court by an aggrieved party in interest by the filing of a written petition praying that the Order of the Commission be modified or set aside in whole or in part. Such petition for appeal shall be filed with the Secretary of the Commission within twenty days after the date of service of the decision, order or ruling of the Commission, or within such further time as the Commission may allow upon request filed prior to the expiration of the twenty days after the date of service of said decision, order or ruling. Within ten days after such petition has been filed, the appealing party shall enter the appeal in the Supreme Judicial Court sitting in Suffolk County by filing a copy thereof with the Clerk of said Court. G.L. c. 25, § 5.