

136 FERC ¶ 61,093  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

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

Northern States Power Company,  
a Minnesota corporation

Docket No. QM11-3-000

Northern States Power Company,  
a Wisconsin corporation

ORDER GRANTING APPLICATION TO TERMINATE PURCHASE OBLIGATION

(Issued August 10, 2011)

1. On May 12, 2011, Xcel Energy Services Inc. (XES), on behalf of its utility operating company affiliates Northern States Power Company, a Minnesota corporation (NSPM), and Northern States Power Company, a Wisconsin corporation (NSPW) (collectively, the NSP Companies) filed an application pursuant to section 210(m) of the Public Utility Regulatory Policies Act of 1978 (PURPA)<sup>1</sup> to be relieved, on a service-territory-wide basis, of the requirement under PURPA and the Commission's regulations to enter into new contracts or obligations to purchase energy and capacity from qualifying facilities (QF) that have a net capacity greater than 20 megawatts (MW). In this order, we grant the application to terminate the NSP Companies' purchase obligation effective May 12, 2011.

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<sup>1</sup> 16 U.S.C. § 824a-3(m) (2006).

## **Background**

2. On October 20, 2006, the Commission issued Order No. 688,<sup>2</sup> revising its regulations governing utilities' obligations to purchase electric energy produced by QFs. Order No. 688 implements PURPA section 210(m),<sup>3</sup> which provides for termination of the requirement that an electric utility enter into new power purchase obligations or contracts to purchase electric energy from QFs, if the Commission finds that the QFs have nondiscriminatory access to markets. The Commission found in Order No. 688 that the markets administered by Midwest Independent Transmission System Operator, Inc. (MISO) were one of the markets that satisfy the criteria of PURPA section 210(m)(1)(A).<sup>4</sup> Accordingly, section 292.309(e) of the Commission's regulations established a rebuttable presumption (for MISO and other markets) that MISO provides large QFs (over 20 MW net capacity) interconnected with member electric utilities with nondiscriminatory access to markets described in section 210(m)(1)(A).<sup>5</sup> The Commission also established a second rebuttable presumption, contained in section 292.309(d)(1) of the regulations, that a QF with a net capacity at or below 20 MW does not have nondiscriminatory access to markets.<sup>6</sup>

## **Application to Terminate Purchase Obligation**

3. XES asserts that the NSP Companies satisfy the requirements of PURPA section 210(m)(1) and the Commission's regulations<sup>7</sup> and, therefore, should be relieved of the mandatory purchase requirement as of the date of their application. XES states that the NSP Companies' combined service territory is located entirely within the footprint of the MISO. XES contends that, as members of MISO, the NSP Companies should be

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<sup>2</sup> *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).

<sup>3</sup> Section 210(m) was added to PURPA by section 1253 of the Energy Policy Act of 2005 (EPAct 2005). *See* Pub. L. No. 109-58, § 1253, 119 Stat. 594, 967-69 (2005).

<sup>4</sup> 16 U.S.C. § 842a-3(m)(1)(A) (2006); *see* 18 C.F.R. § 292.309(a)(1) (2011).

<sup>5</sup> 18 C.F.R. § 292.309(e) (2011).

<sup>6</sup> 18 C.F.R. § 292.309(d)(1) (2011).

<sup>7</sup> 18 C.F.R. §§ 292.309-.310 (2011).

relieved of the mandatory obligation to purchase electric energy and capacity from QFs with a capacity greater than 20 MW because the Commission has established a rebuttable presumption that those QFs have nondiscriminatory access to the MISO markets. XES requests this application become effective May 12, 2011, the date of the filing.

### **Notice of Filing and Responsive Pleadings**

4. Notice of XES' filing was published in the *Federal Register*, 76 Fed. Reg. 28,761 (2011), with interventions or protests due on or before June 9, 2011. The Commission served notice of the application on the potentially-affected QFs identified by XES' application by letter dated May 15, 2011.

