

151 FERC ¶ 61,110
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Northern States Power Company,
a Minnesota corporation

Docket No. QM15-2-000

ORDER DENYING APPLICATION TO TERMINATE MANDATORY PURCHASE
OBLIGATION

(Issued May 14, 2015)

1. On February 18, 2015, Northern States Power Company, a Minnesota corporation (NSPM) filed an application¹ pursuant to section 210(m) of the Public Utility Regulatory Policies Act of 1978 (PURPA)² and section 292.309(a) of the Commission's regulations.³ NSPM seeks termination of its obligation to purchase electric energy and capacity from an interconnecting run-of-the-river hydroelectric qualifying facility (QF) with a net capacity of 17.92 MW owned by Twin Cities Hydro LLC (Twin Cities).⁴ In this order, we deny NSPM's request to terminate its mandatory purchase obligation for the Twin Cities QF, as discussed below.

I. Background

2. In 2011, the Commission terminated NSPM's mandatory purchase obligation to purchase capacity and energy from new contracts and obligations for QFs larger than 20 MW in its service territory within Midcontinent Independent System Operator, Inc.

¹ On February 24, 2015, NSPM submitted an amendment to its application, including a list of potentially affected QFs as defined in 18 C.F.R. § 292.310 (2014).

² 16 U.S.C. § 824a-3(m) (2012).

³ 18 C.F.R. § 292.309(a) (2014).

⁴ Twin Cities self-certified on October 9, 2007 in Docket No. QF08-11-000.

(MISO).⁵ The termination of NSPM's mandatory purchase obligation was based on the finding, codified in 18 C.F.R. § 292.309(e) (2014), that the MISO markets qualify as markets that warrant termination of the mandatory purchase obligation and on the rebuttable presumption, also codified in 18 C.F.R. § 292.309(e) (2014), that QFs larger than 20 MW have nondiscriminatory access to the MISO markets.

3. Notwithstanding the above, the Commission in Order No. 688 also created another rebuttable presumption; that QFs with a net capacity of 20 MW or below do not have nondiscriminatory access to markets sufficient to warrant termination of the mandatory purchase obligation.⁶ 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.⁷ To overcome this rebuttable presumption that smaller QFs lack nondiscriminatory access to markets, the electric utility seeking termination of its purchase obligation 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.⁸ Additionally, 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, MISO), and explained that "relevant evidence may include the extent to which the QF has been participating in the market or is owned by, or is an affiliate of, a[n] entity that has been participating in the relevant market."⁹

⁵ *Northern States Power Co., a Minnesota corporation*, 136 FERC ¶ 61,093 (2011) (NSPM).

⁶ 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) (Order No. 688).

⁷ Order No. 688, FERC Stats. & Regs. ¶ 31,233 at P 103.

⁸ *Id.* P 9 (B)-(C) and n.9.

⁹ *Id.* P 78.

II. NSPM Application

4. NSPM's principal argument for terminating its PURPA mandatory purchase obligation with the Twin Cities QF is based on its contention that the Twin Cities QF has nondiscriminatory access to the MISO markets. Specifically, NSPM contends that Twin Cities has been selling energy into the wholesale energy markets of MISO, and that Twin Cities is affiliated with experienced hydroelectric plant operators. These facts, NSPM argues, refute the rebuttable presumption that Twin Cities, as a small QF, lacks nondiscriminatory access to the MISO markets.¹⁰

5. NSPM explains that, historically, Twin Cities and NSPM had entered into both a Qualifying Facility Generator Distribution Interconnection and Operating Agreement and a Distribution Wheeling Service Agreement, effective March 31, 2008, facilitating the sale of energy from the Twin Cities QF into the MISO wholesale energy market.¹¹ In accordance with the terms of the Distribution Wheeling Service Agreement, NSPM provides distribution wheeling service from the Twin Cities QF to NSPM's Merriam Park Substation, which is under the functional control of MISO. NSPM states that Twin Cities agreed to pay a distribution rate of \$1.65 per month per kilowatt for firm point-to-point distribution wheeling service on NSPM's distribution facilities, totaling \$29,568 each month.¹² Based on this distribution arrangement, NSPM asserts that, since March 2008, the Twin Cities QF has had the ability and did in fact participate in the MISO wholesale energy market, and that Twin Cities has been able to pay the distribution rate for firm point-to-point distribution wheeling service on NSPM's distribution facilities.

