

146 FERC ¶ 61,186
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Fitchburg Gas and Electric Light Company

Docket No. QM14-1-000

ORDER GRANTING THE APPLICATION TO TERMINATE MANDATORY
PURCHASE OBLIGATION

(Issued March 14, 2014)

1. On December 17, 2013, Fitchburg Gas and Electric Light Company (Fitchburg) 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 Fitchburg seeks termination of the obligation to purchase electric energy and capacity from Pinetree Power Fitchburg, Inc. (Pinetree), a qualifying facility (QF) with a net power production capacity of approximately 16 MW.

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

I. Background

3. Fitchburg, a wholly owned subsidiary of Unifil Corporation, is a public utility that provides electric (and natural gas) service in Massachusetts.³ Fitchburg provides transmission and ancillary services over Pool Transmission Facilities (PTF) pursuant to the ISO New England, Inc. (ISO-NE) Open Access Transmission Tariff (OATT) and

¹ 16 U.S.C. § 824a-3(m) (2012).

² 18 C.F.R. § 292.310 (2013).

³ Fitchburg Application at 4.

transmission service to *non*-Pool Transmission Facilities (Non-PTFs) pursuant to Schedule 21-FG&E of the ISO-NE OATT.⁴

4. Pinetree is a small power production qualifying facility located in Westminister, Massachusetts and is owned by GDF SUEZ S.A.'s wholly-owned subsidiary GDF SUEZ Energy North America, Inc. (GDF Suez).⁵ The Pinetree facility includes a steam boiler and a steam turbine and generator, and uses tree chips, wood chips, waste wood, wood shavings, sawdust, and landfill gas for primary fuels.⁶ According to Pinetree's Form 556, "[t]he facility also includes a transformer to step up voltage from 13.8 kV to 69 kV and 1.5 miles of lines to its point of interconnection with Fitchburg Gas & Electric Company."⁷ According to Fitchburg, Pinetree's power is transmitted over that 1.5 mile transmission line owned by Pinetree to Pinetree's point of interconnection with ISO-NE, which is Fitchburg's Flagg Pond Substation in Fitchburg, Massachusetts. Pinetree's power is then delivered to the ISO-NE regional network over Fitchburg's Non-PTF transmission lines, which Fitchburg states are unconstrained transmission lines.⁸ Fitchburg also states that it charges for this Non-PTF transmission service under ISO-

⁴ *Id.* As described by the United States Court of Appeals for the First Circuit, there are two types of transmission facilities in ISO-NE:

[O]ne set-the so-called PTF (Pool Transmission Facilities)-are the core backbone transmission facilities in the New England power grid as defined by the NEPOOL Agreement, which governs their use and charges for it; the other set, including local connections owned by Boston Edison, are called LNS (Local Network Service). To use Boston Edison's metaphor, PTF facilities are the electricity highway and LNS facilities are the access ramps connecting to the local streets

Boston Edison Co. v. FERC, 441 F.3d 10, 11 (1st Cir. 2006).

⁵ Pinetree Power Fitchburg, Inc., Form 556, Docket No. QF91-37-005, at 6, 19 (Feb. 15, 2013) (Pinetree Form 556).

⁶ *Id.* at 9, 19.

⁷ *Id.* at 9.

⁸ Fitchburg Application at 4-5, 13-14.

NE's OATT, Schedule 21-FG&E.⁹ Fitchburg states that "Pinetree is not connected to Fitchburg's (or any other utility's) distribution system."¹⁰

5. Fitchburg represents that Pinetree sold energy to Fitchburg under a twenty-year PURPA power purchase agreement that expired on October 31, 2012.¹¹ Fitchburg states that, from November 1, 2012, through April 30, 2013, while Fitchburg and Pinetree were re-negotiating that expired power purchase agreement, Pinetree generated in excess of 17,000 MWh of electricity. Fitchburg states that it did not purchase this output, but rather Pinetree instead made sales of the output either directly into the ISO-NE market or to third parties, and that GDF Suez, Pinetree's parent company, scheduled Pinetree's output. Fitchburg also states that Pinetree's output is not variable, and that ISO-NE classifies Pinetree as a non-intermittent, dispatchable resource.¹²

