

155 FERC ¶ 61,066
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

	Docket Nos.
Exelon Wind 1, LLC	EL12-80-001 QF05-114-004
Exelon Wind 2, LLC	QF05-116-004
Exelon Wind 3, LLC	QF05-115-004
Exelon Wind 4, LLC	QF03-13-005
Exelon Wind 5 LLC	QF06-289-004
Exelon Wind 6, LLC	QF06-290-004
Exelon Wind 7, LLC	QF07-46-004
Exelon Wind 8, LLC	QF07-53-004
Exelon Wind 9, LLC	QF07-54-004
Exelon Wind 10, LLC	QF07-55-004
Exelon Wind 11, LLC	QF07-56-004
High Plains Wind Power, LLC	QF07-257-003

ORDER DENYING RECONSIDERATION

(Issued April 21, 2016)

1. On August 28, 2012, the Commission issued an order giving notice that it declined to initiate an enforcement action against the Public Utility Commission of Texas (Texas Commission) pursuant to the section 210(h) of the Public Utility Regulatory Policies Act of 1978 (PURPA)¹ on behalf of Exelon Wind 1, LLC, Exelon Wind 2, LLC, Exelon Wind 3, LLC, Exelon Wind 4, LLC, Exelon Wind 5, LLC, Exelon Wind 6, LLC, Exelon Wind 7, LLC, Exelon Wind 8, LLC, Exelon Wind 9, LLC, Exelon Wind 10, LLC, Exelon Wind 11, LLC, and High Plains Wind Power, LLC (collectively, Exelon Wind).² The Commission also accepted clarifications to two of the provisions of Southwestern Public Service Company's (SPS) tariff for purchases of "as available" energy from

¹ 16 U.S.C. § 824a-3(h) (2012).

² *Exelon Wind 1, LLC*, 140 FERC ¶ 61,152 (2012) (2012 Order).

qualifying facilities (QFs) (SPS Tariff) that were approved by the Texas Commission to be consistent with PURPA and the Commission's regulations implementing PURPA,³ and so dismissed Exelon Wind's petition for declaratory order in part as it applied to those provisions. Regarding a third provision involving the methodology for calculating avoided cost rates, the Commission concluded that the Texas Commission's approval of the SPS Tariff was inconsistent with the requirements of PURPA and the Commission's regulations implementing PURPA, and therefore granted Exelon Wind's petition for declaratory order in part. On September 27, 2012, the Texas Commission, Occidental Permian, Ltd. (Occidental), and Xcel Energy Services Inc. (Xcel), on behalf of SPS, filed requests for reconsideration of the 2012 Order.

2. In this order, the Commission denies reconsideration of the 2012 Order, as discussed below.

I. Background

3. On June 29, 2012, Exelon Wind, the owner of several QFs, filed a petition requesting that the Commission initiate an enforcement action under section 210(h) of PURPA or, in the alternative, issue a declaratory order finding that the Texas Commission's 2010 Order that approved an application by SPS to revise its tariff for purchases of "as available" energy from QFs failed to implement PURPA and the Commission's regulations implementing PURPA.⁴

4. Xcel, acting on behalf of SPS, and Exelon Wind's QFs have long disputed SPS's obligation to purchase from Exelon Wind's QFs. The Commission denied Xcel's petition to terminate SPS's mandatory purchase obligation pursuant to section 210(m) of PURPA on the ground that QFs in the SPS service territory lacked non-discriminatory access to

³ *Application of Southwestern Public Service Company for Authority to Revise its Tariff for Purchase of Non-Firm Energy from Qualifying Facilities*, Docket No. 37361, (Texas Commission Oct. 6, 2010) (Texas Commission 2010 Order).

