

124 FERC ¶ 61,073  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

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

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

Docket No. QM07-5-002

ORDER DENYING REHEARING

(Issued July 21, 2008)

1. On January 22, 2008, the Commission granted in part and denied in part an application, filed pursuant to section 210(m) of the Public Utility Regulatory Policies Act of 1978<sup>1</sup> (PURPA) and section 292.310 of the Commission's regulations.<sup>2</sup> Xcel Energy Services, Inc. (Xcel Energy) on behalf of Southwestern Public Service Company (SPS), Oklahoma Gas and Electric Company (OG&E), and American Electric Power Service Corporation (AEP) on behalf of Public Service Company of Oklahoma (PSO) and Southwestern Electric Power Company (SWEPCO) (collectively Applicants) filed an application seeking termination on a service territory-wide basis of the requirement that these utilities enter into new obligations or contracts to purchase electric energy and capacity from qualifying cogeneration and small power production facilities (QFs) with net capacity in excess of 20 MW. In a January 22, 2008 order,<sup>3</sup> the Commission granted OG&E and AEP's (on behalf of PSO and SWEPCO) request to terminate their purchase obligations, but denied SPS's request. As discussed below, the Commission denies rehearing.

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

<sup>2</sup> 18 C.F.R. § 292.310 (2008).

<sup>3</sup> *Xcel Energy Services, Inc.*, 122 FERC ¶ 61,048 (2008) (January 22 Order).

## **I. Background**

### **A. Statutory and Regulatory Background**

2. PURPA, as originally enacted, placed a requirement on electric utilities to purchase power from QFs.<sup>4</sup> In the Energy Policy Act of 2005, Congress amended PURPA by adding section 210(m),<sup>5</sup> which provides for the termination of the requirement that an electric utility enter into a new obligation or contract to purchase electric energy from QFs<sup>6</sup> if the Commission finds that QFs have non-discriminatory access to certain markets. PURPA section 210(m) established three different standards for these specific findings, depending on the nature of a particular wholesale market: “Day 2” markets (those described in section 210(m)(1)(A) of PURPA); “Day 1” markets (those described in section 210(m)(1)(B) of PURPA); and “wholesale markets for the sale of capacity and energy that are, at a minimum, of comparable competitive quality as those described in (A) and (B)” (section 210(m)(1)(C) of PURPA). The Commission promulgated regulations implementing section 210(m) of PURPA in Order No. 688.<sup>7</sup>

### **B. Application for Termination of the Purchase Obligation**

3. Applicants filed to be relieved of their PURPA power purchase obligation on a territory-wide basis within the Southwest Power Pool, Inc. (SPP) footprint. Applicants asserted that QFs and potential QFs located within their service territories have non-discriminatory access to markets that meet the standards of section 210(m)(1)(B) of PURPA and section 292.309(a)(2) of our regulations. To demonstrate that the SPP region offers QFs PURPA section 210(m)-compliant market opportunities, Applicants provided: (1) a description of SPP’s organized market; (2) identification of transactions of independent power producers (IPPs), one QF, and ten wind projects selling power in

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<sup>4</sup> 16 U.S.C. § 824a-3(a) (2006).

<sup>5</sup> Section 210(m) was added to PURPA by section 1253 of the Energy Policy Act of 2005. *See* Pub. L. No. 109-58, § 1253, 119 Stat. 594, 967-69 (2005).

<sup>6</sup> The requirement that an electric utility enter into a new contract or obligation to purchase electric energy from QFs is referred to as either the mandatory purchase obligation, or more simply the purchase requirement.

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

the region; (3) identification of a number of requests for proposals (RFPs) for capacity and energy purchases; and (4) a list of potential buyers of capacity and energy in SPP.

4. Protesters maintained that Applicants did not demonstrate that QFs have a meaningful opportunity to sell capacity and energy to third-party buyers. Protesters argued that the markets within the SPP footprint are illiquid and that transmission constraints preclude QFs' access to third-party buyers. Protesters, among other things, submitted evidence that they asserted rebutted the presumption of transmission access; they alleged that there are significant transmission constraints within the SPP footprint that prevent QFs from accessing SPP's transmission services and potential buyers other than the utility to which the QF is interconnected.