6. Fitchburg states that Pinetree is currently operating under a temporary month-to-month contract that may be terminated with thirty-days' notice in the event Fitchburg is no longer required by law to purchase QF power.¹³ Fitchburg also states that it notified Pinetree that Fitchburg intended to file petitions both with the Commission and with the Massachusetts Department of Public Utilities (Massachusetts Commission) seeking relief from its PURPA mandatory purchase obligation with respect to Pinetree.¹⁴

II. Fitchburg's Application

7. Fitchburg seeks to terminate the mandatory purchase obligation imposed by PURPA by rebutting the Commission's presumption that Pinetree, a QF with a net power production capacity under 20 MW, lacks access to the ISO-NE market. Fitchburg seeks to rebut this presumption by asserting that Pinetree:

(1) has sold its electric output and capacity into the ISO-NE market; (2) takes station service from ISO-NE; (3) is owned by a sophisticated market participant; (4) interconnects with ISO-NE at the transmission level, not with a utility at the

⁹ *Id.* at 5.

¹⁰ *Id.*

¹¹ *Id.* at 5.

¹² *Id.* at 7-9, 13.

¹³ *Id.* at 5.

¹⁴ *Id.*

distribution level; and (5) [faces] no further barriers to market entry¹⁵

8. Fitchburg asserts that, while “Fitchburg does not know the nature or extent of Pinetree’s sales into the ISO-NE market,” Fitchburg “does know that such sales took place during the period of time in which Fitchburg was not buying Pinetree’s power,” i.e., from November 1, 2012, through April 30, 2013.¹⁶ Fitchburg provides a list of ISO-NE Forward Capacity Market auction results relating to Pinetree to demonstrate that Pinetree has cleared that market since its establishment, which Fitchburg concludes guarantees to Pinetree a revenue stream via ongoing capacity sales.¹⁷ On top of Pinetree selling power directly to ISO-NE, Fitchburg points to Pinetree’s receipt of supplementary power, backup power, maintenance power, and/or interruptible power service from ISO-NE as indicative of Pinetree’s ability to reach the ISO-NE market.¹⁸

9. Fitchburg references the electric generation assets, share of ISO-NE generation capability, and natural gas terminal serving New England that belong to Pinetree’s parent, GDF Suez, to show how large GDF Suez is and how familiar GDF Suez is with ISO-NE markets.¹⁹ Fitchburg also cites the Commission’s decision in *Burlington*, which terminated another utility’s PURPA mandatory purchase obligation relating to another QF owned by GDF Suez, to demonstrate GDF Suez’s familiarity with the ISO-NE markets.²⁰

10. Fitchburg argues that Pinetree interconnects directly to the ISO-NE transmission system at the transmission level at a 69 kV breaker-and-a-half substation and receives transmission service from ISO-NE in addition to the transmission service Pinetree also takes from Fitchburg.²¹ Because Pinetree is not connected to Fitchburg’s (or any other utility’s) distribution system or at lower voltage radial lines, only takes OATT service,

¹⁵ Fitchburg Application at 7.

¹⁶ *Id.* at 7-8.

¹⁷ *Id.* at 8-9.

¹⁸ *Id.* at 9 (citing Pinetree Form 556 at 6, 19).

¹⁹ *Id.* at 10-11.

²⁰ *Id.* (citing *City of Burlington, Vermont*, 145 FERC ¶ 61,121 (2013) (*Burlington*)).

²¹ *Id.* at 11.

schedules its power into ISO-NE each day in coordination with Fitchburg, and has a steady production profile, Fitchburg portrays Pinetree as not within the category of small QFs that Order No. 688 aims to protect.²² Fitchburg treats Pinetree's use of and access to unconstrained transmission lines and its receipt of "on-going transmission services without any need for upgrades" as indications that no changes would be needed to continue the interconnection of Pinetree to ISO-NE were the Commission to terminate Fitchburg's PURPA mandatory purchase obligation.²³

11. Further, according to Fitchburg, pursuant to the Massachusetts Commission's regulations implementing PURPA, QF generation sold under PURPA is sold into the ISO-NE market, and ISO-NE market clearing prices are paid to QFs in lieu of an administratively determined avoided cost rate. Therefore, Fitchburg states that the revenue to Pinetree for power generated would be the same regardless of whether the sale is made to Fitchburg pursuant to its Massachusetts QF tariff or directly by Pinetree into the ISO-NE market.²⁴

III. Notice and Responsive Pleadings

12. Notice of Fitchburg's application was mailed by the Commission on December 18, 2013 to each of the potentially-affected QFs identified in Fitchburg's application. Notice of the application was published in the *Federal Register*, 78 Fed. Reg. 78,348 (2013), with interventions and protests due on or before January 14, 2014.

