

154 FERC ¶ 61,035
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Norman C. Bay, Chairman;
Cheryl A. LaFleur, Tony Clark,
and Colette D. Honorable.

Entergy Services, Inc.
Entergy Arkansas, Inc.
Entergy Gulf States Louisiana, L.L.C.
Entergy Louisiana, LLC
Entergy Mississippi, Inc.
Entergy New Orleans, Inc.
Entergy Texas, Inc.

Docket No. QM14-3-000

ORDER GRANTING IN PART, AND DENYING IN PART, APPLICATION TO
TERMINATE MANDATORY PURCHASE OBLIGATION

(Issued January 21, 2016)

1. On September 29, 2014,¹ Entergy Services, Inc., on behalf of the Entergy Operating Companies² (collectively, Entergy) filed an application pursuant to section 210(m) of the Public Utility Regulatory Policies Act of 1978 (PURPA)³ and section 292.310 of the Commission's regulations⁴ (Application). Entergy seeks to terminate, on a service territory-wide basis, the requirement imposed on the Entergy Operating Companies, under section 292.303(a) of the Commission's

¹ Entergy amended its Application on December 5, 2014, March 27, 2015, and October 23, 2015, in response to deficiency letters issued by the Commission.

² The Entergy Operating Companies are Entergy Arkansas, Inc., Entergy Gulf States Louisiana, L.L.C. (Entergy Gulf States Louisiana), Entergy Louisiana, LLC (Entergy Louisiana), Entergy Mississippi, Inc., and Entergy New Orleans, Inc.

³ 16 U.S.C. § 824a-3(m) (2012).

⁴ 18 C.F.R. § 292.310 (2015).

regulations,⁵ to enter into new power purchase obligations or contracts to purchase electric energy and capacity from qualifying cogeneration or small power production facilities (QF) with a net capacity in excess of 20 MW (over-20 MW QFs).

2. In this order, with the exception of the purchase obligations for the Dow Chemical Company and Union Carbide Corporation (jointly, Dow) over-20 MW Plaquemine QF, we find that Entergy has met the statutory standard. Accordingly, we grant Entergy's Application, in part, to terminate the requirement that it enter into new obligations or contracts with QFs with net capacity in excess of 20 MW, effective October 23, 2015, the date of Entergy's completed application, and deny, Entergy's Application, in part, with respect to Dow's over-20 MW Plaquemine QF.

I. Background

3. On October 20, 2006, the Commission issued Order No. 688,⁶ revising its regulations governing utilities' obligations to purchase electric energy produced by QFs. Order No. 688 implements PURPA section 210(m),⁷ which provides for termination of the requirement that an electric utility enter into new power purchase obligations or contracts to purchase electric energy from QFs if the Commission finds that the QFs have nondiscriminatory access to markets. The Commission found that the markets administered by the Midcontinent Independent System Operator, Inc. (MISO)⁸ are among the markets that satisfy the criteria of PURPA section 210(m)(1)(A).⁹ Accordingly, section 292.309(e) of the Commission's regulations established a rebuttable presumption that MISO provides over-20 MW QFs interconnected with member electric utilities with

⁵ *Id.* § 292.303(a).

⁶ *New PURPA Section 210(m) Regulations Applicable to Small Power Production and Cogeneration Facilities*, Order No. 688, FERC Stats. & Regs. ¶ 31,233 (2006), *order on reh'g*, Order No. 688-A, FERC Stats. & Regs. ¶ 31,250 (2007), *aff'd sub nom. Am. Forest & Paper Ass'n v. FERC*, 550 F.3d 1179 (D.C. Cir. 2008).

⁷ Section 210(m) was added to PURPA by section 1253 of the Energy Policy Act of 2005 (EPAct 2005). *See* Pub. L. No. 109-58, § 1253, 119 Stat. 594, 967-69 (2005).

⁸ Effective April 26, 2013, MISO changed its name from "Midwest Independent Transmission System Operator, Inc." to "Midcontinent Independent System Operator, Inc."

⁹ 16 U.S.C. § 824a-3(m)(1)(A) (2012); *see* 18 C.F.R. § 292.309(a)(1) (2015).

nondiscriminatory access to markets described in section 210(m)(1)(A).¹⁰ The Commission also established a second rebuttable presumption contained in section 292.309(d)(1) of the regulations, which provides that QFs with a net capacity at or below 20 MW do not have nondiscriminatory access to markets sufficient to warrant termination of the mandatory purchase obligation.¹¹

II. Entergy's Application

4. Entergy states that the Entergy Operating Companies are transmission-owning members of MISO. Entergy relies on the rebuttable presumption in section 292.309(e) of the Commission's regulations that over-20 MW QFs have nondiscriminatory access to the MISO markets. Entergy states that the Entergy Operating Companies therefore satisfy the criteria in PURPA section 210(m)(1)(A) and section 292.309(a)(1) of the Commission's regulations for termination of their PURPA mandatory purchase obligation with respect to over-20 MW QFs in the areas that they serve.¹²

5. Entergy states that the scope and impact of the requested relief is limited. Entergy asserts that the relief requested does not affect the ability of a QF to generate power to serve host load requirements, nor does it affect the ability of a QF to register with MISO as a Market Participant, or retain the services of a Market Participant to act as its agent, and sell directly in the MISO Day 2 markets or enter into physical bilateral sales.¹³

III. Notice of Filing and Responsive Pleadings

6. Notice of Entergy's Application was published in the *Federal Register*, 79 Fed. Reg. 60,462 (2014). The Commission served notice of the Application on the potentially affected QFs identified by Entergy's by letter dated October 1, 2014. Interventions and protests were due on or before October 27, 2014.

7. A notice of intervention was filed by the Louisiana Public Service Commission (Louisiana Commission). Motions to intervene were filed by Rain CII Carbon LLC (Rain CII), Formosa Plastics Corp. (Formosa), MISO, Occidental Chemical Corporation

¹⁰ 18 C.F.R. § 292.309(e) (2015).

¹¹ *Id.* § 292.309(d)(1); *see also* Order No. 688, FERC Stats. & Regs. ¶ 31,233 at P 72 *et seq.*; Order No. 688-A, FERC Stats. & Regs. ¶ 31,250 at P 94 *et seq.*

¹² Application at 7.

¹³ *Id.*

(Occidental), Carville Energy LLC (Carville), CF Industries Nitrogen, LLC (CF Industries), Mosaic Fertilizer, LLC (Mosaic), Calpine Corporation (Calpine), Axiall Corporation (Axiall), NRG Companies, the Council of the City of New Orleans, Louisiana (Council of the City of New Orleans), Dow, and Evonik Corporation (Evonik). A motion to intervene out-of-time was filed by Arkansas Electric Cooperative Corporation.

8. The Louisiana Commission filed comments in support of the Application. Protests were filed by Axiall, Carville, Rain CII, Mosaic, Occidental, CF Industries, Formosa, and Dow. On November 13, 2014, the Louisiana Commission submitted an answer.

9. On November 21, 2014, Entergy filed an answer.¹⁴ Comments were due December 19, 2014. Timely protests to Entergy's November 21, 2014 answer were filed by CF Industries and Occidental. On December 31, 2014, Formosa filed an answer to Entergy's November 21, 2014 answer. On January 20, 2015, Entergy filed an answer to CF Industries', Occidental's, and Formosa's protests. On February 12, 2015, Occidental filed an answer.

10. The Commission issued a deficiency letter to Entergy on November 10, 2014, requesting further information on how Entergy identified "potentially affected QFs." On December 5, 2014, Entergy filed its response to the November 10, 2014 deficiency letter.¹⁵ Protests were due January 2, 2015. The Commission served notice of the response to the November 10, 2014 deficiency letter on the potentially affected QFs identified by Entergy by letter dated December 9, 2014. Timely protests were filed by Occidental, Formosa, and Evonik.

11. On February 26, 2015, the Commission issued a second deficiency letter to Entergy requesting further information on how Entergy identified "potentially affected QFs." On March 27, 2015, and supplemented on March 30, 2015, Entergy filed its response to the February 26, 2015 deficiency letter.¹⁶ Protests were due April 24, 2015 and April 27, 2015. The Commission served notice of the response to the February 26, 2015 deficiency letter on the potentially affected QFs identified by Entergy by letters dated March 31, 2015 and April 1, 2015. On April 24, 2015, Carville filed a protest. On May 18, 2015, Entergy filed an answer. On May 29, 2015, Occidental filed an answer.

¹⁴ Entergy's answer was noticed at 79 Fed. Reg. 71,993 (2014).

¹⁵ Entergy's response was noticed at 79 Fed. Reg. 74,081 (2014).

¹⁶ Entergy's response was noticed at 80 Fed. Reg. 18,225 (2015) and 80 Fed. Reg. 18,613 (2015).

12. On June 25, 2015, the Commission issued a third deficiency letter to Entergy requesting information about alleged transmission congestion between MISO Midwest and MISO South,¹⁷ and how that congestion impacts the potentially affected QFs' access to MISO markets. On August 17, 2015, the Commission granted an extension of time to respond until and including October 23, 2015. On October 23, 2015, Entergy filed its response to the June 25, 2015 deficiency letter.¹⁸ Protests were due November 20, 2015. The Commission served notice of the response to the June 25, 2015 deficiency letter on the potentially affected QFs identified by Entergy by letter dated October 28, 2015. On November 13, 2015, Georgia-Pacific Consumer Operations LLC filed a motion to intervene. On November 20, 2015, Occidental and Dow filed protests and MISO filed comments. On December 3, 2015 Occidental filed an answer to MISO's comments. On December 7, 2015, Entergy filed an answer to the protests filed by Dow and Occidental.

A. Comments in Support of Application

13. The Louisiana Commission supports Entergy's Application and requests that it be granted. The Louisiana Commission states that QFs in Entergy's service territory have non-discriminatory access to MISO's Day-2 markets and Entergy is entitled to the rebuttable presumption allowed by this Commission's rules as a result. The Louisiana Commission notes that Entergy's Application was made in part to satisfy the Louisiana Commission's requirements in approving MISO membership for Entergy Gulf States Louisiana and Entergy Louisiana. The Louisiana Commission explains that, in its Order No. U-32148,¹⁹ the Louisiana Commission determined that the request of Entergy Gulf States Louisiana and Entergy Louisiana to join MISO was in the public interest subject to a series of contingencies and conditions. One of the contingencies was a "final non-appealable Order from [the Commission] removing the PURPA 'put' obligation to the greatest extent permissible under applicable law."²⁰ The Louisiana Commission asserts

¹⁷ MISO South is defined as the portion of MISO that joined as part of the integration of the Entergy Operating Companies on December 18, 2013, while MISO Midwest is defined as the portion of MISO that constituted MISO prior to the integration of the Entergy Operating Companies on December 18, 2013.

¹⁸ Entergy's response was noticed at 80 Fed. Reg. 67,392 (2015).

