

145 FERC ¶ 61,121
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;
Philip D. Moeller, John R. Norris,
Cheryl A. LaFleur, and Tony Clark.

City of Burlington, Vermont

Docket No. QM13-4-000

ORDER GRANTING THE APPLICATION TO TERMINATE MANDATORY
PURCHASE OBLIGATION

(Issued November 13, 2013)

1. On August, 15, 2013, the City of Burlington, Vermont (Burlington) filed an application pursuant to section 210(m) of the Public Utility Regulatory Policies Act of 1978 (PURPA)¹ and section 292.310 of the Commission's regulations.² Burlington seeks termination of the obligation to enter into new power purchase obligations or contracts to purchase electric energy and capacity from the Chace Mill Hydroelectric Project (Chace Mill), an interconnecting run-of-the-river hydroelectric qualifying facility (QF) with a net capacity of 7.4 MW.

2. In this order, we grant Burlington's request to terminate its PURPA mandatory purchase obligation.

I. Background

3. In 1991, Burlington, a municipal utility,³ and Winooski One Partnership (Winooski One) entered an agreement under which Burlington leased to Winooski One

¹ 16 U.S.C. § 824a-3(m) (2012).

² 18 C.F.R. § 292.310 (2013).

³ See 16 U.S.C. § 824(f) (2012) (identifying those public utilities that are exempt from most provisions of the Federal Power Act); *but see id.* §§ 796(22), 2602(4) (2012) (as distinct from a "public utility," defining an "electric utility"); 18 C.F.R. § 292.303(a) (2013) (defining each electric utility's mandatory purchase obligation pursuant to PURPA).

land and water rights to construct Chace Mill.⁴ Chace Mill interconnects with Burlington's 13.8 kV distribution system. Winooski One sold the energy and capacity of Chace Mill to Vermont retail electric utilities under a 20-year contract through a state purchasing agent, the Vermont Power Exchange, Inc., which later became VEPP Inc. (VEPPI).⁵ During the term of the contract, VEPPI re-sold Chace Mill capacity and energy into the ISO New England, Inc. (ISO-NE) market with Vermont Electric Company (VELCO) acting as lead market participant on VEPPI's behalf.⁶ The Project Agreement gave Burlington the option to acquire Chace Mill for its fair market value after the expiration of the 20-year contract with VEPPI, which expired on March 31, 2013.⁷ On September 26, 2012, Burlington notified Winooski One of its intent to exercise that option.⁸ Burlington states that it and Winooski One are currently involved in arbitration to determine the fair market value of Chace Mill.⁹

4. Burlington's 13.8 kV distribution lines connect directly to the ISO-NE grid, and Burlington does not have a safe-harbor reciprocity tariff on file with the Commission.¹⁰

⁴ See Petition at 12 (citing Petition, exh. 2, Amended and Restated Agreement for Hydroelectric Project Development between The City of Burlington, acting by and through the Burlington Electric Department and Winooski One Partnership at art. 26 (Dec. 12, 1991) (Project Agreement)).

⁵ See *id.* at 2, 11-12 (citing Petition, exh. 6, Vermont Power Exchange, Inc. and Winooski One Partnership, Long-Term, Firm, Levelized Purchase Agreement (July 1, 1991) (Purchase Agreement)).

⁶ *Id.* at 16 (citing Petition, attach. A, Affidavit of Kenneth A. Nolan, Manager of Power Resources, Burlington Electric Department ¶ 15 (Aug. 15, 2013) (Nolan Aff.)).

⁷ *Id.* at 12 (citing Project Agreement, exh. B, Amendment to Option Agreement (Dec. 12, 1991)).

⁸ *Id.* (citing Petition, exh. 7, Letter from William F. Ellis, Counsel to Burlington Electric Department, to John L. Warshow, Managing Partner, Winooski One Partnership (Sept. 26, 2012)).

⁹ *Id.* at 6, 12; see also Nolan Aff. ¶ 14.

¹⁰ Petition at 9 (citing Nolan Aff. ¶ 7).

