

155 FERC ¶ 61,069
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Entergy Services, Inc.
Entergy Arkansas, Inc.
Entergy Gulf States Louisiana, L.L.C.
Entergy Louisiana, LLC
Entergy Mississippi, Inc.
Entergy New Orleans, Inc.
Entergy Texas, Inc.

Docket No. QM14-3-001

ORDER DENYING REHEARING

(Issued April 21, 2016)

I. Background

1. In a January 21, 2016 Order,¹ the Commission granted, in part, and denied, in part, an application filed by Entergy Services, Inc., on behalf of the Entergy Operating Companies² (collectively, Entergy) seeking termination, on a service territory-wide basis, of the requirement to enter into new power purchase obligations or contracts to purchase electric energy and capacity from qualifying cogeneration or small power production facilities (QFs) with a net capacity in excess of 20 MW (over-20 MW QFs). Given that the Entergy Operating Companies are transmission-owning members of the Midcontinent Independent System Operator, Inc. (MISO), Entergy relied on the rebuttable

¹ *Entergy Servs., Inc.*, 154 FERC ¶ 61,035 (2016) (January 21 Order).

² The Entergy Operating Companies are Entergy Arkansas, Inc., Entergy Gulf States Louisiana, L.L.C. (Entergy Gulf States Louisiana), Entergy Louisiana, LLC (Entergy Louisiana), Entergy Mississippi, Inc., Entergy New Orleans, Inc. and Entergy Texas, Inc. Entergy filed its Application pursuant to section 210(m) of the Public Utility Regulatory Policies Act of 1978 (PURPA), 16 U.S.C. § 824a-3(m) (2012), and section 292.310 of the Commission's regulations, 18 C.F.R. § 292.310 (2015).

presumption, set forth in section 292.309(e) of the Commission's regulations, that MISO provides over-20 MW QFs with nondiscriminatory access to independently administered, auction-based day-ahead and real-time wholesale markets for the sale of electric energy and to wholesale markets for long-term sales of capacity.³ The Commission found that, based on the unrebutted statements in Entergy's Application, MISO provides all over-20 MW QFs in Entergy's service territory (with the exception of Dow Chemical Company's over-20 MW Plaquemine QF) nondiscriminatory access to MISO's markets.⁴ Accordingly, the Commission granted Entergy's request to terminate its mandatory purchase obligation pursuant to section 210(m) of PURPA, with the exception of the Plaquemine QF.⁵

2. Occidental Chemical Corporation (Occidental) attempted to rebut the presumption that its qualifying cogeneration facility at its Hahnville, Louisiana chemical plant site (Taft QF) had nondiscriminatory access to the MISO markets, but the Commission disagreed.⁶ Specifically, the Commission found unpersuasive Occidental's argument that transmission constraints in the Amite South load pocket and elsewhere prevent the Taft QF from having nondiscriminatory access to the MISO markets. The Commission stated that, because the Taft QF is located in a load pocket in Amite South, it is generally advantaged in making sales in the MISO markets.⁷ Moreover, the Commission found that the Taft QF's energy is more likely to be dispatched and will receive a relatively high locational marginal price (LMP) for its energy in the MISO centralized markets compared to the rest of MISO.⁸ The Commission noted that several other orders also

³ 18 C.F.R. § 292.309(e) (2015). The rebuttable presumption contained in section 292.309(e) further provides that MISO (among other RTOs/ISOs) qualifies as a market described in section 292.309(a)(1), that QFs with a capacity greater than 20 MW are rebuttably presumed to have access to that market, and that electric utilities that are members of MISO (among other RTOs/ISOs) should be relieved of the obligation to purchase electric energy from the over 20-MW QFs. A QF may seek to rebut this presumption by demonstrating, *inter alia*, that (1) the QF has certain operational characteristics that effectively prevent the QF's participation in a market; or (2) the QF lacks access to markets due to transmission constraints. *Id.*

⁴ January 21 Order, 154 FERC ¶ 61,035 at P 73.

⁵ *Id.*

⁶ *Id.* P 84.

⁷ *Id.* P 90.

⁸ *Id.*

issued on January 21, 2016⁹ that related to a settlement among MISO, Southwest Power Pool, Inc. (SPP) and the Joint Parties¹⁰ would further reduce the constraint between MISO Midwest and MISO South and improve access to transact within the MISO markets.¹¹

3. On February 22, 2016, Occidental filed a request for rehearing of the January 21 Order. As discussed below, we deny that request for rehearing.