¹⁹ *Entergy Louisiana, LLC, Ex Parte*, Docket No. U-32148 (Louisiana Public Service Commission June 28, 2012) (Order No. U-32148).

²⁰ Louisiana Commission October 27, 2014 Comments at 2 (quoting Order No. U-32148 at 41, 44).

that elimination of the QF purchase obligation “pursuant to section 290(m)” [sic] is necessary to assure that Entergy and its ratepayers receive the full benefits of MISO membership.

B. Protests of QFs Claiming to be 20 MW or Less

14. Rain CII, Mosaic, and Evonik argue that their QFs have capacities less than 20 MW and are not subject to Entergy’s Application for relief from the requirement to purchase from over-20 MW QFs. Rain CII states that its Chalmette QF has a maximum net capacity of 18.9 MW, not 46 MW as stated in Entergy’s Application.²¹ Mosaic argues that its Uncle Sam QF has a net power production capacity of 11 MW and should not be impacted by Entergy’s Application.²² Evonik states that its QF’s current rated capacity is 5.3 MW.²³

C. Protests of QFs Claiming Existing Agreements

15. Rain CII, Axiall, CF Industries, Carville, Formosa, and Dow each state that they have existing agreements with Entergy such that granting the Application should not affect their QFs’ existing agreements with Entergy.²⁴ Rain CII argues that its Sulphur Facility has a power purchase agreement (PPA) with Entergy that does not expire until April 30, 2032.²⁵ Axiall argues that Entergy may not terminate its existing agreement prior to July 1, 2017.²⁶ CF Industries notes that, although its QF is not yet built nor completely designed, it has an existing agreement with an effective date one day prior to the day Entergy initially filed its Application.²⁷ Carville states that Entergy should

²¹ Rain CII October 21, 2014 Protest at 2.

²² Mosaic October 27, 2014 Protest at 2-3.

²³ Evonik December 31, 2014 Protest at 2-3.

²⁴ Rain CII October 21, 2014 Protest at 4; Axiall October 27, 2014 Protest at 4; CF Industries October 27, 2014 Protest at 7; Carville April 24, 2015 Answer at 2; Dow October 27, 2014 Protest at 5-6.

²⁵ Rain CII October 21, 2014 Protest at 1-5.

²⁶ Axiall October 27, 2014 Protest at 4.

²⁷ CF Industries October 27, 2014 Protest at 7.

continue to abide by existing PPAs with QFs, until they terminate in accordance with applicable contract termination requirements.

16. Carville, Dow, and CF Industries request that the Commission clarify that existing agreements can only be terminated through mutual agreement of the parties or through expiration by the agreement's own terms.²⁸ Dow states that this clarification is necessary because the Application is purposefully vague as to what exactly Entergy intends but it appears that Entergy intends to terminate existing contracts and obligations if the Application is granted.²⁹ Carville also states that the Commission should clarify that: (1) it does not agree with Entergy's characterization or interpretation of any existing PPA; (2) the Commission's ruling will not have any impact on the terms and conditions of any existing PPA; and (3) the Commission does not intend to give Entergy any termination rights beyond those provided for in the respective PPAs.³⁰

17. CF Industries requests that the Commission clarify that Entergy's Application and any resulting relief granted by the Commission do not trigger termination rights under the Statutory and Regulatory Changes provision of CF Industries' contract with Entergy Louisiana.³¹ Similarly, Formosa states that in its PPA, there are no termination options specified for Entergy, other than that general termination is allowed as dictated by law or governing/regulatory body, such as this Commission or the Louisiana Commission.³² Dow and CF Industries argue that the Commission should further clarify that disputes regarding the termination of existing contracts or obligations should be resolved in QF-specific proceedings where the details of individual arrangements may be considered, including details regarding transmission constraints that may limit a QF's access to organized markets administered by MISO.³³ CF Industries requests that the Commission withhold any decision on the appropriate jurisdiction for resolving potential future issues

²⁸ Carville April 24, 2015 Protest at 2; Dow October 27, 2014 Protest at 1-2; CF Industries October 27, 2014 Protest at 9.

²⁹ Dow October 27, 2014 Protest at 5.

³⁰ Carville April 24, 2015 Protest at 2.

³¹ CF Industries October 27, 2014 Protest at 9.

³² Formosa October 24, 2014 Protest at 2.

³³ Dow October 27, 2014 Protest at 1-2; CF Industries October 27, 2014 Protest at 9.

relating to termination of a QF's existing contract until Entergy provides clarity with respect to the basis it will rely on for each specific QF's contract termination.³⁴

18. Entergy states that it does not seek Commission approval to terminate specific QF power purchase contracts, and that it will continue to abide by the power purchase contracts with over-20 MW QFs pending satisfaction of applicable contract termination requirements.³⁵ Entergy states that, although the granting of relief may give rise to a right of termination under certain QF contracts or, if such contracts are terminated per their terms, may allow the Entergy Operating Companies to refuse to enter into any new or replacement QF contract, such contractual issues will depend on the terms of the applicable QF contracts.³⁶ Particularly, Entergy states that it does not concur with Formosa's characterization of the termination provisions of its QF contract, or of its characterization of Entergy's position with respect to those provisions.³⁷ Entergy argues that contractual issues are not before the Commission and are appropriately resolved in state proceedings.³⁸ Entergy states that it will not seek to terminate any existing agreements effective prior to 120 days after the Commission issues an order granting the relief Entergy requests in the Application.³⁹ Further, Entergy agrees that, if an over-20 MW QF cannot be integrated into MISO's market within 120 days of a Commission order in this docket, Entergy will allow an additional transition period not to exceed the date of the next MISO commercial model update (scheduled for September 1, 2016) following the 120-day "grace-period."⁴⁰

19. In its November 20, 2015 protest, Dow agrees that issues regarding the termination of existing agreements are beyond the scope of this proceeding.⁴¹

³⁴ CF Industries December 19, 2014 Protest at 6.

³⁵ Entergy November 21, 2014 Answer at 8.

³⁶ *Id.* at 4-5.

³⁷ Entergy January 20, 2015 Answer at 5-7.

³⁸ Entergy October 23, 2015 Response to June 25, 2015 Deficiency Letter at 3.

³⁹ *Id.*

⁴⁰ MISO November 20, 2015 Comments at 3.

⁴¹ Dow November 20, 2015 Protest at 2.

D. Protests of QFs Claiming Operational Characteristics

20. CF Industries and Formosa argue that they have operational characteristics that effectively prevent their QFs from participating in the market, thereby rebutting the presumption of nondiscriminatory access.

1. Formosa

21. Formosa states that its cogeneration facility output is primarily utilized inside-the-fence for thermal output efficiency based on plant process needs, and is not primarily intended for sale to an electric utility.⁴² Formosa states that its sales of excess cogenerated power output to the grid are highly variable and unpredictable because of Formosa's site process and thermal needs, which are typically process dynamic and weather related. Formosa states that its excess output therefore varies day-to-day and hour-to-hour with outputs ranging between 0 and less than 20 MW, with a typical annualized "average" output of approximately 10 MW. As such, Formosa maintains that it is impractical to make firm sales commitments on a consistent basis in the MISO day-ahead market or real-time market, because MISO tariff(s) imposes penalties on generators with variable loads and conversely, Formosa may not be compensated, or even penalized by MISO, for any unplanned over-generation.⁴³

22. In response, Entergy disputes Formosa's claim of highly variable output, arguing instead that Formosa's output is not highly variable.⁴⁴ According to Entergy, Formosa's average daily range in net output (the difference between the daily minimum and maximum) in 2014 was less than 5 MW and the average hour-to-hour change in net output was less than 1 MW.⁴⁵ Entergy also states that Formosa's net output is reasonably predictable and that, in 2014, the difference between net output in an hour and the average net output in all hours of the preceding month was, on average, 2.6 MW. Therefore, Entergy contends that if Formosa were to schedule output in the day-ahead market based on its average hours, it would only incur \$44 per day in Revenue Sufficiency Guarantee (RSG) charges. Entergy argues that Formosa can modify its

⁴² Formosa December 31, 2014 Answer at 1.

⁴³ *Id.* at 3.

⁴⁴ Entergy January 20, 2015 Answer at 18; *see also* Entergy January 20, 2015 Answer, January 20, 2015 Supplemental Affidavit of Michael M. Schnitzer at 6-7, 29 (January 20, 2015 Schnitzer Aff.).

⁴⁵ January 20, 2015 Schnitzer Aff. at 29.

day-ahead schedule up to four hours in advance of the real-time market. Entergy argues that Formosa would be compensated for generating above what Formosa schedules in the day-ahead market. Entergy explains that Formosa would receive the day-ahead locational marginal price (LMP) for energy that Formosa schedules in the day-ahead market and receive the real-time LMP for actual output that exceeds Formosa's day-ahead scheduled amount. Entergy represents that the MISO market rules accommodate resources such as Formosa that are unable to schedule their output, and such generators may in fact receive compensation for over-generation, contrary to Formosa's representation.⁴⁶

2. CF Industries

23. CF Industries argues that its QF, which is not yet in operation, will be located within, and fully integrated with, the ammonia plant expansion at the CF industrial complex. CF Industries states that the generator will be powered by waste heat produced in the steam methane reforming process used to produce ammonia. CF Industries asserts that the production of power will be dependent upon the level of ammonia production, and that all power produced by the generator will be consumed within the industrial complex. CF Industries argues that its QF will lack access to MISO's markets due to the likelihood that the QF will experience an unexpected trip or outage of production equipment resulting in significant loss of load, such that power would flow to the grid. CF Industries states that this would result in highly variable load requirements that would not permit the scheduling of excess power in MISO markets.⁴⁷

24. In its answer to CF Industries, Entergy argues that CF Industries has not provided sufficient evidence about the operational characteristics of its not yet operational QF to rebut the presumption of nondiscriminatory access for its facility. Entergy argues that if CF Industries' facility were to experience an unexpected trip or outage of production equipment, the QF would have the ability to sell its output into the wholesale market or, if circumstances warrant, to arrange for a bilateral sale of the output.⁴⁸ According to

⁴⁶ Entergy January 20, 2015 Answer at 18 (citing January 20, 2015 Schnitzer Aff. at 30-31).

⁴⁷ CF Industries October 27, 2014 Protest at 11.

⁴⁸ Entergy November 21, 2014 Answer at 19.

