

122 FERC ¶ 61,048
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Xcel Energy Services, Inc.
Southwestern Public Service Company
Oklahoma Gas and Electric Company
American Power Service Corp.
Public Service Company of Oklahoma
Southwestern Electric Power Company

Docket Nos. QM07-5-000
QM07-5-001

ORDER GRANTING IN PART AND DENYING IN PART APPLICATION

(Issued January 22, 2008)

1. On September 25, 2007, as amended on October 24, 2007, Xcel Energy Services, Inc. (Xcel Energy) on behalf of Southwestern Public Service Company (SPS), Oklahoma Gas and Electric Company (OG&E), and American Electric Power Service Corporation (AEP) on behalf of Public Service Company of Oklahoma (PSO) and Southwestern Electric Power Company (SWEPCO) (collectively Applicants) filed an application pursuant to section 210(m) of the Public Utility Regulatory Policies Act of 1978¹ (PURPA) and section 292.310 of the Commission's regulations² seeking termination on a service territory-wide basis of the requirement that these utilities enter into new power obligations or contracts to purchase electric energy and capacity from qualifying cogeneration and small power production facilities (QFs) with net capacity in excess of 20 MW. In this order, we find that OG&E and AEP have met the statutory standard, and accordingly, we grant their request to terminate the requirement that they enter into new obligations or contracts with QFs with net capacity in excess of 20 MW. As discussed below, we deny without prejudice Xcel Energy's request.

¹ 16 U.S.C. § 824a-3(m) (Supp. V. 2005).

² 18 C.F.R. § 292.310 (2007).

I. Background

2. PURPA, as originally enacted, placed a requirement on electric utilities to purchase power from QFs.³ In the Energy Policy Act of 2005, Congress amended PURPA by adding section 210(m),⁴ which provides for the termination of the requirement that an electric utility enter into a new obligation or contract to purchase electric energy from QFs⁵ if the Commission finds that QFs have non-discriminatory access to markets which would allow QFs to sell to non-interconnected, third party buyers. PURPA 210(m) established three different standards⁶ for these specific findings, depending on the nature of a particular wholesale market: “Day 2” markets (those described in section 210(m)(1)(A) of PURPA); “Day 1” markets (those described in section 210(m)(1)(B) of PURPA); and “wholesale markets for the sale of capacity and energy that are, at a minimum, of comparable competitive quality as those described in (A) and (B)” (section 210(m)(1)(C) of PURPA). The Commission promulgated regulations implementing section 210(m) of PURPA in Order No. 688.⁷

3. The Commission may grant the relief requested by Applicants in this case if as provided by section 210(m)(1)(B) of PURPA the Commission finds that QFs have non-discriminatory access to “competitive wholesale markets that provide a meaningful opportunity to sell capacity, including long-term and short-term sales, and electric

³ 16 U.S.C. § 824a-3(a) (Supp. V. 2005).

⁴ Section 210(m) was added to PURPA by section 1253 of the Energy Policy Act of 2005. *See* Pub. L. No. 109-58, § 1253, 119 Stat. 594, 967-69 (2005).

⁵ The requirement that an electric utility enter into a new contract or obligation to purchase electric energy from QFs is referred to as either the mandatory purchase obligation, or more simply the purchase requirement.

⁶ The three markets are described in sections 210(m)(1)(A), (B) and (C) of PURPA. Sections 292.309(a)(1), (2) and (3) of the Commission’s regulations adopt the statutory description of the three markets.

⁷ *New PURPA Section 210(m) Regulations Applicable to Small Power Production and Cogeneration Facilities*, Order No. 688, 71 Fed. Reg. 64,342 (2006), FERC Stats. & Regs. ¶ 31,233 (2006), *order on rehearing*, Order No. 688-A, 72 Fed. Reg. 35,872 (2007), FERC Stats. & Regs. ¶ 31,250 (2007), *appeal pending sub nom. American Forest & Paper Assoc. v. FERC*, D.C. Cir. No. 07-1328.

energy, including long-term, short-term and real-time sales, to buyers other than the utility to which the qualifying facility is interconnected.”⁸

4. Applicants are electric utilities serving customers within the Southwest Power Pool, Inc. (SPP). SPP is a regional transmission organization (RTO) that covers 255,000 square miles and includes all or some portion of eight states: Arkansas, Kansas, Louisiana, Mississippi, Missouri, New Mexico, Oklahoma, and Texas.⁹ SPP is composed of several balancing authorities which are bounded by its member utilities’ control areas. SPP’s system consists of 451 generating facilities and a total installed capacity of 55,000 MW serving a peak load of 42,556 MW.

5. Applicants own transmission facilities in the states of Arkansas, Louisiana, New Mexico, Oklahoma, and Texas that are operated by SPP pursuant to SPP’s open access transmission tariff (OATT). SPS, a subsidiary of Xcel, serves retail customers in the eastern portion of New Mexico and the Texas panhandle. OG&E, a subsidiary of OG&E Energy Corporation, serves retail customers in Oklahoma and western Arkansas. PSO, an affiliate of AEP, serves retail customers in eastern and southwestern Oklahoma. SWEPCO, an affiliate of AEP, serves retail customers in Louisiana, Arkansas and Texas.