6. NSPM also contends that, under the Distribution Wheeling Service Agreement, Twin Cities recognized that the purpose of NSPM's wheeling service was to wheel electric energy produced by the Twin Cities QF to the wholesale energy market. NSPM quotes section 1.2 of the Distribution Wheeling Service Agreement which states, "[Twin Cities] acknowledges that NSP-M is providing nondiscriminatory, open access to the Midwest ISO wholesale energy market in rebuttal to any presumption express or implied in 18 C.F.R. § 292.309 while [Twin Cities] is taking service pursuant to this Agreement."¹³ NSPM claims that the quote means that Twin Cities acknowledges that its QF has access to the MISO markets. NSPM also points out that the Distribution

¹⁰ Application at 10-16.

¹¹ *Id.* at 8 (citing *Xcel Energy Services, Inc.*, Docket No. ER08-719-000, *et al.*, Delegated Letter Order (May 16, 2008)).

¹² *Id.* at 9, 13 (citing Distribution Wheeling Service Agreement § 1.4).

¹³ *Id.* at 12.

Wheeling Service Agreement states that Twin Cities will make its own transmission service requests and arrangements for credit, transmission service payments, and transmission capacity reservations and energy market participation with MISO under MISO's Open Access and Energy Market Tariff.¹⁴ NSPM concludes that the Distribution Wheeling Service Agreement establishes that the Twin Cities QF has nondiscriminatory access to MISO.

7. Next, NSPM maintains that the Twin Cities QF is affiliated with experienced hydroelectric plant operators, and that Twin Cities' parent company owns "one of the world's largest renewable power portfolios."¹⁵ NSPM explains that Twin Cities is a wholly-owned subsidiary of Brookfield Power US Holding America Company, which is a wholly-owned subsidiary of Brookfield Power Inc., an indirect wholly-owned subsidiary of Brookfield Asset Management Inc. Furthermore, NSPM states that Brookfield Renewable Energy Partners L.P. (Brookfield Renewable) owns \$17 billion in power assets, 5,849 MW of installed capacity, and long-term average generation from operating assets of 22,159 GWh annually. In the United States, NSPM states, Brookfield Renewable owns and manages 126 generating hydroelectric facilities and 371 generating units, and those assets have a generating capacity of 2,696 MW;¹⁶ the annualized long-term generation of Brookfield Renewable's hydroelectric portfolio in the United States in 2013 was 9,951 GWh, and actual generation was 10,082 GWh.¹⁷ NSPM argues that "[w]ith access to this expertise and these resources, Twin Cities should not have issues with continuing to access the MISO wholesale market."¹⁸

8. Finally, NSPM further asserts that it is not aware of any barriers to market access that the Twin Cities QF may face, and that it is not aware of any operational characteristics or transmission limitations or constraints that would prevent the Twin Cities QF from accessing and continuing to access the MISO market on a nondiscriminatory basis.¹⁹

¹⁴ *Id.* at 13.

¹⁵ *Id.* at 16.

¹⁶ *Id.* at 4.

¹⁷ *Id.*

¹⁸ *Id.* at 16.

¹⁹ *Id.*

III. Notices and Responsive Pleadings

9. Notice of NSPM's application and amendment to its application was published in the *Federal Register*, 80 Fed. Reg. 11,428 (2015), with interventions and protests due on or before March 24, 2015. Notices of NSPM's application were mailed by the Commission on February 25, 2015 to each of the potentially-affected QFs identified by NSPM.

10. Twin Cities filed a timely motion to intervene and protest. NSPM filed a motion for leave to answer and answer to Twin Cities' protest on April 8, 2015. Twin Cities filed a motion for leave to answer and answer on April 20, 2015. NSPM filed a brief answer in response Twin Cities' answer on April 23, 2015.