Entergy, the risk CF Industries describes is a general business risk not unique to CF Industries' QF, and argues that all generators face potential risks of such unforeseen events.⁴⁹

E. Protests of QFs Claiming Transmission Constraints

1. Protests

25. Occidental states that Entergy's Application must be denied as to Occidental's qualifying cogeneration facility at its Hahnville, Louisiana chemical plant site (Taft QF) because the Taft QF lacks nondiscriminatory access to MISO due to persistent transmission constraints in the Amite South load pocket where the Taft QF is located.⁵⁰ Occidental explains that Amite South has a limited import capability of less than 3,000 MW,⁵¹ which means that generation resources located within Amite South cannot export power outside of Amite South without hampering reliability because their generation is needed to meet the demand within the Amite South load pocket at times of binding transmission constraints.⁵² Additionally, Occidental states that real-time transmission constraints at the Taft QF are more significant than the day-ahead forecasts.⁵³ Occidental argues that there is no uncommitted monthly transmission capability available for the Taft QF to deliver even just 25 MW of power to buyers located in MISO Midwest.⁵⁴ Occidental argues that the practical effect of the persistent transmission constraints in Amite South is that, despite Entergy having joined MISO, the Taft QF still can only sell to one buyer: Entergy.⁵⁵ Occidental asserts that QFs like the Taft QF, which are located in Amite South, suffer from persistent transmission constraints that preclude them from accessing markets outside the persistently congested

⁴⁹ *Id.* at 16-17.

⁵⁰ Occidental October 27, 2014 Protest at 1, 6.

⁵¹ *Id.*, Attachment A, October 27, 2014 Affidavit of Songhoon Yang, Ph.D. at 27 (October 27, 2014 Yang Aff.).

⁵² October 27, 2014 Yang Aff. at 4-5.

⁵³ *Id.* at 20.

⁵⁴ *Id.* at 8.

⁵⁵ *Id.* at 2.

area of Amite South.⁵⁶ Occidental notes that MISO has designated Amite South a Narrow Constrained Area (NCA).⁵⁷

26. Both Occidental and Formosa note that there is an open investigation by the U.S. Department of Justice (DOJ) into Entergy's transmission practices.⁵⁸ Formosa requests that the Commission deny Entergy's Application until there is a clear ruling on Entergy's non-compliance with the antitrust matter. Occidental also notes that the DOJ stated that its concerns would be addressed not just by Entergy's promise to join MISO, but also Entergy's commitment to divest its transmission system, which has not occurred.⁵⁹ Occidental states that no proposals for relieving the transmission constraints have been approved by the MISO board of directors for implementation,⁶⁰ and thus the Amite South load pocket will continue to remain transmission-constrained for the foreseeable future.

27. Occidental argues that the Entergy system is different than the MISO system. Occidental asserts that MISO has had many years of an open, independent, and collaborative transmission planning process to help establish a robust transmission grid, while Entergy has not. Moreover, Occidental posits that the Entergy system is characterized by load pockets, and has relied on reliability must run (RMR) resources for decades to deal with persistent load pockets and transmission constraints. In contrast, Occidental represents that, prior to Entergy joining MISO, MISO had *de minimis* RMR resources.⁶¹

28. Occidental further states that the MISO South region is only interconnected with MISO Midwest through a single interconnection with a contract path capacity of 1,000 MW.⁶² Occidental states that subsequent to the MISO South integration, power

⁵⁶ *Id.* at 1-3.

⁵⁷ *Id.* at 10.

⁵⁸ Occidental October 27, 2014 Protest at 2-3; Formosa October 24, 2014 Protest at 3.

⁵⁹ Occidental December 19, 2014 Protest at 5 (citing Occidental October 27, 2014 Protest, Attachment B (DOJ Statement)).

⁶⁰ Occidental October 27, 2014 Protest at 12.

⁶¹ October 27, 2014 Yang Aff. at 33.

⁶² *Id.* at 38.

flows between MISO South and MISO Midwest exceeded the contract path limit of 1,000 MW and, as a result, there were significant loop flows across the neighboring Southwest Power Pool, Inc. (SPP) grid. The dispute over the compensation for the use of SPP's transmission system resulted in MISO implementing the Sub-regional Power Balance Constraint, limiting the flows between MISO Midwest and MISO South regions to the contract path limit of 1,000 MW with a proposed hurdle rate.⁶³

29. Formosa states that its grid nodal connection into the Entergy grid is at a historically constrained corridor during certain peak times of the year, such that Formosa does not have unrestricted grid access for truly competitive wholesale markets sales.⁶⁴ Formosa states that MISO has agreed that a QF's transition to being a market participant is not automatic and that a QF could face substantial delays as well as incurred costs.⁶⁵

30. CF Industries argues that transmission constraints in Entergy Louisiana's service territory restrict access to MISO markets. CF Industries notes that Amite South and West of the Atchafalaya Basin have been classified as Narrow Constrained Areas due to congestion on Entergy's transmission systems.⁶⁶

31. Dow states that it owns a QF with a capacity of 1,491 MW located in Plaquemine, Louisiana, straddling Iberville and West Baton Rouge parishes (Plaquemine QF). Dow states that its subsidiary Union Carbide also owns a QF located in Hahnville, in St. Charles Parish, Louisiana with a capacity of 353 MW.⁶⁷ Dow argues that congestion in the area of its Plaquemine QF adversely affects the ability of the Plaquemine QF to make sales into MISO markets.⁶⁸ Dow asserts that it is "well-documented that much of the Entergy transmission system is severely under-built, resulting in persistent transmission constraints and congestion in various locations throughout the system."⁶⁹ Dow argues that "[s]uch constraints and persistent congestion severely compromise Dow's access to

⁶³ *Id.* at 40.

⁶⁴ Formosa October 24, 2014 Protest at 3.

⁶⁵ *Id.* at 4-5.

⁶⁶ CF Industries October 27, 2014 Protest at 14.

⁶⁷ Dow October 27, 2014 Protest at 3.

⁶⁸ *Id.* at 6-7.

⁶⁹ *Id.*

the MISO market by, among other things, limiting the amount of energy that Dow may sell into the MISO market and subjecting Dow to exceedingly low (and sometimes negative) nodal prices for extended periods while congestion persists.”⁷⁰

2. **The Louisiana Commission’s and Entergy’s Responses to Protests**

32. The Louisiana Commission asserts that the protests should be denied, or hearing procedures should be established to resolve any disputed issues.⁷¹ The Louisiana Commission argues that generators located inside the load constraint areas benefit from their locations because the nodal prices are higher than would be the case if the congestion did not exist. The Louisiana Commission states that any transmission constraints within MISO as a matter of law do not interfere with access to the MISO markets and do not prevent Occidental from full access to the Day 2 markets.⁷² The Louisiana Commission argues that Occidental enjoys full access to MISO’s Day 2 market no matter where Occidental’s facilities are located in MISO’s system, and thus has not demonstrated any harm from operating within the Amite South area.⁷³

33. The Louisiana Commission states that the fact that Amite South was designated as an NCA at the recommendation of the MISO Independent Market Monitor has nothing to do with whether Occidental has nondiscriminatory access to MISO’s Day 2 market. The Louisiana Commission states that all regional transmission organizations (RTOs) have congestion, and the presence of congestion alone is not a sufficient rationale to deny to the Entergy Operating Companies the right to be relieved of their PURPA put obligations.⁷⁴

34. The Louisiana Commission argues that Order No. 688 allows Entergy to rely on its MISO membership to rid itself of its QF mandatory purchase obligation system-wide consistent with EAct 2005, and asserts that if the Commission finds that one or more QFs have successfully rebutted the PURPA section 210(m) and Order No. 688

⁷⁰ *Id.* at 7.

⁷¹ Louisiana Commission November 13, 2014 Answer at 2.

⁷² *Id.* at 1, 3.

⁷³ *Id.* at 4.

⁷⁴ *Id.* at 1, 5.

presumption, that should have no impact on Entergy's obligations to the other QFs that have failed to protest or that have not rebutted the presumption.⁷⁵

35. Entergy states that the protesting QFs are not constrained by transmission. Entergy states that the prices at the buses of protesting QFs are above average compared to all generators in MISO and thus that these QFs are able to sell directly to the MISO centralized energy markets at above average prices, and that they can engage in bilateral transactions with load-serving entities throughout MISO with below average, or perhaps negative, congestion charges. Entergy asserts that the protesting QFs also have nondiscriminatory access to bilateral capacity markets and the MISO Planning Resource Auction, and thus the ability to sell capacity in MISO.⁷⁶ Entergy states that the presence of congestion, by itself, does not mean that market access is limited.⁷⁷

36. Entergy states that Occidental has not provided sufficient evidence of transmission constraints to rebut the presumption that the Taft QF has access to the MISO market. Entergy asserts that, because the Taft QF is located in a load pocket, Amite South, as opposed to a generation pocket, the Taft QF is actually advantaged in selling into the MISO market because LMPs for generators inside a load pocket are higher than they would be absent the import-constrained nature of a load pocket.⁷⁸ Entergy explains that a load pocket such as Amite South is import-constrained, i.e., generating facilities can export energy from the load pocket but imports into the load pocket are limited by congestion because "there is insufficient transmission capability to supply all of the load in the area reliably without using generation capacity physically located within the area."⁷⁹ As a result, Entergy represents that (a) LMPs in load pockets are higher than in areas that are not so constrained and (b) congestion charges for bilateral transactions from generating facilities located in load pockets to load serving entities

⁷⁵ *Id.* at 7.

⁷⁶ Entergy November 21, 2014 Answer at 6.

⁷⁷ January 20, 2015 Schnitzer Aff. at 4.

⁷⁸ Entergy November 21, 2014 Answer at 13; Entergy November 21, 2014 Answer, November 21, 2014 Affidavit of Michael M. Schnitzer at 7, 20 (November 21, 2014 Schnitzer Aff.).

⁷⁹ November 21, 2014 Schnitzer Aff. at 7, 18.

outside of load pockets often are relatively low, and often result in payments to the generator for congestion.⁸⁰

37. Conversely, Entergy describes a generation pocket as export constrained, not import constrained.⁸¹ According to Entergy, a generation pocket typically arises in a circumstance when the available supply resources in an area of the transmission system cannot all run simultaneously because they exceed the transmission capability to export that excess energy.⁸² Entergy argues that LMP data indicates that, from December 19, 2013, through October 31, 2014, (1) day-ahead LMPs at the Taft QF were higher than 69 percent of all generators in MISO and real-time LMPs were higher than 84 percent of those generators and (2) day-ahead LMPs at Formosa's QF were higher than 51 percent of all generators in MISO, and real-time LMPs at the generating facility were higher than 69 percent of those generators.⁸³

38. Entergy explains that the Taft QF has access to the MISO market because Occidental may freely make bilateral sales of energy within MISO using financial schedules, or "FinScheds," without the need to obtain transmission service to do so.⁸⁴ Entergy states that Occidental can sell via bilateral transactions with the advantage of having among the lowest congestion charges of any generator, and that Occidental would actually be paid for congestion relief when it schedules energy sales to locations outside of the Amite South load pocket where Occidental's Taft Facility is located.⁸⁵ Entergy states that Occidental may also make sales of capacity either in MISO's Planning Resource Auction or through bilateral sales.⁸⁶

39. In response to Occidental's argument that because of Amite South's limited import capability, Occidental cannot export power outside of Amite South without hampering reliability, Entergy states that even a generator that is required to run for local

⁸⁰ *Id.*

⁸¹ *Id.* at 18.

