

148 FERC ¶ 61,207  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Cheryl A. LaFleur, Chairman;  
Philip D. Moeller, Tony Clark,  
and Norman C. Bay.

PPL Electric Utilities Corporation

Docket No. QM13-2-002

ORDER DENYING REHEARING AND  
DISMISSING REQUEST FOR CLARIFICATION

(Issued September 18, 2014)

1. On November 18, 2013, PPL Electric Utilities Corporation (PPL Electric) filed a request for rehearing of a Commission order issued on October 17, 2013.<sup>1</sup> In the October 17 Order, the Commission denied PPL Electric's request to terminate its mandatory purchase obligation under section 210(m) of the Public Utility Regulatory Policies Act of 1978 (PURPA)<sup>2</sup> for the Souderton LLC cogeneration qualifying facility (Souderton QF), which is expected to have a net capacity of 18.1 MW.<sup>3</sup> On December 3, 2013, the Pennsylvania Public Utility Commission (Pennsylvania Commission) filed a motion for clarification in response to the October 17 Order. As discussed below, we deny PPL's request for rehearing, and dismiss the Pennsylvania Commission's motion for clarification.

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<sup>1</sup> *PPL Elec. Util. Corp.*, 145 FERC ¶ 61,053 (2013) (October 17 Order).

<sup>2</sup> 16 U.S.C. § 824a-3(m) (2012).

<sup>3</sup> The Souderton QF was self-certified as a topping-cycle cogeneration qualifying facility in Docket No. QF13-325-000 and self-recertified in QF13-325-001, and was slated to begin operations and sales on April 1, 2014. The Souderton QF is owned and operated by IPS Power Engineering Inc. (IPS Power).

## I. Background

2. In 2009, the Commission terminated PPL Electric's mandatory purchase obligation to purchase capacity and energy from qualifying facilities (QF) that are larger than 20 MW in its service territory within PJM Interconnection, LLC (PJM).<sup>4</sup> The termination of PPL Electric's mandatory purchase obligation was based on the finding, reflected in section 292.309(e) of the Commission's regulations,<sup>5</sup> that the PJM markets qualify as markets that warrant termination of the mandatory purchase obligation and the rebuttable presumption, also reflected in section 292.309(e), that QFs with a capacity larger than 20 MW have nondiscriminatory access to the PJM markets, and thus electric utilities that are members of PJM may be relieved of the obligation to purchase electric energy from larger-than-20 MW QFs.

3. However, the Commission created another rebuttable presumption: QFs with a net capacity of 20 MW or below do not have nondiscriminatory access to the market.<sup>6</sup> In creating this rebuttable presumption the Commission found persuasive arguments that some QFs may, in practice, not have nondiscriminatory access to markets in light of their small size; the Commission noted that there was agreement among commenters representing both QFs and utilities that small size could affect a QF's ability to access markets.<sup>7</sup> The Commission explained that it adopted this rebuttable presumption for small QFs to reflect that smaller QFs are often interconnected at a distribution level and that QFs interconnected at the distribution level may, in practice, lack the same level of access to markets as those connected to transmission lines.<sup>8</sup> The Commission also explained that smaller QFs were more likely to have to overcome obstacles that larger QFs would not have to overcome, such as jurisdictional differences, pancaked delivery

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<sup>4</sup> *PPL Elec. Util. Corp.*, Docket Nos. QM09-6-000 and QM09-6-001 (Oct. 14, 2009, *errata* Oct. 15, 2009) (delegated letter order).

<sup>5</sup> 18 C.F.R. § 292.309(e) (2014).

<sup>6</sup> 18 C.F.R. § 292.309(d)(1) (2014); *see also New PURPA Section 210(m) Regulations Applicable to Small Power Production and Cogeneration Facilities*, Order No. 688, FERC Stats. & Regs. ¶ 31,233, at P 72, *et seq.* (2006), *order on reh'g*, Order No. 688-A, FERC Stats. & Regs. ¶ 31,250, at P 94, *et seq.* (2007), *appeal denied sub nom. American Forest and Paper Assoc. v. FERC*, 550 F.3d 1179 (D.C. Cir. 2008).