13. Pinetree filed a timely motion to intervene and protest. Fitchburg filed an answer to Pinetree's motion to intervene and protest on January 30, 2014.

A. Pinetree's Protest

14. Pinetree states that it "is one 'wheel' (transmission charge) away from the ISO-NE market" because it "cannot sell into the ISO-NE market at its bus bar" and that, "[r]elative to [its] size and revenue stream, the local service transmission charge to get its energy to the ISO-NE market is an economic barrier and unreasonably jeopardizes the ability of the QF to remain operational."²⁵ Pinetree argues that "[i]t cannot be enough to rebut the presumption that exists for a transmission owner to point to sales made by a

²² *Id.* at 11-13.

²³ *Id.* at 13.

²⁴ *Id.* at 8.

²⁵ Pinetree Protest at 2.

small QF over a short-term period as conclusive evidence that a small QF is capable of making sales into a centralized market over a longer term without becoming uneconomic.”²⁶ Pinetree objects that, “[i]f the renegotiation process of a PPA can be extended past the point of the termination date of the existing PPA, then, unless the QF chooses not to operate during that period, that period can be relied upon by the transmission owner to rebut the presumption that a small QF lacks nondiscriminatory market access.”²⁷

15. Pinetree asserts that charges for transmission service provided by Fitchburg (via Non-PTF facilities such as Fitchburg’s lines operated under Schedule 21-FG&E of the ISO-NE OATT), on top of regional transmission service provided by ISO-NE (via PTF facilities operated under ISO-NE’s OATT), presents an economic barrier to Pinetree’s participation in the ISO-NE markets.²⁸ Pinetree acknowledges that it is interconnected to the grid through transmission level lines and not local distribution level lines.²⁹ Pinetree states that, under the interim contract, Pinetree never signed a service agreement with Fitchburg for Non-PTF transmission service pursuant to Schedule 21-FG&E of the ISO-NE OATT.³⁰ Pinetree states that it does not currently pay for Non-PTF transmission service due to the PURPA mandatory purchase obligation but points to the \$17,000 to \$18,000 per month in transmission charges Fitchburg imposed when Pinetree did not sell pursuant to the mandatory purchase obligation from November 1, 2012 through April 30, 2013. Given those fees incurred during that period, Pinetree asserts that, were the Commission to terminate Fitchburg’s mandatory purchase obligation, Pinetree would not be able to operate.³¹

16. Pinetree reiterates that it lacks nondiscriminatory access to the ISO-NE markets because the Schedule 21-FG&E (Non-PTF) transmission charges amount to pancaked rates and are an uneconomic barrier that will unreasonably jeopardize its continued operations. In support of its arguments, Pinetree claims that the Schedule 21-FG&E (Non-PTF) transmission charges amount to an additional cost of \$1.57 to \$1.59 per MW, and that, where total Operation & Maintenance (O&M) costs for Pinetree range from \$32

²⁶ *Id.* at 3.

²⁷ *Id.* at 4.

²⁸ *Id.* at 5-6.

²⁹ *Id.* at 6.

³⁰ *Id.* at 7.

³¹ *Id.* at 6-7.

to \$36 per MW, this transmission charge would represent an approximate 4.3 percent to 4.8 percent increase in Pinetree QF's O&M costs.³² Pinetree states that this transmission charge is large relative to the operations of this small wood burner, and in the ISO-NE market, where competitive margins are typically about 3 percent, an additional 5 percent increase in costs is an economic obstacle to Pinetree's future operations.³³

17. Even though Pinetree does not here challenge the validity of Fitchburg's formula rates for Non-PTF transmission service under Schedule 21-FG&E of the ISO-NE OATT, Pinetree asserts that it reserves the right to do so were the Commission to terminate Fitchburg's PURPA mandatory purchase obligation. Pinetree also argues, however, that as a small QF, it should not have to bear the burden of incurring such litigation expenses once the PURPA mandatory purchase obligation is terminated, and adds that potential litigation expenses contribute to Pinetree's claims that it lacks non-discriminatory access to the ISO-NE markets.³⁴