⁸² *Id.*

⁸³ *Id.* at 19, 32-33.

⁸⁴ Entergy November 21, 2014 Answer at 12.

⁸⁵ November 21, 2014 Schnitzer Aff. at 7.

⁸⁶ *Id.* at 13.

reliability reasons under MISO operating procedures has an unfettered ability to transact bilaterally outside its region.⁸⁷

40. In response to arguments that Amite South is defined as an NCA, Entergy states that the designation of an NCA does not have any effect on access to MISO markets or the ability to engage in bilateral transactions. Entergy states that the NCA designation only limits the ability of suppliers to exercise market power in MISO's day-ahead and real-time markets.⁸⁸

41. Regarding the DOJ Investigation, Entergy argues that DOJ has taken no action against the Entergy Operating Companies since the initiation of the investigation more than four years ago, and asserts that this challenge is outside the scope of the information required for the Commission to grant relief pursuant to PURPA section 210(m).⁸⁹

42. Entergy asserts that Dow has failed to demonstrate that its Plaquemine facility lacks access to the markets and that planned upgrades will alleviate Dow's asserted concerns regarding transmission congestion.⁹⁰ Specifically, Entergy responds that upgrades in the vicinity of Dow's Plaquemine QF that are expected to go into service in December 2018 will alleviate the congestion affecting that QF.⁹¹ According to Entergy, while these projects were justified and included in the 2014 MISO Transmission Expansion Plan based on production cost benefits to Entergy retail customers and the loads of other MISO Market Participants, these projects will also mitigate the congestion that Dow's Plaquemine QF experiences and will have the effect of raising LMPs at the Plaquemine QF once they go into service.⁹² Entergy relies on Commission precedent finding that a QF had failed to rebut the presumption of market access in MISO due to planned transmission upgrades to relieve congestion around that QF.⁹³ Therefore,

⁸⁷ *Id.* at 23.

⁸⁸ *Id.* at 24-25.

⁸⁹ Entergy November 21, 2014 Answer at 18-19.

⁹⁰ *Id.* at 14-15.

⁹¹ *Id.* at 14.

⁹² *Id.* at 14-15; November 21, 2014 Schnitzer Aff. at 31-32.

⁹³ Entergy November 21, 2014 Answer at 14-15 (citing *Northern States Power Co., a Minnesota corporation*, 136 FERC ¶ 61,093 (*Northern States Power*), at P 21 (2011)); November 21, 2014 Schnitzer Aff. at 31.

Entergy argues, Dow has not rebutted the presumption that its QFs have nondiscriminatory access to the MISO markets. If the Commission finds to the contrary, Entergy contends that the Commission should limit any denial of the requested relief only to Dow's Plaquemine QF, and only until the planned transmission upgrades go into service.⁹⁴

43. Entergy argues that, in order to rebut the presumption of access to the markets due to transmission constraints, a generator must show that, notwithstanding its ability to engage in bilateral transactions with any party in MISO, due to the cost of congestion on those transactions the generator "in effect" cannot sell outside the area that is subject to persistent congestion; Entergy maintains that QFs in this proceeding have not made that showing.⁹⁵

3. Occidental's December 19, 2014 Answer

44. Occidental states that Entergy creates a new standard under section 292.309(e) of the Commission's regulations for what a QF must show in order to rebut the presumption of nondiscriminatory access to the MISO market.⁹⁶ Occidental states that section 292.309(e) of the Commission's regulations does not require a showing of the "cost of congestion." Occidental states that section 292.309(e) of the Commission's regulations focuses instead on the existence of "persistent transmission constraints."⁹⁷ Occidental states that this narrow focus on "the cost of congestion" is also belied by the scope of section 292.310(d)(3) of the Commission's regulations, which requires applicants such as Entergy to file "[t]ransmission Studies and related information, including" a specific list

⁹⁴ Entergy November 21, 2014 Answer at 15.

⁹⁵ November 21, 2014 Schnitzer Aff. at 15.

⁹⁶ Occidental December 19, 2014 Protest at 6.

⁹⁷ *Id.* at 6. Occidental cites 18 C.F.R. § 292.309(e)(2) (2015), which states:

A qualifying facility may seek to rebut this presumption by demonstrating, *inter alia*, that . . . [t]he qualifying facility lacks access to markets due to transmission constraints. The qualifying facility may show that it is located in an area where persistent transmission constraints in effect cause the qualifying facility not to have access to markets outside a persistently congested area to sell the qualifying facility output or capacity.

of six kinds of information, only one of which is “levels of congestion, if available.”⁹⁸ Occidental notes that the Commission’s regulations refer to “levels of congestion” not “cost of congestion on those transactions.”⁹⁹ Occidental argues that the Commission already rejected the logic underlying Entergy’s new standard in response to the Edison Electric Institute’s request for rehearing or clarification of Order No. 688. Occidental states that the Edison Electric Institute argued that “the Commission’s focus on transmission constraints as a barrier to nondiscriminatory access is inappropriate in markets where financial transmission rights provide a mechanism to overcome transmission congestion.”¹⁰⁰ Occidental states that Edison Electric Institute proffered the very same logic underlying Entergy’s new standard:

The QF has access to the market operated by the RTO/[independent system operator (ISO)] through such financial transmission rights regardless of whether a physical path exists for electric sales. . . . As long as a QF can be interconnected . . . transmission access to markets is guaranteed, provided the congestion price is paid. That is, all generators face the same economics of obtaining transmission service and thus have nondiscriminatory access to the market.¹⁰¹

45. Occidental states that, in Order No. 688-A, the Commission rejected the argument that physical transmission constraints are irrelevant in RTO/ISO markets with financial transmission rights models.¹⁰²

46. Occidental argues that, even accepting Entergy’s new standard, the Taft QF in effect cannot sell outside the persistently congested Amite South load pocket. Occidental

⁹⁸ *Id.* at 7 (citing 18 C.F.R. § 292.310(d)(3)(iii) (2015)).

⁹⁹ *Id.* (citing November 21, 2014 Schnitzer Aff. at 15).

¹⁰⁰ *Id.* at 8-9 (quoting Edison Electric Institute, Request for Clarification or, in the Alternative, Rehearing of the Edison Electric Institute, Docket No. RM06-10-001, at 5 (filed Nov. 20, 2006)).

¹⁰¹ *Id.* (quoting Edison Electric Institute, Request for Clarification or, in the Alternative, Rehearing of the Edison Electric Institute, Docket No. RM06-10-001 at 5-6 (filed Nov. 20, 2006)).

¹⁰² *Id.* at 9 (citing Order No. 688-A, FERC Stats. & Regs. ¶ 31,250 at PP 114-115).

states that sales into the MISO central market at the Taft QF's node located inside Amite South cannot, by definition, be evidence of the ability to sell outside Amite South.¹⁰³ Moreover, Occidental asserts that the Taft QF is unable to access the MISO markets outside of Amite South because buyers outside of Amite South will not purchase power from the Taft QF where (1) Amite South has higher LMPs than elsewhere in MISO, and (2) there is significantly greater volatility associated with the Taft QF's LMPs in real time relative to locations outside of Amite South, due to the persistent transmission constraints and the load pocket nature of Amite South.¹⁰⁴ Occidental states that Taft is unable to transfer even an insignificant amount of its output (less than 3 percent) to market participants located in MISO Midwest.¹⁰⁵

47. Occidental argues that Entergy's assertion that the Taft QF has nondiscriminatory access to the MISO market through FinScheds is irrational because it assumes irrational behavior on the part of market participants.¹⁰⁶ Occidental notes that a FinSched is a "financial" instrument settled outside of MISO's central markets and thus physical power flows on the MISO transmission system do not change simply because Occidental has a *theoretical* ability to enter into FinSched transactions with any load serving entity in MISO.

48. Given that the LMPs on average are higher at the Taft QF's node relative to locations outside of Amite South, Occidental argues that, from a practical perspective, it is both highly implausible and economically counter-intuitive to expect load serving entities located on the low-priced side of a transmission constraint to transact bilaterally with a generation source located on the high-priced side of the constraint.¹⁰⁷ Occidental states that, from January 1 through October 31, 2014, the Taft QF node had a higher day-ahead LMP than 66 percent of all generation nodes in MISO and a higher real-time LMP than 82 percent of all such nodes. Occidental argues that it makes no sense to assume that buyers outside Amite South would be willing to execute FinSched transactions for energy from the Taft QF when energy can be procured elsewhere in MISO at a lower

¹⁰³ *Id.* at 3, 11.

¹⁰⁴ *Id.*, Attachment A, December 19, 2014 Supplemental Affidavit of Songhoon Yang, Ph.D. at 5-6 (December 19, 2014 Yang Aff.).

¹⁰⁵ Occidental December 19, 2014 Protest at 17.

¹⁰⁶ *Id.* at 12.

¹⁰⁷ December 19, 2014 Yang Aff. at 21.

price.¹⁰⁸ Occidental states that even during the small percentage of hours in which the Taft QF LMP may be lower than other LMPs in MISO, economically rational buyers outside of Amite South would not want to enter into FinScheds for energy from the Taft QF, even if such buyers were offered any congestion credits that might accrue due to the real-time LMP volatility at the Taft node.¹⁰⁹ Occidental states that, since Entergy joined MISO, none of the MISO load serving entities (except Entergy) entered into a bilateral agreement with Occidental to purchase power from the Taft QF, notwithstanding the availability of FinScheds.¹¹⁰

4. Entergy's January 20, 2015 Answer

49. Entergy describes as unsound Occidental's argument that Entergy created a new standard under section 292.309(e) of the Commission's regulations for what a QF must show in order to rebut the presumption of nondiscriminatory access to the MISO market. Entergy attempts to refute Occidental's claims that the Commission's treatment of Edison Electric Institute's rehearing requests impugns Entergy's arguments, stating that unlike Edison Energy Institute's arguments, Entergy does not argue that in Day 2 RTOs, all QFs have market access so long as congestion is paid. Entergy asserts that the Commission's basis for rejecting Edison Electric Institute's arguments related to markets with financial transmission rights was narrow; Entergy represents the Commission as having found that information regarding congestion "will help potentially affected QFs understand the transmission market circumstances they would face if the Commission approves the utility's application."¹¹¹

50. Entergy describes as incorrect Occidental's argument that load serving entities outside of Amite South cannot access generation within the load pocket because the energy is needed to serve load within the load pocket.¹¹² Entergy argues that power flows do not change as a result of FinScheds; Entergy maintains that FinScheds simply affect the allocation of congestion costs and revenues under MISO's market rules. Because FinScheds do not change load flows on the system, Entergy argues that there is no

¹⁰⁸ Occidental December 19, 2014 Protest at 13.

¹⁰⁹ December 19, 2014 Yang Aff. at 23.

¹¹⁰ *Id.* at 27.

¹¹¹ Entergy January 20, 2015 Answer at 10-11 (citing Order No. 688-A, FERC Stats. & Regs. ¶ 31,250 at PP 114-15).