<sup>7</sup> *E.g.*, Order No. 688, FERC Stats. & Regs. ¶ 31,233 at PP 72-7, *order on reh'g*, Order No. 688-A, FERC Stats. & Regs. ¶ 31,250 at P 103.

<sup>8</sup> Order No. 688-A, FERC Stats. & Regs. ¶ 31,250 at PP 94-103.

rates, and administrative burdens to obtaining access to distant buyers. The Commission found that such difficulties supported a rebuttable presumption that smaller QFs have “substantially less ability to access wholesale markets than do larger QFs.”<sup>9</sup> The Commission further explained that it set this rebuttable presumption at 20 MW, rather than at a much smaller size of one or two MW, to reflect its understanding of “the general nature of QFs’ interconnection practices and the relative capabilities of small entities” to participate in markets.<sup>10</sup>

4. The Commission has explained that, to overcome the rebuttable presumption that QFs 20 MW and smaller lack nondiscriminatory access to markets, the electric utility must make additional showings to demonstrate, on a QF-by-QF basis, that each small QF, in fact, has nondiscriminatory access to the relevant wholesale markets.<sup>11</sup> Order No. 688 placed the burden of proof on the electric utility to demonstrate that a small QF has nondiscriminatory access to the markets of which the electric utility is a member (i.e., in this case, PJM). The Commission also has stated that an application for relief must be fully supported by documentation upon which it can make the required finding.<sup>12</sup>

5. PPL Electric petitioned to be relieved of the obligation to purchase power from the Souderton QF. PPL Electric argued that the Souderton QF will have nondiscriminatory access to PJM, an independently-administered, auction-based day-ahead and real-time wholesale market for energy and long-term sales of capacity. PPL Electric urged that, by showing that the Souderton QF had access to the PJM markets, PPL Electric had overcome the rebuttable presumption set forth in section 292.309(d)(1) of the Commission’s regulations for the below 20 MW Souderton QF.

6. In denying PPL Electric relief from its mandatory purchase obligation with respect to the Souderton QF, the Commission stated:

While PPL Electric argues that it is not aware of any problematic operational characteristics, transmission constraints or congestion, it does not appear, based on the record before us, that there have been any QF-specific studies, e.g., an interconnection study, that would demonstrate the absence of any specific transmission constraints that may be facing the

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<sup>9</sup> *Id.* P 96; *accord id.* P 103.

<sup>10</sup> *Id.* P 101.

<sup>11</sup> Order No. 688, FERC Stats. & Regs. ¶ 31,233 at P 9(B)-(C) & n.9.

<sup>12</sup> *Id.* P 28.

Souderton QF. Additionally, while PPL Electric contends that the design of the Souderton QF, as detailed in the Souderton QF's self-certification, should allow for [IPS Power] to readily sell net capacity into the PJM markets, it is too early to determine whether the QF will, in fact, be built according to its anticipated plan, and it is similarly too early to know whether, in practice, the Souderton QF will be able to sell net capacity into the PJM markets at that time.<sup>13</sup>

7. The Commission further stated:

While the Commission chose not to prejudge what evidence would be sufficient to demonstrate whether a small QF has nondiscriminatory access to the market, Order No. 688 did note that such evidence could include whether the QF has, in fact, been participating in the market or is owned by, or is an affiliate of, an entity that has been participating in the market. Here, the Souderton QF is a new QF not yet in operation, and as such has not been participating in PJM's markets, and there is no evidence that the Souderton QF will be owned by, or is an affiliate of, an entity participating in PJM's markets.<sup>14</sup>

## II. Filings

### PPL Electric's Request for Rehearing

8. PPL Electric asserts that the October 17 Order errs by effectively creating an exemption from section 210(m) of PURPA for small QFs that have not yet been built and/or are not yet operational, and effectively insulates such QFs from section 210(m) of PURPA by precluding a utility from terminating its mandatory purchase obligation for this "entire class" of QFs.<sup>15</sup> PPL Electric argues that the Commission has created an evidentiary standard for overcoming the rebuttable presumption that is impractical, if not impossible, for host utilities to satisfy. PPL Electric asserts that such an evidentiary standard is therefore inconsistent with the statute and, as so, is arbitrary and capricious.<sup>16</sup>

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<sup>13</sup> October 17 Order, 145 FERC ¶ 61,053 at P 21.