5. On June 9, 2011, Greenhead Wind LLC (Greenhead), Watonwan Wind LLC (Watonwan), and Allco Renewable Energy Limited (Allco) (collectively, Joint Protesters) filed a timely motion to intervene and protest.<sup>8</sup> On June 24, 2011, XES filed an answer to the protest. On July 8, 2011, as revised on July 14, 2011, the Joint Protesters filed a reply. On July 25, 2011, XES filed a reply. Velva Windfarm LLC filed a motion to intervene out-of-time.

### **Joint Protest**

6. The Joint Protesters contend that XES' application should be denied with respect to the Joint Protesters' projects. The Joint Protesters state that operational characteristics of a renewable QF in Minnesota prevent the QF from participating in the MISO market because there is no meaningful market for long-term contracts from renewable energy generators. The Joint Protesters also claim that the current MISO market does not reflect avoided costs, as defined either by the Commission's decision in *CPUC*<sup>9</sup> or under

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<sup>8</sup> Greenhead is developing a 78 MW wind energy project in Southwest Minnesota that would connect with NSPM. Watonwan also is developing a 78 MW wind energy project in southwest Minnesota that would connect with ITC Midwest LLC. Allco is the developer of renewable energy projects and an owner of both Greenhead and Watonwan. The Joint Protesters included copies of the draft power purchase agreements sent to XES in which they indicate that their QFs will begin commercial operation on "[t]he first calendar day following a successful demonstration that the Facility ... has reached Commercial Operation... The latest Commercial Operation Date shall be December 31, 2014." Exh. A of Joint Protest at 3.

<sup>9</sup> *Cal. Pub. Utils. Comm'n*, 132 FERC ¶ 61,047 (*CPUC*), order on clarification, 133 FERC ¶ 61,059 (2010).

Minnesota law.<sup>10</sup> The Joint Protesters further claim that the MISO market does not provide a sufficient long-term commitment to renewable energy QFs to allow a QF to obtain a permit to build its facility. The Joint Protesters explain that, even if there were a MISO market for renewable energy, Minnesota law would still prevent the QF from building its facility without a long-term power purchase agreement (PPA) or legally enforceable obligation.

7. The Joint Protesters argue that QFs can demonstrate a lack of sufficient market access through reliance on factors that are not specifically identified in the regulations. In addition, the Joint Protesters argue that, in states that provide a separate rate for renewable energy, whether there is a wholesale market for long-term sales of capacity and electric energy should be considered in addition to considering whether there are wholesale markets for long-term sales of capacity and energy for other types of generation. The Joint Protesters contend that such an approach is necessary to be consistent with the Commission's reasoning in *CPUC*.

8. With respect to the alleged transmission constraints, the Joint Protesters contend their projects are located in an area that MISO has admitted "was, and still is, the most congested area for generator interconnection requests in the MISO footprint."<sup>11</sup> The Joint Protesters point to a 2008 State of the System Report filed with the Minnesota Public Utilities Commission (Minnesota Commission) by ITC Midwest LLC (ITC Midwest) describing its aging and neglected ITC Midwest transmission system in southwest Minnesota.

9. In addition, the Joint Protesters contend that, when NSPM reviews proposals from QFs pursuant to a request for proposals (RFP), NSPM considers transmission constraints and the amount of time to build transmission improvements. According to the Joint Protesters, NSPM has already considered the two QF facilities to be transmission constrained, resulting in being disqualified by NSPM in their RFPs. The Joint Protesters further allege that XES and NSPM use RFPs as a way to avoid the clear mandates under PURPA and the Minnesota Commission's implementation of PURPA that a utility must purchase from a renewable QF at its full avoided costs, taking into account the renewable characteristics of the QF.

10. The Joint Protesters also aver that both MISO and NSPM limit third-party QF access to markets through the generator interconnection process. Citing a proceeding in

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<sup>10</sup> Minn. Stat. § 216B.164(b).

<sup>11</sup> Citing MISO, Answer, Docket No. EL10-86-000, at 7 (filed September 21, 2010).