⁴ 18 C.F.R. pt. 292 (2015). The rates for purchases that are at issue in this proceeding concern "as available" sales of energy only.

the Southwest Power Pool, Inc. (SPP) Energy Imbalance Service (EIS) Market⁵ due to persistent transmission constraints.⁶

5. In the 2012 Order, the Commission declined to initiate an enforcement action pursuant to section 210(h) of PURPA and granted in part Exelon Wind's petition for declaratory order. In particular, the Commission accepted clarifications on two of the provisions of the SPS Tariff and so dismissed the petition for declaratory order in part. Nevertheless, and as relevant here, the Commission concluded that the Texas Commission's approval of avoided cost rates linked to the locational imbalance price (LIP) at a QF's node in the SPP EIS Market was inconsistent with the requirements of PURPA and the Commission's regulations implementing PURPA. Specifically, we held that the Texas Commission's 2010 Order

incorrectly accepted th[e] SPP Energy Imbalance Service market locational imbalance price at a QF's node as SPS's avoided cost. The problem with the methodology proposed by SPS and adopted by the Texas Commission is that it is based on the price that a QF would have been paid had it sold its energy directly in the EIS Market, instead of using a methodology of calculating what the costs to the utility would have been for self-supplied, or purchased, energy "but for" the presence of the QF or QFs in the markets, as required by the Commission's regulations. Moreover, and in addition, the Commission, in denying SPS' petition to be relieved of the mandatory purchase obligation pursuant to section 210(m) of PURPA, made findings that QFs in the SPS service territory lack access to third-party buyers in the SPP markets because of persistent transmission congestion. The Texas

⁵ "In 2007, SPP began operating an ancillary service market called the Energy Imbalance Service (EIS) market to reduce the overall cost of providing electricity within the SPP region by determining which generation resources should be used to produce the power needed to serve load at least cost. SPP also arranges for coverage of any difference between the scheduled generation of a market participant and the amount of energy actually needed to serve load." 2012 Order, 140 FERC ¶ 61,152 at P 5. As described below, SPP no longer operates an EIS market.

⁶ *Xcel Energy Servs., Inc.*, 122 FERC ¶ 61,048, *reh'g denied*, 124 FERC ¶ 61,073 (2008) (rejecting SPS's request to terminate mandatory purchase obligation due to transmission constraints); *see also* Texas Commission 2010 Order at P 24 (recognizing "considerable transmission constraints" on SPS's transmission system).

Commission Order confirms that SPS's system is still congested; thus SPS' methodology, adopting LIP as avoided costs, unreasonably assumes the full access of QFs to third-party buyers in the SPP Energy Imbalance Service Market.⁷

6. On September 27, 2012, the Texas Commission, Occidental, and Xcel each filed requests for reconsideration of the 2012 Order. On October 12, 2012, Exelon Wind filed a motion for leave to answer and an answer.

II. Requests for Reconsideration

7. The Texas Commission, Occidental, and Xcel each challenge the 2012 Order's holding that SPS's methodology for calculating avoided cost rates was inconsistent with PURPA. These three parties contend that the Commission was incorrect in holding that the EIS Market LIPs cannot represent SPS's avoided costs,⁸ while Xcel suggests specifically that the 2012 Order improperly repudiates the validity of locational market-based pricing for avoided cost rates in a way that unfairly singles out a utility such as SPS in SPP.⁹ These three parties argue that SPS does not have any alternative source of energy in the real-time market because SPS turns over all of its generation and dispatchable power purchases to SPP for economic dispatch before the operating hour. Thus, these three parties state that SPS's only option to purchase power in real-time "but for" the QF's decision to supply power is the EIS Market.¹⁰

8. The Texas Commission, Occidental, and Xcel contest the 2012 Order's finding that the Texas Commission 2010 Order violated PURPA by permitting SPS to set its avoided cost rates based on the price that a QF would have received by selling into the EIS Market, based on i.e., LIP, rather than on the costs SPS would have incurred "but for" the QF purchases.¹¹ Instead, these three parties assert that, because the SPP market

⁷ 2012 Order, 140 FERC ¶ 61,152 at P 52 (footnote omitted).

⁸ Texas Commission Reconsideration Request at 4-5; Occidental Reconsideration Request at 4; Xcel Reconsideration Request at 8.

⁹ Xcel Reconsideration Request at 4, 12-13.

¹⁰ Texas Commission Reconsideration Request at 2-6; Occidental Reconsideration Request at 4; Xcel Reconsideration Request at 2-3, 9-10.