¹¹² *Id.* at 13.

operational basis to limit bilateral sales from a generator in a load pocket to a load serving entity outside of the load pocket.¹¹³

51. Regarding Occidental's argument that the high LMPs at the Taft QF prevent it from making bilateral sales from the Taft QF because it would not be economically rational for a load serving entity to enter into a bilateral transaction for a purchase from the Taft QF, Entergy states that it is not irrational for a load serving entity in MISO with a lower LMP than a generator to enter into a bilateral contract with that generator.¹¹⁴ According to Entergy, FinScheds in MISO enable generators to contract bilaterally to sell energy to load serving entities at a delivery point price agreed upon by the two parties.¹¹⁵ In addition to agreeing on a price for the sale of the energy, the two parties to a FinSched also agree on which party is to be assessed MISO congestion charges or credits.¹¹⁶ Entergy further explains that if the buyer is on the low-priced side of a constraint, and is purchasing energy from Occidental at the Taft QF's generator bus, then the transaction will receive a credit associated with the differences in LMPs between the purchaser's load bus and the Taft generator bus. Entergy states that the congestion credit can make such a transaction "rational" for both parties when the credit is allocated consistent with the delivery point of the transaction. Entergy adds that parties that enter into a bilateral transaction generally choose to settle on the basis of day-ahead prices. Regarding Occidental's argument that Occidental has not entered into bilateral sales, Entergy states that there is no requirement to show bilateral transactions in the context of a Day 2 RTO.¹¹⁷ Entergy also states that it is not surprising that other load serving entities may not have approached Occidental to purchase power from the Taft QF, as it is a matter of public record that under a long-term PPA Entergy Louisiana already purchases all but 25 MW of the Taft QF's capacity.¹¹⁸

¹¹³ *Id.* at 14 (citing January 20, 2015 Schnitzer Aff. at 10-11).

¹¹⁴ *Id.* at 4.

¹¹⁵ January 21, 2015 Schnitzer Aff. at 15.

¹¹⁶ *Id.* at 15-16.

¹¹⁷ Entergy January 20, 2015 Answer at 15-17.

¹¹⁸ January 20, 2015 Schnitzer Aff. at 22.

52. Entergy states that Occidental has not provided any other evidence besides congestion costs to show that transmission constraints in effect cause Occidental to lack access to markets outside of Amite South, and so Occidental has not met its burden.¹¹⁹

53. Entergy states that, in asserting that congestion risk in effect limits Occidental's ability to transact from the Taft QF, Occidental fails to adequately acknowledge that MISO's market includes Financial Transmission Rights (FTRs), which are financial congestion hedges that specifically are designed to address such risk. Entergy states that the uncertainty of a congestion charge can be eliminated by purchasing an FTR.¹²⁰ Entergy explains that an FTR gives the holder a right to a payment based on the difference between day-ahead LMPs at the points of withdrawal and injection. By purchasing an FTR, the holder converts an uncertain charge or credit to a fixed amount, the purchase price of the FTR.¹²¹ Entergy states that once a party holds an FTR, the hourly congestion risk for the hypothetical transaction is eliminated. The congestion on the transaction and the congestion credit on the FTR are an offset to each other, and the party is swapping hourly congestion payments for an up-front payment to take FTRs.¹²²

5. Occidental's December 14, 2014 Protest and February 12, 2015 Answer

54. Regarding Entergy's argument that it is not irrational for a load serving entity in MISO with a lower LMP than a generator to enter into a bilateral contract with that generator, Occidental states that Entergy's argument "shifts from assuming an irrational buyer (i.e., one who is prepared to pay a significantly higher LMP than is available locally or when energy can be procured at a lower price elsewhere) to assuming instead an irrational seller (i.e., one who is prepared to assume all un-hedged congestion risk)."¹²³ Occidental asserts that it would be irrational for a seller to enter into a transaction in which the seller assumes all of the congestion risk without either having an adequate risk

¹¹⁹ Entergy May 18, 2015 Answer at 7-8.

¹²⁰ *Id.* at 11-12.

¹²¹ *Id.*, May 18, 2015 Second Supplemental Affidavit of Michael M. Schnitzer at 16 (May 18, 2015 Schnitzer Aff.).

¹²² *Id.* at 11.

¹²³ Occidental February 12, 2015 Answer at 10 (quoting Occidental February 12, 2015 Answer, Attachment A, February 12, 2015 Answering Affidavit of Songhoon Yang, Ph.D. at 10 (February 12, 2015 Yang Aff.)).

hedging mechanism in place or ensuring significant additional compensation in return for bearing such risk.¹²⁴

55. Occidental also argues that the existence of persistent transmission constraints limits the Taft QF's access to MISO's capacity markets. Occidental asserts that, because bilateral transactions are executed at the difference between the market clearing prices at the load serving entity and generator, if there are transmission constraints, when the contracting parties are located in different capacity zones, one of the contracting parties will have to accept the resulting risk of price separation and capacity deliverability risks.¹²⁵

56. Regarding Entergy's argument that it is not surprising that no other load serving entities have approached Occidental to purchase power from the Taft QF because Entergy Louisiana already purchases all but 25 MW of the Taft QF's capacity, Occidental states that it is incorrect that all but 25 MW of the Taft QF's capacity is under contract to Entergy Louisiana. Moreover, Occidental asserts that 25 MW is not an insignificant amount of energy.¹²⁶

6. Entergy's Responses to Second and Third Deficiency Letters

57. Entergy explains that it will not seek to terminate any existing agreements effective prior to 120 days after the Commission issues an order granting the relief Entergy requests in the Application.¹²⁷ Entergy asserts that for a QF to rebut the presumption of access to the markets due to transmission constraints, a QF should have to show that the congestion it faces is materially higher than the congestion faced by other generators in the RTO.¹²⁸ Additionally, Entergy contrasts QFs in load pockets as compared to those in generation pocket, explaining that in many instances transmission congestion benefits the QFs located in load pockets, and that if transmission constraints at

¹²⁴ Occidental December 19, 2014 Protest at 15; December 19, 2014 Yang Aff. at 33.

¹²⁵ Occidental December 19, 2014 Protest at 15 (citing December 19, 2014 Yang Aff. at 29).

¹²⁶ Occidental February 12, 2015 Answer at 10-11 (quoting Entergy January 20, 2015 Answer at 17).

¹²⁷ Entergy October 23, 2015 Response to June 25, 2015 Deficiency Letter at 3.

¹²⁸ *Id.* at 12.

issue here were removed, the QFs located in load pockets would be harmed financially, not helped.

58. In response to questions from the Third Deficiency Letter, Entergy asserts that the Sub-regional Power Balance Constraint does not prevent any QF from selling its full output to any load serving entity in MISO. Rather, according to Entergy, the Sub-regional Power Balance Constraint is treated similarly to a transmission constraint in MISO's models, and as such the Sub-regional Power Balance Constraint affects locational prices and congestion charges but does not limit the MW quantities accounted for in bilateral transactions between generating resources and load serving entities in MISO. Moreover, Entergy contends QFs that are located in load pockets, such as Occidental's Taft QF, benefit from congestion. Entergy asserts that the Sub-regional Power Balance Constraint also does not affect the amount of capacity from a generating resource that MISO will designate as deliverable. Entergy notes that parties filed a settlement agreement in Docket Nos. ER14-1174-000 *et al.* under which, in most circumstances, the permitted flows from MISO Midwest to MISO South will increase to 3,000 MW and the permitted flows from MISO South to MISO Midwest will increase to 2,500 MW. According to Entergy, if the Commission approves the settlement agreement, MISO will eliminate the Hurdle Rate currently included in MISO's dispatch algorithms for any flows below those levels.¹²⁹ Entergy states if the Commission determines there are generation pockets or other areas experiencing significantly higher congestion than in other areas in the market, it should only exempt QFs in those areas from the waiver of the mandatory purchase obligation. Entergy asserts that the Commission should grant the territory-wide waiver request for all remaining QFs.¹³⁰

7. November and December 2015 Answers

59. Dow clarifies that there are generation pockets on Entergy's system, not just load pockets.¹³¹ Dow asserts that Entergy's own data shows that LMPs at Dow's QF generation site in Plaquemine are well below those of the MISO average load zone, confirming that Dow's QF is in a generation pocket where persistent transmission congestion exists.¹³²

¹²⁹ *Id.* at 9.

¹³⁰ *Id.* at 8.

¹³¹ Dow November 20, 2015 Protest at 1-2 (citing Entergy October 23, 2015 Response to June 25, 2015 Deficiency Letter, Attachment A).

¹³² *Id.* at 2.

60. Occidental complains that Entergy does not substantiate the data in its October 23, 2015 Response to the Third Deficiency Letter and that the LMP data Entergy proffers purports to be the same average LMP data provided in Dr. Yang's Supplemental Affidavit, but instead is materially different from Dr. Yang's data.¹³³ Occidental states that, at best, this creates material issues of fact.¹³⁴ Occidental also states that Entergy's argument that a QF should have to show that the congestion it faces is materially higher than the congestion faced by other generators in the RTO,¹³⁵ both contradicts the standard in section 292.309(e) of the Commission's regulations and modifies Entergy's previously articulated standard.¹³⁶ Occidental characterizes Entergy's position as shifting in focus between the "level of congestion" and "competitive disadvantage."¹³⁷

61. Occidental argues that feasible Auction Revenue Rights (ARRs) from the Taft QF are all held by Entergy, and no actual FTRs were sold from the Taft QF to outside of the Entergy footprint in the MISO annual and monthly auctions. Occidental therefore reasons that the congestion risk associated with bilateral transactions from the Taft QF to buyers other than Entergy cannot be hedged adequately.¹³⁸ Occidental states that Entergy's argument that rejecting Entergy's Application would "open the floodgates" to QFs in other markets seeking to reinstate other utilities' purchase obligations is unfounded and contrary to law because the Commission must make a facility-specific determination that the QF has nondiscriminatory access.¹³⁹ Occidental complains that Entergy does not explain the source of the data in its October 23, 2015 Response to the Third Deficiency Letter comes.¹⁴⁰ Occidental states that, at most, this data presents a material issue of fact.¹⁴¹ Occidental requests that if the Commission grants Entergy's

¹³³ Occidental November 20, 2015 Protest at 5, 10-11.

¹³⁴ *Id.* at 6.

¹³⁵ Entergy October 23, 2015 Response to June 25, 2015 Deficiency Letter at 12.

¹³⁶ Occidental November 20, 2015 Protest at 6.

¹³⁷ *Id.* at 7-8 (citing Entergy October 23, 2015 Response to June 25, 2015 Deficiency Letter at 8).

¹³⁸ *Id.* at 12.

¹³⁹ *Id.* at 15 (quoting Order No. 688, FERC Stats. & Regs. ¶ 31,233 at P 104).

¹⁴⁰ *Id.* at 5.

¹⁴¹ *Id.* at 6.