<sup>14</sup> October 17 Order, 145 FERC ¶ 61,053 at P 23 (footnotes omitted).

<sup>15</sup> PPL Electric Request for Rehearing at 1-4, 7-10.

<sup>16</sup> *Id.* at 1, 4, 5, and 10.

9. According to PPL Electric, in the October 17 Order, the Commission identified some evidence that could support PPL Electric's application, but PPL Electric asserts that, "such evidence would only become available (a) once the Souderton QF becomes or is close to becoming operational; and (b) in reality only after PPL Electric may already be obligated to enter into an agreement to purchase power from the Souderton QF."<sup>17</sup> PPL Electric argues that the Commission has thereby disallowed PPL Electric timely opportunity to overcome the rebuttable presumption, i.e., before the time that PPL Electric may become obligated to purchase the energy output of the facility. PPL Electric also points to Commissioners Clark and Moeller's concurring statement to the October 17 Order: "[it is] important that the Commission's standard for rebutting the presumption not be so high as to preclude a utility from successfully making a showing before the QF is fully operational and the utility is obligated to purchase. Such a circular result would not be a reasonable interpretation of the statute or our own regulations."<sup>18</sup> PPL Electric argues that the Commission's standard for rebutting the presumption is so high as to preclude an electric utility from successfully rebutting the small QF presumption with respect to a QF that is not yet operational.

10. According to PPL Electric, the October 17 Order also precluded an electric utility's ability to rely on a QF's statements made in a Form 556 self-certifying a facility's status as a QF. PPL Electric states that the inability to rely on representations made by IPS Power in its Form 556 QF self-certification of the Souderton QF and requiring PPL Electric and IPS Power to wait an unspecified amount of time before the Commission will consider PPL Electric's arguments that the Souderton QF has access to the PJM markets, and places PPL Electric in the unworkable situation of trying to determine at what point in the development process the design of the Souderton QF will be "final enough" to satisfy the Commission.<sup>19</sup> PPL Electric asserts that, instead, it should be entitled to rely on the representations made by IPS Power in its Form 556 QF self-certification. PPL Electric adds that, if the Commission terminates PPL Electric's obligation to purchase the energy output of the Souderton QF based on representations made in the facility's Form 556 and those circumstances later change, IPS Power may

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<sup>17</sup> *Id.* at 7.

<sup>18</sup> *Id.* at 6 (citing October 17 Order, 145 FERC at 61,329).

<sup>19</sup> *Id.* at 5-6.

then file an application under section 292.311 of the Commission's regulations<sup>20</sup> to reinstate PPL Electric's obligation to purchase based on such changes.<sup>21</sup>

11. Moreover, PPL Electric asserts that "[t]o the extent that the Commission requires further evidence to demonstrate that the Souderton QF has nondiscriminatory access to the market, the Commission should identify the specific evidence that must be provided to address any identified deficiencies and ensure that such evidence can be obtained prior to the time that PPL Electric may become first obligated to purchase the output of the Souderton QF."<sup>22</sup>

### **Pennsylvania Commission's Motion for Clarification**

12. On December 3, 2013, the Pennsylvania Commission filed a motion for clarification, stating that it supports the position of the concurring Commissioners to the October 17 Order that it would be beneficial for the Commission to provide additional guidance for applicants seeking to be relieved of PURPA obligations for 20 MW and below facilities.<sup>23</sup> The Pennsylvania Commission submits that additional clarification of the applicable standard may be necessary so that, as stated in the concurring statement, the presumption is not so high as to "preclude a utility from successfully making a showing before the QF is fully operational and the utility is obligated to purchase."<sup>24</sup> Moreover, according to the Pennsylvania Commission, further clarity will provide greater legal predictability for the states where these requests are first presented. The Pennsylvania Commission further asserts that PPL Electric has addressed factors pertaining to the Souderton QF being able to access PJM markets, including: operational, transmission service scheduling and transmission constraints. According to the Pennsylvania Commission, PPL Electric additionally provided transmission information as to the following: (1) PJM's long-term transmission plan; (2) transmission constraints; (3) levels of congestion; and (4) relevant system impact studies for generation

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<sup>20</sup> 18 C.F.R. § 292.311 (2014).

