

DOCKET NO. 29218

PETITION OF GREAT PLAINS	§	PUBLIC UTILITY COMMISSION
WINDPOWER, LLC FOR	§	
DECLARATORY ORDER	§	OF TEXAS
INTERPRETING PUBLIC UTILITY	§	
REGULATORY ACT § 39.904, AND	§	
COMMISSION SUBST. R. § 25.242	§	

ORDER

This Order addresses the petition of Great Plains Windpower, LLC (Great Plains) for a declaratory order interpreting Public Utility Regulatory Act (PURA) § 39.904¹ and Public Utility Commission of Texas (Commission) Substantive Rule 25.242. For the reasons discussed in this Order, the Commission finds that P.U.C. SUBST. R. 25.242(f)(1)(B) does not obligate an electric utility to enter into a written agreement to purchase energy from a Qualifying Facility (QF)² utilizing renewable energy technologies if the renewable energy will not be available within 90 days notice from the QF.

I. Background

On January 23, 2004, Great Plains filed its petition for declaratory order. In its petition, Great Plains avers that it made a formal offer to deliver and sell non-firm electric energy to Southwestern Public Service Company (SPS) from two separate wind energy facilities with a combined net electrical capacity of approximately 160 MW. Each facility will have a net electric capacity of about 80 MW and is a small power producer QF. The two facility sites are under lease and are separated by a distance of approximately 10 miles. Both facilities will be interconnected into a 345 kV transmission line owned by SPS in the North Texas Panhandle, at a common interconnection point about 1.6 miles south of the Texas–Oklahoma state line. There are no transmission constraints on the existing 345 kV line.

¹ Public Utility Regulatory Act, TEX. UTIL. CODE ANN. (Vernon 2000 & Supp. 2004) (PURA).

² QFs are cogeneration facilities and small power production facilities that obtain qualifying status under Section 210 of the Public Utility Regulatory Policies Act of 1978.

Great Plains further avers that in its proposal to SPS it stated that the wind project could be online on or before June 30, 2005, if an energy sales agreement were to be promptly put in place. SPS's response was a refusal to negotiate because the proposed in-service date was, at that time, 561 days later and, therefore, the obligations placed on SPS by P.U.C. SUBST. R. 25.242(f)(1)(B) were not triggered.

Motions to Intervene were filed in this docket by SPS, Occidental Permian, Ltd. (OPL), Texas Industrial Energy Consumers (TIEC), and Texas–New Mexico Power Company (TNMP). SPS, OPL, and TIEC (collectively, Intervenors) were granted party status. TNMP's motion to intervene was denied.

In response to Order No. 4 in this docket the parties filed briefs and reply briefs on the following legal issue:

Whether, in light of PURA §39.904, P.U.C. SUBST. R. 25.242(f)(1)(B), as amended, obligates an electric utility to enter into a written agreement to purchase the energy from a Public Utility Regulatory Policies Act Qualifying Facility (QF) utilizing renewable energy technologies, even if the renewable energy will not be available within 90 days after notice from the QF, a departure from the Commission's interpretation of the relevant language in Docket No. 19715 and a departure from the manner in which other QFs are currently treated.

In response to Order No. 5, the parties submitted a joint statement of facts.

II. Discussion

Great Plains' Position

Great Plains acknowledges that in Docket No. 19715 the Commission concluded that under the predecessor version of P.U.C. SUBST. R. 25.242(f)(1)(B), the utility was not obligated to purchase cogeneration energy or capacity from the potential seller until the QF was able to provide energy within 90 days after notifying the utility that the

cogeneration energy or capacity would be available. The Commission's interpretation was subsequently upheld in State Court and in Federal District Court.³

Simply stated, Great Plains argues that the passage of Senate Bill 7 by the Texas Legislature in 1999 restructuring the electric industry necessitates a change in the Commission's interpretation of P.U.C. SUBST. R. 25.242(f)(1)(B). The position of Great Plains is that the Commission should issue a declaration that, pursuant to the subsequently enacted Senate Bill 7 with its 2,000 megawatt renewable energy mandate, the Commission's limiting interpretation in Docket No. 19715 does not apply to QFs utilizing renewable energy technologies, and that accordingly the utility is obligated to enter into a written agreement to purchase the renewable energy from a QF even if the renewable energy will not be available within 90 days after the notice from the QF.