18. Pinetree states that, when it bid into the ISO-NE Forward Capacity Market, it did not contemplate transmission charges arising from termination of Fitchburg's mandatory purchase obligation. Because Pinetree states that it would no longer be able to operate were the Commission to relieve Fitchburg of its PURPA mandatory purchase obligation, Pinetree asserts that it "will need to work out some way of being relieved of its capacity obligations."³⁵

19. Pinetree urges the Commission to disregard the period when Pinetree sold directly into the ISO-NE markets as demonstrative of its ease of accessing those markets. Pinetree asserts that it only made those sales because it was in the process of renegotiating a new power purchase agreement with Fitchburg. Pinetree warns that, were the Commission to rely on such sales in terminating Fitchburg's PURPA mandatory purchase obligation, the Commission would create an incentive for electric utilities to move slowly in the renegotiation process in order to use interim sales against a QF when seeking termination of the PURPA mandatory purchase obligation.³⁶

³² See *id.*, DeBarba Aff. at 4-5.

³³ Pinetree Protest at 6-7; DeBarba Aff. at 3-6.

³⁴ *Id.* at 8.

³⁵ *Id.* at 10.

³⁶ *Id.* at 11-12.

20. Pinetree also urges the Commission to disregard Fitchburg's assertions about GDF Suez. Pinetree suggests that findings relating to the size of GDF Suez are inappropriate for the purpose of weighing a PURPA section 210(m) application because it would chill investment in small QFs.³⁷

21. Pinetree also states that Fitchburg's Application is deficient because Fitchburg may only apply for relief of the PURPA mandatory purchase obligation on a service-territory-wide basis, while Fitchburg only sought relief with regard to Pinetree.³⁸

22. Pinetree states that it has informed Fitchburg that it would agree to sell its output directly into ISO-NE's markets, if Fitchburg would charge nothing for the Pinetree QF to access the Fitchburg's transmission lines needed to access the ISO-NE energy markets, which would make this proceeding moot.³⁹

B. Fitchburg's Answer

23. Fitchburg contends that the Commission has explicitly found that the mere existence of a transmission charge is not a barrier to market entry in its holding 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."⁴⁰

24. Fitchburg points out that the transmission rate at issue here is "Fitchburg's filed rate, contained in Schedule 21-FG&E of the ISO-NE OATT, which has been found to be just and reasonable by the Commission," so arguments that the transmission rate is unreasonable are not at issue in this proceeding.⁴¹

³⁷ *Id.* at 12.

³⁸ *Id.* at 13-14.

³⁹ *Id.* at 5-6.

⁴⁰ Fitchburg Answer at 4 (citing *City of Burlington, Vermont*, 145 FERC ¶ 61,121, at P 34 (2013) (*Burlington*) (citing *New PURPA Section 210(m) Regulations Applicable to Small Power Production and Cogeneration Facilities*, Order No. 688, FERC Stats. & Regs. ¶ 31,233, at P 90 (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))).

⁴¹ *Id.* at 5.

25. Fitchburg also states that it is appropriate to scrutinize the “sophistication and infrastructure” of GDF Suez, and compares the relative sizes and market capitalization of Unutil (Fitchburg’s upstream owner) and GDF Suez.⁴² Fitchburg states that Pinetree’s arguments about affiliation ignore Order No. 688, where the Commission found “that whether a QF is affiliated with a sophisticated market participant is probative of whether it will be able to access sophisticated markets.”⁴³

26. Fitchburg further argues that, if it were to provide free transmission service to Pinetree, it would need to offer the same rate (or lack thereof) to any other similarly-situated generator under the Commission-approved OATT. Fitchburg posits that this could lead to an absurd result, not contemplated by the PURPA regulations, whereby Fitchburg becomes obligated to offer free transmission service to any QF wishing to interconnect in its footprint. Furthermore, if Fitchburg provides free transmission service to Pinetree, Fitchburg states that the cost of that transmission service will be allocated to Fitchburg’s other customers.⁴⁴ Fitchburg further argues that it has the right to seek termination of the PURPA mandatory purchase obligation relating to Pinetree only and need not ask for termination across its entire service territory.⁴⁵

IV. Discussion

A. Procedural Matters

27. Pursuant to Rule 214 of the Commission’s Rules of Practice and Procedure, 18 C.F.R. § 384.214 (2013), the timely, unopposed motion to intervene serves to make Pinetree a party to this proceeding.