<sup>21</sup> PPL Electric Request for Rehearing at 6.

<sup>22</sup> *Id.* at 3.

<sup>23</sup> Pennsylvania Commission Motion for Clarification at 4 (citing October 17 Order, 145 FERC at 61,330).

<sup>24</sup> Pennsylvania Commission Motion for Clarification at 5 (citing October 17 Order, 145 FERC at 61,330).

interconnections.<sup>25</sup> The Pennsylvania Commission states that it agrees with the concurring statement that, although PPL Electric did not provide all of the necessary, specific information as to the Souderton QF itself, the information related to the PJM market rules and planning process were very instructive.<sup>26</sup> The Pennsylvania Commission requests that the Commission clarify that this type of information regarding regional transmission organization market rules and planning is important in the Commission's consideration of applications filed under section 292.303 of the regulations.

13. Additionally, the Pennsylvania Commission further requests that the Commission provide guidance as to how PURPA should be applied in deregulated states, i.e., states in which the electric utilities do not own their generation and may not occupy a default supplier role in the future. According to the Pennsylvania Commission, Pennsylvania is a fully deregulated state and its electric distribution utilities have divested themselves of all generation, and Pennsylvania has enacted a default supply procurement policy that discourages entry into long term contracts.<sup>27</sup> Therefore, the Pennsylvania Commission asserts that requiring utilities such as PPL Electric to enter into long-term contracts with QFs may be inconsistent with state law and may result in consequences unintended by the Commission.<sup>28</sup> According to the Pennsylvania Commission, it is possible that Pennsylvania's electric utilities may not be required to provide default supply in the future, and if this were to occur it is unclear how utilities such as PPL Electric would be expected to comply with the QF mandatory purchase obligations of PURPA.<sup>29</sup> The Pennsylvania Commission requests the Commission to provide clarification "on these important questions and provide the necessary legal predictability that will be required to implement its PURPA obligations in the future."<sup>30</sup>

### **III. Discussion**

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<sup>25</sup> *Pennsylvania Commission Motion for Clarification* at 3.

<sup>26</sup> *Id.* at 5.

<sup>27</sup> *Id.* at 6 (citing 66 Pa.C.S.A. § 2807(e)).

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

<sup>29</sup> *Id.* (citing S. B. 1121, The General Assembly of Pennsylvania (Session of 2013)).

<sup>30</sup> *Id.*

14. PPL Electric's arguments on rehearing do not persuade us to change our prior determination that PPL Electric failed to overcome the rebuttable presumption that the Souderton QF, as a QF 20 MW or smaller, lacks nondiscriminatory access to the relevant wholesale markets. As discussed below, we deny PPL Electric's request for rehearing.

15. We disagree with PPL Electric's argument on rehearing that the Commission has, in its October 17 Order, effectively exempted an entire class of QFs, i.e., those 20 MW and smaller, from the termination of the mandatory purchase obligation. As noted above, the Commission, in implementing section 210(m) of PURPA, made certain findings, and adopted and codified, as part of its regulations, certain rebuttable presumptions for processing applications made pursuant to section 210(m) of PURPA. In section 292.309(e) of the Commission's regulations, the Commission found that the PJM markets qualify as markets that warrant termination of the mandatory purchase obligation. In section 292.309(e), the Commission also adopted two rebuttable presumptions: (1) that QFs larger than 20 MW have nondiscriminatory access to the PJM markets, and (2) that electric utilities that are members of PJM should be relieved of the obligation to purchase electric energy from larger-than-20 MW QFs. The Commission's regulations also contain an additional rebuttable presumption that a QF with a net capacity at or below 20 MW does not have nondiscriminatory access to the markets that qualify as markets that warrant termination of the mandatory purchase obligation.