II. Applicants’ Filing

6. Applicants assert that QFs and potential QFs located within their service territories have non-discriminatory access to markets that meet the standards of section 210(m)(1)(B) of PURPA and section 292.309(a)(2) of our regulations. In this regard, Applicants note the Commission’s determination in Order No. 688, which found that SPP meets the criteria of section 210(m)(1)(B)(i). Applicants claim that they also meet the requirements of PURPA section 210(m)(1)(B)(ii), arguing that SPP has competitive wholesale markets that provide QFs with a meaningful opportunity to sell capacity including long-term and short-term sales, and electric energy, including long-term, short-term, and real-time sales to buyers other than the utility to which the QF is interconnected.

7. To demonstrate that the SPP region offers QFs PURPA section 210(m)-compliant market opportunities, Applicants provide: (1) a description of SPP’s organized market; (2) identification of transactions of independent power producers (IPPs), one QF, and ten wind projects selling power in the region; (3) identification of a number of requests for

⁸ Section 292.309(a)(2) of the Commission’s regulations adopts the statutory description of this market.

⁹ *Southwest Power Pool, Inc.*, 106 FERC ¶ 61,110, *order on reh’g*, 109 FERC ¶ 61,010 (2004).

proposals (RFPs) for capacity and energy purchases; and (4) a list of potential buyers of capacity and energy in SPP.

8. Applicants state that they each rely on an organized procurement process to purchase energy or capacity and that IPPs and potential QFs have an opportunity to participate in each Applicant's procurement process. Applicants argue that granting this application would require QFs to compete on an equal footing with other bidders. Applicants assert that currently some QFs are not participating in the RFP process and instead are waiting until the winning bidder is selected and then demanding to sell their electric output to the utility at that winning price. Applicants argue that this gives QFs an unfair advantage over other market participants and hinders competition. Applicants argue that termination of the mandatory purchase obligation in the SPP market would result in the QFs being forced to participate in the RFP process on the same basis as any other seller, thereby enhancing competition.

9. Regarding long-term capacity sales, Applicants state that in 2006 long-term capacity sales totaled approximately 13 percent of SPP's peak load and that there were 45 RFPs requesting 7,000 MW of long-term capacity. Further, Applicants assert that there are several generators that have signed long-term contracts with various third parties. Regarding short-term capacity sales, Applicants state that in 2006, approximately 3 percent of peak load in SPP was met through short-term capacity sales and that over 40 RFPs requesting 3,600 to 15,400 MW of short-term capacity were conducted. Regarding long-term electric energy sales, Applicants state that in 2006 long-term energy sales accounted for approximately 9 percent of SPP's energy requirements. Applicants assert that approximately 25 sellers and over 100 buyers reported long-term energy transactions. Regarding short-term electric energy sales, Applicants state that, according to the Electronic Quarterly Reports (EQRs) in 2006, approximately 25 percent of SPP's energy requirements were met through short-term energy sales. Applicants assert that approximately 50 sellers and over 200 buyers reported short-term energy transactions.

10. Applicants separately argue that SPP's regional Energy Imbalance Service (EIS) market is sufficient to provide a QF with the requisite meaningful opportunity to sell to buyers other than a QF's interconnected utility. Applicants state that energy offered into the EIS market is at a locational imbalance price that reflects cost variations at different times and locations based on real-time system conditions. Applicants contend that there are no market rules that would prevent QFs from participating in this market and that, currently, several IPPs and one QF, Eastman Cogeneration, LP (Eastman Cogen),¹⁰ sell energy in the EIS market. Applicants point, as well, to the Commission's determination in Order No. 688, where the Commission found that the Electric Reliability Council of

¹⁰ Eastman Cogen is a 402 MW QF located in the American Electric Power Company West control area within SPP.

Texas (ERCOT) met the PURPA 210(m) statutory requirement, and argue that SPP compares favorably to ERCOT.

III. Notice and Responsive Pleadings

11. Notice of Applicants' filing was mailed by the Commission on September 27, 2007 to each of the potentially affected QFs identified in Applicants' application.¹¹ Notice of Applicants' filing was published in the *Federal Register*, 72 Fed. Reg. 56,733 (2007). Notice of Applicants' amended filing was published in the *Federal Register*, 72 Fed. Reg. 62,641 (2007), with interventions and protests due on or before November 21, 2007. Redbud Energy LP, AES Shady Point LLC, Occidental Permian Ltd., and Valero Services, Inc., on behalf of Diamond Shamrock Refining Company LP filed timely motions to intervene. Outland Renewable Energy LLC, Electric Power and Supply Association (EPSA), Calpine Corporation, Noble Environmental Power, LLC; Golden Spread Electric Cooperative, Chermac Energy Corporation, Borger Energy Associates LP,¹² John Deere Renewables, LLC, JD Wind 1, LLC, JD Wind 2, LC, JD Wind 3, LLC, JD Wind 4, LLC, JD Wind 5, LLC and JD Wind 6, LLC (collectively JD Wind), PowerSmith Cogeneration LP, and American Wind Energy Association (AWEA) along with the Wind Coalition, John Deere, Acciona Wind Energy USA LLC, Eurus Energy America Corporation filed timely motions to intervene and protest

