

152 FERC ¶ 61,215  
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. QM15-2-001

ORDER DENYING REHEARING

(Issued September 17, 2015)

1. On February 18, 2015, Northern States Power Company, a Minnesota corporation (NSPM) filed an application pursuant to section 210(m) of the Public Utility Regulatory Policies Act of 1978<sup>1</sup> (PURPA) and section 292.309(a) of the Commission's regulations,<sup>2</sup> seeking 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). In a May 14, 2015 order,<sup>3</sup> the Commission denied NSPM's application, and as discussed below, the Commission likewise denies NSPM's request for rehearing.

**I. Background**

**A. Statutory and Regulatory Background**

2. 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

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<sup>1</sup> 16 U.S.C. § 824a-3(m) (2012).

<sup>2</sup> 18 C.F.R. § 292.309(a) (2015).

<sup>3</sup> *Northern States Power Company, a Minnesota corporation*, 151 FERC ¶ 61,110 (2015) (May 14 Order).

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,<sup>4</sup> the Commission found that the markets of Midcontinent Independent System Operator (MISO), as pertinent here, among others, qualify as markets that justify relief from the mandatory purchase obligation, provided that QFs, in fact, have nondiscriminatory access to such markets.<sup>5</sup> 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.

3. One of those rebuttable presumptions, contained in section 292.309(d)(1) of the Commission's regulations,<sup>6</sup> 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.<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 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

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<sup>4</sup> *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).

<sup>5</sup> Order No. 688, FERC Stats. & Regs. ¶ 31,233 at P 117.

<sup>6</sup> 18 C.F.R. § 292.309(d)(1) (2015).

<sup>7</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>8</sup> Order No. 688-A, FERC Stats. & Regs. ¶ 31,250 at PP 94-103.

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. 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.<sup>11</sup> 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.”<sup>12</sup>

5. 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>13</sup> The Commission has also stated that an application for relief must be fully supported by documentation upon which it can make the required finding.<sup>14</sup>

6. In 2011, the Commission granted NSPM relief from its mandatory purchase obligation to purchase capacity and energy from QFs that are larger than 20 MW in its

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<sup>9</sup> *Id.* P 96.

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

<sup>11</sup> 18 C.F.R. § 292.310(d)(2) (2015) (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).

<sup>12</sup> Order No. 688, FERC Stats. & Regs. ¶ 31,233 at P 78. 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).

<sup>13</sup> Order No. 688, FERC Stats. & Regs. ¶ 31,233 at P 9(B)-(C) & n.9.

<sup>14</sup> *Id.* P 101.

service territory within MISO.<sup>15</sup> The termination of NSPM's mandatory purchase obligation was based on the finding, reflected in section 292.309(e) of the Commission's regulations,<sup>16</sup> that the MISO 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 MISO markets, and thus electric utilities that are members of MISO may be relieved of the obligation to purchase electric energy from QFs larger than 20 MW.

**B. May 14 Order**

7. In the May 14 Order, the Commission concluded that, based on the evidence presented in the proceeding, NSPM had not met its burden of proof to be relieved of its PURPA mandatory purchase obligation with respect to the Twin Cities QF.<sup>17</sup> Among the various reasons noted by the Commission, the Commission pointed out that NSPM acknowledged in its answer that the Twin Cities QF presently cannot access the MISO capacity market and has no history of sales into the MISO capacity market. Moreover, the order noted that NSPM's own witness acknowledged that, if the Twin Cities QF were to submit an interconnection service request, it would more than likely be conditional, due to pending completion of several transmission network upgrades in the MISO, and accordingly would not qualify the Twin Cities QF to participate in the MISO capacity market.<sup>18</sup> The May 14 Order noted that this limited access is the result of constraints on the MISO transmission system and requirements of the MISO Tariff that are the "very circumstances explained in Order No. 688 that gave rise to the rebuttable presumption that smaller QFs lack nondiscriminatory access to markets"<sup>19</sup>

8. Acknowledging that "[w]hile it is true, as NPSM 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.... 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

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<sup>15</sup> *Northern States Power Co., a Minnesota corporation, et al.*, 136 FERC ¶ 61,093 (2011).

