

140 FERC ¶ 61,152
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;
Philip D. Moeller, John R. Norris,
Cheryl A. LaFleur, and Tony T. Clark

14-238
CC
Allegretti + Dolan

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
High Plains Wind Power, LLC

Docket Nos. EL12-80-000
QF05-114-003
QF05-116-003
QF05-115-003
QF03-13-004
QF06-289-003
QF06-290-003
QF07-46-003
QF07-53-003
QF07-54-003
QF07-55-003
QF07-56-003
QF07-257-002

NOTICE OF INTENT NOT TO ACT AND DECLARATORY ORDER

(Issued August 28, 2012)

1. In an October 6, 2010 decision, the Public Utility Commission of Texas (Texas Commission) approved an application by Southwestern Public Service Company (SPS), an operating subsidiary of Xcel Energy Services Inc. (Xcel), to revise its tariff (SPS Tariff) for purchases of non-firm energy from Qualifying Facilities (QF).¹
2. On June 29, 2012, as corrected on August 1, 2012, Exelon Wind 1, LLC, Exelon Wind 2, LLC, Exelon Wind 3, LLC, Exelon Wind 4, LLC, Exelon Wind 5, LLC, Exelon

¹ *Application of Southwestern Public Service Company for Authority to Revise its Tariff for Purchase of Non-Firm Energy from Qualifying Facilities*, PUC Docket No. 37361, Order of Aug. 19, 2010, superseded by Order on Rehearing of Oct. 6, 2010 (the Texas Commission Order).

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 or Petitioner) filed a petition requesting that the Commission initiate an enforcement action under section 210(h) of the Public Utility Regulatory Policies Act of 1978 (PURPA),² or in the alternative, issue a declaratory order finding that the Texas Commission Order fails to implement PURPA and the Commission's PURPA regulations.³

3. In this order, we give notice that we decline to initiate an enforcement action pursuant to the section 210(h) of the PURPA. Moreover, we accept clarifications on two of the provisions of the SPS Tariff, as discussed herein, and so dismiss the petition for declaratory order in part. We nevertheless conclude as to a third provision involving payment that the Texas Commission Order is inconsistent with the requirements of PURPA and our regulations implementing PURPA, and therefore we grant the petition for declaratory order in part.

I. Background

4. Exelon Wind, formerly known as John Deere Renewables, LLC (JD Wind), owns and operates wind generating facilities (Exelon QFs) that are connected to SPS's transmission and distribution system. Each of the Exelon QFs is self-certified as a small power production QF under the Commission's regulations, and sells 100 percent of its net output to SPS, its host utility. The Exelon QFs are located in the panhandle of Texas within the Southwest Power Pool, Inc. (SPP) and outside of the Electric Reliability Council of Texas (ERCOT) balancing area.

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.

6. Xcel (on behalf of SPS) and the Exelon QFs have had a long-running dispute over SPS's obligation to purchase from the Exelon QFs and the terms pursuant to which the

² 16 U.S.C. § 824a-3(h) (2006).

³ 18 C.F.R. Part 292 (2012).

purchases should occur.⁴ As most relevant here, Xcel filed a petition to terminate SPS's mandatory purchase obligation pursuant to section 210(m) of PURPA.⁵ The Commission denied that petition on the ground that QFs in the SPS service territory lacked non-discriminatory access to the SPP markets due to persistent transmission constraints.⁶

II. Petition for Enforcement or Declaratory Order

7. Exelon Wind requests that the Commission initiate an enforcement action under section 210(h) of PURPA to compel the Texas Commission to act consistently with PURPA. In the alternative, however, Exelon Wind requests that the Commission issue a declaratory order finding that the Texas Commission Order is inconsistent with PURPA and the Commission's PURPA regulations. Exelon Wind states that the Texas Commission Order failed to implement PURPA, and therefore is preempted by Federal law, because the SPS Tariff revisions violate PURPA's mandatory purchase obligation and contradict the Commission's regulations and precedent.

8. Specifically, Exelon Wind argues that the Texas Commission Order: (1) allows SPS to curtail QF energy and "be relieved of the obligation to purchase the QF's energy" for reasons other than those expressly permitted in the Commission's PURPA regulations; (2) requires the Exelon QFs to choose between paying SPS the cost of additional transmission delivery upgrades, or accepting curtailment, even though the Exelon QFs were interconnected to the SPS system and funded all required upgrades many years before; (3) uses a methodology to determine the avoided-cost rate for "as available" energy that is inconsistent with the requirements of PURPA as set forth in the Commission's regulations; and (4) by making QFs accept an avoided cost equal to the locational imbalance prices (LIP) at the QF's specific node, allows SPS to achieve the same result that it would have obtained had the Commission granted, rather than denied,

⁴ Exelon Wind refers to several Commission cases, including complaints filed by Xcel in Docket Nos. EL07-28-000, EL07-87-000 (registration of QFs in EIS market) and Docket No. EL09-77-000 (establishing non-contractual legally enforceable obligations), as well as filings in Docket Nos. ER09-149-000 and ER12-1600-000 (QF registration issues), and an Xcel application to terminate its PURPA mandatory purchase obligation in Docket No. QM07-5-000, *et al.*

⁵ 16 U.S.C. § 824a-3(m) (2006).