II. Discussion

4. In its rehearing request, Occidental makes three main claims. All three are unpersuasive.

5. First, Occidental claims that the Commission ignored record evidence that the discrimination inherent in the MISO QF Integration Plan denies the Taft QF nondiscriminatory access to the MISO markets, despite Occidental specifically introducing such evidence and explicitly stating that Occidental's complaint in Docket No. EL13-41-000 was incorporated in this docket by reference.¹² We disagree. The Commission analyzed all pertinent evidence in the record in this proceeding before

⁹ *Sw. Power Pool, Inc.*, 154 FERC ¶ 61,021 (2016); *Sw. Power Pool, Inc.*, 154 FERC ¶ 61,022 (2016); *Midcontinent Indep. Sys. Operator, Inc.*, 154 FERC ¶ 61,023 (2016).

¹⁰ The Joint Parties include Alabama Power Company, Associated Electric Cooperative, Inc., Georgia Power Company, Gulf Power Company and Mississippi Power Company, by and through their agent Southern Company Services, Inc., the Tennessee Valley Authority, Louisville Gas and Electric Company and Kentucky Utilities Company, PowerSouth Energy Cooperative, and NRG Energy, Inc. The settlement among MISO, SPP, and the Joint Parties provides the terms and conditions under which MISO will provide compensation related to available system capacity usage and firm point-to-point transmission service between MISO Midwest and MISO South on SPP's or the Joint Parties' system. The settlement also provides that MISO will remove from its Open Access Transmission, Energy and Operating Reserve Markets Tariff (Tariff) the "hurdle rate" mechanism accepted by the Commission in Docket No. ER14-2445-001. *Sw. Power Pool, Inc.*, 154 FERC ¶ 61,021 at P 2.

¹¹ January 21 Order, 154 FERC ¶ 61,035 at P 90.

¹² Rehearing Request at 3-4. The MISO QF Integration Plan addresses the treatment of QFs in the Entergy service territory upon Entergy's integration into MISO.

determining that Occidental failed to rebut the presumption that the Taft QF has nondiscriminatory access to the MISO markets.¹³

6. Occidental's complaint in Docket No. EL13-41-000 raised broad issues about whether the MISO QF Integration Plan denies QFs nondiscriminatory access to MISO's markets. Occidental generally alleged that the plan: (1) improperly conditions QFs' registration for and participation in MISO's markets upon QFs foregoing their rights under PURPA; (2) improperly restricts QFs to exercising their PURPA rights only where QFs forego their ability to participate simultaneously in the MISO markets with any of their QF assets; and (3) does not appear in MISO's Commission-approved Tariff.¹⁴

7. In Order No. 688, the Commission explained that it would consider QF-specific issues, "such as operational characteristics and transmission limitations" in proceedings involving section 210(m) of PURPA.¹⁵ But issues relating to the manner in which a public utility implements its OATT and provides access to the markets, the Commission explained, "are more properly addressed in a complaint proceeding and will not be considered in the context of petitions for the termination of mandatory purchase requirements."¹⁶

¹³ See January 21 Order, 154 FERC ¶ 61,035 at PP 84-90.

¹⁴ Rehearing Request at 3-4 (citing Occidental October 27, 2014 Protest at 13-14).

¹⁵ *New PURPA Section 210(m) Regulations Applicable to Small Power Production and Cogeneration Facilities*, Order No. 688, FERC Stats. & Regs. ¶ 31,233, at P 9 n.7 (2006), *order on reh'g*, Order No. 688-A, FERC Stats. & Regs. ¶ 31,250 (2007), *aff'd sub nom. Am. Forest and Paper Ass'n v. FERC*, 550 F.3d 1179 (D.C. Cir. 2008).

¹⁶ Order No. 688, FERC Stats. & Regs. ¶ 31,233 at P 9 n.7 ("To the extent that a QF raises issues about the adequacy of an electric utility's implementation of an OATT, such issues are more properly addressed in a complaint proceeding and will not be considered in the context of petitions for the termination of mandatory purchase requirements. However, a QF may raise other issues, such as operational characteristics and transmission limitations, to attempt to rebut the presumption of market access when it files a response to an application submitted pursuant to section 210(m)(3) of PURPA and section 292.310 of our regulations."); *see also id.* P 53 ("[T]he FPA provides specific mechanisms, complaints under FPA section 206 or 306, to address allegations that a particular utility is not properly administering the OATT. We take very seriously allegations that a transmission owner is violating its OATT, but there are established statutory procedures for addressing such allegations. PURPA section 210(m) does not change this statutory framework."); Order No. 688-A, FERC Stats. & Regs. ¶ 31,250 at P 72 ("[O]nly issues other than issues related to the provision of open access transmission
(continued ...)")