### **C. January 22 Order**

5. In the January 22 Order, the Commission granted termination of the PURPA mandatory purchase obligation for OG&E and AEP (on behalf of PSO and SWEPCO), but denied Xcel's application filed on behalf of SPS. The Commission stated that OG&E and AEP had demonstrated that QFs had nondiscriminatory access to competitive wholesale markets that provide the QFs a meaningful opportunity to sell energy and capacity to buyers other than the utility to which the QF is interconnected. The Commission denied Xcel Energy's application, without prejudice, stating that on the record before it, the Commission could not find that QFs located in the SPS control area have nondiscriminatory access.<sup>8</sup>

6. In the January 22 Order, the Commission quoted the relevant parts of section 210(m)(1) of PURPA:

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

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(B)(i) transmission and interconnection services that are provided by a Commission-approved regional transmission entity and administered pursuant to an open access transmission tariff that affords nondiscriminatory treatment to all customers; and

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<sup>8</sup> January 22 Order at P 22.

(ii) competitive wholesale markets that provide a meaningful opportunity to sell capacity, including long-term and short-term sales, and electric energy, including long-term, short-term and real-time sales to buyers other than the utility to which the qualifying facility is interconnected. In determining whether a meaningful opportunity to sell exists, the Commission shall consider, among other factors, evidence of transactions within the relevant market[.][<sup>9</sup>]

7. The Commission next analyzed whether the Applicants had shown that QFs had nondiscriminatory access. The Commission stated that it had created a rebuttable presumption that a QF has nondiscriminatory access if the QF is larger than 20 MW and if it is eligible for service under a Commission-approved open access transmission tariff (OATT) or a Commission-filed reciprocity tariff. The Commission stated that Applicants had relied on this presumption. The Commission also stated that in Order No. 688, the Commission found that SPP is a Commission-approved regional transmission entity that provided transmission and interconnection services administered pursuant to an OATT and therefore satisfied the first prong of the PURPA section 210(m)(1)(B)(i).<sup>10</sup> The Commission codified this finding in section 292.309(g) of its regulations.<sup>11</sup> The Commission stated that Applicants relied on this determination as a foundation for their application.<sup>12</sup>

8. The Commission also noted that a QF can rebut the presumption of access by showing transmission constraints or other operational characteristics limiting access to third-party buyers.<sup>13</sup> The Commission noted that protesters presented arguments intended to rebut the presumption of transmission access. The Commission found that, in most cases, those arguments did not rebut the presumption that a QF would have nondiscriminatory access to transmission services under SPP's OATT and that, despite the concerns raised by protesters about transmission constraints generally, except with regard to SPS, there was a meaningful opportunity for independent generators to make sales to third-party buyers, and thus that protesters had not convincingly rebutted the presumption of access.<sup>14</sup> However, with respect to SPS, protesters provided QF-specific

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<sup>9</sup> *Id.* P 23.

<sup>10</sup> Order No. 688 at P 164.

<sup>11</sup> 18 C.F.R. § 292.309(g) (2008).

<sup>12</sup> January 22 Order at P 24-25.

<sup>13</sup> *Id.* P 26.

<sup>14</sup> *Id.* P 27.

evidence that transmission constraints in SPS limited access to buyers outside SPS. The Commission concluded that protesters had rebutted the presumption of access within the service territory of SPS. The Commission accordingly denied Xcel Energy's application that SPS be exempted from the mandatory purchase obligation without prejudice to its filing a new application.<sup>15</sup>