5. In February 2013, Winooski One filed a petition with the Vermont Public Service Board, asking it to establish new, forward-looking avoided cost rates for the power sold by QFs to VEPPI.¹¹

6. Separately, Burlington states that since the expiration of the power purchase agreement with VEPPI, on March 31, 2013, GDF Suez, a 50 percent owner of Winooski One, has assumed the role of lead market participant on behalf of the QF and, according to Burlington, has offered the Chace Mill output to the ISO-NE markets directly.¹²

II. Burlington's Application

7. Burlington's principal argument for terminating the PURPA mandatory purchase obligation is that Chace Mill has nondiscriminatory access to the ISO-NE markets. Burlington seeks to demonstrate such access through actual market sales of the project's output by the Vermont utilities during the term of their Purchase Agreement with Winooski One, and by ownership of the project by GDZ Suez and GDF Suez's offers into the market since the expiration of that agreement on March 31, 2013. Burlington explains that these sales show how ISO-NE's market rules accommodate participation by small run-of-river hydroelectric resources like Chace Mill. According to Burlington, there is nothing intrinsic to Chace Mill's location, configuration, or operations posing a discriminatory barrier to market access. Burlington argues that there is no relevant difference between Winooski One's and GDF Suez's ability to sell Chace Mill's energy and capacity into the ISO-NE markets and the Vermont utilities' and VELCO's ability to make such sales under PURPA.

8. Burlington states that it believes that energy from Chace Mill has been sold into the ISO-NE markets since April 1, 2013, demonstrating that Chace Mill has nondiscriminatory market access. Burlington concedes, however, that it is no longer in a position to verify that capacity and energy continues to be sold from Chace Mill to the ISO-NE markets. But Burlington posits that circumstantial evidence strongly suggests that GDF Suez has made such sales on behalf of Winooski One. For example, Burlington states that, unless an existing asset such as Winooski One first submits a de-list bid, the auction price then drops to the level of that bid, and ISO-NE then determines that the asset is unnecessary for reliability, such existing resources are automatically entered into and cleared in each annual ISO-NE Forward Capacity Market.¹³ According to

¹¹ *See id.* at 13; *see also* Winooski One Protest at 13.

¹² Petition at 15.

¹³ *See id.* at 18-19 & n.38, 22.

Burlington, Winooski One cleared each auction before and after the underlying power purchase agreement expired and thus Winooski One has had an obligation to bid into the market.¹⁴ Burlington points out that Winooski One has stated its intent to sell into the ISO-NE markets if Winooski One's ability to sell to VEPPI pursuant to PURPA was in question after expiration of the power purchase agreement.¹⁵ Also, Burlington states that ISO-NE has listed Chace Mill as an active generating asset.¹⁶ Burlington also points to the involvement of GDF Suez in ISO-NE's Market Committee as a reason why Winooski One enjoys access to markets.¹⁷ Burlington states that, "[t]o put it simply, entities far smaller and less sophisticated than GDF Suez have successfully managed the participation of Intermittent Power Resources in ISO-NE markets, and there can be no reasonable doubt about GDF Suez's ability to do so."¹⁸

9. While Burlington posits that, here, actual sales of capacity and energy from Chace Mill into the ISO-NE markets before and after April 1, 2013 provide irrefutable evidence of the project's non-discriminatory access to those markets, and thus no more is needed to rebut the presumption that the project lacks such access, Burlington nonetheless also addresses factors that, it states, the Commission has identified as relevant when a large QF seeks to rebut its presumed market access. Burlington argues there are no operational characteristics or transmission limitations that prevent Chace Mill from accessing ISO-NE capacity and energy markets on a nondiscriminatory basis because ISO-NE has rules designed for intermittent power resources to access such markets and other hydroelectric resources in Vermont participate in that market.¹⁹

10. Burlington states that ISO-NE operates the New England Transmission system on a nondiscriminatory basis through its operating authority over Pool Transmission Facilities, which "form the backbone of the regional transmission system."²⁰ Burlington

¹⁴ *Id.* at 22.

¹⁵ *Id.* at 23 (citing Petition, exh. 9, Letter from Mathew Rubin, General Partner, Winooski One Partnership, to John Spencer, Executive Director, VEPP Inc. (Feb. 27, 2013)).