A. Twin Cities' Protest

11. Twin Cities argues that NSPM has not met its burden of demonstrating that the Twin Cities QF has nondiscriminatory access to the market. First, Twin Cities claims that neither its history of energy sales, nor its association with Brookfield Renewable, constitute sufficient basis for terminating the mandatory purchase obligation. Twin Cities states that its interconnection at the distribution level limits its access to the MISO markets and that this limitation hinders its ability to sell capacity into the MISO market.²⁰

12. Twin Cities acknowledges that it must pay NSPM a rate of \$1.65 per kilowatt per month for firm point-to-point distribution wheeling service over NSPM's distribution lines, but points out that this wheeling rate is in addition to MISO transmission charges, and results in pancaked delivery rates.²¹

13. Next, Twin Cities notes that, to serve as a capacity/planning resource²² to MISO load serving entities other than NSPM, it would have to go through the MISO

²⁰ Twin Cities Protest at 2.

²¹ *Id.* at 6-7.

²² The parties in this proceeding consistently refer to selling capacity into MISO's market or into the MISO capacity market. While, in one instance, Twin Cities referred to MISO's resource adequacy construct, *see id.* at 7, we will refer to the MISO capacity market in our discussion below given the parties' use of that phrase and because the Commission previously has found that MISO has "wholesale markets for long-term sales of capacity and electric energy" as that term is used in section 210(m) of PURPA.

interconnection process to obtain “Network Resource Interconnection Service under Attachment X” or “Energy Resource Interconnection Service under Attachment X and Firm Transmission Service” under MISO’s Tariff. Twin Cities claims that procuring a transmission interconnection is not a viable option for market access due to the prohibitive costs and significant amount of time required to complete the interconnection with no guarantee of timely upgrades necessary for deliverability. Thus, Twin Cities argues that it cannot currently sell capacity into the MISO capacity market or to another MISO load serving entity.²³ Based on these facts, Twin Cities concludes that it does not have nondiscriminatory access to the MISO market.

14. Secondly, Twin Cities argues that, even if NSPM has rebutted the presumption that the Twin Cities QF does not have nondiscriminatory access to the market, a legally enforceable obligation already exists requiring NSPM to enter into a power purchase agreement.²⁴ Twin Cities cites *JD Wind* for the proposition that a “QF, by committing itself to sell to an electric utility, also commits the electric utility to buy from the QF; these commitments result either in contracts or in non-contractual, but binding, legally enforceable obligations.”²⁵ Twin Cities states that it engaged in months of negotiations with NSPM, which according to *Cedar Creek*²⁶ show that a legally enforceable obligation was established. In *Cedar Creek*, the Commission stated that:

extensive negotiations between the parties are persuasive and point to the reasonable conclusion that Cedar Creek did commit itself to sell electricity to Rocky Mountain Power. Such commitment to sell to an electric utility, the Commission has found, ‘also commits the electric utility to buy from the QF; these commitments result either in contracts or in non-contractual, but binding, legally enforceable obligations.’²⁷

18 C.F.R. § 292.309(e) (2014). And, in the context of this case, NSPM must show that, to be relieved of its obligation to enter into a new contract or obligation to purchase from Twin Cities, Twin Cities has access to wholesale markets for long-term sales of capacity and electric energy.

²³ *Id.* at 8-9.

²⁴ *Id.* at 9.

²⁵ *JD Wind 1, LLC, et al.*, 129 FERC ¶ 61,148, at P 25 (2009), *reh’g denied*, 130 FERC ¶ 61,127 (2010) (*JD Wind*).

²⁶ *Cedar Creek Wind, LLC*, 137 FERC ¶ 61,006 (2011) (*Cedar Creek*).

²⁷ *Id.* P 39.

15. Specifically, Twin Cities argues that, on October 30, 2014, it formally communicated its agreement to enter into a QF contract to sell energy and capacity to NSPM under NSPM's terms, including payment for energy and capacity based on NSPM's yearly avoided cost calculation, a term of 1 year with the option to extend on an annual basis, and delivery at the Point of Interconnection, as defined in the Qualifying Facilities Interconnection and Operating Agreement between NSPM and Twin Cities.²⁸ Twin Cities argues that this communication established a legally enforceable obligation under state rules.²⁹