Docket No. EL10-86-000, the Joint Protesters explain that MISO and other transmission owners have prevented the Watonwan Wind Farm from interconnecting to MISO and securing meaningful access to markets. Joint Protesters also claim that NSPM uses its monopoly power as a generator to interfere with a QF's ability to sell power to utilities, thereby limiting market access.

11. Alternatively, the Joint Protesters argue that the Greenhead and Watonwan QFs should be grandfathered because a legally enforceable obligation to purchase arose prior to the filing of NSPM's application. The Joint Protesters explain that they sent power purchase agreements to NSPM on February 15, 2011, creating a binding contract under Minnesota law, and NSPM must now honor its purchase obligations.

### **Procedural Matters**

12. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2011), the timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding. Pursuant to Rule 214(d) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214(d) (2011), the Commission will grant Velva Windfarm LLC's late-filed motion to intervene given its interest in the proceeding, the early stage of the proceeding, and the absence of undue prejudice or delay.

13. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2011), prohibits an answer to a protest unless otherwise ordered by the decisional authority. We are not persuaded to accept the answers filed by XES and the Joint Protesters and will, therefore, reject them.<sup>12</sup>

### **Discussion**

14. XES relies upon the rebuttable presumption set forth in section 292.309(e) of the Commission's regulations, i.e., that MISO provides QFs larger than 20 MW net capacity

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<sup>12</sup> We separately note that, under PURPA section 210(m) the Commission must make a final determination on applications for termination of the mandatory purchase requirement within a 90-day time frame. 16 U.S.C. § 824a-3(m)(3) (2006); *see also* Order No. 688, FERC Stats. & Regs. ¶ 31,233 at P 53 n.31, 100 n.53. Considering this time restriction and the fact that the Commission has provided guidance on the type of information required to be filed with the application and the type of information that could be used to rebut the rebuttable presumption applicable certain ISOs and RTOs, we encourage entities filing an application and those attempting to rebut the presumption to present all relevant information as early as possible.

nondiscriminatory access to independently administered,<sup>13</sup> auction-based day-ahead and real-time wholesale markets for the sale of electric energy and to wholesale markets for long-term sales of capacity and electric energy. The potentially affected QFs identified by XES were provided notice of their application. The Joint Protesters filed the only protest. We find that NSP Companies provide QFs larger than 20 MW nondiscriminatory access to independently-administered, auction-based day-ahead and real-time wholesale markets for the sale of electric energy and to wholesale markets for long-term sales of capacity and electric energy, and we grant the request to terminate the NSP Companies' mandatory purchase obligation pursuant to section 210(m) of PURPA; we grant the request with respect to all QFs larger than 20 MW.

15. In Order No. 688, the Commission explained that there can be factors unique to individual QFs, including operational characteristics and transmission limitations, that prevent such QFs from having nondiscriminatory access to the markets described in section 210(m)(1) of PURPA.<sup>14</sup> Thus, the Commission expressly provided the opportunity for QFs larger than 20 MW to rebut the presumption that such QFs have nondiscriminatory access to the markets described in section 210(m)(1) of PURPA.<sup>15</sup>

16. In Order No. 688-A, the Commission reiterated that the presumptions were not final determinations, and that they were rebuttable; the Commission stated that there may be circumstances unique to a particular QF that interfere with that QF's nondiscriminatory access, and the Commission reiterated that it would allow QFs to rebut the presumption of access to the markets; the Commission noted, as an example, that "a QF might have operational characteristics that effectively prevent its participation in a market."<sup>16</sup>

17. The Commission therefore, in section 292.309(e) of its regulations, expressly provided QFs the opportunity to rebut the presumption that a QF larger than 20 MW has

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<sup>13</sup> 18 C.F.R. §§ 292.309(a)(1), 292.309(e) (2011).