<sup>16</sup> 18 C.F.R. § 292.309(e) (2015).

<sup>17</sup> 151 FERC ¶ 61,110 at P 31.

<sup>18</sup> *Id.* PP 32-33.

<sup>19</sup> *Id.* P 34; *see id.* PP 35-36.

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.”<sup>20</sup>

9. Noting the provisions contained in Order No. 688-A, the May 14 Order observed that the Commission had perceived the relevance of transmission related access and constraints that impact a potentially-affected QF’s access to the wholesale market, and that 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.<sup>21</sup> Observing the record evidence, in particular that “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.... 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.”<sup>22</sup>

## **II. NSPM’s Request for Rehearing and Twin Cities’ Answer**

### **A. NSPM’s Request for Rehearing**

10. NSPM raises the following three issues in its request for rehearing: (1) the legal standard applied in the May 14 Order is contrary to the plain language of section 210(m) of PURPA and the Commission’s implementing regulations, which require only that an electric utility seeking to terminate a QF mandatory purchase obligation to demonstrate that the QF has nondiscriminatory access to wholesale markets; (2) the May 14 Order inappropriately permits Twin Cities to claim “one potential transmission constraint”<sup>23</sup> to establish that it lacks access to wholesale markets in which it can make long-term sales of capacity and energy, even though similarly-situated entities would face the same potential transmission constraint and despite Twin Cities’ ability to sell its capacity into a wholesale market through other avenues; and (3) the May 14 Order inappropriately permits Twin Cities to elect not to request interconnection service or pursue transmission

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<sup>20</sup> *Id.* P 35.

<sup>21</sup> *Id.* P 36.

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

<sup>23</sup> This constraint, NSPM notes, is one that “all facilities seeking to participate: in the MISO Planning Resource Auction face.” *Id.* at 14. Thus, according to NSPM, Twin Cities is on “equal footing” with all sellers. *Id.*

service and then use the effect of this self-election to establish that Twin Cities lacks access to a wholesale market.<sup>24</sup>

11. First, NSPM asserts that “[t]he May 14 Order erred because it required a showing that the Twin Cities QF has *access* to an *organized capacity market*... [which] is contrary to the plain language of Section 292.309(a)(1) and Order Nos. 688 and 688-A. It also conflates the requirements under Section 292.309(a)(1)(i) and 292.309(a)(1)(ii).”<sup>25</sup>

12. NSPM contends that section 292.309(a)(1)(i) and (a)(1)(ii) of the regulations should be applied separately.<sup>26</sup> NSPM explains that subsection (a)(1)(i) provides that the QF must have nondiscriminatory access to independently administered, auction-based day ahead and real time wholesale markets for the sale of *electric energy*, i.e., an organized “Day 2” market to sell *electric energy*. By contrast, NSPM further notes, subsection (a)(1)(ii) provides only that, “the QF must have nondiscriminatory access to *[w]holesale markets* for long-term sales of capacity and electric energy,’ which do not need to be organized markets.”<sup>27</sup> NSPM asserts that these two provisions require a showing that the QF has nondiscriminatory access to wholesale markets for long-term capacity and energy sales, with the existence of bilateral long-term contracts for long-term capacity and energy being a sufficient indication of a market; thus, section 292.309(a)(1)(ii) “does not require a showing that the QF has nondiscriminatory access to an *organized capacity market*.”<sup>28</sup>

13. Additionally, in further support of its contentions, NSPM maintains that “section 210(m)(1)(A)(ii)... *requires only that a long-term market is present*, not that it be competitive or that it meet the subjective preferences of all QFs...[and] do[es] not require an applicant to make a showing that the QF has access to an *organized capacity market* for long-term sales of capacity to satisfy Section 292.309(a)(1)(ii).”<sup>29</sup> All that is

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<sup>24</sup> NSPM Rehearing Request at 3-4.