16. Twin Cities argues that it followed up several times with NSPM to check on the status of NSPM's contract preparation. Twin Cities argues that, while NSPM indicated that there were delays due to NSPM's needs to address other priorities, NSPM never indicated that it was not preparing the QF contract according to the terms in Twin Cities' October 30, 2014 communication to NSPM. Twin Cities states that, as recently as January 22, 2015, NSPM provided Twin Cities with updated avoided cost rates.³⁰ Twin Cities argues that NSPM never indicated that it was not committed to purchasing power from Twin Cities, that it was awaiting additional information from Twin Cities, or that it did not intend to enter into a QF power purchase agreement with Twin Cities. Twin Cities adds that NSPM's representation in its application that "NSPM has never indicated to Brookfield that NSPM would voluntarily enter into a power purchase agreement using the A52 Time of Day Purchase Service" for the Twin Cities QF, even if accurate, is of no legal consequence, because Twin Cities "committed to sell to [NSPM], and notwithstanding [NSPM's] decision not to follow through on its commitment to [Twin Cities] to memorialize the parties' agreement in a written contract, [NSPM] legally committed itself to purchase energy and capacity from [Twin Cities]."³¹

²⁸ Twin Cities Protest at 10.

²⁹ Twin Cities states that the Minnesota Public Utilities Commission has determined that, for a legally enforceable obligation to be established, certain specific information must be provided to the utility including, but not limited to, "(1) price; (2) site and design details of the proposed QF; (3) interconnection plans; (4) financing for the project; and (5) fuel supply."

³⁰ Twin Cities Protest at 11-12.

³¹ *Id.* at 12.

17. Twin Cities also cites *JD Wind*, in which the Commission stated:

[p]etitioners are thus entitled to a legally enforceable obligation in those situations where, for example, a utility has refused to negotiate a contract. In order to protect the rights of a QF, once a QF makes itself available to sell to a utility, a legally enforceable obligation may exist prior to the formation of a contract.³²

Twin Cities argues that a legally enforceable obligation arose when Twin Cities committed to sell to NSPM. Twin Cities requests that, in the event the Commission elects to grant NSPM's application, it be conditioned on resolution of this legally enforceable obligation issue, i.e., that such an obligation had been established before NSPM filed its application.³³

B. NSPM's Answer

18. NSPM reiterates that Twin Cities has been selling power from its QF into the MISO energy and ancillary services market since 2008, through NSPM's distribution system. NSPM argues that, while the Twin Cities QF may not be able to access the MISO capacity market, it could do so if it went through the MISO network resource interconnection service interconnection process. NSPM explains that this process requires a request to be submitted, a payment to be made to MISO for any required transmission studies, and approval by MISO.³⁴

19. NSPM also argues that the Commission should not decide whether a legally enforceable obligation already exists between NSPM and the Twin Cities QF. NSPM contends that the Commission has consistently left it to the states to determine whether a legally enforceable obligation exists. NSPM also argues that it never reached common ground with the Twin Cities QF to begin negotiations, because the Twin Cities QF could not fully meet the "firm power" requirement of NSPM's Rate Code A52 (the criteria for a long term avoided cost rate available to QFs over 100 kW). NSPM claims that its communication with Twin Cities was purely informational. NSPM recognizes that discussions regarding the requirements and rates set forth in Rate Code A52 took place; however, NSPM claims it never indicated to Twin Cities that the Twin Cities QF was fully eligible for Rate Code A52 Time of Day purchase service or that NSPM would

³² *JD Wind*, 129 FERC ¶ 61,148 at P 25 (internal footnotes omitted) (citing Order No. 688, FERC Stats. & Regs. ¶ 31,233 at P 212).

³³ Twin Cities Protest at 13.

³⁴ NSPM Answer at 6.

enter into a power purchase agreement with the Twin Cities QF using the A52 Time of Day Purchase Rate.³⁵

