

145 FERC ¶ 61,057
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Council of the City of New Orleans, Louisiana
Mississippi Public Service Commission
Arkansas Public Service Commission

Docket No. EL13-43-000

ORDER GRANTING, IN PART, PETITION FOR DECLARATORY ORDER

(Issued October 17, 2013)

1. On January 22, 2013, the Council of the City of New Orleans, the Mississippi Public Service Commission and the Arkansas Public Service Commission (collectively, Entergy Retail Regulators)¹ filed a petition for declaratory order (Petition) pursuant to Rule 207(a)(2)² of the Commission's Rules of Practice and Procedure, requesting that the Commission determine whether the locational marginal price (LMP) based avoided cost calculation methodology for qualifying facilities (QFs) proposed by Entergy Services, Inc., (Entergy) on behalf of Entergy Louisiana, LLC and Entergy Gulf States Louisiana, L.L.C., at the Louisiana Commission,³ satisfies the Public Utility Regulatory Policies Act

¹ The Public Utility Commission of Texas (Texas Commission) and the Louisiana Public Service Commission (Louisiana Commission) filed pleadings in support of the Petition.

² 18 C.F.R. § 385.207(a)(2) (2013).

³ Joint Application of Entergy Gulf States Louisiana, L.L.C. and Entergy Louisiana, LLC for Approval of the Current Methodology for Calculating Avoided Cost, Louisiana Public Service Commission Docket No. U-32628 (Nov. 30, 2012) (Avoided Cost Filing). Entergy Retail Regulators listed this docket number as "U-32148," but the Commission's review of Entergy's docketing sheet lists the docket number as "U-32628."

of 1978 (PURPA)⁴ and the Commission's regulations implementing PURPA. As discussed below, the Commission will grant, in part, the petition for declaratory order.

I. Background

2. In September 2010 Charles River Associates (CRA) released a study that found that Entergy and Cleco Power LLC joining the Southwest Power Pool, Inc. (SPP) regional transmission organization (RTO) will "yield significant economic benefits" due in part to treatment of QFs as firm suppliers.⁵ Subsequently, Entergy instead announced that it would join Midwest Independent Transmission System Operator, Inc. (MISO)⁶ and that joining an RTO with a Day 2 market will result in production cost benefits for the Entergy region.⁷

3. On November 30, 2012, as amended on March 15, 2013, Entergy filed, at the Louisiana Commission, the Avoided Cost Filing, to be effective when Entergy joins MISO. In the Avoided Cost Filing, Entergy explained that there will be two options for QFs in a MISO Day 2 Market: (1) the hybrid option; and (2) the behind-the-meter option. Entergy stated that the avoided cost calculation methodology only applies to behind-the-meter QFs.⁸ Entergy explained that MISO uses a day-ahead market and a real-time market. The prices in the day-ahead market, both for generator injections and

⁴ 16 U.S.C. § 824a-3 (2006).

⁵ *Cost-Benefit Analysis of Entergy and Cleco Power Joining the SPP RTO*, Charles River Associates and Resero Consulting (Sept. 30, 2010) (CBA Study) at 53. The Commission hired CRA to conduct the CBA Study.

⁶ Effective April 26, 2013, MISO changed its name from "Midwest Independent Transmission System Operator, Inc." to "Midcontinent Independent System Operator, Inc."

⁷ Entergy, *Summary of the Evaluation of Possible Regional Transmission Organization ("RTO") Membership by the Entergy Operating Companies*, http://entergy.com/global/rto/rto_summary.pdf.

⁸ Avoided Cost Filing at 9-10. Entergy subsequently supplemented the avoided Cost filing on March 15, 2013, revising the proposal to reflect that it applies not only to the behind-the-meter option, but to the hybrid option where the QF puts energy to the Entergy operating company. Errata to Joint Application of Entergy Gulf States Louisiana, L.L.C. and Entergy Louisiana, LLC for Approval of the Current Methodology for Calculating Avoided Cost, Louisiana Public Service Commission Docket No. U-32628 (March 15, 2013).

load withdrawals, are based on hourly LMPs. An LMP is calculated at every node on the transmission system for every hour of every day in the day-ahead market. The real-time energy market supplements the day-ahead energy market, where the vast majority of energy is scheduled, by pricing real-time deviations from day-ahead schedules by purchasers and suppliers. Deviations from day-ahead schedules and obligations result in additional charges or credits against those established in the day-ahead market, based on real-time LMPs.⁹ For QFs electing the behind-the-meter option, their sales of “as available” energy will not be part of the utilities’ day-ahead schedules, because by definition such QFs do not have to schedule their energy to the utilities; they simply sell to the utilities with no notice, in real-time. Instead, “as available” QF sales will be shown in the real-time market and will be treated as reduced load to the utility.