⁶ *Xcel Energy Servs., Inc.*, 122 FERC ¶ 61,048 (2008), *reh'g denied*, 124 FERC ¶ 61,073 (2008).

Xcel's section 210(m) of PURPA petition to terminate SPS's PURPA mandatory purchase obligation.

9. In addition, Exelon Wind also asserts the Texas Commission did not properly apply its own regulations and improperly implemented PURPA; the rules governing the PURPA purchase obligation are set forth in sections 25.242(f) and (g) of the Texas commission's Substantive Rules.

A. Curtailment and Interruptions

10. Exelon Wind states the Texas Commission authorized SPS to curtail QF output (and therefore allows SPS to take less than the full net output of the QF) in circumstances not permitted under the Commission's regulations: (1) based on "operational circumstances" such as transmission congestion; and (2) in circumstances where there is no "system emergency" as provided under PURPA, but where SPS, in its sole discretion, determines that QF purchases would contribute to continuation of undefined "hazardous conditions"; and (3) by making the PURPA purchase obligation "subject to" other, unspecified North American Electric Reliability Corporation (NERC) and North American Energy Standards Board (NAESB) standards and SPP curtailment policies and procedures, which are also not defined in the SPS Tariff.

11. In this regard, Exelon Wind particularly objects to the following italicized language:

All delivery arrangements are subject to all applicable [North American Electric Reliability Corporation (NERC)] reliability standards, [North American Energy Standards Board (NAESB)] standards, and Southwest Power Pool curtailment policies and procedures.

Additionally, non-firm energy purchases may be interrupted in case of a system or area Emergency or *when a hazardous condition exists if, in the Company's sole judgment, the continuation of such purchases would contribute to* the Emergency or *hazardous condition*. Upon ten (10) minutes notice to the QF to cease delivery of energy, *non-firm energy purchases may be interrupted due to operational circumstances*, including instances when the amount of energy produced by the QF exceeds the portion of the Company's load that can reliably be served by said energy.

If transmission or distribution service is curtailed by SPS or SPP for the reasons set forth in this "Curtailment and Interruptions" section of the Tariff, SPS shall be relieved of its obligation to purchase the

QF's energy during the time the condition giving rise to the curtailment exists.

SPS Tariff at 9 (emphasis added by Exelon Wind).

12. Exelon Wind states that the Commission has consistently rejected proposals that would permit host utilities to curtail or otherwise discontinue QF purchases in the absence of a system emergency or low loading scenario.⁷

B. Delivery Arrangements

13. Exelon Wind also objects to SPS's tariff changes that require the Exelon QFs to either accept curtailment or agree to fund additional upgrades, because, if they do not, and SPP determines that transmission upgrades are necessary, then SPS will continue to utilize non-firm transmission service to deliver energy from the QF to SPP's load.

14. In this regard, Exelon Wind objects particularly to the following italicized language:

For purchases under this Tariff, Company shall be responsible for acquiring transmission service to deliver energy from the QF to Company's load. The Company shall request firm transmission service from the SPP to deliver the QF's energy to Company's load. Non-firm transmission service will be utilized during the pendency of the firm transmission request. If the SPP determines that no transmission upgrades are necessary for firm transmission service from the QF to Company's load, Company shall procure firm transmission service to deliver energy from the QF to Company's load. *If the SPP determines that transmission upgrades are necessary for firm transmission service from the QF to Company's load, Company shall continue to utilize non-firm transmission service to deliver energy from the QF to Company's load.*

SPS Tariff at 6 (emphasis added by Exelon Wind).

15. Exelon Wind asserts that this language violates PURPA by permitting SPS to curtail output on the same basis as non-firm transmission service.⁸ Exelon Wind argues

⁷ Petition at 22-28, citing to, e.g., *Southwest Power Pool, Inc.*, 136 FERC ¶ 61,097, at P 14 (2011) (SPP curtailment order); *Entergy Servs. Inc.*, 137 FERC ¶ 61,199 (2011).