Great Plains argues that the Commission's limiting rule interpretation in Docket No. 19715 was for a cogeneration project and was before the enactment of Senate Bill 7 with its 2,000 megawatt mandate. Great Plains believes a reinterpretation of the meaning and intent of P.U.C. SUBST. R. 25.242(f)(1)(B) is necessary to give effect to the Legislature's intent. While not actually asserting its applicability, Great Plains indicates the statutory construction principle of "repeal by implication" is also germane to the analysis of the rule and how it is impacted by Senate Bill 7. Finally, Great Plains points out that agencies have wide latitude to adapt their rules and policies to the demands of changed circumstances.

Great Plains argues the Commission can, in the face of a new statute, adopt a "rule" in a contested case. It maintains that any interpretation of a rule in a contested case automatically becomes part of the rule. Here, if the Commission were to interpret P.U.C. SUBST. R. 25.242(f)(1)(B) as Great Plains advocates, a new subclass of QFs

³ *Power Resource Group, Inc. v. Public Util. Comm'n of Texas*, 73 S.W. 3d 354 (Tex. App. – Austin, Jan 10, 2002, pet. denied); *Power Resource Group, Inc. v. Paul Hudson, in His Official Capacity as Chairman of the Public Utility Commission of Texas ,et al.*, NO. A-03-CA-762-H, U.S. District Court, Western District of Texas, Jul 15, 2004).

(renewable QFs), based on the new statute (Senate Bill 7), would be created and the new interpretation would operate equally on all within that subclass. These arguments address challenges that a rule making proceeding would be a more appropriate forum for Great Plains and that treating renewable QFs differently than non-renewable QFs results in preferential treatment.

Intervenors' Position

SPS argues that what Great Plains is really doing is asking the Commission to change its substantive rule in an adjudicating proceeding rather than an Administrative Procedure Act (APA)⁴ rulemaking. Intervenors return to this point again and again. Intervenors cite case law for the proposition that the Commission must follow the clear, unambiguous language of its own regulations and that allowing an agency to create broad amendments to its rules through administrative adjudication rather than through its rulemaking authority undercuts the APA.⁵ Intervenors point out that the courts have allowed only limited exceptions to that general position; none of which exist here.⁶ Intervenors contend the rule Great Plains seeks to change is a general rule and that any change could be easily captured in a general rule not requiring an ad hoc resolution.

Intervenors maintain that P.U.C. SUBST. R. 25.242(f)(1)(B) is plain on its face, that it requires that energy purchased from a QF be available within 90 days after the notice from the QF, that the Commission so held in Docket No. 19715, and that the Courts have up held that interpretation.

Intervenors also argue that Great Plains' requested interpretation of P.U.C. SUBST. R. 25.242(f)(1)(B) results in discriminatory treatment between renewable and non-

⁴ Administrative Procedure Act, TEX. GOV'T CODE ANN. Chapter 2001 (Vernon 2000 & Supp. 2004).

⁵ *Rodriguez v. Service Lloyds Insurance Company*, 997 S.W. 2d 248, 255 (Tex. 1999), citing *Public Utility Commission of Texas v. Gulf State Utility Company*, 809 S.W. 2d 201, 207 (Tex. 1991).

⁶ *Id.*

renewable QFs, and that the Commission's current interpretation of the rule has not limited the development of renewable energy resources.

Finally, Intervenor point out that Great Plains' proposed interpretation of P.U.C. SUBST. R. 25.242(f)(1)(B) would improperly require utilities to bear the risk of market shifts during construction of renewable energy QFs. Great Plains' request would require price-to-beat retail electric providers to contract with renewable energy QFs based on estimates of the market closing price for energy (avoided costs) months into the future. Intervenor maintain such a program would wreak havoc on the market.

Staff's Position

Commission Staff (Staff) states that P.U.C. SUBST. R. 25.242(f)(1)(B) does not require a utility to enter into a contract with a QF for the purchase of energy. The rule acknowledges that a QF and a utility may enter into a contract for the purchase of QF energy, but does not require it. Staff then analyzes whether in light of the mandate found in PURA § 39.904 the Commission is now required to interpret P.U.C. SUBST. R. 25.242(f)(1)(B) as obligating an electric utility to enter into a contract for the purchase of QF renewable energy, even if the energy will not be available within 90 days after notice from the QF. Staff concludes it is not.