8. We find the complaint proceeding in Docket No. EL13-41-000, not the instant PURPA section 210(m) application proceeding, is the more appropriate forum to raise broad issues related to the MISO QF Integration Plan, including those involving MISO's implementation and administration of its Tariff and whether the MISO QF Integration Plan should be on file as part of the Tariff. It would be both administratively inefficient and impractical for the Commission to address in the context of a single PURPA section 210(m) application Occidental's broader claims regarding the MISO QF Integration Plan, especially given the implications of any such ruling on all QFs and electric utilities in the MISO region. Order Nos. 688 and 688-A presume that MISO provides nondiscriminatory access *because* it operates under a Commission-approved OATT and these orders focus the Commission's inquiry in reviewing a PURPA section 210(m) application on whether, due to QF-specific issues, that presumption should apply to that particular PURPA section 210(m) application.¹⁷ Where a QF believes that MISO does not, in fact, provide nondiscriminatory access through its OATT, the QF may file a complaint, which Occidental has done in Docket No. EL13-41-000.

9. In any event, the order issued today in Docket No. EL13-41-000 denies Occidental's complaint, finding, among other things, that there are options under the MISO QF Integration Plan which provide QFs the ability to participate in the MISO

under the [open access transmission tariff (OATT)] will be considered when analyzing whether the presumption of nondiscriminatory access to markets has been rebutted. The Commission continues to believe that complaint proceedings are the appropriate forum for such disputes. However, where there are pending complaints raising credible issues concerning a transmission provider's implementation or administration of its OATT, the Commission will also consider that fact, as appropriate, when evaluating whether a QF does in fact have nondiscriminatory access to the market.”).

¹⁷ Cf. Order No. 688-A, FERC Stats. & Regs. ¶ 31,250 at P 69 (“Under the OATT, transmission providers must make transmission capacity available to all customers on a nondiscriminatory basis, thereby ensuring a level playing field for all market participants attempting to access supplies. That requirement by definition satisfies the nondiscriminatory access criteria of section 210(m). To the extent a QF believes that it in fact is not receiving nondiscriminatory access to the market, however, it can make that demonstration in response to an electric utility's application to terminate the purchase requirement.”); Order No. 688, FERC Stats. & Regs. ¶ 31,233 at P 9 (finding that, with respect to MISO, “the existence of an open access transmission tariff (OATT), or a reciprocity tariff filed by a non-jurisdictional utility, pursuant to the Commission's open access regulations, creates a rebuttable presumption, under section 210(m)(1), that [over 20 MW capacity] QFs have ‘nondiscriminatory access to’ the relevant wholesale markets.”).

markets while continuing to be able to exercise their rights pursuant to PURPA.¹⁸ Given this finding, Occidental's argument in the instant case that it lacks nondiscriminatory access to the MISO markets based on the MISO QF Integration Plan is moot.

10. Second, Occidental argues that the Commission ignored the plain meaning of its regulations and precedent in weighing allegations of high LMP, advantageous market conditions, and the Taft QF's location within a "load pocket" over evidence of severe and persistent transmission constraints in determining that Occidental failed to rebut the presumption of nondiscriminatory access to the MISO markets.¹⁹ We reject this contention. Section 292.309(e) of the Commission's regulations provides that a QF with a capacity greater than 20 MW may seek to rebut the presumption that it has nondiscriminatory access to the MISO markets by demonstrating, *inter alia*, that:

(1) The [QF] has certain operational characteristics that effectively prevent the [QF's] participation in a market; or

(2) The [QF] lacks access to markets due to transmission constraints. The [QF] may show that it is located in an area where persistent transmission constraints in effect cause the [QF] not to have access to markets outside a persistently congested area to sell the [QF] output or capacity.²⁰

As explained in Order No. 688, "[i]n evaluating transmission constraints, the Commission will consider, on a case-by-case basis, *among other things*, the opportunity for QFs, on a nondiscriminatory basis, to obtain transmission upgrades to relieve constraints and *whether the structure of the relevant market provides for the opportunity for the QF to sell notwithstanding the constraint.*"²¹ In contrast to Occidental's claims,²²

¹⁸ *Occidental Chemical Corp. v. Midwest Indep. Transmission Sys. Operator, Inc.*, 155 FERC 61,068, at PP 65-73 (2016).

¹⁹ Rehearing Request at 2.

²⁰ 18 C.F.R. § 392.309(e)(1)-(2) (2015).

²¹ Order No. 688, FERC Stats. & Regs. ¶ 31,233 at P 84 (emphasis added).