28. 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 Fitchburg’s answer because it has provided information that assisted us in our decision-making process.

B. Determination

29. At the outset, we disagree with Pinetree’s claim here that Fitchburg’s petition is deficient procedurally because it does not seek termination of the PURPA mandatory

⁴² *Id.* at 9-10.

⁴³ *Id.* at 8.

⁴⁴ *Id.* at 6.

⁴⁵ *Id.* at 7-8.

purchase obligation for all similarly-situated QFs. As we stated in *Burlington*,⁴⁶ section 210(m)(3) of PURPA and section 292.310(a) of the Commission's regulations allow, but do not require, Fitchburg to file an application to terminate its mandatory purchase obligation on a "service territory-wide basis."⁴⁷ Here, however, Fitchburg petitions for relief from the mandatory obligation to purchase from Pinetree only. Our determination here thus applies only to Pinetree; 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.

30. Section 210(m) of PURPA provides for 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, the Commission found that the markets run by ISO-NE, among others, qualify as markets that justify relief from the PURPA mandatory purchase obligation, provided that QFs, in fact, have nondiscriminatory access to such markets.⁴⁸ 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 this 90-day action requirement.

31. As relevant here, one of those rebuttable presumptions, contained in section 292.309(d)(1) of the Commission's regulations,⁴⁹ is that a QF with a net power production 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 QFs 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.⁵⁰ The 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,

⁴⁶ *Burlington*, 145 FERC ¶ 61,121 at P 28.

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

⁴⁸ Order No. 688, FERC Stats. & Regs. ¶31,233 at P 117.

⁴⁹ 18 C.F.R. § 292.309(d)(1) (2013).

⁵⁰ *E.g.*, Order No. 688, FERC Stats. & Regs. ¶ 31,233 at PP 72-73; Order No. 688-A, FERC Stats. & Regs. ¶ 31,250 at P 103.

lack the same level of access to markets as those connected to transmission lines.⁵¹ 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.”⁵² 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.⁵³

32. 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.⁵⁴ 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.”⁵⁵

33. We find that Fitchburg has rebutted the presumption that Pinetree, as a QF with net power production capacity below 20 MW, lacks nondiscriminatory access to ISO-NE markets and therefore grant Fitchburg’s application to terminate its PURPA mandatory purchase obligation with respect to Pinetree.⁵⁶ Pinetree does not dispute that energy from Pinetree was sold into the ISO-NE markets subsequent to the expiration of its power

⁵¹ Order No. 688-A, FERC Stats. & Regs. ¶ 31,250 at PP 94-103.

⁵² *Id.* P 96.

⁵³ *Id.* P 101.

⁵⁴ 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).

⁵⁵ Order No. 688, FERC Stats. & Regs. ¶ 31,233 at P 78. 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).

⁵⁶ *See* Order No. 688, FERC Stats. & Regs. ¶ 31,233 at P 78 (finding that the burden rests with the utility).

purchase agreement, from November 1, 2012, until Pinetree's interim agreement with Fitchburg commenced on May 1, 2013. The fact that Pinetree has had forward capacity obligations for periods through May 2017⁵⁷ for most of its capacity also shows that Pinetree "has been participating in the market."⁵⁸

34. We reject Pinetree's contrary suggestion that our consideration of the existence of Pinetree's sales into the ISO-NE markets might incent utilities like Fitchburg to delay the process of contract renegotiation in order to create a history of QF sales that the utility may then point to in an application pursuant to section 210(m) of PURPA.⁵⁹ Despite a QF's fear that developing a track record of selling into a relevant market might contribute to a termination of the QF's PURPA mandatory purchase obligation, the Commission cannot refuse to carry out Congress's intent to terminate the mandatory obligation to enter into new contracts or legally enforceable obligations to purchase from a QF when that QF has access to that market. Until a utility applies for termination of the PURPA mandatory purchase obligation, a QF has the statutory right to pursue a contract or other legally enforceable obligation with that utility, and the Commission will grandfather any existing contracts or other legally enforceable obligations and also those pending before the relevant state regulatory authority.⁶⁰ Therefore, a QF has sufficient protections in place to ensure that it is not abused in the renegotiation process.