9. The Commission then turned to the issue of whether QFs interconnected to OG&E and AEP have access to markets that satisfy PURPA section 210(m)(1)(B)(ii). The Commission thus stated that to relieve OG&E and AEP of the mandatory purchase obligation it must find that the nondiscriminatory access that these utilities provided to their interconnected QFs is to “[c]ompetitive wholesale markets that provide a meaningful opportunity to sell capacity, including long-term and short-term sales, and electric energy, including long-term, short-term and real-time sales, to buyers other than the utility to which the qualifying facility is interconnected.”<sup>16</sup> The Commission noted that the statute charges the Commission to consider evidence of transactions within the relevant market, among other factors in considering whether such a market exists.<sup>17</sup> The Commission also noted that Applicants provided data on actual transactions and RFPs, as well as the range of potential purchasers, and concluded, that on balance this evidence demonstrates that QFs interconnected to OG&E and AEP have access to “[c]ompetitive wholesale markets that provide a meaningful opportunity to sell capacity, including long-term and short-term sales, and electric energy, including long-term, short-term and real-time sales, to buyers other than the utility to which the qualifying facility is interconnected.”<sup>18</sup> In reaching this conclusion, the Commission analyzed the evidence regarding real-time energy sales,<sup>19</sup> short-term energy sales,<sup>20</sup> short-term capacity sales,<sup>21</sup> long-term energy sales,<sup>22</sup> and long-term capacity sales.<sup>23</sup> The Commission rejected contentions that, before it relieve OG&E and AEP of the mandatory purchase obligations,

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<sup>15</sup> *Id.* P 28-30.

<sup>16</sup> *Id.* P 31 (*citing to* 18 C.F.R. § 292.309(a)(2)(ii) (2008)).

<sup>17</sup> *Id.*

<sup>18</sup> *Id.* P 31; *see id.* P 32-34 (addressing protestor's evidence).

<sup>19</sup> *Id.* P 35.

<sup>20</sup> *Id.* P 36-37.

<sup>21</sup> *Id.* P 38.

<sup>22</sup> *Id.* P 39.

<sup>23</sup> *Id.* P 40.

it must make findings beyond those required in section 210(m) of PURPA.<sup>24</sup> Finally, the Commission rejected arguments that SPP wholesale markets are illiquid under the Commission's market liquidity standard and should accordingly be found to fail the statutory test for termination of the mandatory purchase obligation.<sup>25</sup>

## II. Requests for Rehearing

### A. Applicants' Request for Rehearing

10. On February 21, 2008, Xcel filed a request for rehearing, or in the alternative, clarification of the January 22 Order. Xcel asserts that the Commission erred in denying the application with respect to SPS. Xcel asserts that protesters provided insufficient evidence of transmission constraints to successfully rebut the presumption of transmission access. Xcel argues that the Commission took American Wind Energy Association's (AWEA's) assertions about the Texas PUC's statements regarding transmission constraints out of context. Further, Xcel claims that JD Wind's assertion regarding its inability to secure a third party purchase agreement due to potential buyers' concerns over lack of transmission service is unsubstantiated but rather is due to JD Wind's inability to provide output at competitive rates. Xcel contends that, even if JD Wind correctly alleges that transmission constraints were the reason JD Wind was unable to secure a power purchase agreement, it was specific only to JD Wind and did not support an SPS-wide finding of lack of access to markets. Xcel further argues that, even if there are transmission constraints, under the SPP OATT, QFs have access to a nondiscriminatory mechanism to alleviate these constraints and, therefore, have the necessary nondiscriminatory transmission access.<sup>26</sup>

11. Xcel also requests that the Commission clarify that the SPP market satisfies the PURPA 210(m)(1)(B)(ii) standard as to the entire SPP footprint, not just that part of SPP outside of the SPS balancing authority. Xcel claims that the Commission, while it did not explicitly make a finding as to the entire SPP footprint, necessarily made such a determination based on the evidence presented and because it must make the determination that the markets satisfy the market criteria for relief before it can address the issue of transmission access.

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<sup>24</sup> *Id.* P 41-42.

<sup>25</sup> *Id.* P 43.

<sup>26</sup> Xcel Request for Rehearing and Clarification of Xcel Energy Services Inc. at 7 (citing AWEA Protest at 25).

## **B. Protesters' Requests for Rehearing**

12. AWEA, the Wind Coalition, John Deere Renewables, L.L.C. and PowerSmith Cogeneration Project L.P. (PowerSmith) (collectively Protesters) filed requests for rehearing, or in the alternative, clarification. In their rehearing requests, Protesters argue that the Commission erred in finding that markets that satisfy the criteria of PURPA section 210(m)(1)(B) exist in the OG&E and AEP service territories. Protesters argue that this finding was the result of the Commission: (1) ignoring evidence that demonstrates that QFs in the SPP footprint do not have a meaningful opportunity to sell power to third parties; (2) applying an erroneous standard for relief from the mandatory purchase obligation; (3) failing to define “competitive wholesale market” and “meaningful opportunity”; (4) treating the test for Day 1 markets as identical to that for Day 2 markets; and, (5) shifting the burden of proof from the utilities to the QFs.