⁸ Petition at 28-29.

that, under PURPA, the Exelon QFs are only required to pay for transmission service if they are using the host utility's system to transmit power to another utility; a QF is not required to obtain transmission service to reach the host utility's own load or to fund transmission delivery upgrades to exercise their PURPA rights.⁹ Exelon Wind maintains that, under Order No. 2003, an interconnection customer is required to fund only those upgrades that are necessary for interconnection and that are set forth in the interconnection agreement.¹⁰

C. Payment Determination

16. Exelon Wind requests that the Commission find that SPS's locational imbalance pricing methodology violates PURPA because it does not reflect SPS's avoided costs and is, in fact, the price that the Exelon QFs would have received if PURPA had never been enacted or if the Commission had terminated SPS's PURPA purchase obligation.¹¹ Exelon Wind argues that the Texas Commission's order contradicts PURPA when the Texas Commission finds that SPP's EIS market locational imbalance price at the QF's own specific node represents SPS's avoided cost, when in fact PURPA defines avoided cost as the incremental cost to the host utility of energy or capacity, that, but for the QF purchases, such utility would incur by generating itself or purchasing from another source.¹² Exelon Wind argues that, by purchasing from QFs, SPS avoids costs that SPS would have incurred if it had generated the power itself, purchased the power from another source under a power purchase agreement, or purchased EIS market energy at the load node -- not at the QF-specific node.¹³

⁹ See 18 C.F.R. § 292.303(d) (2012).

¹⁰ Petition at 30-37, citing, e.g., *Standardization of Generator Interconnection Agreements and Procedures*, Order No. 2003 FERC Stats. & Regs. ¶ 31,146, at P 778 (2003), *order on reh'g*, Order No. 2003- A, FERC Stats. & Regs. ¶ 31,160, *order on reh'g*, Order No. 2003-B, FERC Stats. & Regs. ¶ 31,171 (2004), *order on reh'g*, Order No. 2003-C, FERC Stats. & Regs. ¶ 31,190 (2005), *aff'd sub nom. Nat'l Ass'n of Regulatory Util. Comm'rs v. FERC*, 475 F.3d 1277 (D.C. Cir. 2007), *cert. denied*, 552 U.S. 1230 (2008).

¹¹ Petition at 3, 37-40.

¹² Petition at 37, citing 18 C.F.R. § 292.101(b)(6) (2012).

¹³ Petition at 38.

17. In this regard, Exelon Wind particularly objects to the following italicized language:

Rates for purchase of non-firm energy under this Tariff Sheet No. IV-117 are based on the Company's Avoided Cost of energy. Under this Tariff, *the hourly Avoided Cost shall be the SPP EIS Market LIP calculated at the registered resource Settlement Location associated with the QF at the time of production of the energy by the QF*, net of Revenue Neutrality Uplift and Uninstructed Deviation Charges for that hour at that Settlement Location and net of line losses. If no Settlement Location exists, payment will be based on the closest electrical location with a Settlement Location until one can be established for the QF.

SPS Tariff at 7 (emphasis added by Exelon Wind).

18. Exelon Wind also argues that the SPS payment provision violates the "but for" language of the avoided cost definition and pricing methodology, because it does not use the locational imbalance prices or other costs associated with purchases that would have been avoided had the QF not supplied energy.¹⁴ It instead uses the locational imbalance prices settled by SPP at the QF's pricing node for the energy actually supplied.

19. Next, Exelon Wind argues that the EIS market is a market for ancillary services, not energy services, and the locational imbalance prices of the EIS market cannot represent the avoided cost of energy for SPS.¹⁵

20. Finally, Exelon Wind argues there are pervasive transmission constraints on the SPS system that prevent the EIS market from being a functional market for PURPA's purposes, and it bottles up QF output, so that prices in the EIS market are not reflective of the prices that would prevail in a competitive market.¹⁶

III. Notice of Filing and Responsive Pleadings

21. Notice of Exelon Wind's filing was published in the *Federal Register*, 77 Fed. Reg. 40,608 (2012), with interventions and protests due on or before July 30, 2012.

¹⁴ *Id.* at 38-39.

¹⁵ *Id.* at 39.

¹⁶ *Id.* at 39-40.

22. American Electric Power Service Corporation, Entergy Services, Inc. (Entergy), and PacifiCorp filed timely motions to intervene. The Texas Commission filed a notice of intervention and protest; Golden Spread Electric Cooperative, Inc. (Golden Spread), Occidental Permian Limited (Occidental), and Xcel, on behalf of itself and SPS, filed timely motions of intervention and protests (collectively, Protesters). Gregory R. and Beverly F. Swecker filed an untimely motion to intervene.

23. Protesters argue that the Texas Commission's decision is consistent with the Commission's regulations.¹⁷ Protesters state that Exelon Wind's claim is an as-applied challenge, i.e., a challenge to the Texas Commission's application of PURPA, not to its implementation of PURPA,¹⁸ because the harm alleged is specific to Exelon Wind's own QFs rather than a class of QFs. Further, Protesters argue that Exelon Wind is currently seeking a state court remedy and the Commission should leave the Petitioner to that pursuit.¹⁹ Protesters state that the Commission has a long established policy to leave to the states issues relating to the application of PURPA.²⁰ Protesters argue that, because the issues raised in this petition are nearly identical to and are currently the subject of an appeal set for hearing in a proceeding in Travis County, Texas state court, the Commission should follow its policy expressed in *MIT* and decline to act on the petition. Protesters state that not only is this consistent with the Commission's policy as expressed in *MIT* and other cases,²¹ but it does not prevent Exelon Wind from pursuing a remedy in federal court if it so desires.²² Texas Commission and Xcel also state that it has been a

¹⁷ Xcel Protest at 51; Texas commission Protest at 19; Occidental Protest at 30.