35. We agree with Fitchburg that the transmission service Pinetree must pay for under Schedule 21-FG&E of the ISO-NE OATT, coupled with the regional transmission service under the ISO-NE OATT, does not constitute a pancaked rate that rises to the level of a barrier to access as contemplated under Order No. 688. The transmission charges in Schedule 21-FG&E have been found by the Commission to be just and reasonable and not unduly discriminatory, and Fitchburg has stated, without objection from Pinetree, that Fitchburg provides transmission service pursuant to Schedule 21-FG&E over unconstrained transmission lines. Additionally, notwithstanding Pinetree's asking for transmission service at no charge, in order to avoid providing unduly discriminatory

⁵⁷ See Fitchburg Application at 9.

⁵⁸ Order No. 688, FERC Stats. & Regs. ¶ 31,233 at P 78.

⁵⁹ See Pinetree Protest at 11-12.

⁶⁰ See Order No. 688-A, FERC Stats. & Regs. ¶ 31,250 at P 137 ("[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."); *see also* 16 U.S.C. § 824a-3(m)(6) (2012); 18 C.F.R. § 292.314 (2013).

transmission service, Fitchburg may not make an exception and not charge a particular QF for transmission service while still charging other, similarly-situated transmission customers.

36. Pinetree represents that the \$17,000 to \$18,000 per month (totaling \$87,611) that Pinetree has incurred for Schedule 21-FG&E transmission service is a sizable portion of Pinetree's O&M costs. Pinetree, however, has not demonstrated that those costs would necessarily cause Pinetree to cease to operate, nor is it clear that those costs necessarily represent an obstacle to Pinetree reaching the market.⁶¹ Moreover, in Order No. 688, the Commission stated that “[t]here is nothing in section 210(m) of PURPA to suggest that Congress intended to ensure a QF's commercial viability. Nor does the statute require the Commission to find that the ‘economic and technical equivalent to mandatory purchase is available through a competitive market’ before it terminates the requirement that an electric utility enter into a new contract or obligation to purchase electric energy from QFs.”⁶²

37. Finally, we note, as we did in *Burlington*, GDF Suez's ownership of Pinetree and GDF Suez's participation in ISO-NE markets demonstrate that market participation “is not a foreign practice” to Pinetree and to its parent company, GDF Suez.⁶³ In *Burlington*, the Commission granted a municipal utility's application to terminate the PURPA mandatory purchase obligation with respect to another GDF Suez-affiliated under-20 MW QF. In terminating the mandatory purchase obligation, the Commission relied in part on the fact that GDF Suez, the owner of that QF, was a sophisticated market participant in ISO-NE, and also that the QF had been making sales into the ISO-NE market, and that the utility at that time was, in fact, providing transmission service to the QF. The same is no less the case here. GDF Suez, the owner of Pinetree, is again a sophisticated market participant in ISO-NE, and also Pinetree has been making sales into

⁶¹ In this regard, Pinetree argues that this transmission charge is large relative to the operations of this small wood burner, and that in the ISO-NE market, where competitive margins are typically about 3 percent, an additional 5 percent increase in costs is an economic obstacle to Pinetree's future operations. Pinetree Protest at 6-7; DeBarba Aff. at 3-6. The fact that Pinetree's costs have gone up 5 percent does not mean that Pinetree itself, in particular, may still not be viable. That is, Pinetree may be a low-cost producer and a 5 percent increase in costs may not have the same impact that a similar increase might have for a more marginal producer. Put differently, absent a more detailed showing of Pinetree's costs, a 5 percent increase in Pinetree's costs may not make Pinetree's bids uncompetitive.

⁶² Order No. 688, FERC Stats. & Regs. ¶ 31,233 at P 37.

⁶³ *Burlington*, 145 FERC ¶ 61,121 at P 34.

the ISO-NE market, and Fitchburg has been providing transmission service to Pinetree and has done so (and, consistent with the OATT's requirements, we expect that it will do so in the future) under a Commission-accepted OATT at Commission-accepted rates.

The Commission orders:

Fitchburg's petition to be relieved of the obligation to enter into a new power purchase obligation or contract with Pinetree is hereby granted.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.