12. Protesters maintain that Applicants have not demonstrated that QFs have a meaningful opportunity to sell capacity and energy to third-party buyers. Protesters argue that the markets within the SPP footprint are illiquid and that transmission constraints preclude QFs' access to third-party buyers. Protesters also assert that the Applicants provide only theoretical evidence instead of actual historical evidence of sales

¹¹ Applicants identified potentially affected QFs in their application and amended application: Aeolus Wind, LLC; Borger Energy Associates, LP; Calpine Energy Services, LP; Caprock Wind, L.P.; Chermac Energy Corporation; Degussa Engineered Carbons, Inc.; Exelon Generation Company, LLC; Higher Power Energy, LLC; High Plains Wind Power 1; John Deere Wind; Distributed Wind Systems; Lubbock Power & Light; Occidental Permian, Ltd.; National Windmill Project, Inc.; Noble Environmental Power, LLC; San Juan Mesa Wind Project; Sid Richardson Carbon, Ltd.; Southwest BioEnergy, LLC; Westar Energy, Inc; AES Shady Point; Power Smith Cogeneration; Calpine Pryor; Taloga Wind I; Taloga Wind II; Red Hills Wind Project, LLC; Red Hills Wind Project II, LLC; Pryor Energy Center; Valliant Container Board Mill; and Eastman Cogeneration Facility and we rely upon this representation. Applicants state that they served a copy of the filing on each of the potentially affected QFs named in its application. Not every QF listed here is large enough to be affected by this application.

¹² Borger Energy Associates, LP subsequently filed a notice withdrawing its protest.

opportunities for QFs in the region and that much of the data that Applicants provided is misleading and flawed. Protesters argue that, contrary to Applicants' assertions, there are few independent buyers willing and able to purchase from QFs. Protesters assert that Congress intended that utilities in markets offered by regional entities like SPP ("Day 1" markets) provide concrete evidence of actual sales to third-party buyers which, with the exception of evidence of sales from a single QF, Applicants have failed to provide.

13. Protesters assert that in the statute Congress required utilities in "Day 1" markets to make a greater evidentiary showing, as evidenced by the additional requirement that utilities in "Day 1" markets must make a showing of a meaningful opportunity to sell into competitive capacity and energy markets to buyers other than the interconnected utility. Protesters assert that this additional showing is necessary because "Day 1" markets are less robust, are not as transparent, and are not necessarily independently-administered markets as are "Day 2" markets. Protesters argue that Applicants' evidence of sales from a single QF, even with the additional sales information of the six IPPs, does not sufficiently demonstrate that QFs have a meaningful opportunity to sell to third-party buyers within the relevant region. Protesters assert that the lack of transparency in the SPP market also diminishes market competitiveness.

14. Protesters argue that SPP's EIS market suffers from bid insufficiency and demonstrates a limited opportunity for QFs to make sales to third parties. AWEA asserts that SPP's EIS market lacks a single, region-wide unit commitment of resources, which limits the efficiency of the market.

15. Protesters contend that Applicants failed to provide evidence of a competitive capacity market because SPP lacks an independently-administered, transparent capacity market. Protesters assert that RFPs are the only mechanism for QFs to sell capacity and that Applicants failed to provide actual evidence of QFs successfully utilizing this process to sell short-term or long-term capacity to third parties.

16. Protesters assert that the RFP evidence submitted by Applicants shows that the process has not been utilized frequently or for a wide range of products. Protesters also claim that Applicants' data show that electric utilities often award bids to affiliates rather than to the least cost alternative, and that two of the Applicants have tried to circumvent the RFP process altogether, arguing that they did not need to submit all transactions and investment proposals to a competitive bid process.¹³ EPSA argues that, while SPP utilities have an organized RFP procurement process in place, it is not a competitive one because the utility or an affiliate is often both a bidder and the evaluator. EPSA argues that the procurement process lacks transparency and oversight by non-interested parties, which is necessary to make it a truly competitive process and thus indicative of a competitive market. Protesters also contend that Applicants failed to provide substantive

¹³ EPSA protest at 7.

evidence that QFs actually benefit from the RFP process; protesters argue that providing a laundry list of RFPs and potential buyers without evidence of successful transactions is not evidence that demonstrates that QFs have a meaningful opportunity to sell to third-party buyers.

17. Protesters also submit evidence that they assert rebuts the presumption of transmission access; they allege that there are significant transmission constraints within the SPP footprint that prevent QFs from accessing SPP's transmission services and potential buyers other than the utility to which the QF is interconnected. Protesters argue that persistent transmission congestion in certain areas of SPP, frequent use of transmission loading relief procedures in SPP, and the lack of financial transmission rights (FTRs) in SPP prevent QFs from obtaining the physical access necessary to provide QFs meaningful opportunity to sell.

18. JD Wind requests that the Commission make a determination that each of its QFs has a grandfathered legally enforceable obligation (LEO). JD Wind states that it initiated proceedings before the Public Utility Commission of Texas (Texas Commission) to enforce these rights prior to the Applicants' instant filing. JD Wind submits that the state proceeding is currently in abatement pending Commission action on the Applicants' filing. JD Wind requests that the Commission rule that these LEOs exist in accordance with state law and are grandfathered so that JD Wind's rights to sell under PURPA will not be terminated by this proceeding.