4. Regarding the proposed avoided cost calculation methodology, the Avoided Cost Filing states:

Specifically, the formula proposed by [Entergy] would use calculations that are made by MISO for the credits and charges associated with QF energy, plus any administrative costs incurred directly by the Companies, such as to administer the real-time scheduling option. The Companies simply would sum these MISO-determined credits and charges in each hour during which energy is delivered and then adding any approved administrative costs incurred by the Companies. The MISO settlement data will include hourly values for the amount of energy injected by the QF (shown as a negative load), the relevant LMP, and other market charges (including, but not necessarily limited to, Revenue Sufficiency Guarantee, Schedule 17, and Schedule 24 charges) assessed by MISO to the Companies and identified by MISO as being associated with the QF energy. For each hour, the avoided cost payment will be the product of the relevant LMP times the quantity of energy injected, less the other market charges associated with the QF. The monthly payment will be the sum of the results of each of these hourly amounts, which will be calculated by MISO and identified on the settlement statement. The avoided cost also will include

⁹ *Id.* at 15.

any applicable administrative charges incurred by the Companies.¹⁰

5. Additionally, in the Avoided Cost Filing, Entergy also asks the Louisiana Commission to allow Entergy to postpone filing an expected PURPA section 210(m) application with this Commission until no later than September 30, 2014, with the effective date to be June 1, 2015. According to Entergy, this postponement is for the purpose of allowing QFs “a chance to test the Hybrid Option and operate as Market Participants,” and an opportunity to switch back to behind-the-meter QF status since, depending on the QF contractual arrangement, a return to QF status could constitute a new contract or obligation under section 210(m).¹¹ After Louisiana Commission staff engaged in discussions with Entergy Gulf States Louisiana, L.L.C. and Entergy Louisiana, the Louisiana Commission adopted the staff’s recommendation to grant the request to delay the filing to no later than September 30, 2014, but requiring Entergy Gulf States Louisiana, L.L.C. and Entergy Louisiana, L.L.C. to request an effective date of September 30, 2014.¹²

¹⁰ *Id.* at 17-18. The Avoided Cost Filing also says:

Due to the unscheduled nature of QF put, there could be other charges or credits to which a QF could be subject under the Companies’ proposal. As Mr. Schnitzer explains, Load Zones are assessed Revenue Sufficiency Guarantee (“RSG”) charges and administrative charges based on their deviations from day-ahead schedules. Any RSG and administrative charges assessed by MISO to a QF Load Zone would reduce the avoided cost payment received by the QF for energy put to a Company. However, as Mr. Hurstell explains, to the extent that a QF is able to provide a schedule of its generation four hours in advance of dispatch, it is expected that a Company could convey that information to MISO on behalf of the QF Load Zone. That would serve to reduce the RSG and administrative charges and increase the avoided cost payments to the QF.

Id. at 19.

¹¹ *Id.* at 13.

¹² *Entergy Gulf States Louisiana, L.L.C.*, Docket No. U-32628 (Louisiana Public Service Commission July 8, 2013).

II. Petition for Declaratory Order

6. Entergy Retail Regulators explain that QFs on Entergy's system sell their power to the Entergy Operating Companies¹³ either "as available" or by power purchase agreement. When a QF sells "as available" it may, without prior notice, sell whatever portion of its generation output to Entergy, and Entergy must purchase the power. As a result, Entergy keeps generation online that it can ramp down so that it can accept QF power when required. Entergy Retail Regulators state that if QFs were required to provide energy as firm energy, then Entergy would not have to keep some of its generation online, which would reduce costs.¹⁴