¹⁶ *Id.* at 24.

¹⁷ *Id.* at 24-26.

¹⁸ *Id.* at 26.

¹⁹ *Id.* at 27-29.

²⁰ *Id.* at 29.

states that ISO-NE provides Regional Network Service, which allows customers to wheel power without advance reservations and at no cost to Winooski One. Burlington states that ISO-NE also provides Through or Out Service, such that power exported from New England over Pool Transmission Facilities using Through or Out Service similarly does not need advance reservation, and that Through or Out Service charges for exports to New York are waived.²¹

11. With respect to transmission constraints, Burlington states that ISO-NE uses locational marginal pricing to manage congestion on the ISO-controlled grid. As a result, Burlington states, curtailments “occur only rarely” and “the ISO’s security-constrained economic dispatch software produces dispatch patterns and nodal energy market prices that reflect modeled transmission constraints.”²² Burlington represents that the locational marginal prices at Chace Mill’s node “generally have been very close to prices for the Vermont zone as a whole, demonstrating that transmission congestion has not been a significant or persistent problem affecting [Chace Mill].”²³ Burlington states that any curtailed transactions that do occur would be on a nondiscriminatory basis and that GDF Suez, as Chace Mill’s owner and operator, will be better situated to offer Chace Mill’s output into the ISO-NE Day-Ahead Market than the Vermont purchasing utilities were under the now-expired PURPA contract Purchase Agreement.²⁴

12. Moreover, while Burlington admits that it is a municipal utility and that it lacks a Commission-approved reciprocity tariff, it also states that it currently provides nondiscriminatory service to Winooski One with minimal outages and does not charge for interconnection or distribution service.²⁵ Burlington does “reserve the right to assess a reasonable and nondiscriminatory distribution charge” against Chace Mill should the Commission terminate Burlington’s must-purchase obligation.²⁶ But Burlington states that Winooski One has legal options to challenge Burlington in state and federal fora, should Winooski One be dissatisfied with Burlington’s post-termination service.²⁷

²¹ *Id.* at 30.

²² *Id.* at 31-32.

²³ *Id.* at 32.

²⁴ *Id.* at 32-33.

²⁵ *Id.* at 9, 34-37.

²⁶ *Id.* at 36.

²⁷ *Id.* at 35-36.

Burlington promises not to levy any unreasonable or discriminatory charges to prevent Chace Mill from obtaining access to the markets.²⁸

13. Because the Vermont Public Service Board is conducting ongoing avoided cost rate proceedings for all of Vermont, which serve as conditions precedent to Winooski One having a legally enforceable obligation, Burlington reasons that VEPPI has denied Winooski One's request to establish a legally enforceable obligation. Burlington thus claims that Winooski One lacks a grandfathered legally enforceable obligation entitling Winooski One to maintain its PURPA rights.²⁹

III. Notice and Responsive Pleadings

14. Notice of Burlington's application was mailed by the Commission on August 20, 2013 to each of the potentially-affected QFs identified in Burlington's application. Notice of the application was published in the *Federal Register*, 78 Fed. Reg. 52,171 (2013), with interventions and protests due on or before September 12, 2013.

15. Timely motions to intervene and protests were filed by Winooski One, Otter Creek Solar, LLC (Otter Creek), Boltonville Hydro Associates (Boltonville), and Solar Energy Industries Association (SEIA). Burlington filed a motion to answer and answer to the protests on September 27, 2013, and on October 11, 2013, Winooski One filed a motion for leave to answer and answer to Burlington's answer.

16. Winooski One states that relief from the PURPA mandatory purchase obligation is not appropriate because there are over 200 similarly situated small, run-of-river hydro facilities in ISO-NE. Winooski One argues that Burlington has not distinguished Chace Mill's circumstance from that of any other QFs on Burlington's system, and so granting relief here would mean that all of the other small, non-dispatchable intermittent power resources participating directly or indirectly in the ISO-NE markets would no longer be entitled to PURPA protection.