20. NSPM contends that correspondence between itself and Twin Cities does not satisfy conditions for a legally enforceable obligation as defined in a Minnesota Public Utilities Commission (Minnesota Commission) order; NSPM explains that “[c]ommissions and courts in other jurisdictions have generally found a LEO [i.e., a legally enforceable obligation] to exist when a QF has done everything within its power to create an enforceable obligation such that only an act of acceptance by the utility or approval by the state regulatory authority remains to establish the existence of a contract.”³⁶ NSPM argues that email correspondence with Twin Cities in October 30, 2014, in which Twin Cities indicated it was “comfortable with” certain terms does not constitute a legally enforceable obligation as defined by the Minnesota Commission. NSPM also references an email dated February 4, 2015, in which Twin Cities inquired whether NSPM would be able to “start negotiating,” is proof that Twin Cities did not believe negotiations had commenced.³⁷ NSPM argues that there are fundamental differences between the instant situation and the facts underlying the Commission’s ruling in *Cedar Creek*, which Twin Cities used to support its position. Namely, it maintains that, in *Cedar Creek*, the Commission did not rule on the existence of a legally enforceable obligation, but noted the parties had engaged in extensive negotiations involving drafts of agreements.³⁸ NSPM claims that it had not engaged in any negotiations with Twin Cities and NSPM had not proposed a draft contract, nor had Twin Cities proposed detailed contract terms to NSPM. Thus, NSPM argues there is no evidence to support extensive negotiations or the establishment of a legally enforceable obligation.³⁹

³⁵ *Id.* at 10-17.

³⁶ *In the Matter of the Petition by Highwater Wind LLC and Gadwall Wind LLC for Resolution of a Cogenerator and Small Power Production Dispute with Minnesota Power under Minn. Stat. § 216B.164, Subd. 5*, Minnesota Commission Docket No. E-015/CG-11-1073, Order Denying Claim of Legally Enforceable Obligation at 7 (Feb. 25, 2013), *available at*: <https://www.edockets.state.mn.us/EFiling/edockets/searchDocuments.do?method=showPoup&documentId={80AC5242-9912-44A8-886B-D35B486D9021}&documentTitle=20132-84101-01>.

³⁷ *Id.* at 18-20.

³⁸ *Cedar Creek*, 137 FERC ¶ 61,006 at PP 38-39.

³⁹ NSPM Answer at 19.

21. With regard to Rate Code A52, NSPM states that it discussed with Twin Cities on October 17, 2014 that the A52 rates were intended for QFs with a capacity of less than 100 kW, and that A52 rates were also available to QFs with capacity of more than 100 kW only if firm power is provided.⁴⁰ NSPM states that it explained that, for a determination of firm power delivery, the QF must have achieved an on peak capacity factor of at least 65 percent firm power during the billing period.⁴¹ NSPM states it did not indicate that Twin Cities QF would fully qualify for the Rate Code A52 service or discuss terms of any potential agreement during the October 17, 2014 telephone call, and that the call was purely informational.⁴²

22. NSPM also claims that, in *NSPM*, the Commission “determined that a QF that has initiated a state PURPA proceeding that may result in a legally enforceable obligation prior to the applicable electric utility filing its petition for relief pursuant to section 292.310 of the Commission’s regulations will be entitled to have any contract or obligation that may be established under state law grandfathered,” but Twin Cities has no ongoing proceeding with the Minnesota Commission.⁴³

C. Twin Cities’ Answer

23. Twin Cities again argues that NSPM has failed to rebut the presumption that the Twin Cities QF does not have nondiscriminatory access to both energy and capacity markets, due to its interconnection at the distribution level.⁴⁴ Twin Cities argues that, although NSPM asserts that the Twin Cities QF could gain access to MISO capacity markets through the MISO network resource interconnection service interconnection process, the same is true for any QF under 20 MWs.⁴⁵ Twin Cities thus argues that, if NSPM need only show the possibility of a QF under 20 MW being able to interconnect at the transmission level to access the MISO capacity market, the presumption in section

⁴⁰ *Id.* at 12-13.

⁴¹ *Id.* at 13.

⁴² *Id.*

⁴³ *Id.* at 20.

⁴⁴ Twin Cities Answer at 3.

⁴⁵ *Id.*

292.309(d)(1) that a small QF does not have nondiscriminatory access to markets would have no effect.⁴⁶

24. Twin Cities also reiterates that there are limitations to its ability to accredit its QF as a capacity resource through the MISO interconnection process, and that it is subject to pancaked charges.⁴⁷ Twin Cities explains that it cannot presently serve as a capacity resource in MISO.⁴⁸ Twin Cities lastly adds again that a legally enforceable obligation had been established prior to NSPM filing its application.⁴⁹