7. Entergy Retail Regulators state that one of the key benefits of Entergy joining an RTO is the treatment of QFs as firm suppliers.¹⁵ Entergy Retail Regulators seek guidance to confirm whether QFs will indeed be treated as firm suppliers as a result of Entergy joining MISO, and thus whether a major source of promised economic benefits from MISO membership will materialize.¹⁶ Entergy Retail Regulators state that there are two alternatives to ensure that the benefits are achieved: (1) relief from the PURPA mandatory purchase obligation; or (2) state recalibration of the avoided cost calculation methodology to provide QFs the same compensation/payment obligation they would receive if they were MISO market participants. The timing with implementation of both alternatives is troubling to Entergy Retail Regulators because Entergy does not intend to request relief of the PURPA mandatory purchase obligation until nine months after the Entergy Operating Companies are fully integrated into MISO¹⁷ and state-approved QF avoided-cost methodologies are likely to be challenged and remain subject to challenge after the Entergy Operating Companies have already joined MISO.¹⁸

¹³ Entergy states that the Operating Companies in Louisiana are Entergy Gulf States Louisiana, LLC, Entergy New Orleans, Inc., and Entergy Louisiana, LLC. The other Operating Companies are Entergy Arkansas, Inc., Entergy Mississippi, Inc. and Entergy Texas, Inc.

¹⁴ Petition at 6-7.

¹⁵ *Id.* at 7-8 (citing Cost-Benefit Analysis of Entergy/Cleco Power or Entergy Arkansas Joining the Midwest ISO – Addendum Study, Charles River Associates and Resero Consulting (Mar. 10, 2011) at 11; CBA Study at 7).

¹⁶ *Id.* at 2.

¹⁷ *Id.* at 2, 29 (citing Avoided Cost Filing at 23).

¹⁸ *Id.* at 2-3.

8. To relieve their concerns, Entergy Retail Regulators request that the Commission make findings and clarifications on four issues. First, they request that the Commission determine whether the Avoided Cost Filing filed with the Louisiana Commission is generally compliant with PURPA. Entergy Retail Regulators cite to the Commission's order in *Exelon Wind 1, LLC*,¹⁹ addressing a petition for declaratory order challenging a state commission's approval of an avoided cost methodology based on locational imbalance prices in the SPP energy imbalance market, and state that *Exelon Wind* suggests that avoided costs cannot be based on LMP methodologies, and thus "appears to prevent [Entergy]'s proposal to use the MISO-calculated LMPs to determine the QF avoided cost payment on [Entergy]'s system."²⁰ Entergy Retail Regulators state that Commission guidance will remove uncertainty and is needed now because the Louisiana Commission is currently reviewing the Avoided Cost Filing, and a similar proposal will be filed with the Texas, Mississippi, and Arkansas Commissions.²¹

9. Second, Entergy Retail Regulators request that the Commission explain the link between the standard for granting an application for termination of the PURPA mandatory purchase obligation²² and finding that an avoided cost methodology satisfies PURPA. Entergy Retail Regulators cite to *Xcel Energy Services, Inc.*,²³ in which the Commission denied Southwestern Public Service Company (SPS)'s request for relief from the PURPA mandatory purchase obligation because of constraints and transmission congestion such that QFs lacked "access to third-party buyers" and non-discriminatory access to the market."²⁴ Entergy Retail Regulators note that subsequently in

¹⁹ 140 FERC ¶ 61,152 (2012) (*Exelon Wind*).

²⁰ Petition at 20.

²¹ Entergy Retail Regulators March 13, 2013 Motion for Leave to Respond at 2-3.

²² In implementing section 210(m) of PURPA, the Commission created a rebuttable presumption that QFs larger than 20 MW in certain markets (including New York Independent System Operator, Inc. (NYISO) and MISO) have nondiscriminatory access to those markets and that utilities in those markets should be relieved of the obligation to purchase electric energy from QFs larger than 20 MW. 18 C.F.R. § 292.309(e) (2013). The Commission also provided that a QF larger than 20 MW could seek to rebut this presumption by showing, *inter alia*, that "the [QF] lacks access to markets due to transmission constraints." 18 C.F.R. § 292.309 (e)(2) (2013).

²³ 122 FERC ¶ 61,048 (SPS Order), *reh'g denied*, 124 FERC ¶ 61,073 (2008).

²⁴ Petition at 15 (citing SPS Order, 122 FERC ¶ 61,048 at P 30).