17. Winooski One also contends that Burlington has not met its burden of demonstrating that Chace Mill has non-discriminatory access to the market. Winooski One points out that Burlington's distribution system is not subject to the terms and conditions of ISO-NE's OATT, or a Commission-approved reciprocity tariff, and that Burlington's own expert in its ongoing arbitration with Winooski One has estimated that Burlington could charge Winooski One annual distribution wheeling charges of

²⁸ *Id.* at 37-38.

²⁹ *Id.* at 39-42.

approximately \$286,000 per year.³⁰ Winooski One argues that without the PURPA mandatory purchase obligation, there is no requirement, by Commission-approved tariff or otherwise, for Burlington to deliver power from Chace Mill to ISO-NE.

18. Winooski One also argues that various factors obstruct or pose an obstacle to market access, including: (1) Winooski One's dependence upon Burlington's 13.8 kV radial distribution system, which is Chace Mill's only path to the market; (2) the possibility of litigation if Burlington reserves the right to assess a distribution charge for transmitting power to the market; and (3) the possibility of a future change in vendor such that GDF Suez is no longer assisting in the marketing of QF power.

19. Winooski One states that, because of the wide variances of output faced by intermittent QFs such as Chace Mill, certain aspects of the ISO-NE markets such as long-term self-schedules that allow resources to bid into the market more efficiently are not available. With respect to the effect of this petition on the pending arbitration to determine the purchase price of Chace Mill, Winooski One points out that Burlington's admission that a "key issue in the pending arbitration is level of project revenues"³¹ negates Burlington's claims that Chace Mill's market access is unobstructed. Winooski One argues that its current petition before the Vermont Public Service Board will result in a legally enforceable obligation which, under *Pub. Serv. Co. of N.H.*, 131 FERC ¶ 61,027 (2010), and *Midwest Renewable Energy Projects, LLC*, 116 FERC ¶ 61,017 (2006), preserves Winooski One's right to continue selling power at avoided cost rates under PURPA.

20. Otter Creek argues that it is only VEPPI, rather than Burlington, that has standing to bring a petition for relief from the PURPA mandatory purchase obligation, since VEPPI has assumed the PURPA obligations of the Vermont electric utilities. Otter Creek further argues that a legally enforceable obligation arose as of April 1, 2013, after Winooski One "had done everything within its power" to create a legally enforceable

³⁰ See Winooski One Protest at 13 (citing Winooski One Protest, attach. 1, Affidavit of Eric DeBarba (Sept. 11, 2013)); see also Winooski One Protest, exh. 1, Competitive Energy Services, "Fair Market Value of Winooski One Hydroelectric Plant" at 7 (Nov. 19, 2012).

³¹ Winooski One Protest at 14 (citing Petition at 13). As noted above, Burlington has notified Winooski One of its intent to exercise an option to acquire Chace Mill for its fair market value, and the parties are currently involved in arbitration to determine the fair market value of Chace Mill. According to Burlington, a key issue in the pending arbitration to establish the option purchase price is the level of Chace Mill revenues that a purchaser of Chace Mill would expect to realize from future operations of the project. See Petition at 6, 12; see also Nolan Aff. ¶ 14.

obligation, and that any Commission order granting termination of a mandatory purchase obligation would have to grandfather Chace Mill, leaving Burlington's petition moot. Otter Creek argues that all QFs in the VEPPI service territory are potentially affected QFs, and Burlington's petition should be rejected because Burlington has failed to provide the names and addresses of all potentially affected QFs across Vermont.

21. Boltonville argues that, although VEPPI and Vermont electric utilities have economies of scale and expertise to interact with ISO-NE, small QFs like Chace Mill lack the time, expertise, or resources necessary to participate in the ISO-NE markets. Also, sales through a purchasing agent do not demonstrate that a small QF enjoys nondiscriminatory access. Boltonville states that relief from the PURPA mandatory purchase obligation would expose QFs to cost barriers, such as wheeling charges, payments to step up energy to transmission level voltage, and pancaked rates to block access to the ISO-NE grid. Boltonville claims that these charges, in addition to fees and costs associated with participation in ISO-NE markets, might well render many QFs in Vermont uneconomic.