²² Rehearing Request at 8-9. Occidental argues that the January 21 Order failed to apply section 292.309(e)(2) of the Commission's regulations and instead based its decision on factors that are outside the plain meaning of the regulations and contrary to Commission orders, including relying on "higher than average LMPs in MISO" and other "alleged market advantages."

the January 21 Order followed the Commission's regulations and the precedent applying them.

11. The Commission reviewed and was persuaded by the record in this proceeding that the Taft QF has nondiscriminatory access to sell capacity either in MISO's Planning Resource Auction or through bilateral sales "notwithstanding transmission constraints that limit energy flows into the Amite South load pocket and the Sub-regional Power Balance Constraint between MISO Midwest and MISO South."²³ In evaluating the constraints, the Commission took into account "whether the structure of the relevant market provides for the opportunity for the QF to sell notwithstanding the constraint[s]" by finding that the Taft QF is located in a load pocket in Amite South, that its energy is more likely to be dispatched and will receive a relatively high LMP compared to the rest of MISO for its energy in the MISO centralized markets, and that sales by the Taft QF outside the Amite South load pocket would most often relieve the constraints rather than be barred from accessing the market by the constraints.²⁴ In reviewing the evidence submitted regarding transmission constraints and concluding that the constraints do not "cause the [QF] not to have access to markets outside a persistently congested area to sell the [QF] output or capacity,"²⁵ the Commission's analysis was fully consistent with its regulations.

12. We disagree with Occidental's contention that, by relying on LMP and "market advantage," the January 21 Order gives no meaning to section 292.310(d)(3) of the Commission's regulations. Section 292.310(d) requires PURPA section 210(m) applicants to file transmission studies and related information, including: (i) the applicant's long-term transmission plan; (ii) transmission constraints by path, element or other level of comparable detail; (iii) levels of congestion; (iv) relevant system impact studies for generation interconnections, already completed; (v) other information pertinent to showing whether transfer capability is available; and (vi) the appropriate link

²³ January 21 Order, 154 FERC ¶ 61,035 at PP 89-90.

²⁴ *Id.* PP 84, 90 (citing *inter alia* Entergy November 21, 2014 Answer, Affidavit of Michael M. Schnitzer at 7-8, 18 (Schnitzer Aff.)); *see also* Schnitzer Aff. at 7-8 ("Even when a constraint is binding and limiting the ability to import power into a load pocket, the generators inside the load pocket can sell out of the load pocket. . . . [T]he relatively high LMPs within Amite South mean . . . if [Occidental] chooses to sell energy from the facility directly into the MISO central market, it will on average receive some of the highest prices in MISO. . . . [and] for any customer located within MISO, [Occidental] can transact bilaterally with below average congestion costs compared to other generators in MISO.").

²⁵ 18 C.F.R. § 292.309(e)(2) (2015).

to applicant's OASIS. The six pieces of information were included in the regulations to be "sensitive to the QFs' potential need for information relevant to rebutting the presumption of nondiscriminatory access" and "to give potentially affected QFs data that may be relevant" to rebutting such presumption.²⁶ They were included as a procedural requirement, not as an exhaustive or dispositive list of factors the Commission must consider when evaluating whether a QF has rebutted the presumption of nondiscriminatory access.

13. We also note that, in considering a QF's location in a load pocket versus a generation pocket, the January 21 Order is not establishing a new standard or "depriving QFs of the guarantee that the Commission will make a 'facility-specific determination that the QF has nondiscriminatory access,'" as Occidental suggests.²⁷ In fact, just the opposite is true. In accordance with Order No. 688-A, the Commission properly performed its "case-by-case review" when considering the instant application and the record in this proceeding, and will continue to do so when presented with PURPA section 210(m) applications in the future.²⁸

14. We are also not persuaded that the January 21 Order departs in any way from *Northern States 2011*²⁹ and *Northern States 2015*.³⁰ Occidental argues that, in *Northern States Power 2011*, the Commission, in granting the application to relieve the utility of the requirement to enter into new contracts or obligations to purchase energy and capacity from over-20 MW QFs, pointed to "'significant transmission system upgrades that are planned for many of these flowgates – primarily to . . . reduce congestion.'"³¹ Whereas here, Occidental argues that "'MISO has neither undertaken nor yet proposed transmission upgrades that would relieve the persistent transmission constraints in Amite

²⁶ Order No. 688-A, FERC Stats. & Regs. ¶ 31,250 at P 67.

²⁷ Rehearing Request at 8-9.

²⁸ Order No. 688-A, FERC Stats. & Regs. ¶ 31,250 at P 68 ("The rebuttable nature of the presumption acknowledges that a QF may not actually have nondiscriminatory access and leaves that determination for case-by-case review by the Commission.").