19. Applicants, Occidental Permian Ltd., PowerSmith Cogeneration, JD Wind, John Deere, AWEA and Texas Commission filed answers to the protests.

IV. Discussion

A. Procedural Matters

20. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2007), the timely unopposed motions to intervene serve to make the entities that filed them parties to this proceeding.

21. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2007), prohibits an answer to a protest 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. Substantive Matters

22. We grant OG&E's request and AEP's request (on behalf of PSO and SWEPCO) to terminate the requirement that they enter into new obligations or contracts with QFs with net capacity in excess of 20 MW. We find they have demonstrated that there are competitive wholesale markets that provide QFs a meaningful opportunity to sell energy

and capacity to buyers other than the utility to which the QF is interconnected. As to Xcel Energy's request, based on the record before us, we cannot find that QFs located in the SPS control area have non-discriminatory access as required; accordingly, we deny the Xcel Energy's application with respect to SPS without prejudice.

23. Section 210(m)(1) of PURPA provides, in relevant part, that:

. . . no electric utility shall be required to enter into a new contract or obligation to purchase electric energy from a qualifying cogeneration facility or a qualifying small power production facility under this section if the Commission finds that the qualifying cogeneration facility or qualifying small power production facility has nondiscriminatory access to—

* * * * *

(B)(i) transmission and interconnection services that are provided by a Commission-approved regional transmission entity and administered pursuant to an open access transmission tariff that affords nondiscriminatory treatment to all customers; and (ii) competitive wholesale markets that provide a meaningful opportunity to sell capacity, including long-term and short-term sales, and electric energy, including long-term, short-term and real-time sales to buyers other than the utility to which the qualifying facility is interconnected. In determining whether a meaningful opportunity to sell exists, the Commission shall consider, among other factors, evidence of transactions within the relevant market[.]

1. Transmission and Nondiscriminatory Access

24. In Order No. 688, the Commission created a rebuttable presumption that a QF has nondiscriminatory access if the QF is larger than 20 MW and if it is eligible for service under a Commission-approved OATT or a Commission-filed reciprocity tariff, including Commission-approved interconnection rules.¹⁴ Applicants rely on this presumption here.

25. In Order No. 688, the Commission also found that SPP is a Commission-approved regional transmission entity that provided transmission and interconnection services administered pursuant to an open access transmission tariff and therefore satisfied the first prong of the PURPA section 210(m)(1)(B)(i).¹⁵ The Commission codified this

¹⁴ 18 C.F.R § 292.309(c) (2007).

¹⁵ Order No. 688 at P 164.

finding in section 292.309(g) of its regulations.¹⁶ Applicants rely on this determination as a foundation for their application.

26. However, the Commission also ruled that a QF can rebut this presumption of transmission access by showing transmission constraints or other operational characteristics limiting access to third-party buyers.¹⁷ In Order 688-A, we stated that QFs need to present QF-specific evidence to rebut the presumption. The Commission said:

...regarding the OATT presumption in particular, there may be circumstances unique to a particular QF that interfere with that QF's nondiscriminatory access notwithstanding its eligibility for service under an OATT. The QF might have operational characteristics that effectively prevent its participation in a market. The QF might lack access to a mechanism to schedule transmission service or make advance sales on a consistent basis. Each QF will be in the best position to have knowledge of the particular circumstances that interfere with its ability to access the market through the OATT and, thus, requiring the QF to submit evidence of its lack of nondiscriminatory access is entirely reasonable.¹⁸

27. As discussed above, protesters present arguments intended to rebut the presumption of transmission access. Protesters assert that transmission congestion, frequent use of curtailment procedures and a lack of FTRs limit all QFs in the SPP region from accessing any markets. While protesters make several general arguments as to the transmission constraints within SPP's footprint, they for the most part do not provide QF-specific evidence of transmission constraints or operational characteristics which deny specific QFs access to the markets. These arguments do not, in most cases, rebut the presumption that a QF would have nondiscriminatory access to transmission services under SPP's OATT. Despite the concerns raised by the protesters about transmission constraints generally, we note, as described more fully below in our discussion of wholesale markets in SPP, that evidence was presented of a meaningful opportunity for independent generators to make sales to third-party buyers. Accordingly, we find that, except for our determination with regard to SPS, protesters have not convincingly rebutted the presumption of nondiscriminatory access.

¹⁶ 18 C.F.R. § 292.309(g) (2007).

¹⁷ 18 C.F.R. § 292.309(c) (2007).

¹⁸ Order No. 688-A at P 66.