¹⁸ Xcel Protest at 17-18; Texas commission Protest at 13; Occidental Protest at 9.

¹⁹ Xcel Protest at 19; Texas commission Protest at 18; Occidental Protest at 14. Both the Texas commission and Xcel state that allegations that a state regulatory authority failed to properly apply PURPA must be raised in state courts pursuant to section 210(g) of PURPA and not section 210(h).

²⁰ Xcel Protest at 19-21; Texas commission Protest at 14-15; Occidental Protest at 8, citing *Massachusetts Institute of Technology*, 74 FERC ¶ 61,221 (1996) (*MIT*).

²¹ See *MIT*, 74 FERC ¶ 61,221 (1996); *accord Metro. Edison*, 72 FERC ¶ 61,015, at 61,051, *order on clarification*, 72 FERC ¶ 61,269 (1995); *West Penn Power*, 71 FERC ¶ 61,153, at 61,490 (1995).

²² See, e.g., *Policy Statement Regarding the Commission's Enforcement Role Under Section 210 of the Public Utility Regulatory Policies Act of 1978*, 23 FERC ¶ 61,304, at 61,645 (1983) (1983 Policy Statement) (stating that the Commission's enforcement authority under Section 210(h) is discretionary, and that the Commission's

(continued...)

longstanding Commission policy to afford the states considerable latitude in the determination of PURPA avoided costs.²³ The Texas Commission, Golden Spread and Xcel argue that the Texas Commission's ruling was based on an extensive evidentiary record finding that locational imbalance prices in the EIS market accurately reflect SPS's avoided cost rate.²⁴

A. Curtailment and Interruptions

24. With regard to the SPS Tariff curtailment language, Protesters state that Exelon Wind is incorrect in its assertion that the Curtailment and Interruptions section of the SPS Tariff allows curtailment beyond what is permitted under PURPA or the Commission's regulations.²⁵ Xcel, the Texas Commission and Occidental state that the "hazardous condition" language in this section of the SPS Tariff is intended only to refer to an event which rises to the level of an emergency.²⁶

25. Xcel argues that the "operational circumstances" portion of the SPS Tariff is appropriate because it addresses the low-loading condition identified in section 292.304(f) of the Commission's regulations as well as circumstances which could result in a system emergency.²⁷ Occidental states this language was included to specifically address issues related to QFs interconnected with the distribution system.²⁸

decision to exercise its discretion not to initiate an enforcement proceeding does not preclude a petitioner from seeking relief because the petitioner can bring an enforcement action directly in the appropriate court) (1983 Policy Statement); *Cogeneration Coalition of America*, 61 FERC ¶ 61,252 (1992).

²³ Texas Commission Protest at 35.

²⁴ Xcel Protest at 38-39; Golden Spread Protest at 5; Texas commission Protest at 36.

²⁵ Xcel Protest at 22; Texas Commission Protest at 19; Occidental Protest at 6; Golden Spread Protest at 16. Protesters further state that this section of the SPS Tariff only allows curtailment as defined by sections 292.307 and 209.304(f) of the Commission's regulations.

²⁶ Xcel Protest at 24; Texas Commission Protest at 25; Occidental Protest at 16-17.

²⁷ Xcel Protest at 25.

²⁸ Occidental Protest at 20.

26. Protesters state the inclusion of the NERC, NAESB and SPP standards does not impose any new requirements on QFs, claiming that the standard already applied to or will have no effect on QFs.²⁹ Further Protesters state the SPS Tariff provisions which allow for curtailment due to federal reliability standards are appropriate because a violation of those standards could result in a system emergency.

27. Xcel states that the two precedents Exelon Wind describes in which the Commission rejected efforts to curtail QFs' output are different from this case.³⁰ Xcel states this case is different from the SPP curtailment order because nothing in the SPS Tariff allows for the curtailment of QFs unless congestion rises to the level of a system emergency. Xcel states the *Entergy Servs. Inc.* case is also different, in that Entergy proposed curtailing QFs, due to congestion, before a system emergency has been reached, and is therefore also irrelevant here.³¹ Xcel avers it has never curtailed QF energy in the absence of conditions described in section 292.304(f)(1).³²

28. Golden Spread states that the two curtailment functions, the Merchant Function issuing economic curtailments and the SPS Transmission Function issuing reliability or safety curtailments, are fundamentally different.³³

B. Delivery Arrangements

29. Protesters state the language of the SPS Tariff does not provide for or mention curtailment.³⁴ Occidental, the Texas Commission, and Xcel state that the Delivery Arrangements section of the SPS Tariff does not require QFs to pay for transmission service or upgrades.³⁵ Instead, they explain, this section outlines SPS's responsibility for acquiring transmission service to deliver a QF's electric energy to SPS's load, and that SPS will request firm transmission service for that energy. Protesters states that, should it

²⁹ Xcel Protest at 27; Texas Commission Protest at 26; Occidental Protest at 17-20.