22. SEIA argues that, with respect to GDF Suez and its 50 percent ownership interest in Winooski One, the Commission should not give significant weight to whether a small QF is owned by an entity that provides the QF with access to competitive wholesale markets. SEIA argues that ownership can change at any time. Should the Commission's decision to terminate a PURPA mandatory purchase obligation rest on ownership, SEIA contends that it would be administratively burdensome, costly, and inefficient to require QFs to petition for reinstatement of PURPA rights as a result of a change in upstream ownership. SEIA states that ownership might have nothing to do with a QF's operation, or whether a QF faces administrative and cost burdens. SEIA claims that focusing on QF ownership might discourage investments in QFs by certain owners. SEIA emphasizes that a larger market participant's ownership of a small QF does not necessarily mitigate the costs that market participant must bear to offer the QF into a centralized market.

23. Burlington, in its answer, reiterates that Chace Mill energy and capacity have been sold into the ISO-NE markets, and that there is nothing particular to Chace Mill or to Burlington's actions that "precludes such sales."³² With respect to whether it has standing to bring this petition, Burlington points out that VEPPI never takes title to QF power and does not have the ultimate responsibility to purchase power under Vermont's PURPA implementation. Burlington also argues that it has standing because Winooski One has commenced an avoided-cost rate proceeding before the Vermont Public Service Board, which could impose on Burlington a legally enforceable obligation to purchase energy. With respect to its distribution system, Burlington states that the

³² Burlington Answer at 4.

radial nature of its connection with Chace Mill is not discriminatory and “is very reliable.”³³

24. In reply to Winooski One’s argument that Winooski One lacks nondiscriminatory market access because Burlington has no reciprocity tariff on file with the Commission, Burlington argues that the lack of safeguards against future discrimination is an insufficient basis to deny Burlington’s petition. Burlington suggests that recourse for future potentially discriminatory conduct could be sought before the Vermont Public Service Board or the Commission and adds that Winooski One would bear a financial burden to bring such actions regardless of whether Burlington has a tariff guaranteeing open access. According to Burlington, it would be “poor public policy” and “contrary to the statutes” to designate reciprocity tariffs and regional transmission organization membership as prerequisites for exempt utilities to obtain termination of the PURPA mandatory purchase obligation.³⁴ Burlington discounts the relevance of its own expert’s estimation of expected transmission charges by stating that it has retained multiple experts to weigh in on expected transmission charges and that it would be unreasonable to rely solely on the highest estimation. Burlington also states that, because other intermittent resources participate in the ISO-NE markets and the Commission in Order No. 688 declined to set a QF’s intermittency as a presumption that a QF lacks nondiscriminatory market access, Chace Mill’s intermittent output does not deprive it of nondiscriminatory access. Burlington argues that Chace Mill lacks a grandfathered agreement because Winooski One could have commenced its state avoided cost rate proceeding earlier and because that proceeding will not result in the imposition of a legally enforceable obligation.

25. Winooski One, in its answer, argues that it should not be put in a position of having to litigate unknown future transmission terms and charges to prevail in this proceeding, because the burden is on Burlington to prove nondiscriminatory open access transmission exists for Winooski One. Winooski One argues that its access to long-term contracts in energy markets is constrained because of Chace Mill’s interconnection with Burlington on a radial line and Chace Mill’s lack of guaranteed transmission access. Winooski One acknowledges that the \$286,000 estimated transmission charge is only one of three estimated transmission charges. But Winooski One states that the disparity among those estimates supports Winooski One’s contention that there is no guarantee what Burlington would charge Winooski One for transmission access. Winooski One points out that Chace Mill has a grandfathered legally enforceable obligation not subject to a PURPA section 210(m) petition because Winooski One initiated the required multi-step state proceeding before Winooski One’s contract with Burlington expired.

³³ *Id.* at 13.

³⁴ *Id.* at 15; *see* 16 U.S.C. § 824(f) (2012).

Winooski One also claims that the unique nature of Vermont's PURPA implementation, under which all QF sales are made through contracts with a purchasing agent, means that VEPPI is the exclusive entity with a mandatory purchase obligation and that Burlington has no standing to file its petition.

IV. Discussion

A. Procedural Matters

26. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 384.214 (2013), the timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding.

27. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2013), prohibits an answer to a protest or an answer to an answer unless otherwise ordered by the decisional authority. We will accept Burlington's and Winooski One's answers because they have provided information that assisted us in our decision-making process.

B. Determination

28. The Commission finds, at the outset, that Burlington has standing to bring a petition, pursuant to section 210(m) of PURPA, requesting relief from the PURPA mandatory purchase obligation. Burlington interconnects with Chace Mill and would be responsible for purchasing output from Chace Mill under PURPA. Although Vermont implements PURPA by requiring a purchasing agent, VEPPI, to purchase all QF output,³⁵ PURPA's mandatory purchase obligation ultimately lies with electric utilities themselves,³⁶ who are expressly permitted to petition the Commission for relief from that obligation.³⁷ Burlington, as an electric utility subject to PURPA, has standing to petition

³⁵ See 18-1 Vt. Code R. § 10-4.104(A) (2013).

³⁶ See 16 U.S.C. § 824a-3(a)(1)-(2) (2012) (mandating that the Commission establish rules "requir[ing] *electric utilities* to offer to -- (1) sell electric energy to qualifying cogeneration facilities and qualifying small power production facilities and (2) purchase energy from such facilities" (emphasis added)).

³⁷ *Id.* § 824a-3(m)(3) ("Any electric utility may file an application with the Commission for relief from the mandatory purchase obligation pursuant to this subsection on a service territory-wide basis."); see also 18 C.F.R. § 292.310(a) (2013). We acknowledge that Burlington has not sought relief from its mandatory purchase obligation on a service territory-wide basis, but instead just as to Chace Mill, and our decision herein thus only applies to Burlington's obligation to purchase from Chace Mill.

for relief of its mandatory purchase obligation with respect to Chace Mill pursuant to section 210(m) of PURPA. We also disagree with Winooski One's claim that Burlington's petition applies to all similarly situated QFs. Section 210(m)(3) of PURPA and section 292.310(a) of the Commission's regulations allow, but do not require, Burlington to file an application to terminate its mandatory purchase obligation on "service territory-wide basis."³⁸ Here, however, Burlington petitions for relief from the mandatory obligation to purchase from Chace Mill only. Our determination here applies only to Chace Mill; we do not decide here whether any other QF, larger than 20 MW, or 20 MW or smaller, has, or does not have, market access.

29. Section 210(m) of PURPA provides for the termination of the requirement to enter into a new obligation or contract to purchase from a QF, if the QF has nondiscriminatory access to certain types of markets specified in section 210(m) of PURPA. In Order No. 688,³⁹ the Commission found that the markets run by ISO-NE, among others, qualify as markets that justify relief from the mandatory purchase obligation, provided that QFs, in fact, have nondiscriminatory access to such markets.⁴⁰ Because section 210(m) of PURPA requires the Commission to make a final determination on applications to terminate the requirement to enter into new obligations or contracts to purchase from QFs within 90 days of the application, the Commission established certain rebuttable presumptions to make the processing of the applications possible given the 90-day action requirement.

30. As relevant here, one of those rebuttable presumptions, contained in section 292.309(d)(1) of the Commission's regulations,⁴¹ is that a QF with a capacity at or below 20 MW does *not* have nondiscriminatory access to markets. In creating this rebuttable presumption, the Commission found persuasive arguments that some QF's may, in practice, not have nondiscriminatory access to markets in light of their small size; the Commission noted that there was agreement among commenters representing both QFs and utilities that small size could affect a QF's ability to access markets.⁴² The

³⁸ 16 U.S.C. § 824a-3(m)(3) (2012); 18 C.F.R. § 292.310(a) (2013).

³⁹ *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).

⁴⁰ *Id.* P 117.

⁴¹ 18 C.F.R. § 292.309(d)(1) (2013).

⁴² *E.g.*, Order No. 688, FERC Stats. & Regs. ¶ 31,233 at PP 72-73, *order on reh'g*, Order No. 688-A, FERC Stats. & Regs. ¶ 31,250 at P 103.