28. However, as to SPS, protesters argue that transmission constraints in SPS limit QFs' ability to access buyers outside of SPS; and some provide QF-specific evidence. JD Wind provides evidence of specific SPS curtailment issues it faced due to transmission constraints. JD Wind states that it was unable to secure a third-party purchase agreement for its JD Wind No. 4 project in large part because of buyers' concerns over the lack of transmission service.¹⁹ AWEA cites the Texas Commission's finding that transmission constraints within SPS "limit the ability of sellers to reach customers."²⁰

29. Further, while applicants cite five IPPs and one QF with OASIS reservations between January 2006 and June 2007,²¹ only one, Mustang Station, is located in SPS, and according to the EQR data provided by Applicants, it was the only one to make a sale to a third-party buyer outside of SPS. This sale was for only 275 MWh, a tiny fraction of the 3.8 million MWh, of energy generated by Mustang Station during that period.²²

30. JD Wind provides sufficient QF-specific evidence that its JD Wind facility lacks access to third-party purchasers due to transmission constraints and thus rebuts the presumption of access conferred in 292.309(c) (2007). In their answer, Applicants provide no information that counters JD Wind's showing of lack of access to third-party buyers. Accordingly, we find that protesters have provided sufficient evidence of operational constraints to rebut the presumption that QFs within SPS have non-discriminatory access to the market, and Xcel Energy has not demonstrated to the contrary that QFs in SPS do, in fact, have non-discriminatory access to the market; *i.e.*, Xcel Energy has not shown on this record that SPS qualifies for the lifting of the mandatory purchase obligation. Consequently, we deny Xcel Energy's application that

¹⁹ JD Wind, Affidavit of E. Jay Lobitt, 65-72. *See, e.g.*, "Xcel indicated at various times that, because of transmission constraints on the SPS system, the JD Wind QFs could be severely curtailed (*i.e.*, SPS would open circuit breakers or take other steps to prevent the flow of energy from the JD Wind QF projects)." *Id.* at 67; JD Wind states that an independent entity hired to market the output of a JD Wind QF was unable to secure any buyer indications of interest because "[m]ultiple parties expressed concern with the changing market rules in SPP, the availability of transmission service, the ability to model and manage the wind risk, the SPP market being illiquid, investor-owned utility affiliates leaving it to the affiliated utility to issue an RFP, and the location of the resource with respect to the distance to load or being within the same state as the utility." *Id.* at 71 (emphasis added).

²⁰ AWEA protest at 25 citing *Scope of Competition in Electric Markets in Texas*, PUCT Report to the 78th Texas Legislature (January 2003) at 55.

²¹ Application, Attachment A at 57 and Table 8.

²² *Id.* at 5.

SPS be exempted from the mandatory purchase obligation without prejudice to its filing a new section 210(m) application.

2. Markets

31. The remaining issue in this case, as it applies to OG&E and AEP, is whether QFs interconnected to these utilities have access to markets which satisfy section 210(m)(1)(B)(ii). Thus, to relieve Applicants of the mandatory purchase obligation, we must find that these QFs have nondiscriminatory access to “[c]ompetitive wholesale markets that provide a meaningful opportunity to sell capacity, including long-term and short-term sales, and electric energy, including long-term, short-term and real-time sales, to buyers other than the utility to which the qualifying facility is interconnected.”²³ In addition, the statute charges the Commission to consider evidence of transactions within the relevant market, among other factors.²⁴ As discussed below, Applicants provide data on actual transactions and RFPs, as well as the range of potential purchasers; on balance this evidence demonstrates that QFs in fact have access to such markets.²⁵

32. As discussed above, Applicants provide: (1) a description of SPP’s organized market; (2) identification of transactions of IPPs, one QF, and ten wind projects selling power in the region; (3) identification of a number of RFPs for capacity and energy purchases; and (4) a list of potential buyers of capacity and energy in SPP. As an initial matter, protesters argue that the EQR data and RFP evidence are not probative of competitive markets that provide a meaningful opportunity to sell.

33. Protestors raise a variety of arguments against Applicants’ use of EQR data. They allege double counting, inclusion of transactions with distant trading parties that are not representative of opportunities normally available in the wholesale marketplace, and point to alleged insufficiencies in the data. However, even when appropriate consideration is given to these concerns, the remaining evidence in the record shows that there is an active wholesale market activity in SPP, which provides QFs and potential and

²³ 18 C.F.R. § 292.309(a)(2)(ii) (2007).

²⁴ *Id.*

²⁵ Applicants also argue that SPP compares favorably to ERCOT and suggests that because the Commission found in Order No. 688 that ERCOT met the statutory standard section 210(m)(1)(C) of PURPA, the Commission should similarly conclude that SPP meets the standard of PURPA 210(m). However, the Commission is granting Applicants’ filing under the standard of section 210(m)(1)(B) of PURPA, a different standard than 210(m)(1)(C), and, therefore, we do not rely on nor accept Applicants’ comparison of SPP to ERCOT as a basis for granting relief in this order.

future QFs a meaningful opportunity to sell their electric output to purchasers other than the interconnected utility. The number and types of transactions since 2004 indicate that there are competitive wholesale markets for both capacity and energy on both a long-term and short-term basis. More than three hundred different purchasers have been active in the SPP area since 2004, buying a total of 36 million MWh of energy in 2004, more than 45 million MWh in 2005, and more than 56 million MWh in 2006.²⁶ This is distributed between both short-term and long-term energy.²⁷ Likewise, 2006 EQR data show sales of more than 5,000 MW of long-term capacity and 1,200 MW of short-term capacity.²⁸ Applicants have provided evidence, including the evidence of actual transactions, that QFs will have a meaningful opportunity to sell to buyers other than the utility to which they are interconnected.