Application, the Commission should make the termination of the purchase obligation effective no earlier than 120 days after the order is issued.¹⁴²

62. MISO states that for those entities that have elected not to participate in MISO's QF training and registration efforts prior to the issuance of a Commission order in this docket, the 120-day transition period may not be sufficient to allow an over-20 MW QF to become certified as a Market Participant and be included in MISO's markets. MISO states that Entergy has authorized MISO to state that, at this time, if an over-20 MW QF cannot be integrated into MISO's market within 120 days of a Commission order in this docket, Entergy will allow an additional transition period not to exceed the date of the next MISO Commercial Model update following the 120-day "grace period."¹⁴³

63. Occidental responds to MISO's representations on behalf of Entergy by describing MISO as failing to remain independent in this contested proceeding and as unauthorized to propose amendments to Entergy's Application. Occidental argues that if Entergy wishes to propose amendments to its Application, then Entergy must propose such amendments itself subject to the opportunity for comment.¹⁴⁴

64. In response to Occidental's claim that no FTRs were sold from the Taft QF to outside of Entergy's footprint, Entergy states that this does not mean that additional FTRs from the Taft QF were not or will not be available in MISO's FTR auctions. Entergy asserts that "[b]ecause the Taft QF is located in the Amite South load pocket, and thus flows from the facility to delivery points outside the load pocket provide counterflows that relieve congestion in the models MISO uses to determine simultaneous feasibility, FTRs sourcing at the Taft QF and sinking to a load located outside of the load pocket likely would have been available in the FTR auctions had a purchase offer been made" and "will likely be available in the future."¹⁴⁵ Relying on data from the 2014-2015 annual MISO FTR auction, Entergy also asserts that MISO would pay a Market Participant to obtain an FTR from the Taft QF to three out of four load zones because auction participants expected the LMP to be higher at the Taft QF. According to

¹⁴² *Id.* at 19.

¹⁴³ MISO November 20, 2015 Answer at 3.

¹⁴⁴ Occidental December 3, 2015 Answer at 2-3.

¹⁴⁵ Entergy December 7, 2015 Answer at 2-3.

Entergy, there is no evidence that Occidental or any other Market Participant attempted to but was unable to purchase FTRs from the Taft QF.¹⁴⁶

65. Entergy asserts that the fact that Entergy holds all ARR from the Taft QF is a reflection of the history that Entergy was the only entity with long-term firm transmission service in that direction at the time Entergy integrated into MISO. Entergy asserts that another entity that obtains long-term transmission service from the Taft QF, by designating the Taft QF as a Network Resource, could also be eligible to pursue ARRs from the Taft QF.¹⁴⁷

66. Entergy responds to Dow's comments regarding the Plaquemine QF by representing that the proposed transmission projects that would alleviate congestion for the Plaquemine QF, which have an in-service date of December 2018, were subject to an uncontested settlement expected to be approved by the Louisiana Commission at its December 16, 2015 Business and Executive Meeting.¹⁴⁸

F. Other Claims

67. Occidental asserts that Entergy's entry into MISO has only exacerbated the discrimination against QFs on Entergy's transmission system because the MISO QF Integration Plan discriminates against QFs in violation of Federal Power Act (FPA) sections 205 and 206 by conditioning the registration of QF assets with MISO on waiver of PURPA rights.¹⁴⁹ Occidental asserts that, just because the discriminatory treatment of QFs under the MISO QF Integration Plan is at issue in other Commission proceedings does not negate these QFs' lack of nondiscriminatory access to the MISO market in this proceeding and other proceedings while that discrimination against QFs is ongoing.¹⁵⁰

68. Occidental also asserts that Entergy's Application must be denied because it does not provide the transmission constraint information required under section 292.310 of the

¹⁴⁶ *Id.* at 3 & n.2.

¹⁴⁷ *Id.* at 3-4.

¹⁴⁸ *Id.* at 4.

¹⁴⁹ Occidental October 27, 2014 Protest at 3-4 (citing Occidental October 27, 2015 Protest, Attachment D (Qualifying Facilities (QF) Generator Readiness for MISO Reliability Coordination and Market Integration (Oct. 10, 2012)).

¹⁵⁰ Occidental December 19, 2014 Protest at 4.

Commission's regulations. Occidental states that the Commission requires electric utilities seeking to terminate their QF mandatory purchase obligations to provide specific data designed to aid QFs in evaluating whether they have nondiscriminatory access to wholesale markets, and that Entergy has not done so.¹⁵¹

69. CF Industries states that Entergy Louisiana's membership in MISO has been approved for only a trial period until December 2018. CF Industries argues that should the Commission grant the Application, any perceived nondiscriminatory access to the MISO market is currently only available for approximately four years.¹⁵²

70. In response to CF's Industries' claim that Entergy Louisiana's membership in MISO has been approved for only a trial period, the Louisiana Commission states that the fact that Entergy Louisiana's MISO membership is subject to a review at the end of 5 years under LPSC Order No. U-32148 does not provide a valid rationale for rejecting Entergy's Application in this docket. The Louisiana Commission states that if Entergy Louisiana is required to exit MISO after five years, a mechanism exists under Order No. 688 for the QF purchase obligation to be re-instated, if justified.¹⁵³

IV. Discussion

A. Procedural Matters

71. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2015), the notice of intervention and timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding.

72. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2015), prohibits an answer to a protest or an answer to an answer unless otherwise ordered by the decisional authority. We will accept the answers because they have provided information that assisted us in our decision-making process.

B. Commission Determination

73. Entergy, whose operating companies are members of MISO, relies upon the rebuttable presumption set forth in section 292.309(e) of the Commission's regulations, namely, that MISO provides over-20 MW QFs with nondiscriminatory access to

¹⁵¹ Occidental October 27, 2014 Protest at 3-4.

¹⁵² CF Industries October 27, 2014 Protest at 16-17.

¹⁵³ Louisiana Commission November 13, 2014 Answer at 6.

independently administered, auction-based day-ahead and real-time wholesale markets for the sale of electric energy and to wholesale markets for long-term sales of capacity and electric energy.¹⁵⁴ As explained below, we find, based on the unrebutted statements in Entergy's Application, that MISO provides all over-20 MW QFs (with the exception of Dow's Plaquemine QF) nondiscriminatory access to independently administered, auction-based day-ahead and real-time wholesale markets for the sale of electric energy and to wholesale markets for long-term-sales of capacity and electric energy.¹⁵⁵ Accordingly, we grant Entergy's request to terminate the mandatory purchase obligation pursuant to section 210(m) of PURPA to enter into new contracts or obligations to purchase electric energy or capacity from QFs larger than 20 MW net capacity that are located in Entergy's service territory, with the exception of Dow's Plaquemine QF.¹⁵⁶ As discussed below, we also find that the protests do not warrant our denying Entergy's request.

1. QFs Less than or Equal to 20 MWs

74. Order No. 688 established a rebuttable presumption that all QFs with a net capacity below 20 MW lack nondiscriminatory access to markets.¹⁵⁷ The Commission determines the QF's net capacity, and therefore the QF's eligibility for the rebuttable presumption that the QF lacks access to markets due to its size, based on the QF's certification documents.¹⁵⁸ Rain CII's Chalmette QF, Mosaic's Uncle Sam QF, and

¹⁵⁴ 18 C.F.R. § 292.309(a)(1), (e) (2015); Order No. 688, FERC Stats. & Regs. ¶ 31,233 at P 117; *see generally Pub. Serv. Co. of N.H.*, 131 FERC ¶ 61,027, at PP 17-22 (2010), *reh'g denied*, 134 FERC ¶ 61,041 (2011).

¹⁵⁵ Occidental's argument that its complaint pending before the Commission in Docket No. EL13-41-000 precludes a finding that MISO provides nondiscriminatory access is misplaced. To date, we have made no findings in Docket No. EL13-41-000. We will address Occidental's complaint in Docket No. EL13-41-000 and Occidental is free to then argue that the Commission's findings in that docket show that Occidental is not provided nondiscriminatory access to the MISO markets. As discussed in the body of this order, based on the record in this proceeding, we find that Occidental is provided nondiscriminatory access to the MISO markets.

¹⁵⁶ To the extent that a potentially affected QF's net capacity is 20 MW or smaller, this order also does not terminate the mandatory purchase obligation for that QF.

¹⁵⁷ Order No. 688, FERC Stats. & Regs. ¶ 31,233 at P 72.

¹⁵⁸ *See Wis. Pub. Serv. Co.*, 142 FERC ¶ 61,173, at P 19 (2013) (citing Order No. 688-A, FERC Stats. & Regs. ¶ 31,250 at P 104).

Evonik's QF most recent Form 556s state that these QFs have net capacities of 18.9 MW, 14.8 MW, and 5 MW respectively.¹⁵⁹ Entergy's Application seeks only to be relieved of the mandatory purchase obligation for QFs with a net capacity greater than 20 MW. Because Rain CII's Chalmette QF, Mosaic's Uncle Sam QF, and Evonik's QF each are certified as 20 MW or smaller, we will not terminate Entergy's mandatory purchase obligation with respect to these facilities.

2. Termination of Existing Agreements

75. Section 210(m)(6) of PURPA protects existing contracts or legally enforceable obligations that are either in effect or pending state regulatory authority approval at the time of a PURPA section 210(m) application.¹⁶⁰ Acknowledging that contracts may contain clauses that terminate the contract upon enactment of particular legislation or regulatory decisions, the Commission has determined that "the issue will be best determined in an individual case-specific proceeding in which the particulars of the contract can be examined."¹⁶¹ The Commission also has stated that, if there is a disagreement as to the meaning of a termination clause, "either the electric utility or the QF may seek a determination regarding its rights under the termination clause in the appropriate state forum since the issue of whether a QF has a continuing right to sell is a matter of contract interpretation."¹⁶²

76. The Commission reiterates that granting Entergy's Application does not relieve Entergy of its obligation to abide by its existing agreements.¹⁶³ Entergy has represented that it will continue to abide by the power purchase contracts pending satisfaction of applicable contract termination requirements.¹⁶⁴ Entergy also states that it will not seek

¹⁵⁹ Rain CII Carbon LLC, Form 556, Docket No. QF32-161-005 (filed May 27, 2008); Mosaic Fertilizer, LLC, Form 556, Docket No. QF13-404-000 (filed May 2, 2013); Evonik Corporation, Form 556, Docket No. QF11-359-001 (filed December 30, 2014).

¹⁶⁰ 16 U.S.C. § 824a-3(m)(6) (2012); *see* 18 C.F.R. § 292.314 (2015); Order No. 688, FERC Stats. & Regs. ¶ 31,233 at P 203.

¹⁶¹ Order No. 688, FERC Stats. & Regs. ¶ 31,233 at P 219.

¹⁶² Order 688-A, FERC Stats. & Regs. ¶ 31,250 at P 143.

¹⁶³ *See* 16 U.S.C. § 824a-3(m)(6) (2012); 18 C.F.R. § 292.314 (2015); Order No. 688, FERC Stats. & Regs. ¶ 31,233 at P 203.