<sup>25</sup> *Id.* at 5 (emphasis in original).

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

<sup>27</sup> *Id.* at 5 (emphasis in original).

<sup>28</sup> *Id.* at 6 (emphasis in original).

<sup>29</sup> *Id.* at 7 (emphasis in original).

required is “a showing that long-term markets for capacity sales are *present*, a showing that NSPM has made.”<sup>30</sup>

14. Next, NSPM further asserts that the “May 14 Order erred in requiring a showing that [the] Twin Cities QF had *access*—instead of *nondiscriminatory access*—to the markets.”<sup>31</sup> The May 14 Order erred, according to NSPM, in noting that the Twin Cities QF has no history of sales in the MISO capacity market.<sup>32</sup> NSPM’s opines that “Section 210(m) does not require a showing that the QF currently has met the requirements to sell its capacity into a market or a showing that the QF has had a history of sales. It simply requires a showing that the QF is on a level playing field with other facilities to establish nondiscriminatory access.”<sup>33</sup> NSPM contends that “for purposes of Section 292.309(a)(1)(ii), a market exists if QF sellers can reach purchasers and if long-term contracts for capacity and energy exist...[and the market] does not need to be an organized market, and the applicant does not need to make a showing that the QF had a ‘meaningful opportunity’ to sell its capacity into a competitive wholesale market, i.e., that it had a history of sales.”<sup>34</sup>

15. Second, it is NSPM’s contention that it was “required to show, and did show, that the Twin Cities QF has *nondiscriminatory* access to (1) an organized ‘Day 2’ market (i.e., the MISO energy and ancillary services markets) and (2) wholesale markets for long-term sales of capacity and energy.”<sup>35</sup> NSPM goes on to contend that, as relevant here, there were no obstacles such as local distribution access rules, pancaked delivery rates, administrative burdens (i.e., items which NSPM claims were identified by the Commission as means to rebut the presumption) that exist.<sup>36</sup> Additionally, NSPM asserts that the May 14 Order erred in that it “incorrectly requires the Twin Cities QF to have

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<sup>30</sup> *Id.* Additionally, NSPM opines that the “Twin Cities QF has, however, self-elected to not participate in those capacity markets.” *Id.*

<sup>31</sup> *Id.* at 8 (emphasis in original).

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> *Id.* at 10.

<sup>35</sup> *Id.* (emphasis in original).

<sup>36</sup> *Id.* In support, NSPM refers to its wheeling of the Twin Cities QF’s energy to be sold in the MISO energy market. *Id.* at 11-12.

access to sell its capacity into an *organized* capacity market; and... incorrectly applies a standard of having *achieved* access rather than the standard of having nondiscriminatory access.”<sup>37</sup>

16. NSPM, after highlighting the history of Twin Cities’ sales into the MISO energy market since 2008, opines that this is sufficient to rebut the presumption that the Twin Cities QF lacks nondiscriminatory access to an organized “Day 2” market.<sup>38</sup>

17. Further, NSPM contends that, not only does the Twin Cities QF have access to an organized “Day 2” market, it has nondiscriminatory access to both the MISO administered capacity market, i.e., Planning Resource Auction and bilateral wholesale markets in which it can make long-term capacity as well as energy sales, but Twin Cities QF has elected to not take the necessary steps to participate in these markets by failing to request interconnection service or pursuing transmission service.<sup>39</sup> It is NSPM’s opinion that the May 14 Order enables Twin Cities to avoid taking the necessary steps to make capacity sales through the MISO interconnection process or transmission service process permitting it to “abuse the purchase requirement.”<sup>40</sup> NSPM contends that Twin Cities QF is able to “deliver both capacity and energy to the Merriam Park substation (part of the MISO transmission system) on a firm basis.”<sup>41</sup> Thus, in light of the aforementioned, NSPM contends that it has rebutted the presumption that the Twin Cities QF lacks nondiscriminatory access to wholesale markets satisfying the requirement of section 292.309(a)(1)(ii) of the Commission’s regulations. NSPM also maintains that “[r]equiring a showing that the Twin Cities QF has *access* and the *ability* to sell its capacity into the MISO *capacity* market, instead of *nondiscriminatory* access to *wholesale markets* in which it can make long-term sales of capacity and energy, relies on an overly narrow, and incorrect, application of Section 292.309(a)(1)(ii) that is inconsistent with the purpose of Section 210(m).”<sup>42</sup>