²⁹ *N. States Power Co.*, a Minnesota corporation, 136 FERC ¶ 61,093 (2011) (*Northern States 2011*).

³⁰ *N. States Power Co.*, a Minnesota corporation, 151 FERC ¶ 61,110, *order on reh'g*, 152 FERC ¶ 61,215 (2015) (*Northern States 2015*).

³¹ Rehearing Request at 11 (citing *Northern States 2011*, 136 FERC ¶ 61,093 at P 21).

South.’’³² Occidental’s argument is misplaced. In *Northern States Power 2011*, the Commission found that protesters provided insufficient evidence to demonstrate that there were transmission constraints that would deny those protesters’ QFs nondiscriminatory access to the MISO markets.³³ The same rationale is applicable in the instant case. While recognizing the existing transmission constraints in the area of the Amite South load pocket, the Commission determined that such constraints would not deny the Taft QF nondiscriminatory access to the MISO markets.³⁴ Moreover, the mere existence of transmission constraints or the fact that MISO has not proposed transmission upgrades in the area of Amite South to relieve constraints is not dispositive of whether the Taft QF lacks nondiscriminatory access to the MISO markets.³⁵

15. Similarly, we reject Occidental’s contention that “the January 21 Order is at direct odds with *Northern States 2015* and other [PURPA section] 210(m) decisions, ignoring evidence of persistent transmission constraints in favor of factors that . . . do not derive from the language of the regulations and have never previously been applied in a [PURPA section] 210(m) proceeding”³⁶ In contrast to Occidental’s claims, the Commission did evaluate the constraints in the Amite South load pocket area, determining that they would not prevent the Taft QF from having nondiscriminatory access to the MISO markets. Nothing in the Commission’s regulations or prior case law precludes the Commission from considering “LMP” and “market advantage” and whether a QF is in a load pocket versus a generation pocket to evaluate constraints. Indeed, Occidental’s initial protest in this proceeding relied on an LMP analysis to support its claims and that protest and analysis comprise part of the record.³⁷

³² *Id.* (citing Occidental December 19, 2014 Answer at 16).

³³ *Northern States 2011*, 136 FERC ¶ 61,093 at P 21.

³⁴ January 21 Order, 154 FERC ¶ 61,035 at P 90.

³⁵ See 18 C.F.R. § 292.309(e)(2) (2015) (QF may rebut presumption of nondiscriminatory access to markets by demonstrating, *inter alia*, that “[t]he [QF] lacks access to markets due to transmission constraints. The [QF] may show that it is located in an area where persistent transmission constraints in effect cause the [QF] not to have access to markets outside a persistently congested area to sell the [QF] output or capacity.”).

³⁶ Rehearing Request at 12.

³⁷ See Occidental October 27, 2014 Protest at 7-8 (“An analysis of relevant Locational Marginal Prices (LMPs), which finds not only that the Taft Facility is located
(continued ...)

16. The Commission has a responsibility to analyze each fact pattern in which a QF seeks to rebut the presumption of nondiscriminatory access on a case-by-case basis, and properly did so here.³⁸ In this instance, the analysis warranted a finding that Occidental had not rebutted the presumption.

17. Third, Occidental argues that the Commission erred by basing its decision to terminate Entergy's mandatory purchase obligation with respect to the Taft QF on speculation rather than record evidence.³⁹ Occidental argues that it put forth "extensive" evidence of the persistent transmission constraints in Amite South and that the January 21 Order impermissibly counters this evidence by pointing to hypothetical, future transactions and market possibilities, rather than to actual transactions documented in the evidence.⁴⁰ The Taft QF has no history of making sales into the MISO markets. The Commission only relied on the evidence submitted by the parties. The Commission found most convincing the evidence submitted by Entergy to show that the Taft QF has nondiscriminatory access to the MISO markets.⁴¹ In contrast, the Commission did not find persuasive Occidental's arguments to the contrary.

The Commission orders:

Occidental's request for rehearing is hereby denied.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.

in a transmission-constrained area but also that real-time transmission constraints at the Taft facility are more significant than the day-ahead forecasts.").

³⁸ Order No. 688, FERC Stats. & Regs. ¶ 31,233 at P 84; Order No. 688-A, FERC Stats. & Regs. ¶ 31,250 at PP 66-68.

³⁹ Rehearing Request at 13-14.

⁴⁰ *Id.* at 13 (citing January 21 Order, 154 FERC ¶ 61,035 at PP 85, 87, 88).

⁴¹ *See* January 21 Order, 154 FERC ¶ 61,035 at PP 84-85, 87-88, n.184.