¹¹ Texas Commission Reconsideration Request at 2-3, 6-7; Occidental Reconsideration Request at 3-4; Xcel Reconsideration Request at 3, 9-10.

is the only source of power available as an alternative to the “as available” QF power that is not supplied, the LIP is the “but for” price and thus the avoided cost for SPS.¹²

9. The Texas Commission, Occidental, and Xcel argue that the Commission erred by factoring the pervasive congestion on the SPS transmission system, which prevents QFs in SPS from accessing third-party buyers in competitive markets, into the Commission’s conclusion that the EIS LIPs cannot represent SPS’s avoided costs.¹³ These three parties argue that lack of access to third-party buyers does not mean that the avoided cost rate may not be set based on LIP. These three parties argue that congestion preventing access to third-party buyers relates to the separate issue of whether SPS should be released from its mandatory purchase obligations pursuant to section 210(m) of PURPA, not to the Texas Commission-approved methodology of using LIP in calculating avoided cost rates.¹⁴

III. Discussion

A. Procedural Matters

10. The Commission's Rules of Practice and Procedure, although silent with respect to requests for reconsideration and answers to requests for reconsideration, do not normally permit answers to requests for rehearing.¹⁵ We have previously indicated, however, that the concerns that militate against answers to requests for rehearing should apply to answers to requests for reconsideration.¹⁶ Accordingly, we reject the answer submitted by Exelon Wind.

¹² Texas Commission Reconsideration Request at 2-3, 6-7; Occidental Reconsideration Request at 3-4; Xcel Reconsideration Request at 3, 9-10.

¹³ Texas Commission Reconsideration Request at 4, 7-8; Occidental Reconsideration Request at 7-9; Xcel Reconsideration Request at 3-4, 10-11.

¹⁴ Texas Commission Reconsideration Request at 4, 7-8; Occidental Reconsideration Request at 7-9; Xcel Reconsideration Request at 3-4, 10-11.

¹⁵ 18 C.F.R. §385.713(d) (2015).

¹⁶ See *JD Wind I, LLC*, 130 FERC ¶ 61,127, at P 13 (2010); *CGE Fulton, L.L.C.*, 71 FERC ¶ 61,232, at 61,880-81 (1995); *Connecticut Light & Power Co.*, 71 FERC ¶ 61,035, at 61,151 (1995).

B. Commission Determination

11. We will deny reconsideration of the 2012 Order. We take administrative notice that, since our issuing the 2012 Order, SPP has evolved from an energy imbalance service market into an Integrated Marketplace, with day-ahead and real-time energy and operating reserve markets.¹⁷ In a proceeding separate from the one underlying the Texas Commission's 2010 Order, the Texas Commission approved a separate request from SPS to substitute LMP for LIP in calculating avoided costs.¹⁸ Accordingly, we find that the issue of whether LIP may be used to calculate avoided costs has been overtaken by events. We therefore deny the Texas Commission's, Occidental's, and Xcel's requests for reconsideration.¹⁹

¹⁷ *See Sw. Power Pool, Inc.*, 146 FERC ¶ 61,130 (2014) (approving start-up and operation of SPP's Integrated Marketplace, effective March 1, 2014); *Sw. Power Pool, Inc.*, 141 FERC ¶ 61,048, at P 1 (2012), *order on reh'g*, 142 FERC ¶ 61,205 (2013) (describing SPP's Integrated Marketplace).

¹⁸ *See Application of Southwestern Public Service Company for Authority to Revise its Tariff for Purchase of Non-Firm Energy from Qualifying Facilities*, Docket No. 42180, at PP 16-35 (Texas Commission Jan. 21, 2015) (approving SPS's request to use LMP to set avoided costs).

¹⁹ We note that the Commission to date has not been asked to, and so has not, opined on whether LMP may be used to calculate avoided costs. *See Council of the City of New Orleans, La.*, 145 FERC ¶ 61,057, at P 30 (2013).

In this regard, the Commission's regulations provide a framework for state regulatory authorities and nonregulated electric utilities to use in determining avoided costs. This framework identifies a range of factors that, to the extent practicable, must be taken into account. 18 C.F.R. § 292.304(e) (2015). When a challenge to an avoided cost adopted by a state regulatory authority or nonregulated electric utility comes before the Commission, whatever that avoided cost may be, the Commission will look to the application of that framework by the state regulatory authority or nonregulated electric utility in evaluating the state regulatory authority's or nonregulated electric utility's actions and the resulting avoided cost.

The Commission orders:

The Texas Commission's, Occidental's, and Xcel's reconsideration requests are denied, as described in the body of this order.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.