¹⁶⁴ Entergy November 21, 2014 Answer at 8.

to terminate any existing agreements effective prior to 120 days after the Commission issues an order granting the relief Entergy requests in the Application¹⁶⁵ and, if an over-20 MW QF cannot be integrated into MISO's market within 120 days of a Commission order in this docket, Entergy has committed to allow an additional transition period not to exceed the date of the next MISO commercial model update (scheduled for September 1, 2016) following the 120-day "grace-period."¹⁶⁶ Although Entergy has made representations as to when it will seek to terminate existing agreements in amendments to its Application and authorized MISO to make additional representations through MISO's November 20, 2015 answer, we disagree with Occidental that these representations are dispositive to the Commission's findings with regard to Entergy's Application. We also disagree with Occidental that MISO's attempt to clarify these timelines represent a deficiency in MISO's independence.

77. Moreover, as we have previously stated, disagreements as to the meaning of a termination clause, including disagreements as to statutory and regulatory changes provisions, are best determined in an individual case-specific proceeding before an appropriate state forum.¹⁶⁷ We therefore decline to comment on protestors' particular contracts.

3. Operational Characteristics

78. Section 292.309(e)(1) of the Commission's regulations allows a QF to rebut the presumption of nondiscriminatory access to markets by showing that the QF "has certain operational characteristics that effectively prevent the qualifying facility's participation in a market."¹⁶⁸ Order No. 688 states that "[s]uch operational characteristics might include, but are not limited to: (a) highly variable thermal and electrical demand (from the QF

¹⁶⁵ Entergy October 23, 2015 Response to June 25, 2015 Deficiency Letter at 3.

¹⁶⁶ MISO November 20, 2015 Answer at 3.

¹⁶⁷ See Order No. 688, FERC Stats. & Regs. ¶ 31,233 at P 203 (section 210(m)(6) of PURPA protects the "rights and remedies under a contract or obligation in effect or pending approval before the state regulatory authority"); accord Order No. 688-A, FERC Stats. & Regs. ¶ 31,250 at P 143 ("If an electric utility and a QF disagree as to the meaning of a termination clause, either the electric utility or the QF may seek a determination regarding its rights under the termination clause in the appropriate state forum since the issue of whether a QF has a continuing right to sell is a matter of contract interpretation.").

¹⁶⁸ 18 C.F.R. § 292.309(e)(1) (2015).

host) on a daily basis, such that the QF cannot participate in a market; or (b) highly variable and unpredictable wholesale sales on a daily basis.”¹⁶⁹

79. To date, the Commission has found only once that a QF had rebutted the presumption of nondiscriminatory access to the markets due to operational characteristics. In *NYSEG*,¹⁷⁰ the Commission found that a cogeneration QF owned by Cornell University (Cornell QF) rebutted the presumption that it had sufficient access to markets operated by New York Independent System Operator, Inc. due to the Cornell QF’s operational characteristics. The Commission relied on the uncontested assertion that the Cornell QF “serves its campus steam load, which is ‘highly variable,’ depending on local weather conditions, resulting in electric output that similarly is, ‘on a daily basis, highly variable and unpredictable.’”¹⁷¹ The Commission found that the variability in the Cornell QF’s output was expected due to its status as a new cogeneration QF whose electrical, thermal, chemical, and mechanical output the Commission’s regulations require to be “used fundamentally for industrial, commercial, residential or institutional purposes and is not intended fundamentally for sale to an electric utility.”¹⁷²

80. The Commission finds that neither Formosa nor CF Industries have made showings that the operations of their cogeneration QFs are sufficiently highly variable to rebut the presumption of access to markets. Formosa argues that, like the Cornell QF in *NYSEG*,¹⁷³ Formosa’s QF serves its industrial plant purposes, which are process-dynamic and weather-related, resulting in electric output to the grid that is “highly variable and unpredictable,”¹⁷⁴ preventing it from having nondiscriminatory access to MISO markets.

81. The Commission finds that, although Formosa’s output is highly variable, given MISO’s market rules this variability should not prevent Formosa’s participation in the MISO energy markets, nor force Formosa to incur a penalty. The record in this proceeding shows that (a) Formosa’s net annualized average output is only approximately

¹⁶⁹ Order No. 688, FERC Stats. & Regs. ¶ 31,233 at P 83.

¹⁷⁰ *N.Y. State Elec. & Gas Corp.*, 130 FERC ¶ 61,216 (2010) (*NYSEG*).

¹⁷¹ *Id.* P 18.

¹⁷² *Id.* P 19 (citing 18 C.F.R. § 292.205(d)(2) (2009)).

¹⁷³ Formosa December 31, 2014 Answer at 3; *see NYSEG*, 130 FERC ¶ 61,216 at P 18.

¹⁷⁴ Formosa December 31, 2014 Answer at 3.

10 MW,¹⁷⁵ (b) “in 2014 the average daily range in net output (the difference between the daily minimum and maximum) was less than 5 MW and the average hour-to-hour change in net output was less than 1 MW,” and (c) “the net output from Formosa is reasonably predictable,” such that, “in 2014 the difference between net output in an hour and the average net output in all hours of the preceding month was, on average, 2.6 MW.”¹⁷⁶ We are persuaded by Entergy’s representation that, based on the data described above, if Formosa registers its QF as an Intermittent Resource it would incur deviation charges on average of around \$44/day and would be compensated for generating above what it schedules by receiving the day-ahead LMP for energy that it schedules in the day-ahead market and receiving the real-time LMP for actual output that exceeds its day-ahead scheduled amount.¹⁷⁷

82. CF Industries does not argue that its not-yet-operational QF will be “highly variable” with “unpredictable wholesale sales on a daily basis.”¹⁷⁸ Rather, the possibility of an unexpected trip appears to be CF Industries’ primary argument.¹⁷⁹ The Commission finds that this is a business risk not due to the operating characteristics of a QF, and is not a sufficient showing to rebut the presumption of access to markets.¹⁸⁰

4. Transmission Constraints

83. A QF may show that it lacks access to markets due to transmission constraints by showing “that it is located in an area where persistent transmission constraints in effect cause the qualifying facility not to have access to markets outside a persistently congested area to sell the qualifying facility output or capacity.”¹⁸¹ Occidental, Formosa, CF Industries, and Dow argue that they lack access to the markets due to persistent transmission constraints. As discussed below, we find that, notwithstanding the

¹⁷⁵ *Id.*

¹⁷⁶ January 20, 2015 Schnitzer Aff. at 29.

¹⁷⁷ Entergy January 20, 2015 Answer at 18; January 20, 2015 Schnitzer Aff. at 30-31.

¹⁷⁸ See Order No. 688, FERC Stats. & Regs. ¶ 31,233 at P 83.

¹⁷⁹ CF Industries October 27, 2014 Protest at 11.

¹⁸⁰ See *Wis. Pub. Serv. Corp.*, 142 FERC ¶ 61,173 at P 22.

¹⁸¹ 18 C.F.R. § 292.309(e)(2) (2015).

constraint between MISO Midwest and MISO South, QFs in Entergy's service territory have access to real-time and day-ahead markets for energy and that the QFs also have access to long-term markets for energy and for capacity. The Commission finds that only Dow has presented sufficient evidence to rebut the presumption of access to the markets, due to transmission constraints facing Dow's Plaquemine QF.

84. We find that Occidental has not rebutted the presumption that it has nondiscriminatory access to MISO markets. We disagree with Occidental's argument that transmission constraints in the Amite South load pocket and elsewhere, including the Sub-regional Power Balance Constraint between MISO Midwest and MISO South, prevent the Taft QF from having nondiscriminatory access to MISO. We are persuaded by Entergy's explanation that, as a result of the Taft QF's location in the import constrained Amite South load pocket, the Taft QF is not prevented from selling its energy outside of Amite South. We are also persuaded by Entergy's further representation that LMPs at the Taft QF in Amite South are higher than average LMPs in MISO.¹⁸² Moreover, as Entergy points out, any energy which the Taft QF sells to load serving entities outside the Amite South load pocket, including through the Sub-regional Power Balance Constraint to load serving entities in MISO Midwest would, therefore, most often relieve congestion caused by the constraint, rather than be barred by it, and would instead receive congestion credits.¹⁸³ In contrast, we find that Dow's Plaquemine QF is in effect denied nondiscriminatory access to the MISO market due to transmission constraints. Dow's Plaquemine QF is located in a generation pocket, which is export constrained and therefore subject to lower (and potentially negative) LMPs compared to the rest of MISO because there is insufficient transmission capacity to transmit the Plaquemine QF's energy outside of the generation pocket.

85. We also disagree with Occidental's conclusion that, due to congestion and variability of congestion costs in the real time markets, entering into bilateral contracts to sell energy and capacity to load serving entities in MISO Midwest would be uneconomic for both parties. Rather, we are persuaded that the evidence presented by Entergy in this

¹⁸² See November 21, 2014 Schnitzer Aff. at 7-8, 18.

¹⁸³ See *id.* at 7-8, 20; see also Entergy October 23, 2015 Response to June 25, 2015 Deficiency Letter at 17 ("The [Sub-regional Power Balance Constraint] thus has no effect on congestion within MISO South, and the same effect on all market participants with regard to congestion between MISO South and MISO Midwest. . . . QFs on the Entergy system are not in effect precluded by congestion charges from selling energy to any [load serving entity] in MISO on a bilateral basis. Rather, many of those QFs, including [Occidental] with regard to its Taft [QF], benefit from congestion as a result of their location within load pockets.").

proceeding demonstrates that Occidental's Taft QF has nondiscriminatory access to contract bilaterally to sell both energy and capacity to load serving entities in MISO Midwest and elsewhere in MISO.¹⁸⁴ Moreover, we agree with Entergy that, in most cases Occidental would likely receive congestion cost credits for such sales from its Taft QF.¹⁸⁵

86. We agree with Entergy that Occidental's claim that other market participants would not want to engage in bilateral FinScheds with the Taft QF because LMPs in Amite South are too high rests on a flawed notion of how FinScheds and transmission constraints operate on MISO's system.¹⁸⁶ Under MISO's Tariff, a FinSched is a "financial arrangement between two Market Participants designating a Source Point, Sink Point and Delivery Point establishing the obligations of the buyer and seller for the payment of Cost of Congestion and Cost of Losses."¹⁸⁷ FinScheds do not mean that load must purchase a generator's energy at a price based on the generator's LMP. Instead, the QF and the load serving entity counterparty may mutually agree to a price that they will pay or receive based on the delivery point they select as the point at which to calculate price.¹⁸⁸

87. We disagree with Occidental's contention that no load serving entity would assume the congestion risk associated with entering a FinSched with the Taft QF.¹⁸⁹

¹⁸⁴ See Entergy October 23, 2015 Response to June 25, 2015 Deficiency Letter at 12-17; Entergy January 20, 2015 Answer at 4-5, 12-17; Entergy November 21, 2014 Answer at 5-6, 12-13.