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<sup>37</sup> *Id.* at 10-11 (emphasis in original).

<sup>38</sup> *Id.* at 11-13.

<sup>39</sup> *Id.* at 13.

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

<sup>41</sup> *Id.* at 14.

<sup>42</sup> *Id.* (emphasis in original).

18. Finally, NSPM argues that, via a Distribution Wheeling Service Agreement with Twin Cities, Twin Cities has firm distribution service to wheel its energy to MISO markets and that Twin Cities is not paying pancaked delivery rates, rather an unbundled distribution rate which is a rate paid by all customers of NSPM that use its distribution system.<sup>43</sup> Further, NSPM contends that Twin Cities is “able to submit its offers to supply energy to the MISO market through their parent company, Brookfield Energy Marketing, a certified MISO Market Participant... [and as such designated entity, i.e., certified Market Participant] is not required to pay any additional charge to deliver the energy to the purchasing system.”<sup>44</sup> Additionally, NSPM notes that “Twin Cities has not identified any administrative burden that would prevent it from accessing and transacting with buyers... [and][t]he relatively nominal fees under the MISO Tariff are the same fees all generators must pay on a non-discriminatory basis.”<sup>45</sup>

19. Based on the foregoing arguments, NSPM request that the Commission grant rehearing, and grant the relief requested in its petition.<sup>46</sup>

### **B. Twin Cities Response to Request for Rehearing**

20. On June 29, 2015, Twin Cities filed a motion for leave to file an answer and an answer. Twin Cities submits that the Commission was correct in rejecting NSPM’s application to terminate its PURPA purchase obligation and that NSPM’s request for rehearing should be denied.

### **III. Discussion**

21. As an initial matter, the Commission’s Rules of Practice and Procedure do not permit answers to requests for rehearing.<sup>47</sup> We will accordingly reject the answer filed by Twin Cities in response to NSPM’s request for rehearing.

22. The Commission denies NSPM’s request for rehearing. Nothing raised in the request for rehearing warrants changing our decision in this proceeding. We observe that

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<sup>43</sup> *Id.* at 20.

<sup>44</sup> *Id.*

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

<sup>46</sup> *Id.* at 20-21.

<sup>47</sup> 18 C.F.R. § 385.713(d) (2015).

NSPM bears the burden in this proceeding. While the presumption is rebuttable, it is up to NSPM to, in fact, rebut it and NSPM has failed to do so.

23. The May 14 Order is consistent with the dictates of PURPA and the evidence presented by both NSPM's own witness and Twin Cities' pleadings.

24. First, contrary to NSPM's contention, the May 14 Order is consistent with the language of section 292.309(a) of the Commission's regulations (which parallels the language of section 210(m) of PURPA). Section 292.309(a)(1) (i) and (ii) provides,

[A]n electric utility shall not be required, under this part, to enter into a new contract or obligation to purchase electric energy from a qualifying cogeneration facility or a qualifying small power production facility if the Commission finds that the qualifying cogeneration facility or qualifying small power facility production [sic] has nondiscriminatory access to:

(1)(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;<sup>48</sup>

25. As noted in the May 14 Order, "Section 210(m) of PURPA 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."<sup>49</sup> Further, the order noted that, while the Twin Cities QF has been selling energy into the MISO wholesale market since 2008, NSPM has acknowledged that the Twin Cities QF cannot, at present, access the MISO capacity market.<sup>50</sup> The evidence presented by NSPM's own witness explained 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. Based on this, the Twin Cities QF does not have

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<sup>48</sup> 18 C.F.R. § 292.309(a)(1)(i) and (ii) (2015).