16. In its application for termination of the purchase obligation, PPL Electric presented evidence that PJM markets are the type of markets that warrant termination of the mandatory purchase obligation.<sup>31</sup> On rehearing, PPL Electric argues that this evidence is sufficient to rebut the presumption that small QFs have access to PJM markets.<sup>32</sup> In essence, PPL Electric claims that the same evidence that the Commission relied on to find that QFs larger than 20 MW in the PJM markets have nondiscriminatory access to those markets should be used to find that QFs with a net capacity of 20 MW or less also have access to PJM markets. The evidence PPL Electric submitted does not address whether the Souderton QF, which is a QF smaller than 20 MW, has nondiscriminatory access to the PJM markets despite its small size, however. PPL

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<sup>31</sup> PPL, as discussed below at P 22, also argued that the design of the Souderton QF, as detailed in its Form 556 self-certification, should allow the QF to readily sell net capacity into PJM markets.

<sup>32</sup> PPL Electric also relies on the findings made when its mandatory purchase obligation to purchase from QFs larger than 20 MW was terminated. *See supra*, note 4. The findings in the order terminating PPL's mandatory purchase obligation for QFs larger than 20 MW were based on the rebuttable presumptions, including the presumption of access for QFs larger than 20 MW, contained in 18 C.F.R. § 292.309(e) (2014).

Electric is essentially asking the Commission to read the rebuttable presumption for QFs 20 MW or smaller (that a QF with a net capacity at or below 20 MW does not have nondiscriminatory access to markets) out of the Commission's regulations. We see no reason to read that provision out of our regulations.<sup>33</sup>

17. Turning to the evidence submitted by PPL Electric, that evidence failed to rebut the presumption that QFs 20 MW and smaller lack nondiscriminatory access to markets. As the Commission explained in the October 17 Order, the Commission addressed a similar attempt to rebut the presumption that QFs with a net capacity of 20 MW or less lack nondiscriminatory access to markets in *Public Service Company of New Hampshire*.<sup>34</sup> The Commission there explained that a utility may not simply show that: (1) market rules permit small QF participation in the markets; and (2) that other small QFs have participated in the markets. The showings that PPL Electric claims rebut the presumption that small QFs lack nondiscriminatory access to markets are the same showings that the Commission found were inadequate to rebut that presumption in *PSNH*. PPL Electric effectively acknowledges that it cannot demonstrate at this time that there are no constraints or other barriers to the Souderton QF output reaching the markets;<sup>35</sup> nevertheless it argues that, to the extent barriers or constraints exist, IPS

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<sup>33</sup> Even if the Commission agreed that smaller QFs have the same nondiscriminatory access as larger QFs, the proper forum for changing our regulations would be in a rulemaking proceeding, where comments would be sought on the change the Commission's regulations, not in an individual, case-specific proceeding where the Commission is applying its regulations. *E.g., United States v. DeLeon*, 330 F.3d 1033, 1036 (8<sup>th</sup> Cir. 2001) (Administrative Procedure Act requires, to enact substantive rules, notice of the proposed rule, receipt and consideration of comments, and publication of the final rule). Similarly, the proper forum for raising an argument that the Commission's rebuttable presumption contained in 18 C.F.R. § 292.309(d)(1) (2014) is inconsistent with PURPA is not this proceeding. Our PURPA section 210(m) regulations, including 18 C.F.R. § 292.309(d)(1) (2014), were, in fact, adopted in a rulemaking, and were challenged and affirmed on appeal. Order No. 688, FERC Stats. & Regs. ¶ 31,233 at P 72, *et seq.*, *order on reh'g*, Order No. 688-A, FERC Stats. & Regs. ¶ 31,250 at P 94, *et seq.*, *appeal denied sub nom. American Forest and Paper Assoc. v. FERC*, 550 F.3d 1179 (D.C. Cir. 2008).