13. Protesters (with the exception of PowerSmith)<sup>27</sup> also seek clarification as to whether the January 22 Order found that the markets within the entire SPP footprint, including the SPS balancing authority, meet the standard of Section 210(m)(1)(B)(ii). Protesters request that the Commission clarify that it did not make that determination for the SPS balancing authority. However, if the Commission clarifies that it did in fact make a market finding as to the entire SPP footprint, then Protesters seek rehearing on that issue. Further, Protesters seek clarification that any new SPS application will be reviewed *de novo*.

14. Protesters and Golden Spread Electric Cooperative filed answers to Applicants' request for rehearing. Applicants filed an answer to Protestors request for rehearing. Protestors filed a response to Applicants' answer.

## **III. Discussion**

15. As an initial matter, the Commission's Rules of Practice and Procedure do not permit answers to requests for rehearing. 18 C.F.R. § 285.713(d) (2008). We will accordingly reject the answers to the requests for rehearing, and likewise all answers to those answers.

16. The Commission denies rehearing. Nothing raised in the requests for rehearing warrants changing our decision in this proceeding.

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<sup>27</sup> PowerSmith filed its request adopting the other Joint Protesters' request, except as to the “clarification related to the Commission's determinations related to the markets in [SPS'] balancing authority area contained in page 5... .” PowerSmith Request for Rehearing at 2.

17. We turn first to Xcel's request for rehearing of the Commission's denial of relief for SPS. Protesters provided specific evidence demonstrating that transmission constraints denied QFs located within the SPS balancing authority meaningful access to the markets within the wider SPP region, including reports from the Texas PUC<sup>28</sup> and the Texas Office of House Bill Analysis.<sup>29</sup> While Xcel claims that this evidence does not apply to transmission within SPS or even transmission out of SPS, but only to transmission constraints into SPS, the report of the Texas PUC states, "[t]he SPS service area, in the Panhandle region of Texas, is a transmission-constrained area. . .,"<sup>30</sup> and House Bill Analysis states, "Southwestern Public Service Co...has limited transmission interconnections outside of its territory."<sup>31</sup> Contrary to Xcel's claims, both reports note transmission constraints. Xcel also claims that the Commission erroneously relied on evidence of JD Wind's inability to access markets due to transmission constraints; Xcel claims that JD Wind's evidence was specific to JD Wind only and did not support an SPS-wide finding. However, JD Wind's evidence confirmed what the PUCT Report and the House Bill Analysis stated. The totality of the evidence was sufficient to make an SPS-wide finding. We note that our finding was that "protesters have provided sufficient evidence of operational constraints to rebut the presumption that QFs within SPS have nondiscriminatory access to the market, and Xcel Energy has not demonstrated to the contrary. . . ."<sup>32</sup> The Commission denied Xcel's application that SPS be relieved of the mandatory purchase obligation without prejudice.<sup>33</sup> We accordingly see no error in the finding that QFs within the SPS service territory lack nondiscriminatory access to markets.

18. Xcel also asks the Commission to clarify that its market determination applies to the entire SPP area. Protestors ask the Commission to clarify that it does not. In effect, both ask whether the January 22 Order constitutes a generic finding that SPP's markets meet the PURPA 210(m)(1)(B)(ii) standard, i.e., "competitive wholesale markets that provide a meaningful opportunity to sell capacity, including long-term and short-term

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<sup>28</sup> AWEA protest at 25 (citing Scope of Competition in Electric Markets in Texas, PUCT Report to the 78<sup>th</sup> Texas Legislature at 55 (January 2003) (PUCT Report)).

<sup>29</sup> *Id.* (citing Tex. Office of House Bill Analysis (HB 1692) at 1 (Apr. 16, 2001) (House Bill Analysis)).

<sup>30</sup> PUCT Report at P 25.

<sup>31</sup> House Bill Analysis at 2

<sup>32</sup> January 22 Order at P 30.