³⁰ Xcel Protest at 29.

³¹ *Id.*

³² Xcel Protest at 30.

³³ Golden Spread Protest at 11.

³⁴ Xcel Protest at 31; Texas Commission Protest at 29; Occidental Protest at 21.

³⁵ Xcel Protest at 32; Texas Commission Protest at 28; Occidental Protest at 6.

be determined by SPP that transmission upgrades are required, SPS will acquire non-firm service to deliver a QF's energy to load.

30. Xcel claims that Exelon Wind is essentially demanding that SPS ratepayers pay for transmission upgrades necessary to insulate QFs from lower locational prices resulting from congestion.³⁶ Xcel maintains that Exelon Wind and other non-dispatchable QFs effectively receive "firmer than firm" transmission access because SPP lacks any practical method of curtailing non-dispatchable resources.³⁷

C. Payment Determination

31. The Texas Commission, Golden Spread, and Xcel argue that the Texas Commission correctly found, based on evidence presented in Texas Commission Docket No. 37361, that the locational imbalance prices accurately reflect SPS's avoided cost at each node.³⁸

32. Xcel states that Exelon Wind, after having first argued that market prices could be used to determine avoided cost rates before the Texas Commission, cannot now credibly argue that using market prices to determine avoided cost rates is a PURPA violation.³⁹ Xcel argues that *Cogen Lyondell* found that the Texas Commission's market-oriented approach to determining avoided costs was consistent with PURPA.⁴⁰

33. Protesters also state that a system-average avoided cost rate is discriminatory against QFs located downstream of transmission constraints as well as those non-QFs

³⁶ Xcel Protest at 33-34.

³⁷ *Id.* at 30.

³⁸ Xcel Protest at 40; Golden Spread Protest at 5; Texas Commission Protest at 36. They explain that SPS offers all of its dispatchable generation and purchased power to SPP. SPP then determines which of the mix of available resources (SPS's and others) is employed to serve SPS's retail customers at least cost. SPS then buys all the power it needs to serve its load from the SPP balancing energy market. Regardless of whether SPS generated the last increment of generation, the market-clearing price reflects the cost of serving the next increment of load, and therefore the locational imbalance prices accurately reflects SPS's avoided costs in taking a QF's power.

³⁹ Xcel Protest at 39-40.

⁴⁰ *Id.* at 42-43, citing *Cogen Lyondell, Inc.*, 95 FERC ¶ 61,243 (2002).

located next to upstream QFs.⁴¹ Protesters argue that the constraints within SPS support the use of locational imbalance prices in setting avoided cost rates; by paying a system average avoided cost rate, QFs within constrained regions receive less than the full value of the energy they produce, and QFs upstream receive more than the cost otherwise avoided by SPS.

34. Occidental further argues the EIS market is the only place SPS is able to purchase power in real time to replace power not generated by QFs.⁴² Protesters also state that, because SPP re-dispatches all of the generation made available to it based on economic dispatch, Exelon Wind's portrayal of the EIS market as an ancillary services market is inaccurate.⁴³

35. Entergy separately argues that the facts and circumstances of this proceeding are specific to the Exelon QFs, the Texas Commission, and SPS, and do not present an issue applicable to RTOs with Day 2 markets. Entergy argues that, in RTOs with Day 2 markets, avoided cost prices have been based on hourly Locational Marginal Prices at the generator bus. Entergy explains that it proposed to join Midwest Independent Transmission System Operator, Inc. (MISO) and seek to have avoided cost rates determined on hourly Locational Marginal Prices at the generator bus. Entergy asks the Commission to limit the holding of any order in this case to the specific facts of the case.

D. Other Issues Raised in the Comments and Protests

1. Xcel

36. Separately, Xcel asserts that it is not attempting to circumvent the Commission's order denying it PURPA section 210(m) relief, noting that SPS remains obligated to purchase power from all QFs at state-determined avoided cost rates.⁴⁴

37. Xcel argues that Exelon Wind exaggerates the effect of the Texas Commission decision.⁴⁵ It will not "sweep across the country," as Exelon Wind claims, because it is

⁴¹ Xcel Protest at 44; Texas PUC Protest at 38; Occidental Protest at 23-24; Golden Spread Protest at 4.

⁴² Occidental Protest at 28.

⁴³ Xcel Protest at 42; Texas Commission Protest at 37-38; Occidental Protest at 27.