<sup>14</sup> Order No. 688, FERC Stats. & Regs. ¶ 31,233 at P 82. For example, the Commission noted that a QF's operational characteristics could "effectively prevent the QF's participation in a market." *Id.* And such operational characteristics might include "highly variable thermal and electrical demand (from the QF host) on a daily basis, such that the QF cannot participate in a market" or "highly variable and unpredictable wholesale sales on a daily basis." *Id.*

<sup>15</sup> *Id.* P 83.

<sup>16</sup> Order No. 688-A, FERC Stats. & Regs. ¶ 31,250 at P 66.

nondiscriminatory access to markets, including MISO's markets, and thus the opportunity to demonstrate that electric utilities that are members of, as relevant here, MISO should not be relieved of the obligation to purchase from QFs larger than 20 MW. A QF wishing to rebut the presumption must demonstrate either: (1) that their facility has certain operational characteristics that effectively prevent it from participating in a market; or (2) that the facility lacks access to markets due to transmission constraints.<sup>17</sup> The Commission held that the determination of whether a QF, seeking to rebut the presumption of access to markets, actually has nondiscriminatory access or not would be made on a case-by-case basis.<sup>18</sup>

18. The Joint Protesters, who filed the only protest, did not present any unique operational characteristics that prevent them from participating in the MISO market. The Joint Protesters claim that MISO does not provide a meaningful market for long-term contracts for renewable energy, but, there is no statutory requirement for access to a separate, formalized market for long-term contracts for, specifically, renewable energy.<sup>19</sup> Rather, consistent with the statutory language, the Commission has found that the existence of bilateral long-term contracts for long-term sales of capacity and energy within markets, such as MISO, is a sufficient indication of a market to satisfy the statutory requirement.<sup>20</sup> Thus, we find the Joint Protesters' argument reads more into the statute than is there and to be an impermissible collateral attack on the Commission's findings in Order No. 688.

19. Further, in *CPUC*, the Commission found, *inter alia*, that a state commission may, pursuant to PURPA, determine avoided cost<sup>21</sup> rates for QFs on a resource-by-resource basis, but the Commission did not require ISOs and RTOs to offer specialized wholesale

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<sup>17</sup> 18 C.F.R. § 292.309(e) (2011).

<sup>18</sup> Order No. 688, FERC Stats. & Regs. ¶ 31,233 at P 84; Order No. 688-A, FERC Stats. & Regs. ¶ 31,250 at P 66-68, 100.

<sup>19</sup> 16 U.S.C. § 824a-3(m)(1) (2006); *see* Order No. 688, FERC Stats. & Regs. ¶ 31,233 at P 117; Order No. 688-A, FERC Stats. & Regs. ¶ 31,250 at P 19.

<sup>20</sup> *E.g.*, Order No. 688-A, FERC Stats. & Regs. ¶ 31,250 at P 20.

<sup>21</sup> "Avoided costs" are defined as "the incremental costs to an electric utility of electric energy or capacity or both which, but for the purchase from the qualifying facility..., such utility would generate itself or purchase from another source." 18 C.F.R. § 292.101(b)(6) (2011).

markets for QFs that include avoided costs determined on a resource-by-resource basis.<sup>22</sup> Nothing in *CPUC* changes the rebuttable presumption for MISO, as determined in Order No. 688, that QFs larger than 20 MW in the service territories of MISO member utilities have nondiscriminatory access to markets that meet the statutory criteria for relief from the PURPA mandatory purchase obligation. Thus, the Joint Protesters' reliance on *CPUC* is misplaced.

20. As noted above, the Joint Protesters attempted to show that renewable QFs as a group lack access to MISO markets. The Joint Protesters did not provide any evidence, beyond their allegations, to demonstrate that their particular QFs lack access to the MISO markets based on the operational characteristics of their particular QFs. The Commission has stated that a QF could rebut the presumption by, among other things, showing that it has operational characteristics that effectively prevent the QF's participation in the market,<sup>23</sup> and it will consider arguments rebutting that presumption on a case-by-case basis.<sup>24</sup> Moreover, in *PSNH*, the Commission explained that, under the standards outlined in Order No. 688, a rebuttal of the presumption of nondiscriminatory access will be evaluated on a "QF-by-QF basis."<sup>25</sup> The Joint Protesters have failed to provide evidence, beyond their allegations, to demonstrate that their particular QFs lack access to the MISO markets based on the operational characteristics of their particular QFs.