<sup>33</sup> Xcel did not present evidence of SPP OATT mechanisms to alleviate constraints and we need not address that issue here, on rehearing, in the first instance.

sales, and electric energy, including long-term, short-term and real-time sales, to buyers other than the utility to which the qualifying facility is interconnected.” The January 22 Order did not make a finding as to SPP as a whole. Rather it determined, based on the evidence presented, that the QFs in the SPP service areas of OG&E and AEP have access to such markets. In the discussion of market competitiveness in the January 22 Order, the Commission stated that “The remaining issue in this case, *as it applies to OG&E and AEP*, is whether QFs interconnected to *these* utilities have access to markets which satisfy section 210(m)(1)(B)(ii).”<sup>34</sup> The Commission thus specifically limited its finding to OG&E and AEP.

19. Xcel requests that, if it was the Commission’s intention to limit its market findings to OG&E and AEP, the Commission instead grant rehearing on this issue; Xcel urges that the evidence on markets that it submitted to the Commission applies to the SPP footprint and is not limited to OG&E and AEP. Protesters also ask that, if we do not clarify, we grant rehearing; Protesters urge that the evidence of transmission constraints in SPS also supports a finding that the markets in SPP do not provide QFs with a meaningful opportunity to sell. We believe that our decision to not make a market finding with respect to SPS was correct. Our treatment of SPS is consistent both with the structure of section 210(m) of PURPA, the structure of our regulations, and with our discussion in Order No. 688. Section 210(m)(1) of PURPA provides that “no electric utility shall be required to enter into a new contract or obligation to purchase electric energy from a [QF] . . . if the Commission finds that the [QF] has nondiscriminatory access to” one of three types of markets. Section 210(m)(3) of PURPA also allows utilities to file for relief on a service territory-wide basis.<sup>35</sup> Our regulations, in 18 C.F.R. § 292.309(a) (2008), track the structure of section 210(m)(1) of PURPA. The initial finding required both by the statutory language and by the regulation is of nondiscriminatory access to markets, and then the Commission must find that a market exists that satisfies the statutory criteria. The finding is to be made on a utility service territory-wide basis.<sup>36</sup> The Commission, in this proceeding made the finding that QFs within SPS’s service territory did not have nondiscriminatory access, and did not address whether markets in SPS satisfied the statutory criteria. Where, as here, nondiscriminatory access has not been shown, there is no need to address whether a market that satisfies the statutory criteria exists. We accordingly made market findings on a service territory-wide basis regarding OG&E and AEP, but did not address – and did not need to address – SPS’s markets once we determined that the QFs in SPS did not have nondiscriminatory access to those markets. Finally, in Order No. 688, the Commission, addressing a request that it make

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<sup>34</sup> January 22 Order at P 33 (emphasis added).

<sup>35</sup> 16 U.S.C. § 824a-3(m)(B) (2006).

<sup>36</sup> 18 C.F.R. § 292.310(a) (2008).

generic findings concerning the SPP market in the context of the rulemaking, stated that it “will make determinations on a case-by-case basis, rather than generically, for utilities seeking relief from the mandatory purchase requirement pursuant to section 210(m)(1)(B) and (C).”<sup>37</sup> In sum, in this proceeding, we made determinations that the markets in OG&E and AEP satisfy the criteria of section 210(m)(1)(B) of PURPA; the market findings were made on a utility service territory-wide basis. The market findings did not extend to SPS’s service territory.<sup>38</sup>

20. We turn now to Protesters’ contention that the Commission erred in finding that the markets in OG&E and AEP satisfy section 210(m)(1)(B)(ii) of PURPA. In considering the markets, the Commission stated that it must find that QFs interconnected to OG&E and AEP have nondiscriminatory access to “[c]ompetitive wholesale markets that provide a meaningful opportunity to sell capacity, including long-term and short-term sales, and electric energy, including long-term, short-term and real time sales, to buyers other than the utility to which the qualifying facility is interconnected.”<sup>39</sup> The Commission noted that the statute charges the Commission to consider evidence of transactions within the relevant market.<sup>40</sup> Applicants offered evidence that “[c]ompetitive wholesale markets that provide a meaningful opportunity to sell capacity, including long-term and short-term sales, and electric energy, including long-term, short-term and real time sales, to buyers other than the utility to which the qualifying facility is interconnected” exist for OG&E and AEP. Protesters submitted evidence that they argue contradicted and rebutted Applicants’ evidence. The Commission considered all of the evidence, that was submitted by Applicants and by Protesters, and found that on balance the evidence supported a finding that markets that satisfy the criteria of section 210(m)(1)(B)(ii) of PURPA exist for OG&E and AEP.