Exelon Wind, the Commission found that the LMP-based avoided cost methodology at issue there violated PURPA, stating in part that because the utility's system is still congested, it was unreasonable to assume the full access of QFs to third-party buyers.²⁵ Entergy Retail Regulators contend that some of the circumstances that applied to SPS apply to Entergy: (i) frequent Transmission-line Loading Relief events; (ii) consistent periods of congestion; and (iii) frequent curtailment of generation.²⁶ Entergy Retail Regulators contend that *Exelon Wind* suggests that "if a utility cannot qualify for the PURPA [210(m)] exemption then the Commission will not approve an avoided cost methodology that would effectively create the same result." Entergy Retail Regulators further contend that "it is not clear whether the Commission . . . must conclude that QFs on Entergy's system have access to third party purchasers, e.g., are not restricted by persistent transmission constraints and congestion, before the Commission would find that an avoided cost methodology based on LMP satisfies PURPA."²⁷ Entergy Retail Regulators request that the Commission "explain the link between the standard for granting the exemption from the mandatory purchase obligation . . . and finding that an avoided cost methodology satisfies PURPA." Entergy Retail Regulators state that no fact-specific determination as to whether Entergy's system is so congested that QFs cannot access third-party suppliers is necessary to explain the link, if any, between approving an avoided cost methodology based on LMP and the criteria the Commission considers when granting a 210(m) application.²⁸

10. Third, Entergy Retail Regulators cite to *New York State Electric & Gas Corp.*,²⁹ in which the Commission denied an application for termination of the PURPA mandatory purchase obligation as to a Cornell University QF on the basis of operational limitations

²⁵ *Id.* at 19 (citing *Exelon Wind*, 140 FERC ¶ 61,152 at P 52).

²⁶ Entergy Retail Regulators note that in an order approving the Independent Coordinator of Transmission Filing in 2006, the Commission stated that "[a]n ICT role is supported for Entergy based on the particular circumstances of its system, such as the significant internal *transmission constraints* on that system and the problems that Entergy has experienced in the area of data access, quality, and retention." Petition at 4 (citing *Entergy Servs., Inc.*, 115 FERC ¶ 61,095, at P 3 (2006)) (emphasis added).

²⁷ Petition at 24-25.

²⁸ Entergy Retail Regulators March 13, 2013 Motion for Leave to Respond at 12.

²⁹ 130 FERC ¶ 61,216 (2010) (*NYSEG*).

that would affect its ability to access NYISO markets.³⁰ Entergy Retail Regulators state that *NYSEG* “suggests that the Commission would not want to expose QFs to RTO charges/penalties for inability to schedule and would not require QFs to become merchant generators and give up their QF status,” and that “these scenarios could occur under the use of an avoided cost methodology that mimics RTO market pricing.”³¹ Entergy Retail Regulators ask the Commission to explain: “. . . whether the same concerns that applied to Cornell University’s operation of its QF . . . apply to QFs on Entergy’s system.” Entergy Retail Regulators state that the Commission should clarify whether its policy is to not expose QFs to RTO charges/penalties for inability to schedule, and to not require QFs to become merchant generators and give up their QF status.³² Entergy Retail Regulators state that if Commission policy does not allow the pass-through of RTO charges, including off-schedule penalties, by a utility to a QF, then Entergy’s avoided cost proposal will not send the appropriate pricing signals to QF owners. Entergy Retail Regulators contend that no QF-specific operational information is required to respond to the request.³³

11. Fourth, Energy Retail Regulators request that the Commission determine whether existing QFs that sell “as available” energy on the system are entering into new contracts or obligations with Entergy each time they sell such that the obligation to enter into such new contracts or obligations may be terminated under section 210(m) of PURPA.³⁴ Entergy Retail Regulators clarify that their request focuses on the scenario where an existing QF having no power supply contract with Entergy, sells “as available” energy to Entergy.³⁵ Entergy Retail Regulators state that, “absent an existing contract, [Entergy Retail Regulators] believe a reasonable interpretation is that each [as available sale] is a

³⁰ Cornell stated that its thermal load was highly variable, and thus its electrical output was also highly variable. Cornell argued that, as a result, it was impracticable to make sales on a consistent basis in the NYISO day-ahead market or even the NYISO real-time market because Rate Schedule 3-A of the NYISO Market Services Tariff imposes penalties on generators with variable loads for under-generation, and conversely, it would not be compensated by the NYISO for over-generation.

³¹ Petition at 15.

³² *Id.* at 25.

³³ Entergy Retail Regulators March 13, 2013 Motion for Leave to Respond at 6.

³⁴ Petition at 25.