<sup>49</sup> May 14 Order at P 32.

<sup>50</sup> *Id.*

actual access and thus does not have nondiscriminatory access to wholesale markets for long-term sales of capacity.<sup>51</sup>

26. Related, while NSPM argues that the May 14 Order erred because it established a requirement that the utility must show that a QF has nondiscriminatory access to an *organized* capacity market,<sup>52</sup> the May 14 Order made no such a finding. NSPM's strawman argument that the May 14 Order made such a finding -- when, in fact, it did not -- is thus without merit.

27. Second, contrary to NSPM's contention that the May 14 Order concerns a potential transmission constraint, we did not find a mere "potential" for a transmission constraint in the May 14 Order. As noted, per section 292.309(c), "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."<sup>53</sup> NSPM's efforts to minimize the importance of transmission constraints to the Commission's analysis of whether the mandatory purchase obligation should be terminated does not change the plain meaning of the provision or the importance of consideration of such constraints.<sup>54</sup> Again, NPSM's own witness, as well

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<sup>51</sup> We disagree with any claim by NSPM that a QF can have nondiscriminatory access to a market despite not having actual access to that market. From the outset, the Commission has read the statute to require actual access. *See* Order No. 688-A, FERC Stats. & Regs. ¶ 31,250 at P 103; *Xcel Energy Services, Inc.*, 122 FERC ¶ 61,048 at PP 26, 28-30, *reh'g denied*, 124 FERC ¶ 61,073 at P 17 (2008); *cf.* 18 C.F.R. § 292.309(c) (2015) (discussing rebuttal of "presumption of access" by demonstrating lack of "access to the market because of operational characteristics or transmission constraints.") What the statute requires is that a QF has actual access to specified markets; the statute further requires that the actual access be "nondiscriminatory." While the word "nondiscriminatory" modifies "access," the word "nondiscriminatory" in no way diminishes the requirement that there be actual access to the specified markets.

<sup>52</sup> NSPM Rehearing Request at 5.

<sup>53</sup> 18 C.F.R. § 292.309(c) (2015).

<sup>54</sup> We note that NSPM failed to include in its filing information concerning transmission constraints and congestion that impact the Twin Cities QF project, despite the fact that this information is required by the Commission's regulations, and only provided this information in response to Twin Cities' protest. 18 C.F.R. § 292.310(d)(3)(i) and (ii) (2015).

as Twin Cities' pleading, established that transmission constraints exist in the MISO region which prevent the Twin Cities QF's access to the capacity market.

28. In this same vein, while claiming that the Commission misreads the statute and regulations, NSPM points to Twin Cities' sales of energy and NSPM's wheeling of that energy to be sold in the MISO energy market to claim that NSPM has rebutted the presumption that the Twin Cities QF lacks nondiscriminatory access to *an* organized market.<sup>55</sup> In making this argument, however, NSPM itself ignores the statute and the regulations – which require access to both energy and capacity markets.<sup>56</sup>

29. The statute and the regulations, as discussed above, require that NSPM demonstrate that, as relevant here, the Twin Cities QF has, in the first instance, access to the specified markets and not merely that the Twin Cities QF is no more disadvantaged than any other sellers seeking to sell in such markets.<sup>57</sup> NSPM does not deny that its witness earlier testified that the conditional transmission services available to Twin Cities would not qualify the Twin Cities QF to participate in the MISO capacity market, and there is nothing in the record that would support a finding that such transmission services would provide access to make bilateral capacity sales.<sup>58</sup> NSPM's pleading also includes claims that the Twin Cities QF can make capacity sales because it can request transmission service, which MISO would study to determine “whether” such service would be granted and that such service would allow Twin Cities to be a capacity resource.<sup>59</sup> But that argument assumes MISO's study finds that such service could be granted, and even NSPM does not go so far as to say it would. Claiming Twin Cities can

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<sup>55</sup> NSPM Rehearing Request at 11-13.