Commission explained that it adopted this rebuttable presumption for small QFs to reflect that smaller QFs are often interconnected at a distribution level and that QFs interconnected at the distribution level may, in practice, lack the same level of access to markets as those connected to transmission lines.⁴³ The Commission also explained that smaller QFs were more likely to have to overcome obstacles that larger QFs would not have to overcome, such as jurisdictional differences, pancaked delivery rates, and administrative burdens to obtaining access to distant buyers. The Commission found that such difficulties supported a rebuttable presumption that smaller QFs have “substantially less ability to access wholesale markets than do larger QFs.”⁴⁴ The Commission further explained that it set this rebuttable presumption at 20 MW, rather than at a much smaller size of one or two MW, to reflect its understanding of “the general nature of QFs’ interconnection practices and the relative capabilities of small entities” to participate in markets.⁴⁵

31. Order No. 688 placed the burden of proof on the electric utility to demonstrate that a small QF has nondiscriminatory access to the energy markets described in section 292.309(a), (b) or (c) of the Commission’s regulations.⁴⁶ The Commission, in Order No. 688, did not specify what evidence a utility could set forth to rebut the presumption, but noted that “relevant evidence may include the extent to which the QF has been participating in the market or is owned by, or is an affiliate of, a[n] entity that has been participating in the relevant market.”⁴⁷

32. In its application, Burlington rebuts the presumption that Chace Mill, as a below-20 MW QF, does not have nondiscriminatory access to ISO-NE markets.⁴⁸ Burlington relies on the fact that VEPPI was able to resell energy from Chace Mill in the

⁴³ Order No. 688-A, FERC Stats. & Regs. ¶ 31,250 at PP 94-103.

⁴⁴ *Id.* P 96.

⁴⁵ *Id.* P 101.

⁴⁶ 18 C.F.R. § 292.310 (d)(2) (2013) (to the extent an electric utility seeks relief from the purchase obligation with respect to a QF 20 MW or smaller, the electric utility bears burden to prove the QF has nondiscriminatory access to the wholesale markets).

⁴⁷ *Id.* In saying this, however, the Commission did not intend to suggest that these two facts alone would necessarily be a basis for granting relief from PURPA’s mandatory purchase obligation. *PPL Elec. Utils. Corp.*, 145 FERC ¶ 61,053, at P 23 & n.25 (2013).

⁴⁸ *See* Order No. 688, FERC Stats. & Regs. ¶ 31,233 at P 78 (finding that the burden rests with the utility).

ISO-NE markets. Burlington also states that sales from Chace Mill continued after expiration of the agreement, and that Winooski One stated its intent to sell into the ISO-NE markets. Burlington argues that Winooski One's affiliation with GDF Suez, lead market participant for Chace Mill, lends sophistication to Winooski One, allowing it to participate successfully in ISO-NE markets. Burlington also addresses the potential barriers that the Commission identified as relevant in determining whether a QF larger than 20 MW has nondiscriminatory market access, arguing that none of them exist for Chace Mill.

33. The Commission finds that Burlington has met its burden of showing that Chace Mill has nondiscriminatory access to the ISO-NE markets. Burlington represents that energy from Chace Mill has been sold into the ISO-NE markets following the expiration of its Purchase Agreement earlier this year. Although the nature and extent of those sales are not articulated with specificity, no party disputes that there are sales, and thus it appears that there are no existing barriers to Chace Mill's ability to access the ISO-NE market. Based on these facts and Burlington's representations, we find that Burlington has met its burden.

34. Burlington argues that the key aspects of such market access were unchanged even after Winooski One's power purchase agreement with VEPPi expired, particularly the continued use of a lead market participant and continued wheeling services from Burlington to deliver Chace Mill energy to the ISO-administered transmission grid at no charge. In particular, while there is currently no legal instrument requiring Burlington to provide nondiscriminatory wheeling service to Winooski One in the future, Burlington is so far providing transmission access and states that it has no intention to cease providing Winooski One with such access.⁴⁹ Furthermore, although Burlington represents that it "reserves the right to assess a reasonable and nondiscriminatory charge for [Chace Mill] in the future, if and to the extent such a charge is or becomes permitted by applicable law,"⁵⁰ the Commission has stated that "the requirement to pay an interconnection charge, transmission charge, or distribution charge, in and of itself, is not an indication that a QF does not have nondiscriminatory access to a market."⁵¹ While we are generally concerned that small QFs are vulnerable to administrative burdens preventing their access

⁴⁹ Petition at 35 ("To date, Burlington has provided nondiscriminatory access to its distribution system for the purpose of delivering [Chace Mill's] Net Electric Output to the ISO-controlled transmission grid, and Burlington has no intention to cease providing such access.").