21. On rehearing, Protesters in essence argue that the Commission should have given greater weight to the evidence they submitted. We disagree. A review of the January 22 Order indicates that we did in fact analyze all of the evidence presented, including Protesters’ rebuttal evidence,<sup>41</sup> and concluded that the OG&E and AEP markets in the SPP footprint satisfy PURPA section 210(m)(1)(B)(ii). As discussed in the January 22

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<sup>37</sup> Order No. 688 at P 166.

<sup>38</sup> However, as we stated in the January 22 Order, our denial of SPS’s application was without prejudice.

<sup>39</sup> January 22 Order at P 31.

<sup>40</sup> *Id.*

<sup>41</sup> *Id.* P 31-44.

Order, we found that Applicants' evidence was more persuasive.<sup>42</sup> For example, in discussing the use of Electric Quarterly Report (EQR) data, we noted that "[p]rotestors raise a variety of arguments against Applicants' use of EQR data." We continued that, although some of these concerns were valid, they did not nonetheless diminish the overall "remaining evidence in the record [which] shows that there is an active wholesale market . . . in SPP, which provides QFs and potential and future QFs a meaningful opportunity to sell their electric output to purchasers other than to the interconnected utility."<sup>43</sup> Our reaching a different conclusion to that advocated by Protesters does not mean that the Commission ignored evidence, acted arbitrarily or capriciously, or otherwise engaged in unreasoned decision making.

22. Protesters argue that the Commission's decision making process resulted in shifting the burden of proof from the utilities to the QFs. We disagree. The Commission required the Applicants to make their case. Applicants provided evidence and arguments, which Protesters attempted to rebut with their own evidence. The Commission weighed all the evidence submitted and came to a different conclusion than that advocated by Protesters. This does not inappropriately shift the burden from utilities to QFs. Indeed, Protesters suggest that in PURPA section 210(m)(1)(B) cases, that once Applicants have submitted evidence and Protesters have submitted evidence that purports to rebut that evidence, and given the 90-day timeframe within which the Commission must act on an application (which effectively prevents a trial-type hearing), the Commission may not weigh the evidence and decide which is more persuasive, but must find for Protesters. An application of such a burden of proof rule to section 210(m) of PURPA would effectively mean that any opposed application would be denied. Moreover, we see nothing in section 210(m) of PURPA that would support this result, and we see no evidence that Congress, in enacting section 210(m) of PURPA, intended such a result.

23. Protesters assert that the Commission failed to "define, or even describe, the key terms in the statutory test under section 210(m)(1)(B)(ii)."<sup>44</sup> What Protesters seek the Commission to define are the words "competitive" and "meaningful opportunity" to sell that are contained in section 210(m)(1)(B)(ii) of PURPA. In making its finding, rather than focusing on individual components of section 210(m)(1)(B)(ii), the Commission

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<sup>42</sup> See, e.g., *Arizona Corporation Commission v. FERC*, 397 F.3d 952, 954 (D.C. Cir. 2005)(the fact that there may be contradictory evidence does not mean there is not substantial evidence supporting the Commission's findings); *accord Electricity Consumers Resource Council v. FERC*, 407 F.3d 1232, 1236 (D.C. Cir. 2005); *Florida Municipal Power Agency v. FERC*, 315 F.3d 362, 368 (D.C. Cir.), *cert. denied*, 540 U.S. 946 (2003).

<sup>43</sup> January 22 Order at P 33.