<sup>34</sup> 131 FERC ¶ 61,027, at PP 18-22 (2010), *reh'g denied*, 134 FERC ¶ 61,041 (2013) (*PSNH*).

<sup>35</sup> As a result of the October 17 Order, PPL Electric argues that currently it is at least "impractical" for PPL Electric to rebut the presumption that the Souderton QF lacks nondiscriminatory access. *See* PPL Electric Request for Rehearing at 1-2, 7-8. Moreover, we add, PPL Electric's failure to rebut the presumption at this time does not

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Power can obtain financial transmission rights and upgrades as necessary to relieve any relevant constraints.<sup>36</sup> We find PPL's argument unpersuasive; PPL Electric, in fact, acknowledges its inability to meet its burden and demonstrate that Souderton will have access to the markets, and the need for IPS Power to obtain financial transmission rights and upgrades are examples of the kinds of obstacles and burdens that the Commission had in mind in creating the rebuttable presumption that a small QF may lack nondiscriminatory access to markets because of its size.<sup>37</sup>

18. PPL Electric argues that the October 17 order stands for the proposition that no QF 20 MW or smaller has nondiscriminatory access to PJM markets. PPL Electric believes this result is inconsistent with section 210(m) of PURPA. It is simply untrue, however, that, under the Commission's regulations, no QF 20 MW or smaller will be found to have nondiscriminatory access to markets. Indeed, the Commission has on two occasions since the October 17 Order relieved utilities of the obligation to purchase from specific QFs that are 20 MW or smaller.<sup>38</sup> In each of those cases the applicable electric utilities demonstrated that individual small QFs had either directly participated in organized markets or were affiliated with entities that participated in such markets. PPL Electric has not presented similar evidence concerning the Souderton QF. As the Commission noted in its October 17 Order: "there is no evidence that the Souderton QF will be owned by, or is an affiliate of, an entity participating in PJM's markets."<sup>39</sup>

19. We also disagree with PPL Electric that the standard for rebuttal is too high when applied to a yet-to-be-built QF. The standard is the same for a built or as-yet-unbuilt QF and PPL Electric essentially asks for an easier to meet standard in the latter case. We see no sound reason to do so. The Commission created a rebuttable presumption that QFs with a net capacity of 20 MW or below do not have nondiscriminatory access to the market.<sup>40</sup> That rebuttable presumption is codified in section 292.309(d)(1) of the

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deny PPL Electric the opportunity to make the necessary showing at a later date.

<sup>36</sup> But, beyond postulating that Souderton should be able to over-come any such barriers or constraints, PPL never demonstrates that, in fact, Souderton will be able to do so.

<sup>37</sup> See *supra* notes 6-10 and accompanying text.

<sup>38</sup> *City of Burlington, Vermont*, 145 FERC ¶ 61,121 (2013); *Fitchburg Gas and Electric Light Company*, 146 FERC ¶ 61,186 (2014).

<sup>39</sup> October 17 Order, 145 FERC ¶ 61,053 at P 22.

<sup>40</sup> See *supra* P 3, 15.

Commission's regulations.<sup>41</sup> In creating that rebuttable presumption the Commission recognized that some QFs may, in practice, not have nondiscriminatory access to markets given their small size.<sup>42</sup> The Commission noted that small QFs are often interconnected at a distribution level and that QFs interconnected at the distribution level may lack the same access to markets as QFs interconnected to transmission lines.<sup>43</sup> The Commission also explained that smaller QFs were more likely to have to overcome obstacles that larger QFs would not have to overcome, such as jurisdictional differences, pancaked delivery rates, and other, administrative burdens to obtaining access to distant markets. The Commission found that such difficulties meant that smaller QFs have "substantially less ability to access wholesale markets than do larger QFs."<sup>44</sup> In Order No. 688, the Commission declined to specify precisely what evidence would be sufficient to rebut the presumption that QFs with a net capacity of 20 MW or below do not have nondiscriminatory access to the market, but the Commission noted that the relevant evidence may include the extent to which the QF has already been participating in the market or is owned by, or is an affiliate of, an entity that has already been participating in the market.<sup>45</sup> In Order No. 688-A, the Commission again declined to specify precisely what evidence would rebut the small QF presumption, but stated that it was "appropriate in the first instance to place on the electric utility the burden of demonstrating that a small QF does in fact have nondiscriminatory access to the types of markets" specified in section 210(m) of PURPA.<sup>46</sup>