34. Similarly, protestors argue that the evidence of RFPs proffered by Applicants as evidence of meaningful opportunities for potential QFs to make wholesale sales is unconvincing. Protesters contend that the Applicants have infrequently utilized the RFP process or circumvented it altogether; and when used, the RFP process lacks the necessary transparency to make the RFP process truly competitive and results in affiliates chosen over lower cost alternatives. Although protestors criticize some of the RFP designs, we note that many were approved by appropriate state authorities, and were conducted under their supervision.²⁹ An RFP that results in selection of an affiliate does not necessarily indicate that there was not a meaningful opportunity for a QF to compete. The affiliate may have offered the best bid in a fairly conducted RFP. Protesters offer scant evidence to the contrary here. While we agree that legitimate issues were raised with regard to certain RFPs, in aggregate, the RFPs show a meaningful opportunity for wholesale market participants in the SPP region to make sales in a competitive market. Since 2004, seventeen RFPs have been issued in the SPP region for short-term purchases, twenty-nine for long-term purchases, and another twenty-eight that allowed for short- or long-term sales. These RFPs totaled up to more than 23,000 MW. The smallest RFP requested 2 MW and the largest 1,300 MW.³⁰ PSO and SWEPCO's short-term RFPs resulted in unaffiliated third-party IPPs being chosen as winners.³¹ Further, many SPP load serving entities are deficient of capacity relative to their peak load, according to

²⁶ Application, Attachment A, Exhibit 11.

²⁷ *Id.* Attachment A, Exhibit 5.

²⁸ *Id.* Attachment A, Exhibit 9.

²⁹ Application at 17.

³⁰ *Id.* Attachment A, Exhibit 10.

³¹ Application, Attachment D, Exhibit 12.

Applicants.³² This indicates a continuing need to issue RFPs for new capacity products. State regulatory authorities have required electric utilities to conduct RFPs and have imposed a number of terms and conditions in an attempt to ensure fairness and nondiscriminatory conduct. While some utilities may have selected affiliates in the RFP process over independent bidders,³³ other utilities have selected independent power alternatives. For example, OG&E has entered into agreements to purchase from non-affiliated third party sellers through RFPs conducted under Oklahoma Corporation Commission regulations.³⁴ On the whole, the RFP evidence submitted by Applicants supports a conclusion that there are competitive wholesale markets that provide QFs within the region a meaningful opportunity to sell their electric output.

35. Regarding real-time energy sales, Applicants state that on February 1, 2007 SPP implemented an auction-based real-time energy market. Energy offered into the EIS market is at a locational imbalance price that reflects cost variations at different times and locations based on real-time system conditions. Applicants state that there are no market rules that would prevent QFs from participating in this market and that, currently, several IPPs and one QF, Eastman Cogen³⁵ sell energy in the EIS market. The Commission agrees that the EIS market provides a meaningful opportunity for affected and potential QFs to sell real-time energy. Nothing in the rules governing the EIS market prohibits QF participation in the market.

36. Regarding short-term energy sales, Applicants state that according to the EQRs in 2006 approximately 25 percent of SPP's energy requirements were met through short-term energy sales. Applicants state that approximately 50 sellers and over 200 buyers reported short-term energy transactions. Applicants provide three types of evidence showing that potentially affected QFs have the opportunity to make short-term energy sales: short-term energy sales by proxy generators, RFPs issued in the area since 2004, and EQR data showing purchasers of energy since 2004. There were nearly two hundred buyers of short-term energy according to EQR filings; there were more than forty RFPs for short-term energy in that same time period; and independent generators have made a meaningful number of sales of short-term energy.

³² Application, Attachment A at P 29.

³³ We have no basis in this record for making any conclusions about the fairness of individual state RFP processes, and defer to duly constituted state authorities to ensure the integrity of these processes.

³⁴ Application, Attachment C.

³⁵ A 402 MW QF located in the AEP West control area within SPP.

37. Protesters argue that individual elements of Applicants' data do not support the Applicants' conclusions,³⁶ such as buyers located a great distance from the SPP market and buyers who have made only periodic purchases. However, an examination of actual wholesale market transactions, as represented in the EQR data, RFPs, and evidence of transactions by a QF and IPPs, indicates that QFs have nondiscriminatory access to competitive markets that provide a meaningful opportunity to sell short-term energy within SPP. As stated above, 2006 EQR data show more than 56 million MWh of energy traded in the SPP region, many RFPs have been issued since 2004,³⁷ and one QF and other IPPs have made both long-term and short-term energy and capacity sales.³⁸

38. Regarding short-term capacity sales, Applicants note that the Commission has equated firm energy sales with short-term capacity sales, and thus there is overlap in these two areas.³⁹ Applicants also state that in 2006 approximately 3 percent of peak load in SPP was met through short-term capacity sales and that there were over 40 RFPs requesting 3,600 to 15,400 MW of short-term capacity. Applicants provide evidence showing sales of short-term capacity by independent generators, RFPs, and potential purchasers of short-term capacity. EQR records and OASIS reservations show Eastman Cogen, Green Country, Harrison County, Calpine Oneta, Red Bud, Blue Canyon I and II, Gray County, and Wildorado Wind making short-term capacity sales. EQR data also show a total of more than 1,300 MW of short-term capacity sold in SPP in 2006.⁴⁰ RFPs issued since 2004 have requested almost 14,500 MW of short-term capacity. Finally, EQR capacity sales data show sixteen purchasers of short-term capacity in 2006 alone. Based on this evidence, the Commission finds that Applicants have shown that there is a competitive market that provides QFs a meaningful opportunity to sell short-term capacity in the SPP region.