¹⁸⁵ See Entergy October 23, 2015 Response to June 25, 2015 Deficiency Letter at 12-13; Entergy January 20, 2015 Answer at 16.

¹⁸⁶ January 20, 2015 Schnitzer Aff. at 6.

¹⁸⁷ MISO, FERC Electric Tariff, § 1.F (36.0.0).

¹⁸⁸ See January 21, 2015 Schnitzer Aff. at 15-16 ("Under the MISO Tariff, congestion charges or credits associated with bilateral transactions are apportioned based on the 'delivery point' of the transaction, which can be the source point of the transaction (the generator bus), the sink point of the transaction (the buyer's load bus), or some other point such as a hub bus. The parties to the transaction determine the delivery point by mutual private agreement."); see also MISO, FERC Electric Tariff, § 40.2.8A (32.0.0) ("The Financial Schedule shall include: . . . The Commercial Price Nodes identified as the Source Point, the Sink Point and the Delivery Point . . .").

¹⁸⁹ See Occidental February 12, 2015 Answer at 10, 12; Occidental December 19, 2014 Protest at 12-14, 19.

While no entity besides Entergy has historically served as a counterparty to Occidental, that does not mean that Occidental lacks nondiscriminatory access to participate in MISO's markets in the future or that Occidental would be unable in the future to find a willing and rational counterparty. As Entergy has represented, LMPs generally are higher in the MISO South region, and especially in the Amite South load pocket, than in MISO Midwest, and the Taft QF faces less price volatility in the day-ahead market, which is where parties to bilateral transactions generally choose to settle prices, than most other generators in MISO.¹⁹⁰ Accordingly, the party assuming the congestion charges in this case might readily agree to assume that risk since it would most often receive a payment for reducing congestion into the Amite South load pocket.¹⁹¹ Similarly, we agree with Entergy that the party accepting the congestion charges would either be paid for relieving congestion in Amite South or assessed relatively low congestion charges.¹⁹²

88. In response to Occidental's claim that no FTRs were sold from the Taft QF to outside of Entergy's footprint in the MISO annual and monthly auctions and that FTRs are imperfect instruments for addressing risks,¹⁹³ we agree with Entergy that this does not mean that additional FTRs from the Taft QF were not or will not be available in MISO's FTR auctions. Because the Taft QF is located in the Amite South load pocket, flows from the facility to delivery points outside the load pocket provide counterflows that relieve congestion. Thus, FTRs sourcing at the Taft QF and sinking to a load serving entity located outside of the Amite South load pocket likely would have been available in the FTR auctions had a purchase offer been made and would likely be available in the future.¹⁹⁴ We further find persuasive Entergy's assertion that based on data from the

¹⁹⁰ See Entergy January 20, 2015 Answer at 15-16 (describing relatively high LMPs and lower volatility in day-ahead prices the Taft QF faces compared to other generators in MISO).

¹⁹¹ See Entergy October 23, 2015 Response to June 25, 2015 Deficiency Letter at 7.

¹⁹² November 21, 2014 Schnitzer Aff. at 20.

¹⁹³ Occidental November 20, 2015 Protest at 12 (citing Occidental November 20, 2015 Protest, Attachment A, November 20, 2015 Fourth Affidavit of Songhoon Yang, Ph.D. at 31 (November 20, 2015 Yang Aff.)).

¹⁹⁴ Entergy December 7, 2015 Answer at 2-3 ("Because the Taft Facility is located in the Amite South load pocket, and thus flows from the facility to delivery points outside the load pocket provide counterflows that relieve congestion in the models MISO uses to determine simultaneous feasibility, FTRs sourcing at the Taft Facility and sinking to a load located outside of the load pocket likely would have been available in the FTR

(continued ...)

2014-2015 annual MISO FTR auction, MISO would pay a Market Participant to obtain an FTR from the Taft QF to three out of four load zones discussed by the parties in this proceeding because auction participants expected the LMP to be higher at the Taft QF.¹⁹⁵ In response to Occidental's argument that Entergy holds all the ARR from the Taft QF, we find persuasive Entergy's assertion that another entity that obtains long-term transmission service from the Taft QF, by designating the Taft QF as a Network Resource, could also be eligible to pursue ARRs from the Taft QF.¹⁹⁶

89. We also agree with Entergy that the Taft QF has nondiscriminatory access to sell its capacity either in MISO's Planning Resource Auction or through bilateral sales. Occidental does not dispute that it is able to make capacity sales either pursuant to MISO's Planning Resource Auction or bilaterally, and zonal capacity price separation does not indicate the Taft QF, or any other QF in MISO, lacks nondiscriminatory access given that all bilateral capacity transactions are subject to congestion charges where the load serving entity and generator are located in different Local Resource Zones.¹⁹⁷

90. Thus, we find that Occidental has not rebutted the presumption that its Taft QF has nondiscriminatory access to sell energy and capacity into MISO centralized markets and via bilateral transactions within MISO South and to MISO Midwest, notwithstanding transmission constraints that limit energy flows into the Amite South load pocket and the

auctions had a purchase offer been made. For the same reason, such FTRs likely will be available in the future. In fact, actual price results from an FTR auction indicate that a Market Participant that wished to obtain such an FTR often would have been paid to take it in the auction").

¹⁹⁵ *Id.* at 3 n.2.

¹⁹⁶ *Id.* at 3-4.

¹⁹⁷ *Cf.* November 20, 2015 Yang Aff. at 36-39 ("In sum, capacity bilateral transactions can take place between any [load serving entity] and a generating entity such as the Taft facility. However, bilateral transactions are executed at the difference between the capacity market clearing prices at the [load serving entity] and generator capacity zones. In the presence of transmission constraints, when the contracting parties are located in different capacity zones, one of the contracting parties will have to accept the resulting risk of price separation and capacity deliverability risk."); Entergy October 23, 2015 Response to June 25, 2015 Deficiency Letter at 9-12, 15-16 (describing ability to sell capacity bilaterally, in MISO's Planning Resource Auction, and pursuant to a Fixed Resource Adequacy Plan); Entergy November 21, 2014 Answer at 13 (citing November 21, 2014 Schnitzer Aff. at 25-27).

Sub-regional Power Balance Constraint between MISO Midwest and MISO South. We agree with Entergy that because the Taft QF is located in a load pocket in Amite South, it is generally advantaged in making sales in the MISO market; the Taft QF's energy is more likely to be dispatched and will receive a relatively high LMP compared to the rest of MISO for its energy in the MISO centralized markets.¹⁹⁸ Further, notwithstanding our findings above that the constraint between MISO Midwest and MISO South does not deny QFs in Entergy's service territory access to MISO markets, we note that orders the Commission has issued today in Docket Nos. ER14-1174-000 *et al.*, ER14-1174-001 *et al.*, and ER16-56-000 will further reduce that constraint and improve access to transact within MISO markets.¹⁹⁹

91. In their respective pleadings, Formosa and CF Industries claim that constraints and congestion limits prevent their QFs from having nondiscriminatory access to MISO markets.²⁰⁰ However, they provide no specific evidence regarding how transmission congestion bars them from reaching the MISO market.

92. The Commission finds, in sum, that Occidental, Formosa, and CF Industries have not rebutted the presumption of market access on the basis of transmission constraints.

93. Dow, however, in its pleadings, demonstrates its Plaquemine QF is located in one of the most transmission-constrained and congested portions of the system, as reflected in its attached excerpt from MISO's most recent transmission expansion plan. According to Dow, such constraints and persistent congestion severely compromise Dow's access to the MISO market by, among other things, limiting the amount of energy that Dow may sell into the MISO market and subjecting Dow to exceedingly low (and sometimes negative) nodal prices for extended periods while congestion persists.²⁰¹

¹⁹⁸ See Entergy November 21, 2014 Answer at 13; November 21, 2014 Schnitzer Aff. at 23.

¹⁹⁹ As noted by Entergy, the settlement in Docket No. ER14-1174-000 *et al.* eliminates the so-called hurdle rate and under most circumstances "the permitted flows from MISO Midwest to MISO South will increase to 3,000 MW and the permitted flows from MISO South to MISO Midwest will increase to 2,500 MW." Entergy October 23, 2015 Response to June 25, 2015 Deficiency Letter at 17; see also *Southwest Power Pool, Inc.*, 154 FERC ¶ 61,021, *Southwest Power Pool, Inc.*, 154 FERC ¶ 61,022 and *Midcontinent Independent Systems Operator, Inc.*, 154 FERC ¶ 61,023(2016).

²⁰⁰ Formosa October 24, 2014 Protest at 3.

²⁰¹ Dow October 27, 2014 Protest at 7.

94. While, in its November 21, 2014 answer, Entergy responds that upgrades in the vicinity of Dow's Plaquemine QF are expected to go into service in December 2018, until such time as the planned transmission upgrades go into service, Dow has demonstrated that its Plaquemine QF is located in an area where persistent transmission constraints in effect cause the QF not to have access to markets outside the persistently congested area. While this proceeding is similar to *Northern States Power* because there are planned transmission projects that could relieve congestion to the Plaquemine QF, these proceedings are different in several important ways. In *Northern States Power*, the Commission rejected the QFs' argument that transmission constraints deny the QFs access to the MISO market because those QFs relied solely on a MISO State of the System Report produced by ITC Midwest LLC. That report identified planned transmission projects that would relieve such congestion, but the QFs in that proceeding were not expected to operate until years after the date of the utility's application to terminate its mandatory purchase obligation.²⁰² Here, Dow has presented evidence of congestion currently preventing the Plaquemine QF from reaching the MISO market and the planned projects in this proceeding are not expected to relieve that congestion until at least December 2018. This rebuts the presumption that the Plaquemine QF currently has access to the MISO market. Therefore, we will deny Entergy's requested relief only to Dow's Plaquemine QF.

95. Accordingly, we find that Dow's Plaquemine QF, which is located in a generation pocket where the transmission capacity out of the pocket is constrained, has rebutted the presumption of nondiscriminatory access. We therefore deny the Application with respect to Dow, without prejudice to Entergy refiling to seek termination of the obligation with respect to Dow, upon completion of upgrades that remedy the existing congestion and constraints.

²⁰² See *Northern States Power*, 136 FERC ¶ 61,093 at P 21 & n.27 (referencing MISO State of the System Report from ITC Midwest LLC stating that QFs would not yet be in service until as late as more than three years from utility's application to terminate mandatory purchase obligation).

The Commission orders:

The Commission denies Entergy's Application, in part, with respect to Dow's over-20 MW Plaquemine QF. The Commission grants Entergy's Application, in part, to terminate on a service territory-wide basis the requirement under section 292.303(a) of the Commission's regulations that the Entergy Operating Companies enter into new power purchase obligations or contracts to purchase electric energy and capacity from all other qualifying cogeneration or small power production QFs with a net capacity in excess of 20 MW, effective October 23, 2015.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.