⁴⁴ Xcel Protest at 48.

⁴⁵ Xcel Protest at 49.

in fact not a new decision and reflects the Texas Commission's interpretation of PURPA in the earlier ERCOT case. Xcel further argues that the Texas Commission's decision does not endanger the development of QFs because it maintains the purchase requirement at avoided cost rates as measured by the locational imbalance prices, arguing that PURPA does not require price certainty, but avoided cost rates.

2. Texas Commission

38. The Texas Commission asserts that, significantly, Exelon Wind does not complain that the Texas Commission's rule is inconsistent with PURPA or the Commission's PURPA regulations, nor does it identify any specific defect with the Texas Commission's rule. Exelon Wind's interest is how the tariff revisions will impact its particular QFs. The Texas Commission argues that, because Exelon Wind is not asserting that the Texas Commission's rule is inconsistent with PURPA or the Commission's regulations, Exelon Wind is not entitled to petition pursuant to section 210(h) of PURPA. The Texas Commission argues that Exelon Wind's claims should instead be viewed as "as applied" claims, properly brought as an appeal of the Texas Commission's decision in Texas state court; the Texas Commission points out that Exelon Wind has in fact appealed the Texas Commission's decision in state court.

3. Golden Spread

39. Golden Spread submits it is unreasonable and unduly discriminatory to award either a QF or an electric utility purchasing from a QF transmission access rights that are superior to the rights of unaffiliated transmission customers taking network integration transmission service or firm point-to-point transmission service under an open access transmission tariff.

E. Exelon Wind's Answer

40. On August 14, 2012, Exelon Wind filed an answer to the protests of the Texas Commission and Xcel. Exelon Wind states that, in light of (1) the Texas Commission's and Xcel's protests clarifying that the Curtailment and Interruptions provision and the Delivery Arrangements provision of SPS's Tariff are not intended to authorize curtailment except in the two circumstances permitted under the Commission's regulations, and (2) that those provisions neither authorize SPS to curtail QF purchases on the same basis as non-firm transactions nor require QFs to fund any transmission delivery upgrades to avoid such curtailment, Exelon Wind is willing to accept those clarifications. Exelon Wind does ask the Commission, if it accepts the proposed clarification, to make clear that the Commission's PURPA regulations do not permit SPS

to curtail QF purchases pursuant to the Delivery Arrangements provision, to curtail QF purchases on the same basis as non-firm transactions, or to require QFs to fund transmission delivery upgrades to avoid curtailment.⁴⁶

IV. Discussion

A. Procedural Matters

41. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2012), the notice of intervention and the timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding. Pursuant to Rule 214(d) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214(d) (2012), the Commission will grant Gregory R. and Beverly F. Swecker's late-filed motion to intervene given their interest in the proceeding, the early stage of the proceeding, and the absence of undue prejudice or delay.

42. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2012), prohibits an answer to a protest unless otherwise ordered by the decisional authority. We will accept Exelon Wind's answer because it has provided information that assisted us in our decision-making process.

B. Commission Determination

43. Exelon Wind alleges that the Texas Commission, in its order, violated PURPA by: (1) permitting QF curtailment in circumstances beyond those permitted under the Commission's PURPA regulations; (2) requiring QFs to fund transmission delivery upgrades or else face further curtailment; and (3) setting SPS's avoided costs equal to the SPP Energy Imbalance Service market locational imbalance price at a QF's node.

44. PURPA directs the Commission to prescribe "such rules as it determines necessary to encourage cogeneration and small power production."⁴⁷ PURPA, in turn, directs the states to "implement" the regulations adopted by the Commission.⁴⁸ A "state

⁴⁶ Exelon Wind August 14, 2012 Answer at 7-8.

⁴⁷ 16 U.S.C. §§ 824a-3(a)-(b) (2006).

⁴⁸ 16 U.S.C. § 824a-3(f) (2006); *accord FERC v. Mississippi*, 456 U.S. 742, 751 (1982); *Independent Energy Producers Association v. California Public Utilities Commission*, 36 F.3d 848, 856 (9th Cir. 1994); *Cogeneration Coalition of America, Inc.*, 61 FERC ¶ 61,252, at 61,925-26 (1992); *Small Power Production and Cogeneration*

(continued...)

[c]ommission may comply with the statutory requirements by issuing regulations, by resolving disputes on a case-by-case basis, or by taking other actions reasonably designed to give effect to [the Commission's] rules.”⁴⁹ As a result, a state may take action under PURPA only to the extent that that action is in accordance with the Commission's regulations.