39. Regarding long-term energy sales, Applicants state that in 2006 long-term energy sales accounted for approximately 9 percent of SPP's energy requirements. Applicants assert that approximately 25 sellers and over 100 buyers reported long-term energy transactions. Applicants again provide three types of evidence showing that potentially affected QFs have a meaningful opportunity to make long-term energy sales: long-term

³⁶ PowerSmith points to a number of buyers in the EQR data that are located a great distance from the SPP region (Canada and Washington State, for example). Such examples are very limited and do, nonetheless, show instances of sales.

³⁷ *See supra* notes 29 and 33.

³⁸ Application, Attachment A at 58-61.

³⁹ Application, Attachment A at 46.

⁴⁰ Application, Attachment A, Exhibit 9.

energy sales by independent generators, RFPs for long-term energy issued in the SPP area since 2004, and EQR data showing purchasers of energy since 2004. Applicants cite wind generators as a good proxy for affected and potential QFs and wind generators have made long-term sales. There are hundreds of buyers of long-term energy according to EQR filings, including thirty in 2006 alone. There were more than fifty requests for proposals for long-term energy, and proxy generators have made sales of long-term energy. The Commission is persuaded that this evidence shows that there is a competitive market that provides QFs a meaningful opportunity to sell long-term energy in SPP.

40. Regarding long-term capacity sales, according to EQR data, more than 5,000 MW of long-term capacity sales were made in the SPP area in 2006. Long-term firm energy sales amounted to more than 11 million MWh in 2006. Long-term firm energy and long-term capacity are in many instances substitutes for one another. When purchasing long-term capacity, one is buying an option to purchase energy. Likewise, if one buys long-term firm energy, one is buying the commitment of a certain amount of capacity. Also, independent generators cited by Applicants are currently involved in long-term capacity and energy sales agreements. This includes both IPPs and wind generators that could have structured as QFs but chose otherwise.

41. Finally, protesters request the Commission to make findings beyond what is required in section 210(m) of PURPA. For example, protestors have raised arguments that because SPP does not offer the same organized market opportunities as “Day 2” RTOs, such as auction-based day-ahead markets or capacity markets, SPP should be found to fail the statutory standard. We note that section 210(m) of PURPA has a different standard for “Day 2” RTOs that offer auction-based day-ahead markets (such as PJM Interconnection, LLC (PJM) and Midwest Independent Transmission System Operator, Inc. (Midwest ISO)) than for “Day 1” RTOs (such as SPP). As we said in Order No. 688, “Congress, in setting forth discrete tests for . . . different types of markets, was requiring the Commission to differentiate among these markets, and the differing circumstances they present, in determining whether a utility must be relieved of the mandatory purchase obligation.”⁴¹ Applicants have sought termination of their purchase obligation under section 210(m)(1)(B) of PURPA, the section applicable to “Day 1” RTOs, and have made the showing required by that section for relief. There is no requirement that Applicants show more.

42. Protestors also argue that because there is no retail access competition in SPP, there is no wholesale market competition. We disagree. Retail competition is not a requirement of section 210(m) of PURPA. Here Applicants are required to make the showings required by section 210(m)(1)(B) of PURPA. The Commission must grant termination of the mandatory purchase obligation if it makes the required findings, and

⁴¹ Order No. 688 at P 38.

retail competition is neither an express requirement of the statute nor a precondition to any other wholesale market finding the Commission must make under the statute.

43. AWEA argues that SPP wholesale markets are illiquid under the Commission's market liquidity standard and, therefore, SPP should be found to fail the statutory standard for termination of the mandatory purchase obligation.⁴² The Commission's market liquidity standard requires that before a published price index may be used in a Commission-approved tariff, over a 90 day period the average daily volume of trades must be at least 2,000 MWh, the average daily number of transactions must be at least five, or the average daily number of counterparties transacting must be at least five.⁴³ According to AWEA Platts *Megawatt Daily* publishes daily trading at a point designated as SPP North, but because of the relatively few number of transactions, Platts does not publish numbers of deals or volumes traded. AWEA argues that this shows that SPP wholesale markets are illiquid and not transparent, and thus not competitive. We disagree. First, section 210(m)(1)(B) of PURPA has no minimum standard for liquidity or transparency. What the Commission must find to grant relief under section 210(m)(1)(B) of PURPA, as requested in this filing, is competitive wholesale markets that provide QFs a meaningful opportunity to sell. The statute also directs the Commission in determining whether a meaningful opportunity to sell exists, to consider, among other factors, evidence of transactions within the relevant market. We have reviewed the evidence of transactions within the SPP market and found competitive wholesale markets that provide QFs a meaningful opportunity to sell. While market liquidity and transparency may be factors in determining whether markets are competitive, neither the statute nor the Commission's regulations require any particular measure of market liquidity or transparency for such a finding. While Platts *Megawatt Daily* daily price quotes for SPP North represents one possible measure of liquidity and transparency, it is not the only such measure. Transactional information reported in the quarterly EQR reports, some of which is described previously in this order, convince us that there are sufficient transactions to show that this regional market meets the required statutory test under section 210(m)(1)(B). We also believe there is sufficient transparency provided by SPP in its reporting on the EIS market, and by wholesale market sellers in their quarterly reporting of wholesale market transactions in the EQR.