<sup>56</sup> 16 U.S.C. § 824a-3(m)(1)(A) (2012); 18 C.F.R. § 292.309(a)(1) (2015).

<sup>57</sup> *See* NSPM Rehearing Request at 13, 14-15.

<sup>58</sup> That NSPM has wheeled energy for the Twin Cities QF to be sold in the MISO energy market, *see id* at 11-12, 13, 19-20, does not demonstrate that Twin Cities has transmission access that would support bilateral capacity sales. Rather, all that NSPM can claim is that Twin Cities has not “pursu[ed]” the necessary transmission access. *Id.* at 13. But, as noted elsewhere in this order, seeking transmission access is not the same as having transmission access.

<sup>59</sup> *Id.* at 17.

seek transmission service,<sup>60</sup> is not the same as Twin Cities' actually having transmission service with actual access to markets.

30. Moreover, merely stating that capacity can be sold bilaterally, as NSPM does,<sup>61</sup> does not overcome the presumption and does not demonstrate that the Twin Cities QF, in fact, has transmission access to make such sales. There is nothing in the record to support a finding that Twin Cities has transmission access to make bilateral capacity sales. While NSPM, which, as we note above, has the burden of proof in this proceeding,<sup>62</sup> points out that the Commission found, in Order No. 688, that there had been bilateral sales of capacity in MISO, NSPM has made no demonstration that Twin Cities has access to transmission that would enable Twin Cities to make such bilateral sales.

31. Finally, NSPM's assertion that the May 14 Order improperly permits the Twin Cities QF to "sit on its hands and then be allowed to take advantage of the purchase requirement through its inaction,"<sup>63</sup> is without merit. As previously noted, the Twin Cities QF cannot, at present, access the MISO capacity market, a fact recognized by NSPM's own witness,<sup>64</sup> and in NSPM's rehearing request.<sup>65</sup>

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<sup>60</sup> *See id.* at 15-17.

<sup>61</sup> *Id.* at 13. Indeed, if this were all the showing that was required, then there is hardly an electric utility that could not make this same argument and so escape PURPA's mandatory purchase obligation.

<sup>62</sup> *See supra* note 48.

<sup>63</sup> NSPM Rehearing Request at 4. The record, described in the May 14 Order and here, does not demonstrate that even if Twin Cities took such steps it would, in fact, be able to sell its capacity bilaterally given the transmission constraints NSPM's witness testified to earlier in this proceeding. May 14 Order at PP 33, 35-36.

<sup>64</sup> *Id.* P 35 & n.68.

<sup>65</sup> NSPM Rehearing Request at 15 ("If Twin Cities requested Network Resource Interconnection Service ('NRIS'), it would likely receive *conditional* NRIS, which would enable Twin Cities to participate in the [Planning Resource Auction] PRAs *once any required transmission upgrades are in service.*" (emphasis added)). The kinds of barriers that NSPM admits, here and earlier, that the Twin Cities QF faces are the kinds of barriers that the Commission found justified establishing that smaller QFs were

32. Thus, the assertion that Twin Cities' lack of access to both the organized capacity market and to bilateral capacity sales is due to its own lack of action, even if true, is not germane to NSPM's request to terminate its purchase obligation. The record in this proceeding is clear that there are indeed constraints and obstacles in place that prevent Twin Cities QF's access, and thus nondiscriminatory access, to the organized MISO capacity market and to bilateral capacity sales presently.

33. In sum, the arguments advanced by NSPM are contrary to the record evidence and the Commission will not reverse the May 14 Order.

The Commission orders:

NSPM's request for rehearing is hereby denied.

By the Commission.

( S E A L )

Nathaniel J. Davis, Sr.,  
Deputy Secretary.

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rebuttably presumed not to have access to the specified markets. *See supra* notes 6-14 and accompanying text.