³⁵ Entergy Retail Regulators March 3, 2013 Motion for Leave to Respond at 7.

new obligation. If so, then the Commission has the statutory authority to exempt utilities from having to continue purchasing [as available] energy.”³⁶

III. Notice and Responsive Pleadings

12. Notice of this filing was published in *Federal Register*, 78 Fed. Reg. 7427 (2013), with interventions and protests due on or before February 21, 2013. Timely motions to intervene were filed by Arkansas Electric Cooperative, Calpine Corporation, Dow Chemical Company (Dow), Entergy, Exelon Corporation (Exelon), ExxonMobil Entities, Occidental Chemical (Occidental), and Sabine Cogen, LP. Notices of intervention were filed by the Louisiana Commission and the Texas Commission. Motions to intervene out-of-time were filed by Allco Renewable Energy Limited, Georgia-Pacific Consumer Operations LLC, and MISO. Comments were filed by Dow, Exelon, and the Louisiana Commission. A protest was filed by Occidental. Answers were filed by Entergy, Occidental, and the Texas Commission. Entergy Retail Regulators filed a response.

13. On May 7, 2013 Entergy Retail Regulators filed a motion to expedite Commission action and request for shortened answer period.

14. On the first issue, Entergy, the Louisiana Commission, the Texas Commission, and Dow state that the Commission should determine whether the Avoided Cost Filing is generally compliant with PURPA. Entergy states that the Commission should find that the Avoided Cost Filing is consistent with PURPA, Commission regulations, and *Exelon Wind*. Entergy argues that the Commission has long supported market-based methods, rather than administrative determinations, for calculating avoided costs because they are inherently superior in protecting consumers from excessive costs, and that here the actual avoided costs are determined by the MISO tariff. Moreover, Entergy states that once Entergy Louisiana, LLC and Entergy Gulf States Louisiana, L.L.C., join MISO the existing avoided cost calculation will no longer be feasible or accurate and there will be no reasonable approach to calculating avoided cost that does not rely on the MISO settlement statements.³⁷

15. Entergy further argues that *Exelon Wind* does not suggest that LMP cannot be used in calculating avoided costs under any circumstance, and that indeed multiple states have allowed the use of LMP to calculate avoided costs. Rather, *Exelon Wind* addressed a pricing proposal that did not comply with the “but for” requirement of PURPA section 210(d). Entergy states that *Exelon Wind* does not apply here because the behind-the-meter pricing proposal properly implements the section 210(d) “but for” requirement

³⁶ Petition at 25.

³⁷ Entergy February 21, 2013 Answer at 3, 11.

in the context of the MISO market by comparing: (i) the cost of serving load in MISO's day-ahead market that settled without the QF's sale of "as available" energy (i.e., the "but for" cost) with (ii) the cost of serving load in MISO's real-time market that settled with the QF's sale. Entergy argues that unlike the Day 1 market at issue in *Exelon Wind*—which, by definition, does not provide a day-ahead settlement that can be used to determine the "but for" cost of serving load in the absence of QF sales of "as available" energy—the avoided cost methodology uses MISO's two-settlement system to provide transparent, market-based mechanism for determining the costs that would have been incurred "but for" the QF's sale of "as available" energy.³⁸

16. The Louisiana Commission states that the Commission's guidance will aid in its analysis of the alternative cost filing, which is scheduled for hearing in the summer of 2013, with decision expected in late summer/early fall.³⁹ The Texas Commission states that a similar avoided cost methodology may be filed with the Texas Commission in the future, and argues the Commission may help remove uncertainty with regard to the basis for the Texas Commission's approval of Entergy's integration into MISO.⁴⁰ Dow states that the avoided cost methodology proposed by Entergy appears to be inconsistent with *Exelon Wind* because it derives avoided cost prices based on MISO energy market prices.⁴¹

17. Occidental argues that the Commission should not determine at this time whether Entergy's Avoided Cost Filing is compliant with PURPA. Occidental states that it is inappropriate for the Commission to issue a declaratory order on a proposed avoided cost methodology that is still pending before a state commission, and that doing so would interfere with the Louisiana Commission's fact specific determination.⁴² Occidental argues that issues related to Entergy's avoided cost proposal should only be addressed in

³⁸ *Id.* at 4.

³⁹ Louisiana Commission Comments at 4.

⁴⁰ Texas Commission Answer at 2.

⁴¹ Dow Comments at 4.