44. Accordingly, we find that these markets within SPP's footprint satisfy section 210(m)(1)(B)(ii) of PURPA.

⁴² AWEA protest, Exhibit 1 at P. 23-24, citing to *Price Discovery in Natural Gas and Electric Markets, et al., Order Regarding Future Monitoring of Voluntary Price Formation, Use of Price Indices in Jurisdictional Tariffs, and Closing Certain Tariff Dockets*, 109 FERC ¶ 61,184 (November 19, 2004).

⁴³ *Id.* at P 66.

3. Other Matters

45. Because we are denying Xcel Energy's request that we terminate the purchase obligation for SPS, we see no need to address JD Wind's request that we determine that it has established LEOs with respect to certain QFs within SPS. Under these circumstances we believe it appropriate to leave the determination of whether LEOs have been established to the Texas Commission.

The Commission orders:

(A) The request of Oklahoma Gas and Electric Company, and American Electric Power Service Corporation on behalf of Public Service Company of Oklahoma and Southwestern Electric Power Company, filed pursuant to section 210(m) of PURPA, that they be relieved of the requirement to enter into new obligations or contracts to purchase from QFs is hereby granted.

(B) The request Xcel Energy filed pursuant to section 210(m) of PURPA, that Southwestern Public Service Company be relieved of the requirement to enter into new obligations or contracts to purchase from QFs is hereby denied without prejudice.

By the Commission. Commissioner Kelly dissenting in part with a separate statement to be issued at a later date.
Commissioner Wellinghoff dissenting in part with a separate statement attached.

(S E A L)

Nathaniel J. Davis, Jr.,
Deputy Secretary.

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Xcel Energy Services, Inc.
Southwestern Public Service Company
Oklahoma Gas and Electric Company
American Electric Power Service Corp.
Public Service Company of Oklahoma
Southwestern Electric Power Company

Docket Nos. QM07-5-000
QM07-5-001

(Issued January 22, 2008)

WELLINGHOFF, Commissioner, dissenting in part:

As enacted in EPAct 2005, PURPA section 210(m)(3) states that any electric utility may file an application with the Commission for relief from the mandatory QF purchase obligation established by the statute. The same provision provides that after notice and an opportunity for comment, “the Commission shall make a final determination within 90 days of such application” regarding whether the conditions required to grant the requested relief have been met.

The Commission promulgated regulations implementing PURPA section 210(m) in Order No. 688. Referring to the “compressed 90-day time frame” noted above, the Commission stated that it “provided a clear indication that Congress did not intend hearing or lengthy proceedings in order to make a determination of whether the electric utility must be relieved of the mandatory purchase requirement.”¹ In the absence of procedural options such as a hearing that would assist the Commission in developing a complete record, the assignment of the burden of proof may prove particularly important. As stated in Order No. 688, there is no presumption that a “Day 1” market like SPP’s satisfies the requirements of PURPA section 210(m)(1)(B) or (C); instead, as the Commission stated, “[t]he utility seeking relief will have to make that showing.”²

¹ Order No. 688 at P 53, n.31.

² *Id.* P 103. Order No. 688 did establish other rebuttable presumptions. *See id.* P 9. The Commission stated that those rebuttable presumptions “are not only reasonable because they address common, recurring issues, but also will permit better processing of applications under the compressed 90-day timeframe required by statute.” *Id.* P 100.

This case illustrates the difficulties associated with the requirement that the Commission make a “final determination” within such a compressed timeframe. The filings before the Commission reflect parties’ disagreement as to numerous issues of material fact. As one example, PURPA section 210(m)(1)(B) requires examination of whether QFs have nondiscriminatory access to competitive wholesale markets that provide a meaningful opportunity to make short-term sales of electric energy. While Applicants argue that EQR data supports their claims that the affected QFs have that opportunity, protestors argue that Applicants inappropriately ignore the Commission’s market liquidity standard in examining the relevant short-term energy markets.³ The Commission would be well served by investigating this issue in a trial-type hearing. Unfortunately, as the Commission stated in Order No. 688, it appears that the Congress did not intend for the Commission to use such procedures in these cases.

Based on the record before us, and in the absence of a trial-type hearing or other procedures that would allow the Commission to more thoroughly examine such disputed issues of material fact, I conclude that Applicants have not satisfied their burden of proof. Therefore, with regard to the majority’s decision to grant the relief requested by Oklahoma Gas and Electric Company and American Electric Power Service Corporation, I respectfully dissent.

Jon Wellinghoff
Commissioner

³ Joint Protest of AWEA, *et al.*, at 36-37, Exh. 1 at P 23-25.