<sup>44</sup> Protesters' Request for Clarification and Rehearing at 20.

looked to the relevant phrase as a whole. The Commission is not required to individually define every word. Rather, it is appropriate in these circumstances that the Commission read and apply the entire phrase, where the meaning of the phrase can be more than the meanings of the individual words. By its nature, any definition of “competitive” would either be so vague as to allow for too wide a range of markets to fall under its umbrella or so specific as to reject too many markets for failing to meet every letter of the rule. Instead, the Commission reviewed the totality of the evidence provided and found that Applicants provided sufficient evidence to demonstrate that QFs and potential QFs in OG&E and AEP’s service territories have access to competitive wholesale markets that provide a meaningful opportunity to make sales to third party buyers.

24. Protesters also assert that “[h]istorically, the Commission has utilized market liquidity as a measure of activity in the marketplace, which correlates with the competitiveness of the market.”<sup>45</sup> As we stated in the January 22 Order, liquidity is one measure of the competitiveness of a market, but this standard is neither a necessary nor a sufficient condition for identifying a competitive market in this setting. It is possible for a market to have a relatively high degree of liquidity yet have very few buyers and sellers. It is also possible for a market to be relatively illiquid, yet have other characteristics that lead to competitive results. In the instant setting, the Commission sees no value in adopting a single definitive test for a competitive market. Rather, the Commission will consider various kinds of evidence related to sales by QFs and entities like QFs, opportunities for such sales, and other relevant evidence provided by applicants and by protesters, including but not limited to liquidity data.

25. Protesters claim that, in the January 22 Order, the Commission treated the test for Day 1 markets as identical to that for Day 2 markets. This is incorrect. Applicants in Day 2 markets face a different standard. Applicants in Day 2 markets are not required to present any evidence of sales by QFs or other generators or any evidence of the competitive nature of the market. Indeed, in Order No. 688, the Commission found that certain markets satisfy PURPA section 210(m)(1)(A) criteria for Day 2 markets, and codified those finding in our regulations at 18 C.F.R. § 292.309(e) (2008). Utility applicants from certain Day 2 markets, Midwest Independent System Transmission Operator (MISO), PJM Interconnection, L.L.C. (PJM), ISO New England, Inc. (ISO-NE), and New York Independent System Operator (NYISO), may rely on the rebuttable presumption that utilities in those regions should be relieved from the obligation to enter into new obligations or contracts to purchase from QFs larger than 20 MW. In contrast, Applicants seeking relief pursuant to section 210(m)(1)(B) of PURPA are required to proceed on a case-by-case basis and are required to submit evidence to support the very different criteria contained in section 210(m)(1)(B) of PURPA.

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<sup>45</sup> *Id.* at 21.

The Commission orders:

- (A) Xcel's request for clarification and rehearing is hereby denied.
- (B) Protesters' request for clarification and rehearing is hereby denied.

By the Commission. Commissioner Kelly dissenting in part with a separate statement attached.

Commissioner Wellinghoff dissenting in part with a separate statement attached.

( S E A L )

Nathaniel J. Davis, Sr.,  
Deputy Secretary.

UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

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

Docket No. QM07-5-002

(Issued July 21, 2008)

KELLY, Commissioner, *dissenting in part*:

The Applicants here seek to eliminate the Public Utility Regulatory Policies Act of 1978 (PURPA) purchase obligations in the Southwest Power Pool, Inc. (SPP) region under PURPA section 210(m)(1)(B). The initial order in this proceeding granted termination of the PURPA mandatory purchase obligation for OG&E and AEP (on behalf of PSO and SWEPCO), but denied Xcel's application filed on behalf of SPS.<sup>1</sup> In this order, the majority denies rehearing of the January 22 Order.

As I stated in my dissent in part to the January 22 Order, PURPA section 210(m)(1)(B) places the burden on the Applicants to prove that qualifying cogeneration and small power production facilities (QFs) in the SPP region have non-discriminatory access to:

competitive wholesale markets that provide a meaningful opportunity to sell capacity, including long-term and short-term sales, and electric energy, including long-term, short-term and real-time sales, to buyers other than the utility to which the qualifying facility is interconnected.