45. Section 210(h)(2)(B) of PURPA⁵⁰ permits any electric utility, qualifying cogenerator, or qualifying small power producer to petition the Commission to act under section 210(h)(2)(A) of PURPA⁵¹ to enforce the requirement that a state Commission implement the Commission's regulations. The Commission's enforcement authority under section 210(h)(2)(A) of PURPA is discretionary. As the Commission pointed out in its 1983 Policy Statement, “the Commission is not required to undertake enforcement action.”⁵² If the Commission does not undertake an enforcement action within 60 days of the filing of a petition, under section 210(h)(2)(A) of PURPA, the petitioner then may bring its own enforcement action directly against the state regulatory authority or non-regulated electric utility in the appropriate United States district court.⁵³

46. In this order, we give notice that we do not intend to go to court to enforce PURPA on behalf of Exelon Wind,⁵⁴ Exelon Wind thus may bring its own enforcement

Facilities; Regulations Implementing Section 210 of the Public Utility Regulatory Policies Act of 1978, Order No. 69, FERC Stats. & Regs. ¶ 30,128, at 30,864 (1980), *order on reh'g*, Order No. 69-A, FERC Stats. & Regs. ¶ 30,160 (1980), *aff'd in part and vacated in part*, *American Electric Power Service Corporation v. FERC*, 675 F.2d 1226 (D.C. Cir. 1982), *rev'd in part*, *American Paper Institute, Inc. v. American Electric Power Service Corporation*, 461 U.S. 402 (1983).

⁴⁹ *FERC v. Mississippi*, 456 U.S. 742, 751 (1982); *see also* 1983 Policy Statement, 23 FERC ¶ 61,304, at 61,643.

⁵⁰ 16 U.S.C. § 824a-3(h)(2)(B) (2006).

⁵¹ 16 U.S.C. § 824a-3(h)(2)(A) (2006).

⁵² 1983 Policy Statement, 23 FERC ¶ 61,304, at 61,645.

⁵³ 16 U.S.C. § 824a-3(h)(2)(B) (2006). The Commission may intervene in such a district court proceeding as a matter of right. *Id.*

⁵⁴ Our decision not to go to court effectively moots the Texas Commission's claim that the petition for enforcement was not appropriately before us in the first instance. We also do not address Exelon Wind's arguments that the Texas Commission order is

(continued...)

action against the Texas Commission in the appropriate United States district court. Notwithstanding our decision not to go to court to enforce PURPA on behalf of Exelon Wind, we find that the Texas Commission Order is inconsistent with PURPA in certain respects, as we explain below.

47. Exelon Wind has asked the Commission to declare that the curtailment provisions of the Texas Commission Order are inconsistent with PURPA. As Exelon Wind points out, exceptions to the statutory QF purchase obligation are limited. At the outset we note that a utility can be relieved of its QF purchase obligation under section 210(m) of PURPA, 16 U.S.C. § 824a-3(m) (2006). That provision is not at issue here, however.⁵⁵

48. Of more significance are two provisions of the Commission's PURPA regulations. Section 292.304(f) of the Commission's PURPA regulations, 18 C.F.R. § 292.304(f)(1) (2012), provides, with certain limitations, that a utility is not required to purchase unscheduled QF energy "during any period during which, due to operational circumstances, purchases from qualifying facilities will result in costs greater than those which the utility would incur if it did not make such purchases, but instead generated an equivalent amount of energy itself."⁵⁶ Section 292.307(b) of the Commission's PURPA regulations, 18 C.F.R. § 292.307(b) (2012), provides that a utility may, during a system emergency, discontinue purchases from a QF if such purchases would contribute to such emergency. In turn, section 292.101(b)(4) of the Commission's PURPA regulations, 18 C.F.R. § 292.101(b)(4) (2012), defines "system emergency" as "a condition on a utility's system which is likely to result in imminent significant disruption of service to customers or is imminently likely to endanger life or property."

inconsistent with the Texas Commission's rules; those arguments are properly addressed in a state court appeal of the Texas Commission order. In this regard, sections 210(g) and 210(h) of PURPA provide for separate state and federal rights to challenge a state's implementation of PURPA. *See Rainbow Ranch Wind LLC*, 139 FERC ¶ 61,077, at P 26-29 (2012).

⁵⁵ Section 292.310 of the Commission's PURPA regulations, 18 C.F.R. § 292.310 (2012), implements section 210(m) of PURPA, setting out a process by which an electric utility seeking termination of its QF purchase obligation files a petition and makes a showing that it provides nondiscriminatory access to markets as described in section 210(m) of PURPA.

⁵⁶ The Commission provided a more complete explanation of when curtailment of QF resources is permitted by our PURPA regulations in *Entergy Servs., Inc.*, 137 FERC ¶ 61,199 at PP 52-58 (2011) (*Entergy*).