D. NSPM's Second Answer

25. NSPM argues that Twin Cities' reliance on *VEPCO* as support for Twin Cities' argument that a legally enforceable obligation existed prior to NSPM filing its application is misplaced. NSPM argues that, unlike the parties in *VEPCO*, NSPM and Twin Cities have not yet reached a common framework for negotiating an agreement because NSPM had not yet determined that Twin Cities was fully eligible to receive rates under Rate Code A52. NSPM also again argues that nothing precludes Twin Cities from obtaining Network Resource Interconnection Service and being eligible to participate in the MISO capacity market. NSPM also argues that Twin Cities would not be subject to pancaked charges for delivery because the Distribution Wheeling Agreement between NSPM and Twin Cities does not impede access, but facilitates Twin Cities' eligibility to qualify as a capacity resource.

IV. Discussion

A. Procedural Matters

26. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2014), Twin Cities' timely, unopposed motion to intervene serves to make Twin Cities a party to this proceeding.

⁴⁶ *Id.* at 4.

⁴⁷ *Id.* at 6.

⁴⁸ *Id.* at 7.

⁴⁹ *Id.* at 8-13 (discussing Twin Cities' creation of a legally enforceable obligation and the Commission's denial, in *Virginia Electric & Power Co.*, 151 FERC ¶ 61,038 (2015) (*VEPCO*), of an application to terminate a utility's QF purchase obligation because the relevant QFs had established legally enforceable obligations).

27. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2014), prohibits an answer to a protest or answer unless otherwise ordered by the decisional authority. We will accept the parties' answers because they have provided information that assisted us in our decision-making process.

B. Determination

28. Section 210(m)(1) of PURPA, which was codified in the Commission's regulations as section 292.309(a), provides for termination of the requirement to enter into a new obligation or contract to purchase from a QF, if the QF has nondiscriminatory access to certain types of markets specified in section 210(m) of PURPA. In Order No. 688,⁵⁰ the Commission found that the markets of MISO, among others, qualify as markets that justify relief from the mandatory purchase obligation, provided that QFs, in fact, have nondiscriminatory access to such markets.⁵¹ Because section 210(m) of PURPA requires the Commission to make a final determination on applications to terminate the requirement to enter into new obligations or contracts to purchase from QFs within 90 days of the application, the Commission established certain rebuttable presumptions to make the processing of the applications possible given the 90-day action requirement.

29. As relevant here, one of those rebuttable presumptions, contained in section 292.309(d)(1) of the Commission's regulations,⁵² is that a QF with a capacity at or below 20 MW does *not* have nondiscriminatory access to markets. In creating this rebuttable presumption, the Commission found persuasive arguments that some QFs may, in practice, not have nondiscriminatory access to markets in light of their small size; the Commission noted that there was agreement among commenters representing both QFs and utilities that small size could affect a QF's ability to access markets.⁵³ 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.⁵⁴ The Commission also explained that

⁵⁰See *supra* note 6.

⁵¹ Order No. 688, FERC Stats. & Regs. ¶ 31,233 at P 117.

⁵² 18 C.F.R. § 292.309(d)(1) (2014).

⁵³ *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.

⁵⁴ Order No. 688-A, FERC Stats. & Regs. ¶ 31,250 at PP 94-103.

smaller QFs were more likely to have to overcome obstacles that larger QFs would not have to overcome, such as jurisdictional differences, pancaked delivery rates, and administrative burdens to obtaining access to distant buyers. The Commission found that such difficulties supported a rebuttable presumption that smaller QFs have “substantially less ability to access wholesale markets than do larger QFs.”⁵⁵ 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.⁵⁶

30. Order No. 688 placed the burden of proof on the electric utility to demonstrate that a small QF has nondiscriminatory access to the energy markets described in section 292.309(a), (b), or (c) of the Commission’s regulations.⁵⁷ The Commission, in Order No. 688, did not specify what evidence a utility could set forth to rebut the presumption, but noted that “relevant evidence may include the extent to which the QF has been participating in the market or is owned by, or is an affiliate of, a[n] entity that has been participating in the relevant market.”⁵⁸

31. Based on the evidence presented in this proceeding, the Commission finds that NSPM has not met its burden of proof to be relieved of its PURPA mandatory purchase obligation with respect to the Twin Cities QF.