20. As discussed above, the Commission has twice relieved an electric utility of its mandatory purchase obligation upon a presentation of evidence that, as particularly relevant in the context of those proceedings, the QF was owned by, or was an affiliate of, an entity that had been participating in the relevant market.<sup>47</sup> That is not to suggest that

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<sup>41</sup> 18 C.F.R. § 292.309(d)(1) (2014).

<sup>42</sup> *E.g.*, Order No. 688, FERC Stats. & Regs. ¶ 31,233 at PP 72-73; Order No. 688-A, FERC Stats. & Regs. ¶ 31,250 at P 103.

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

<sup>44</sup> *Id.* P 96; *accord id.* P 103.

<sup>45</sup> Order No. 688, FERC Stats. & Regs. ¶ 31,233 at P 77.

<sup>46</sup> Order No. 688-A, FERC Stats. & Regs. ¶ 31,250 at P 103.

<sup>47</sup> *See supra* P 18 & n.38; *accord* Order No. 688, FERC Stats. & Regs. ¶ 31,233 at P 78.

that is the only relevant evidence, and indeed, depending on the circumstances, other evidence such as the absence of constraints and congestion on the electric utility's system could well be relevant to a showing that a small QF has the necessary market access, despite its small size and circumstances, that would warrant relieving the electric utility of its mandatory purchase obligation pursuant to section 210(m) of PURPA. In this regard, as the Commission explained in Order Nos. 688 and 688-A, the Commission's concerns in establishing the small QF presumption were that:

a small QF will have greater difficulty obtaining nondiscriminatory access to markets due to the tendency for small QFs to be interconnected to lower voltage radial lines, and the consequent need to overcome other potential obstacles to nondiscriminatory access, such as local distribution access rules that are not within the Commission's jurisdiction, pancaked delivery rates and additional administrative burdens to obtain access to buyers other than the interconnected utility.[<sup>48</sup>]

21. In order to rebut the presumption that a QF 20 MW and smaller lacks nondiscriminatory access to the markets, an electric utility should show that the concerns expressed by the Commission in establishing the rebuttable presumption do not apply to a particular small QF. The suggestion that electric utilities may be able to rebut the presumption that a QF 20 MW or smaller lacks nondiscriminatory access to markets by showing that a particular QF is owned by, or is an affiliate of, an entity that has been participating in the relevant market is intended to address the additional administrative burdens that smaller QFs face to obtain access to buyers other than the interconnected utility. As noted above, though, there may be other evidence concerning the transmission and distribution system to which the QF is interconnected that would be relevant to a showing that an individual QF has the necessary access to the market that would warrant relieving the electric utility of its mandatory purchase obligation pursuant to section 210(m) of PURPA. In order to rebut the presumption that a 20 MW or smaller QF lacks nondiscriminatory access to markets, an electric utility will also need to show that other barriers to access, such as those mentioned in the quoted text above, do not exist.<sup>49</sup> This said, in this case PPL Electric did not present sufficient evidence to rebut the presumption that the Souderton QF lacks nondiscriminatory access to the markets.

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<sup>48</sup> Order No. 688, FERC Stats. & Regs. ¶ 31,233 at P 78.