Commission Ruling

The Commission finds Great Plains' arguments unpersuasive and that, to the extent its request for a reinterpretation of P.U.C. SUBST. R. 25.242(f)(1)(B) has merit, the proper forum for such reinterpretation is an APA rulemaking proceeding. The Commission therefore enters the following findings of fact and conclusions of law:

III. Findings of Fact

Procedural History

1. This proceeding was initiated by a petition filed by Great Plains on January 23, 2004, requesting a declaratory order from the Commission interpreting PURA § 39.904 and P.U. C. SUBST. R. 25.242.
2. Notice was provided to all price to beat REPS and to all integrated investor-owned utilities who have not yet unbundled under PURA § 39.051. In addition, the Commission published notice of the petition in the *Texas Register* on February 20, 2004.
3. Motions to intervene were filed by OPL on February 2, 2004; by SPS on February 11, 2004; by TIEC on February 17, 2004; and by TNMP on March 8, 2004.
4. OPL, SPS and TIEC were named parties to the proceeding. TNMP's motion to intervene was denied.
5. Order No. 4, filed April 9, 2004, established a procedural schedule for briefing the following legal issue:

Whether, in light of PURA § 39.904, P.U.C. SUBST. R. 25.242(f)(1)(B), as amended, obligates an electric utility to enter into a written agreement to purchase the energy from a Public Utility Regulatory Policies Act Qualifying Facility (QF) utilizing renewable energy technologies, even if the renewable energy will not be available within 90 days after notice from the QF, a departure from the Commission's interpretation of the relevant language in Docket No. 19715 and a departure from the manner in which other QFs are currently treated.
6. All parties filed initial briefs on April 28, 2004, and all parties except Staff filed reply briefs on May 12, 2004.

7. On June 2, 2004, the parties filed a joint statement of facts. The parties stipulated that a controversy exists regarding the legal issues presented and briefed in this docket, that the Commission has jurisdiction over the controversy, and that except for the jurisdictional facts stipulated by the parties, the issue presented is entirely a legal issue.

Petitioner's Request

8. Great Plains requests that the Commission enter an order declaring that pursuant to the subsequently enacted Senate Bill 7, the Commission's rule interpretation in Docket No. 19715 – that a utility is not obligated to purchase QF energy until a QF is able to provide energy within 90 days after notifying the utility that energy would be available – does not apply to QFs utilizing renewable energy technologies such as wind, and that accordingly, the utility is obligated to enter into a written agreement to purchase the renewable energy for a QF even if the renewable energy will not be available within 90 days of notice from the QF.
9. In Docket No. 19715, the Commission held that P.U.C. SUBST. R. 23.66(d)(1)(C)⁷ does not obligate an electric utility to contract with a QF more than 90 days in advance of the delivery of energy from the QF.
10. The differences in wording between former P.U.C. SUBST. R. 23.66(d)(1)(C) and current P.U.C. SUBST. R. 25.242(f)(1)(B) are not material to the controversy in this docket.
11. The Commission's interpretation of P.U.C. SUBST. R. 23.66(d)(1)(C) has been upheld in both the Texas courts and the Federal courts.⁸

⁷ Now P.U.C. SUBST. R. 25.242(f)(1)(B).

⁸ See cases cited *supra* note 3.

12. Senate Bill 7, restructuring the electric industry, was passed by the Texas Legislature in 1999, subsequent to Docket No. 19715.

IV. Conclusions of Law

1. The Commission has jurisdiction over this matter pursuant to PURA §§ 12.001, 14.001 and 14.051(5).
2. Proper notice of the petition was given pursuant to P.U.C. PROC. R. 22.55 and 22.74.
3. PURA § 39.904 does not require a new interpretation of P.U.C. SUBST. R. 25.242(f)(1)(B) and does not require a departure from the Commission's interpretation of former P.U.C. SUBST. R. 23.66(d)(1)(C) as found in Docket No. 19715.
4. An electric utility is not obligated to enter into a written agreement to purchase the energy from a QF utilizing renewable energy technologies if the renewable energy will not be available within 90 days after notice from the QF.

V. Ordering Paragraphs

In accordance with these findings of fact and conclusions of law, the Commission orders the following:

1. The Commission affirms its interpretation of former P.U.C. SUBST. R. 23.66(d)(1)(C) and applies that same interpretation to current P.U.C. SUBST. R. 25.242(f)(1)(B).

2. All other motions, requests for entry of specific findings of fact and conclusions of law, and any other requests for general or specific relief, if not expressly granted herein, are hereby denied.

SIGNED AT AUSTIN, TEXAS on the _____ day of August 2004.

PUBLIC UTILITY COMMISSION OF TEXAS

JULIE PARSLEY, COMMISSIONER

PAUL HUDSON, CHAIRMAN

BARRY T. SMITHERMAN, COMMISSIONER