32. Section 210(m) of PURPA⁵⁹ and the Commission’s implementing regulations require that an electric utility seeking to terminate its QF purchase obligation demonstrate that the QF has nondiscriminatory access to both energy *and* capacity markets.⁶⁰

⁵⁵ *Id.* P 96.

⁵⁶ *Id.* P 101.

⁵⁷ 18 C.F.R. § 292.310(d)(2) (2014) (to the extent an electric utility seeks relief from the purchase obligation with respect to a QF 20 MW or smaller, the electric utility bears the burden to prove the QF has nondiscriminatory access to the wholesale markets).

⁵⁸ *Id.* In saying this, however, the Commission did not intend to suggest that these two facts alone would necessarily be a basis for granting relief from PURPA’s mandatory purchase obligation. *PPL Elec. Utils. Corp.*, 145 FERC ¶ 61,053, at P 23 & n.25 (2013).

⁵⁹ 16 U.S.C. § 824A-3(m) (2012).

⁶⁰ 18 C.F.R. § 292.309(a)(1) (requiring the Commission to find, in the context of termination of the mandatory purchase obligation, that the QF has nondiscriminatory

Although NSPM argues that Twin Cities has been selling energy from its QF into the MISO wholesale markets since 2008, NSPM has not shown that the Twin Cities QF has nondiscriminatory access to the MISO capacity market. As NSPM acknowledges in its answer, for Twin Cities to access the MISO capacity market:

it would be required to go through the MISO network resource interconnection service (“NRIS”) interconnection process, just as any other seller would. This interconnection process requires a request to be submitted, a payment to MISO for any required transmission study(ies), and approval by MISO. This process is the same for both distribution interconnection and transmission interconnections, and the same process applies to all generators in MISO, including NSPM-owned generation facilities.⁶¹

NSPM thus acknowledges that the Twin Cities QF cannot, at present, access the MISO capacity market. In contrast to the MISO energy market, the Twin Cities QF has no history of sales into the MISO capacity market.

33. As Twin Cities explains in its protest, because the Twin Cities QF is interconnected to NSPM’s distribution system, it would have to go through the MISO interconnection process to obtain “Network Resource Interconnection Service under Attachment X,” or “Energy Resource Interconnection Service under Attachment X and firm Transmission Service,” which Twin Cities argues would come at considerable cost and would also take a significant amount of time, based on the time taken for projects that have already completed the interconnection process.⁶² NSPM’s own witness similarly explained in his affidavit that, if Twin Cities were to submit a Network Resource Interconnection Service request, MISO would likely grant Twin Cities only conditional service, pending completion of several transmission network upgrades in the MISO region. NSPM’s witness states that, under such conditional service, “Twin Cities

access to “(i) Independently administered, auction-based day ahead and real time wholesale markets for the sale of electric energy; *and* (ii) Wholesale markets for long-term sales of capacity and electric energy” (emphasis added)); *see also id.* § 292.309(a)(2)-(3) (describing alternate findings regarding access to wholesale energy and capacity markets that the Commission may make to terminate a utility’s mandatory purchase obligation).

⁶¹ NSPM Answer at 6.

⁶² Twin Cities Protest at 8. Twin Cities explains that recently filed MISO Generator Interconnection Agreements for projects that have already completed the interconnection process state that full capacity accreditation may take years.

would not qualify to participate in the MISO capacity market. This limitation is the result of constraints on the MISO transmission system and requirements of the MISO Tariff....”⁶³

34. Thus, both NSPM and Twin Cities describe the very circumstances explained in Order No. 688 that give rise to the rebuttable presumption that smaller QFs lack nondiscriminatory access to markets. As the Commission explained in Order No. 688-A:

[W]e believe that it is reasonable to conclude that some, perhaps most, small QFs at or below the 20 MW level can be distinguished from larger QFs by the type of delivery facilities to which they typically interconnect. Most QFs larger than 20 MW are interconnected to higher voltage lines, typically considered to be transmission lines, while smaller QFs tend to be interconnected to lower voltage radial lines, frequently considered to be distribution. Many lower voltage facilities are radial systems designed to carry power from the high-voltage grid downstream to loads, and there may be technical enhancements required to move power injected into such facilities upstream to the transmission grid to access the broader wholesale market. Smaller QFs are also more likely to have to overcome other obstacles, such as jurisdictional differences, pancaked delivery rates, and perhaps additional administrative procedures, to obtain access to distant buyers.⁶⁴