49. Exelon Wind originally asked the Commission to find that the Texas Commission Order on the curtailment provisions of the SPS Tariff was inconsistent with PURPA. Exelon Wind subsequently stated that, based on the representations in the protests of the Texas Commission and Xcel, it is satisfied that the curtailment provisions of the SPS Tariff will not be applied inconsistently with PURPA. While Exelon Wind believes that the language of the SPS Tariff would on its face permit curtailment in circumstances beyond those permitted by the Commission's regulations, Exelon Wind relies on the representations made in the Texas Commission's protest and in Xcel's protest, and no longer believes that the Commission needs to find the curtailment provisions contained in the SPS Tariff inconsistent with PURPA; the representations made in those protests, particularly Xcel's representation,⁵⁷ indicate that SPS will not curtail pursuant to section 292.304(f) of the Commission's regulations⁵⁸ for operational purposes other than for reasons permitted by the Commission under that section. In addition, Xcel, in its protest, further represents that SPS will not curtail pursuant to section 292.307(b) of the Commission's regulations until Transmission Loading Relief Level 5 is declared, which, Xcel states, gives Exelon Wind what it seeks.⁵⁹ Given the clarifications made by the Texas Commission and Xcel in their protests to Exelon Wind's petition for enforcement, and given Exelon Wind's acceptance of those clarifications, we will read the Texas Commission Order in light of those clarifications, and thus we see no need to declare here that the Texas Commission Order's approval of the SPS curtailment provisions is inconsistent with PURPA.

50. Exelon Wind has also asked the Commission declare that the delivery arrangements provision of the SPS Tariff, which like the provision just discussed was also approved in the Texas Commission Order, is inconsistent with PURPA because it permits SPS to curtail QF purchases on the same basis as non-firm transactions, contrary to the requirements of PURPA and the Commission's regulations. PURPA and the Commission's implementing regulations require a utility to purchase the full output of an interconnected QF exercising its PURPA rights and to make such purchases at rates that do not exceed the utility's full avoided cost.⁶⁰ Once that energy is purchased, it is SPS's responsibility to deliver that energy to its load (or otherwise manage the energy).⁶¹

⁵⁷ Xcel Protest at 30.

⁵⁸ 18 C.F.R. § 292.304(f) (2012).

⁵⁹ Xcel Protest at 30.

⁶⁰ 16 U.S.C. §§ 824a-3(a), (b) (2006); 18 C.F.R. §§ 292.303, .304 (2012).

⁶¹ *Entergy*, 137 FERC ¶ 61,199 at P 52.

Curtailing unscheduled QF energy output along with non-firm energy is inconsistent with SPS's obligations under PURPA.⁶² As discussed above,⁶³ the circumstances in which QF purchases may be curtailed are limited and the Commission has rejected attempts by utilities to curtail QF output in other circumstances beyond those limited exceptions.

51. However, in its Answer, Exelon Wind states that, in light of the Texas Commission's and Xcel's protests clarifying that the delivery arrangements provision of SPS's Tariff does not authorize SPS to curtail QF purchases on the same basis as non-firm transactions nor require QFs to fund any transmission delivery upgrades to avoid curtailment, Exelon Wind is willing to accept this clarification. Given the clarifications made by the Texas Commission and Xcel in their protests to Exelon Wind's petition for enforcement, and given Exelon Wind's acceptance of those clarifications, we will read the Texas Commission Order in light of those clarifications, and thus we see no need to declare here that the Texas Commission Order's approval of the SPS delivery arrangements provisions is inconsistent with PURPA.

52. As to the remaining issue, payment, the Commission finds that it is inconsistent with PURPA for SPS to use the avoided cost methodology set forth in its Tariff in this situation. Avoided cost is defined in the Commission's PURPA regulations "as the incremental costs to an electric utility of electric energy or capacity or both which, but for the purchase from the [QF or QFs] such utility would generate itself or purchase from another source."⁶⁴ The SPS Tariff's payment determination provision, in contrast, provides that, as quoted above, SPS's avoided cost shall be "the SPP EIS Market LIP calculated at the registered resource Settlement Location associated with the QF at the time of production of the energy by the QF." The Texas Commission Order, we find, incorrectly accepted this 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

⁶² *Id.* PP 52-58.

⁶³ *See supra* PP 44-49.

⁶⁴ 18 C.F.R. § 292.101(b)(6) (2012).

access to third-party buyers in the SPP markets because of persistent transmission congestion.⁶⁵ The Texas 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.

53. In sum, insofar as the Texas Commission Order allows SPS to set the rates in this case based on locational imbalance prices in the Energy Imbalance Service market, the Texas Commission allows SPS to not necessarily pay QFs the statutorily-required avoided cost-based rate when QFs are, in fact, entitled to the statutorily-required avoided cost-based rate.

The Commission orders:

(A) Notice is hereby given that the Commission declines to initiate an enforcement action under section 210(h)(2)(A) of PURPA.

(B) Exelon Wind's petition for a declaratory order is hereby dismissed in part, and granted in part, as discussed in the body of this order.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

⁶⁵ *Xcel Energy Servs., Inc.*, 122 FERC ¶ 61,048 (2008), *reh'g denied*, 124 FERC ¶ 61,073 (2008).