I dissented in part on the January 22 Order because, after a review of all the evidence submitted in this case, I concluded that the Applicants failed to meet their burden to show that (1) SPP has competitive wholesale capacity markets (including long-term and short-term) and competitive wholesale energy markets (including long-term, short-term, and real-time); (2) QFs located in SPP have a meaningful opportunity to sell in each of those markets; and (3) QFs located in

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<sup>1</sup> *Xcel Energy Servs., Inc.*, 122 FERC ¶ 61,048 (2008) (January 22 Order).

SPP have a meaningful opportunity to sell in each of those markets to buyers other than the utility to which the QF is interconnected. My dissent to the January 22 Order provides a comprehensive analysis of the evidence in the record and explains why I reach this conclusion. I will not repeat that analysis here.

On rehearing, the American Wind Energy Association, The Wind Coalition and John Deere Renewables, LLC (Joint Requestors) likewise argue that the Applicants failed to meet their statutory burden of proof. In support of their argument, they also analyze the evidence in the record and reason why it fails to support the majority's conclusion that Applicants' requested relief should be granted. I agree with Joint Requestors and would have granted their rehearing request.

One last issue raised by the Joint Requestors merits further discussion. Throughout Joint Requestors' Request for Rehearing, they repeatedly object to the Commission's failure to provide reasoned analysis in support of its decision. I agree that the Commission failed to provide reasoned analysis to support its decision. In its January 22 Order, the Commission lists facts presented by the Applicants that it believes were un rebutted. A careful review of Joint Requestors' evidence shows that most of the items listed by the Commission in its January 22 Order were rebutted. Further, a review of the un rebutted facts presented by the Applicants will show them insufficient to meet the burden of proof required by the statute. Finally, many facts presented by Joint Requestors that were not rebutted by Applicants were not even listed by the Commission in the January 22 Order. But, in addition to that, it is important to point out that an agency cannot support an action based solely on a simple list of findings of facts and conclusions of law. The agency's findings and conclusions must be linked to the action it takes through a chain of reasoning. The Commission has not done that here. Instead of providing reasoning connecting the facts to the law and the relief granted, the Commission merely seeks refuge in the assertion that "on balance the evidence supported a finding" in favor of Applicants, and the conclusion that "we found that Applicants' evidence was more persuasive."<sup>2</sup> Instead of explaining how it interprets section 210(m)(1)(B)(ii)'s standards regarding competitive markets, it avers that "any definition of 'competitive' would either be so vague as to allow for too wide a range of markets to fall under its umbrella or so specific as to reject too many markets for failing to meet every letter of the rule."<sup>3</sup> This unreasoned, "trust me" approach to decision making is simply not in accordance with law. This can leave the public wondering if the Commission's decision is arbitrary and

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<sup>2</sup> *Xcel Energy Servs., Inc.*, 124 FERC ¶ 61,073, at P 20, 21 (2008) (citation omitted).

<sup>3</sup> *Id.* P 23.

capricious, potentially creating a lack of public confidence in the Commission's decision-making process.

For these reasons, I respectfully dissent in part from this order.

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Sudeen G. Kelly

UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

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

Docket Nos. QM07-5-002

(Issued July 21, 2008)

WELLINGHOFF, Commissioner, dissenting in part:

I dissented in part from the January 22 Order. Based on the record before the Commission, I concluded that Oklahoma Gas and Electric Company (OG&E) and American Electric Power Service Corporation (AEP) had not satisfied their burden of proof such that the Commission should grant their requested relief from the mandatory QF purchase obligation established by PURPA.

In their request for rehearing of the January 22 Order, the American Wind Energy Association, The Wind Coalition, and John Deere Renewables, LLC (collectively, Joint Requesters) make a similar point with respect to the burden of proof in this proceeding. The Joint Requesters state:

[R]egardless of the time pressure, Applicants still must be required to carry their burden of proof under PURPA. In fact, given that PURPA requires a final determination within a 90-day timeframe and the Commission's concomitant conclusion that there is no time for a hearing, the evidence presented by Applicants in pleadings must be of such a caliber that the Commission can decisively conclude, without a hearing, that Applicants meet the high standard set by section 210(m)(1)(B) of PURPA.

I agree with this description of the burden of proof. I would have granted rehearing because I also continue to believe that neither OG&E nor AEP has satisfied that burden of proof. For this reason, I respectfully dissent in part.

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Jon Wellinghoff  
Commissioner