⁵⁰ *Id.* at 36.

⁵¹ See Order No. 688, FERC Stats. & Regs. ¶ 31,233 at P 90.

to organized electric markets,⁵² on the current record it appears that there is nothing that stands in the way of Chace Mill reaching those markets, including charges for interconnection or distribution service.⁵³ Similarly, Chace Mill's affiliate connection to GDF Suez and GDF Suez's participation in ISO-NE markets demonstrates that market participation is not a foreign practice to Chace Mill and its ownership. Should these circumstances change, Winooski One has the right to petition this Commission for reinstatement of Burlington's PURPA mandatory purchase obligation.⁵⁴

35. We recognize that expert evaluations presented by Burlington on the fair market value of Chace Mill indicate a range of estimated annual wheeling charges that Burlington might impose on Chace Mill.⁵⁵ Burlington, however, currently does not charge Chace Mill for such service.⁵⁶ If Winooski One believes that any future charges are indeed discriminatory or burdensome so as to deny Chace Mill access to the ISO-NE markets, Winooski One may petition for reinstatement of Burlington's PURPA mandatory purchase obligation pursuant to section 292.311 of the Commission's regulations.⁵⁷

36. We therefore find that Burlington has rebutted the presumption that Winooski One, a QF under 20 MW, lacks access to a competitive wholesale market.

⁵² See Order No. 688-A, FERC Stats. & Regs. ¶ 31,250 at P 96 (smaller QFs, because of their location on lower voltage radial lines, are more likely to have to overcome obstacles such as jurisdictional differences, pancaked delivery rates, and perhaps additional administrative procedures to obtain access to distant buyers); *accord id.* P 103 (“[M]ore often than not, a small QF will have greater difficulty obtaining nondiscriminatory access to markets due to the tendency for small QFs to be interconnected to lower voltage radial lines, and the consequent need to overcome other potential obstacles to nondiscriminatory access, such as local distribution access rules that are not within the Commission's jurisdiction, pancaked delivery rates and additional administrative burdens to obtain access to buyers other than the interconnected utility.”).

⁵³ Petition at 36.

⁵⁴ 18 C.F.R. § 292.311 (2013). Winooski One's burden would be to show that there has been a change in the circumstances underlying the instant petition.

⁵⁵ See Burlington Answer at 18-19 & n.37; Winooski One Protest at 13.

⁵⁶ Petition at 36.

⁵⁷ See *supra* note 52.

37. One final item bears mention. We have previously held that “a QF that has initiated a state PURPA proceeding that may result in a legally enforceable contract or obligation prior to the applicable electric utility filing its petition for relief pursuant to § 292.310 of the Commission’s regulations will be entitled to have any contract or obligation that may be established by state law grandfathered.”⁵⁸ Winooski One, in fact, initiated a state proceeding before Burlington filed its petition in this proceeding. Nevertheless, we decline at this juncture to assess that proceeding’s significance as to whether Winooski One is entitled to a contract or legally enforceable obligation and, if so, whether such a contract or legally enforceable obligation would be grandfathered for the purposes of PURPA section 210(m).

The Commission orders:

Burlington’s petition to be relieved of the obligation to enter into a new power purchase obligation or contract with Winooski One, the owner of a QF with less than 20 MW net capacity, is hereby granted.

By the Commission. Chairman Wellinghoff is dissenting with a separate statement to be issued at a later date.

(S E A L)

Kimberly D. Bose,
Secretary.

⁵⁸ Order No. 688-A, FERC Stats. & Regs. ¶ 31,250 at P 137; *see also* 16 U.S.C. § 824a-3(m)(6) (2012); 18 C.F.R. § 292.314 (2013).