⁴² Occidental February 21, 2013 Protest at 14. Occidental argues that under PURPA it is the state regulatory authority, not the Commission that determines an electric utility's avoided cost in the first instance. Occidental March 11, 2013 Answer at 5.

the context of the Louisiana Commission proceeding in order to protect the due process rights of QFs.⁴³

18. Occidental states that a Commission determination now would not terminate a controversy or remove uncertainty because the avoided-cost methodology would still be vulnerable to a future “as applied” challenge pursuant to 210(g) or an “implementation” claim pursuant to 210(h).⁴⁴ Occidental notes that Entergy agrees that action on the Petition cannot extinguish a QF’s statutory right to bring an enforcement action under PURPA.⁴⁵ Occidental argues that the fact that a declaratory order might make such future filings less likely to occur does not meet the declaratory order criteria of terminating a controversy or removing uncertainty.⁴⁶

19. Occidental also states that the avoided costs that Entergy proposes are calculated using the same essential components in *Exelon Wind* because both are based on energy injected by the QF and are calculated using real time price at the location where the QF injects energy. Occidental argues that the MISO two-settlement system is not a significant difference from the SPP system in *Exelon Wind* because avoided costs here are still a function of real-time LMP at the node where the QF injects energy, and while SPP does not have a day-ahead market, it nonetheless requires market participants to have pre-arranged supply to meet their energy obligations.⁴⁷

20. As to the second issue raised by Entergy Retail Regulators, the Louisiana Commission, the Texas Commission, and Dow agree that the Commission should explain the link between the standard granting an application for termination of the PURPA mandatory purchase obligation and finding that an avoided cost methodology satisfies PURPA. Dow argues, however, that there is no link. Dow states that:

The Commission rejected the use of market-derived pricing in the *Exelon Wind* order because the price a QF may have received if it had made sales into a market is not the same as an avoided cost price, *i.e.*, a price that is equal to the costs a

⁴³ Occidental March 11, 2013 Answer at 5-6.

⁴⁴ Occidental February 21, 2013 Protest at 11-13.

⁴⁵ Occidental March 11, 2013 Answer at 7 (citing Entergy March 5, 2013 Answer at 3).

⁴⁶ *Id.* at 7-8.

⁴⁷ *Id.* at 8-9.

utility would have incurred to self-supply or purchase energy that was instead provided by the QF. The applicability and logic of that analysis does not depend on the extent to which a utility may meet the requirements of Section 210(m). While that section establishes a process for utilities to apply to be partially relieved of their obligation to make avoided cost purchases, it does not provide an alternative basis to calculate avoided costs.⁴⁸

21. Dow further states that utilities remain obligated to make avoided cost purchases under existing contracts and obligations, and under new contracts and obligations with QFs under 20 MW. Dow claims that a market-derived price for such purchases does not represent the utility's avoided costs, but rather represents the price a QF would have received if it had made sales into the market.⁴⁹

22. Entergy and Occidental believe the Commission should not address whether there is a link between the standard for granting an application for termination of the PURPA mandatory purchase obligation and finding that an avoided cost methodology satisfies PURPA. Entergy states that such a question should not be decided outside the context of a formal PURPA section 210(m) application and argues that because there is no section 210(m) filing there has been no finding that QFs in Entergy's footprint lack access to MISO's Day 2 markets. Entergy argues that if the Commission were to address the more generic issue of "the link between the standard for granting the exemption from the mandatory purchase obligation . . . and finding that an avoided cost methodology satisfies PURPA," it should clarify that nothing in *Exelon Wind* was meant to conflate the statutory criteria for considering termination requests under section 210(m) with the criteria for determining avoided costs under section 210(d).⁵⁰ Occidental notes that it raised the issue of a link in its rehearing requests of *Exelon Wind* and argues that therefore it would be an inappropriate use of a declaratory order to respond to this question in this proceeding.⁵¹

23. On the third issue, the Louisiana Commission and the Texas Commission agree that the Commission should explain whether its policy is to not expose QFs to RTO charges/penalties for the inability to schedule, and to not require QFs to become merchant

⁴⁸ Dow Comments at 5.

⁴⁹ *Id.* at 6-7.

⁵⁰ Entergy February 21, 2013 Answer at 24, 28.