21. The Joint Protesters also have provided insufficient evidence to demonstrate that there are transmission constraints that would deny the Joint Protesters' QFs nondiscriminatory access to the MISO markets.<sup>26</sup> The Joint Protesters rely on a 2008 State of the System Report filed with the Minnesota Commission by ITC Midwest LLC.

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<sup>22</sup> *CPUC*, 132 FERC ¶ 61,047 at P 65.

<sup>23</sup> Order No. 688, FERC Stats. & Regs. ¶ 31,233 at P 83.

<sup>24</sup> *Id.* P 84.

<sup>25</sup> *Pub. Serv. Co. of New Hampshire*, 131 FERC ¶ 61,027, at P 22 (2010) (*PSNH*), *reh'g denied*, 134 FERC ¶ 61,041 (2011).

<sup>26</sup> *See* Order No. 688, FERC Stats. & Regs. ¶ 31,233 at P 83 (stating that, to demonstrate that a QF lacks access to markets due to transmission constraints, a "QF may show that it is located in an area where persistent transmission constraints in effect cause the QF not to have access to markets outside a persistently congested area to sell the QF output or capacity").

However, that same report also identifies planned transmission facility improvements that would mitigate transmission constraints in southwest Minnesota where the Joint Protesters' QFs are located.<sup>27</sup> Also in that report, ITC Midwest commits to “continue to work with MISO to identify appropriate upgrades to mitigate existing congestion in southwest Minnesota and to properly plan for the volume of generation requesting interconnection in southwest Minnesota and northwest Iowa.”<sup>28</sup> In addition, in its application, XES points to MISO’s Transmission Expansion Plan 2010 in which MISO cites several in-depth analyses that identify flowgates that have experienced congestion.<sup>29</sup> That plan cites “[s]ignificant transmission system upgrades [that] are planned for many of these flowgates---primarily to... reduce congestion.” In particular, MISO’s Transmission Expansion Plan references multiple transmission upgrades planned for the ITC Midwest transmission system.<sup>30</sup> Based on this information, we find that the Joint Protesters have not provided sufficient evidence to show that there are transmission constraints that would deny the Joint Protesters’ QFs nondiscriminatory access to the MISO markets. In sum, the Joint Protesters have failed to rebut the presumption that QFs larger than 20 MW have nondiscriminatory access to the MISO’s markets.

22. We similarly reject the Joint Protesters’ arguments that NSPM limits third-party QF access through the generator interconnection process. To support their claim, the Joint Protesters comment that MISO (in a separate proceeding currently pending before the Commission) might treat an interconnection customer’s possible substitution of a 2 MW solar facility for a 2 MW wind facility as a fundamental change that might require a new interconnection request. The Joint Protesters also state that NSPM has built a peaking plant in South Dakota and is now seeking to build a 200 MW wind farm in Minnesota to share the peaking plant’s interconnection even though the generating

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<sup>27</sup> ITC Midwest LLC, *State of the System Report 32* (Dec. 8, 2008), available at <https://www.edockets.state.mn.us/EFiling/edockets/searchDocuments.do?method=showeDocketsSearch&showEdocket=true&userType=public>. Compare *supra* note 8 (highlighting that the two QFs are not yet in service, and that it may be as late as December 31, 2014 before they begin commercial operation).

<sup>28</sup> *Id.*

<sup>29</sup> MISO, *Transmission Expansion Plan 2010* 160 (2010), available at <https://www.midwestiso.org/Library/Repository/Study/MTEP/MTEP10/MTEP10%20Report.pdf>.