35. While it is true, as NSPM argues, that Twin Cities can pay for upgrades, that was equally true for all generators, both those larger than 20 MW and those 20 MW and smaller, at the time the Commission issued Order No. 688. The Commission chose to not establish a presumption of a lack of nondiscriminatory access to markets for larger QFs, but simultaneously chose to establish such a presumption for smaller QFs: the rebuttable presumption that QFs 20 MW and smaller do not have nondiscriminatory access to markets, because the Commission recognized a distinction between the two.⁶⁵ An electric utility must show more than the mere fact that a QF can pay for upgrades to the transmission system in order to rebut the presumption that a QF 20 MW or smaller lacks nondiscriminatory access, particularly where, as here, there have been transmission constraints alleged by the QF and acknowledged by the electric utility seeking relief from the mandatory purchase obligation. Section 292.309(c) of the Commission’s

⁶³ Affidavit of Randall L. Oye appended to NSPM’s Answer at ¶ 6.

⁶⁴ Order No. 688-A, FERC Stats. & Regs. ¶ 31,250 at P 96.

⁶⁵ *E.g., id.*

regulations⁶⁶ is instructive on this point. While it pertains to the rebuttable presumption that QFs larger than 20 MW do have nondiscriminatory access to certain markets, section 292.309(c) also provides that “a qualifying facility may seek to rebut the presumption of access to the market by demonstrating, *inter alia*, that it does not have access to the market because of operational characteristics or *transmission constraints*.”⁶⁷

Correspondingly, for QFs 20 MW or smaller, the presence of transmission congestion can support a finding that such QFs do not have nondiscriminatory access to certain markets. And, here, NSPM’s own witness has acknowledged the existence of transmission constraints and that those transmission constraints do pose a barrier for the Twin Cities QF to access the MISO capacity market on a nondiscriminatory basis.⁶⁸

36. In Order No. 688-A, the Commission noted the relevance of transmission related access and that constraints impact a potentially-affected QF’s access to the wholesale market.⁶⁹ Additionally, transmission system constraints impact the scope and geographic reach of the market a potentially affected QF may reach as an alternative to selling to the local utility.⁷⁰ Here, both NSPM and Twin Cities note that transmission constraints exist which will directly impact the Twin Cities QF’s access to the MISO capacity market.⁷¹ Based on the evidence presented, the Commission cannot conclude that the Twin Cities QF has nondiscriminatory access to the MISO capacity market, and we find that, in fact, the Twin Cities QF lacks such access. Therefore, we decline to grant NSPM’s request to be relieved of its PURPA mandatory purchase obligation to the Twin Cities QF.

⁶⁶ 18 C.F.R. § 292.309(c) (2014).

⁶⁷ *Id.* (emphasis added).

⁶⁸ Affidavit of Randall L. Oye appended to NSPM’s Answer at ¶ 6, explaining that “[u]nder conditional [network resource interconnection service], Twin Cities would not qualify to participate in the MISO capacity market. This limitation is the result of constraints on the MISO transmission system and requirements of the MISO Tariff....”

⁶⁹ Order No. 688-A, FERC Stats. & Regs. ¶ 31,250 at P 115.

⁷⁰ See *Xcel Energy Services, Inc.*, 122 FERC ¶ 61,048 at PP 26-30 (granting termination of the mandatory purchase obligation on a service territory-wide basis with respect to two utilities, but denying termination with respect to a third utility due to constraints), *reh’g denied*, 124 FERC ¶ 61,073 at PP 17-19 (2008).

⁷¹ Twin Cities Answer at 6 (citing Affidavit of Randall L. Oye appended to NSPM’s Answer at ¶ 6).

37. Finally, the Commission declines to address Twin Cities' argument that a legally enforceable obligation existed prior to NSPM's application for termination of its PURPA mandatory purchase obligation. Because we have denied NSPM's application on other grounds, we see no need to address the existence, or absence, of a legally enforceable obligation.

The Commission orders:

NSPM's application to terminate its PURPA mandatory purchase obligation to purchase energy and capacity from the Twin Cities QF is hereby denied, as discussed in the body of this order.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.