⁵¹ Occidental February 21, 2013 Protest at 15.

generators and give up their QF status. The Texas Commission agrees with Entergy Retail Regulators that the questions posed may be answered without QF-specific data.⁵²

24. Dow agrees that Commission guidance would be useful, but argues that it would be premature for the Commission to consider issues relating to specific QFs at this time.⁵³ Entergy, Occidental, and Dow agree that determinations must be made on a “case-by-case basis” on the QF-specific evidence provided in the section 210(m) application.⁵⁴ Dow further argues that the Commission should simply clarify that QF-specific issues may be raised when Entergy submits a section 210(m) application.⁵⁵

25. As to the fourth issue, the Louisiana Commission and the Texas Commission agree that the Commission should determine whether existing QFs that sell “as available” energy on the system are entering into new contracts or obligations with Entergy each time they sell “as available” energy, such that the obligation to enter into such new contracts or obligations may be terminated under section 210(m) of PURPA.⁵⁶

26. Both Entergy and Occidental state that determining now whether existing QFs that sell “as available” energy on the system are entering into new contracts or obligations is premature and should not be decided outside the context of a formal section 210(m) petition. Entergy contends that the issue of which QFs would be affected by a termination order cannot be analyzed in a vacuum, but rather only with respect to the “contracts” and “obligations” that pertain to particular QFs, and Occidental agrees that the Commission does not have the facts required to answer Entergy Retail Regulators’ request.⁵⁷ In response, Entergy Retail Regulators contend that no specific contractual analysis is required.⁵⁸

⁵² Louisiana Commission Comments at 4; Texas Commission Answer at 3.

⁵³ Dow Comments at 6.

⁵⁴ *Id.* at 6; Entergy February 21, 2013 Answer at 29; Occidental February 21, 2013 Protest at 15-16.

⁵⁵ Dow Comments at 6.

⁵⁶ Louisiana Commission Comments at 4; Texas Commission Answer at 3.

⁵⁷ Entergy February 21, 2013 Answer at 31; Occidental February 21, 2013 Protest at 16-17.

⁵⁸ Entergy Retail Regulators March 13, 2013 Motion for Leave to Respond at 8.

27. Dow strongly disagrees with Entergy Retail Regulators' suggestion that each QF sale of "as available" energy constitutes a new obligation. Dow states that QFs have made sales pursuant to these regulations for years, which clearly establishes a preexisting and continuing right. Dow contends that any suggestion that each individual "as available" sale represents a separate and new obligation, which is not part of a preexisting and continuing obligation, would constitute a gerrymandering of the facts to meet the requirements of section 210(m).⁵⁹ In response, Entergy Retail Regulators counter that it is difficult to believe that Congress would provide relief from a continuing mandatory purchase obligation in the case of an arms-length contract with definite terms and conditions between a QF owner and an electric utility once that contract terminates, but would treat the ability to sell "as available" energy as an indefinite and untouchable right in perpetuity.⁶⁰

IV. Discussion

A. Procedural Matters

28. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure,⁶¹ the notices of intervention and timely, unopposed motions to intervene serve to make those entities that filed them parties to this proceeding. Pursuant to Rule 214(d) of the Commission's Rules of Practice and Procedure,⁶² we will grant the late-filed motions to intervene given the parties' interest in the proceeding, the early stage of the proceeding, and the absence of undue prejudice or delay.

29. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure⁶³ prohibits an answer to a protest, or an answer, unless otherwise ordered by the decisional authority. We will accept the answers and response because they have provided information that assisted us in our decision-making process.

⁵⁹ Dow Comments at 7.

⁶⁰ Entergy Retail Regulators March 13, 2013 Motion for Leave to Respond at 10.

⁶¹ 18 C.F.R. § 385.214 (2013).

⁶² *Id.* § 385.214(d).

⁶³ *Id.* § 385.213(a)(2).

B. Commission Determination

1. The LMP-Based Avoided Cost Methodology

30. The Commission cannot determine at this time whether the avoided-cost rate for “as available” sales that is based on LMP in the MISO market and that Entergy has proposed at the state level would comply with PURPA and the Commission’s regulations, because to date, neither the Louisiana Commission, nor any other state regulatory authority, has addressed Entergy’s avoided-cost filing for “as available” sales.⁶⁴ Accordingly, the Commission does not have before it a state regulatory authority decision addressing Entergy’s proposed avoided-cost methodology for “as available” sales or a corresponding state regulatory authority justification for such methodology in light of the avoided-cost implementation factors set forth in the Commission’s regulations.⁶⁵ It is the state’s responsibility in the first instance to determine an avoided cost rate consistent with the Commission’s regulations.⁶⁶