<sup>30</sup> *Id.* at 125-7.

facilities are in different states.<sup>31</sup> The Joint Protesters argue that under the position expressed by MISO, the second interconnection sought by NSPM for the wind farm should not be permitted insofar as it would constitute a material modification from the original interconnection request, but the Joint Protesters state that MISO is permitting NSPM to proceed with the interconnection. We find that the Joint Protesters concerns here are speculative and, in any event, are beyond the scope of this proceeding. If the Joint Protesters have evidence of unduly discriminatory or preferential treatment in MISO's interconnection process, they should detail those concerns in a separate complaint filed under section 206 of the Federal Power Act challenging that process.<sup>32</sup> In fact, entities associated with the Joint Protesters recently filed a complaint requesting that the Commission find that the MISO interconnection process is unjust and unreasonable.<sup>33</sup>

23. With respect to NSPM's RFP process, we find the Joint Protesters' arguments unconvincing. The standard for determining whether generators within NSPM's service territory have sufficient access to markets is not whether a generator has been successful in NSPM's RFP process, rather, under the statute, we need find only that such generators have nondiscriminatory access to the relevant market, i.e., MISO's independently administered, auction-based day-ahead and real-time wholesale market for the sale of electric energy and MISO's wholesale markets for long-term sales of capacity and electric energy.<sup>34</sup> We find no basis to conclude that NSPM has used its RFP process to circumvent its purchase obligation under PURPA.

24. Finally, we find the Joint Protesters' claim that their facilities should be grandfathered to be beyond the scope of this proceeding, and instead is a claim that should be addressed by the Minnesota Commission. The Commission's regulations provide, in certain circumstances, for the grandfathering of rights.<sup>35</sup> The Commission has determined that a QF that has initiated a state PURPA proceeding that may result in a

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<sup>31</sup> Joint Protest at 15.

<sup>32</sup> See Order No. 688, FERC Stats. & Regs. ¶ 31,233 at P 53.

<sup>33</sup> See Shetek Wind Inc., Complaint, Docket No. EL11-53-000 (Jul. 15, 2011).

<sup>34</sup> See 16 U.S.C. § 824a-3(m)(1) (2006).

<sup>35</sup> 18 C.F.R. § 292.314 (2011); Order No. 688-A, FERC Stats. & Regs. ¶ 31,250 at P 140; *PSNH*, 134 FERC ¶ 61,041 at P 10; see also *Alliant Energy Corporate Services, Inc.*, 123 FERC ¶ 61,155, at P 11 (2008); *Midwest Renewable Energy Projects, LLC*, 116 FERC ¶ 61,017, at P 17 (2006).

legally enforceable contract or obligation prior to the applicable electric utility filing its petition for relief pursuant to section 292.310 of the Commission's regulations will be entitled to have any contract or obligation that may be established by state law grandfathered.<sup>36</sup> The Joint Protesters provided two letters, each dated February 15, 2011, that appear to provide notice to NSPM of the Joint Protesters' intent to sell power using the NSPM transmission system. Whether these notices satisfy the Minnesota Commission's process for creating a legally enforceable obligation, and thus whether there is a contract or obligation that should be grandfathered, is a matter of state law to be determined by the Minnesota Commission.<sup>37</sup>

The Commission orders:

The application of XES, filed on behalf of its operating companies, NSPM and NSPW, for termination on a service territory-wide basis of the obligation of these utility affiliates to enter into new power purchase obligations or contracts with QFs that have a net capacity in excess of 20 MW is hereby granted, effective May 12, 2011, as requested.

By the Commission.

( S E A L )

Kimberly D. Bose,  
Secretary.

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<sup>36</sup> *PSNH*, 134 FERC ¶ 61,041 at P 24; *accord* Order No. 688, FERC Stats. & Regs. ¶ 31,233 at P 213; Order No. 688-A, FERC Stats. & Regs. ¶ 31,250 at P 137-140.

<sup>37</sup> *See PSNH*, 134 FERC ¶ 61,041 at P 10.