<sup>49</sup> In this regard, we note that electric utilities are required to include certain information – including information about, for example: constraints and congestion; the process, procedures and practices to arrange for transmission service; and the agreements QFs must execute to effectuate market sales – in their applications. 18 C.F.R. § 292.310(d)(3) (2014). In Order No. 688, the Commission explained that such

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22. As just noted, the Commission has now twice relieved an electric utility from the obligation to enter into a new contract or obligation with a QF upon a showing that, as particularly relevant in the context of those two proceedings, the QF had either itself participated in an organized market or was an affiliate of an entity that participated in an organized market.<sup>50</sup> While it is true that an electric utility would not be able to show that an unbuilt QF has, in fact, participated in an organized market, it can present other relevant evidence, such as: providing studies addressing whether there are constraints or congestion that could deny or limit the QF's market access; and information related to a specific QF's ability to overcome administrative burdens, such as showing that the QF is affiliated with an entity that participates in an organized market or markets. Here, PPL Electric presented no such evidence.

23. Finally, PPL Electric faults the Commission for stating that "it is too early to determine whether the QF will, in fact, be built according to its anticipated plan,"<sup>51</sup> PPL Electric argues that the Commission was stating that a purchasing electric utility could not rely on the information provided by a QF in a Form 556. In its statement, the Commission was responding, in hindsight inartfully, to PPL Electric's assertion that the design of the Souderton QF, as detailed by IPS Power in the Souderton QF Form 556 self-certification, should allow for IPS Power to readily sell net capacity into the PJM markets. However, while the Form 556 indeed provides operational information about the certifying QF itself, the information from the Souderton QF Form 556 does not demonstrate that there are not other practical barriers that prevent the Souderton QF, as a small QF, from obtaining access to the PJM markets. The Commission certainly did not intend to suggest that a Form 556 self-certification cannot be relied on by a purchasing utility. Instead, a review of the Souderton QF's self-certification does not show that the Souderton QF has nondiscriminatory access to markets despite its small size; there is simply no information in the Souderton QF Form 556 that shows that the QF indeed has nondiscriminatory access to markets despite its size.

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information was to enable QFs larger than 20 MW to be able to seek to rebut the presumption – the opposite presumption to that at issue here – that QFs larger than 20 MW indeed have nondiscriminatory access to the market. Order No. 688, FERC Stats. & Regs. ¶ 31,233 at P 129.

<sup>50</sup> As noted elsewhere in this order, the existence of an affiliate, however, is not the only relevant factor, and would not alone warrant a finding of access where other barriers to access – for example, constraints or congestion that deny or limit market access – still exist.

24. Turning to the motion for clarification made by the Pennsylvania Commission, the issues it raises are largely broader issues beyond the scope of this proceeding. Accordingly, we will dismiss it. However, we do agree that PJM market rules and planning processes are relevant to the issue of access to markets; as discussed above, the Commission relied on such rules in determining, in Order No. 688, that QFs larger than 20 MW in PJM have nondiscriminatory access to markets that warrant termination of the PURPA mandatory purchase obligation. However, in creating the rebuttable presumption for QFs 20 MW or smaller, the Commission also considered that smaller QFs, in practice, have substantially less ability to access wholesale markets, like PJM, than do larger QFs. Furthermore, as the Commission stated in *PSNH*, a utility may not simply show that market rules permit small QF participation in the markets, or that other small QFs have participated in the markets.<sup>52</sup> Rather, the relevant issue is the particular QF's access. In this case, PPL Electric relied on the fact that PJM has developed markets and did not demonstrate that the Souderton QF will have nondiscriminatory access to those markets, despite its small size. As to the Pennsylvania Commission's request for additional guidance for deregulated states and for utilities that are faced with entering into long term contracts or that are not required to provide default supply, we understand and appreciate the request for guidance. However, we will not at this time and in this proceeding adopt changes to the rebuttable presumption contained in section 292.309(d) of our regulations.<sup>53</sup>

The Commission orders:

(A) PPL Electric's request for rehearing is hereby denied, as discussed in the body of this order.

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<sup>52</sup> October 17 Order, 145 FERC ¶ 61,053 at P 22.

<sup>53</sup> See 18 C.F.R. § 292.309(d) (2014).

(B) Pennsylvania Commission's request for clarification is hereby dismissed, as discussed in the body of this order.

By the Commission.

( S E A L )

Nathaniel J. Davis, Sr.,  
Deputy Secretary.