31. The Commission notes, however, that Entergy requested, and the Louisiana Commission agreed, that Entergy be able to postpone filing a PURPA section 210(m) application with this Commission until no later than September 30, 2014. Such application, if granted, could provide relief from the PURPA mandatory purchase obligation and associated avoided cost rate for QFs covered by that application. The Commission does not require Entergy to wait until September 30, 2014, to file a PURPA section 210(m) application. If Entergy makes such a filing, the Commission will act on it within 90 days pursuant to PURPA section 210(m)(3).⁶⁷

⁶⁴ It appears that various states have opted to use LMPs in calculating avoided costs. *See* Entergy February 21, 2013 Answer at 19-20. The record in this proceeding does not contain extensive evidence on the particular methodologies that are being used by these states, and these methodologies have not otherwise been the subject of Commission proceedings.

⁶⁵ 18 C.F.R. § 292.304(e) (2013).

⁶⁶ After a state regulatory authority has determined an avoided cost rate, an electric utility, qualifying cogeneration facility or qualifying small power production may file a petition with this Commission pursuant to section 210(h)(2)(B), alleging that the state regulatory authority’s decision is inconsistent with PURPA or the Commission’s regulations and asking the Commission to initiate an enforcement action pursuant to section 210(h)(2)(A) of PURPA. *See* 16 U.S.C. § 824a-3(h) (2006).

⁶⁷ *Id.* § 824a-3(m)(3).

2. Transmission Constraints

32. The Commission finds that whether congestion that obstructs access to third-party buyers is present is a necessary factor for the Commission to consider in weighing a petition to terminate a utility's mandatory purchase obligation pursuant to PURPA section 210(m).⁶⁸ It is not, however, a factor whose presence necessarily needs to be considered in determining whether an avoided cost rate may be based on LMPs.⁶⁹

3. Operational Characteristics

33. The Commission finds that the question of “whether the same concerns that applied to Cornell University’s operation of its QF . . . apply to QFs on Entergy’s system” involves operational characteristics of individual QFs that are properly addressed on a case-by-case basis in PURPA section 210(m) applications. Because there is no section 210(m) application yet before the Commission, the Commission finds that it is premature to address this issue.

4. “As Available” Energy and New Contracts

34. The issue of whether specific continuing “as available” sales are new contracts or obligations such that the obligation to enter into such new contracts or obligations may be terminated under section 210(m) of PURPA is more appropriately addressed in a PURPA section 210(m) proceeding. Because there is no section 210(m) application yet before the Commission, the Commission finds that it is premature to address this issue.

35. However, the Commission notes that QF sales are often controlled by contract. Section 210(m)(6) of PURPA provides:

NO EFFECT ON EXISTING RIGHTS AND REMEDIES. –
Nothing in this subsection affects the rights or remedies of any party under any contract or obligation, in effect or pending approval before the appropriate State regulatory authority or non-regulated electric utility on the date of enactment of this subsection, to purchase electric energy or capacity from or to sell electric energy or capacity to a [QF]

⁶⁸ See 18 C.F.R. § 292.310(d)(2) (2013).

⁶⁹ See *id.* § 292.304(e).

under this Act (including the right to recover costs of purchasing electric energy or capacity).⁷⁰

The Commission, in Order Nos. 688 and 688-A interpreted the term “obligation” as a “legally enforceable obligation” which is established through a state’s implementation of PURPA.⁷¹ The Commission explained that it would address whether a contract or legally enforceable obligation exists in the context of a section 210(m) proceeding. However, nothing in section 210(m) of PURPA or the Commission’s orders implementing section 210(m) suggests that an “obligation” other than a contract or legally enforceable obligation is protected by the grandfathering provision of section 210(m) of PURPA.

The Commission orders:

Entergy Retail Regulators’ Petition is granted, in part, consistent with the discussion in the body of this order.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

⁷⁰ The Commission adopted this language into its regulations at 18 C.F.R. § 292.314.

⁷¹ See *New PURPA Section 210(m) Regulations Applicable to Small Power Production and Cogeneration Facilities*, Order No. 688, FERC Stats. & Regs. ¶ 31,233, at PP 14, 212 (2006), *order on reh’g*, Order No. 688-A, FERC Stats. & Regs. ¶ 31,250, at P 136 (2007) (cross-referenced at 119 FERC ¶ 31,305 (2007)), *appeal denied sub nom. Am. Forest & Paper Ass’n v. FERC*, 550 F.3d 1179 (D.C. Cir. 2008).