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November 4, 2015

Ms. Mary Jo Kunkle
Michigan Public Service Commission
7109 W. Saginaw Highway
P.O. Box 30221
Lansing, Michigan 48909

Re: MPSC Case No. U-17981

Dear Ms. Kunkle:

Attached for electronic filing in the above-referenced matter, please find the Complaint of the Independent Power Producers Coalition of Michigan Against Consumers Energy Company. If you have any questions, please feel free to contact my office.

Thank you for your assistance in this matter.

Sincerely yours,

VARNUM
Timothy J. Lundgren

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STATE OF MICHIGAN

BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

In the matter of the Complaint of the Independent Power Producers Coalition of Michigan against Consumers Energy Company concerning violations of the Public Utility Regulatory Policies Act of 1978 and related Commission orders.	))))))))	Case No. U-17981

COMPLAINT OF
THE INDEPENDENT POWER PRODUCERS COALITION OF MICHIGAN
AGAINST CONSUMERS ENERGY COMPANY

The Independent Power Producers Coalition of Michigan ("IPPC-MI"),[1] by and through its counsel, Varnum LLP, pursuant to Section 8 of Act 419 of 1919, as amended, MCL 46.58, and to Rule 439, *et seq.* of the Rules of Practice and Procedure before the Michigan Public Service Commission ("Commission"), R 792.10439 *et seq.*, files this Formal Complaint regarding violations of the Public Utility Regulatory Policies Act of 1978 ("PURPA"), 16 USC 2601 *et seq.*, and the rules promulgated thereunder (18 CFR Part 292, *et seq.*), as implemented by the Michigan Public Service Commission ("Commission"), by Consumers Energy Company ("Consumers"), and respectfully requests that this Commission order Consumers to comply with federal law and Commission orders by maintaining a Purchase Power Agreement ("PPA" or "PPAs") with each member of the IPPC-MI, and to purchase both capacity and energy from each

[1] IPPC-MI is a coalition of Michigan independent power producers and includes among its members the following: Kent County; Hillman Power Company, LLC; Viking Energy of Lincoln, LLC; Viking Energy of McBain, LLC; Boyce Hydro Power, LLC; White's Bridge Hydro Co.; Black River, L.P.; Elk Rapids Hydroelectric Power, LLC; and Michiana Hydroelectric Co.

IPPC-MI member at either an avoided cost approved by the Commission, or at a rate otherwise determined by the Commission to be just and reasonable.

I. PARTIES

1. Complainant, IPPC-MI, is a group of Michigan independent power producers that each operates hydroelectric or biomass power generation facilities, collectively the "Facilities." The Facilities provide clean and renewable energy and capacity to Consumers under PPAs approved by the Commission.

2. Respondent, Consumers, is a public utility regulated by the Commission, having its principal offices located at One Energy Plaza, Jackson, MI 49201-2276.

II. JURISDICTION

3. The Facilities operated by IPPC-MI members are all Qualifying Facilities ("QF" or "QFs") within the meaning of sections 201 and 210 of the Public Utility Regulatory Policies Act of 1978 ("PURPA"), 16 USC 796 and 824a-3; 18 CFR 292.101(b)(1).

4. As this Commission has previously recognized, "Section 210 [of PURPA] mandated that state regulatory agencies, such as this Commission, establish procedures for the treatment of electric power generation by nonutility cogenerators and small power producers using renewable resources qualifying under the standards contained in Section 201."[2]

5. The Commission has further recognized that:

[2] *In re., on the Commission's own motion, to implement provisions set forth in Title II, Section 210, Cogeneration and Small power Production, of the Public Utility Regulatory Policies Act (PURPA) of 1978 (PL 95-617), Final Order*, Case No. U-6798, August 27, 1982, p. 1.

> Section 210(f) of PURPA expressly provides that state regulatory authorities shall implement PURPA and the FERC rules for each electric utility for which they have ratemaking authority. Under the FERC rules, that implementation may consist of "the issuance of regulations, an undertaking to resolve disputes between qualifying facilities and electric utilities or any other action reasonably designed to implement" the law (18 CFR 292.401). In short, PURPA requires states to provide a forum for dispute resolution.[3]

6. The Commission has previously affirmed its role in approving and reviewing the performance of parties under agreements between Consumers and QFs, stating that "[j]urisdiction would be a strange concept if it permitted the Commission to review and approve the power purchase agreements, but prohibited the Commission from subsequently considering the performance under the power purchase agreements."[4]

7. Adjudication of this dispute is therefore within the jurisdiction of the Commission.

8. Furthermore, the Commission has jurisdiction over this Complaint under Section 8 of Act 419 of 1919, as amended, MCL 46.58, which provides that, "[u]pon complaint in writing that any rate, classification, regulation or practice charged, made or observed by any public utility is unjust, inaccurate, or improper, to the prejudice of the complainant, the commission shall proceed to investigate the matter."

III. STATEMENT OF FACTS

[3] *In re. Midland Cogeneration Venture Limited Partnership for approval of capacity charges contained in a power purchase agreement with Consumers Power Company, Opinion and Interim Order*, Case No. U-8871, January 31, 1989, p. 68 (emphasis added).

[4] *In re. the application of Consumers Energy Company for approval of a power supply cost recovery plan and for authorization of monthly power supply cost recovery factors for calendar year 2004, Opinion and Order*, Case No. U-13917, February 28, 2005, p. 14.

9. On September 30, 2015, Consumers filed its Application for Approval of a Power Supply Cost Recovery Plan and for Authorization of Monthly Power Supply Cost Recovery Factors for the Year 2016, in Case No. U-17918.

10. As shown on Exhibit A-24 of the filed testimony of Consumers' witness Sara T. Walz in Case No. U-17918, each of the IPPC-MI members have existing energy and capacity PPAs with Consumers.

11. In its Application, Testimony, and Exhibits filed in Case No. U-17918, Consumers states an intention to terminate the PPAs of certain of IPPC-MI's members, and asserts that it will offer certain IPPC-MI members new, short-term PPAs based on a "market"-based price and a forecasted capacity expense. This "market" price does not reflect factors required under PURPA to establish a true market price of energy, and Consumer's proposed costs are based on improper assumptions.

12. As stated in the testimony of David F. Ronk, Jr., on December 18, 2014, Consumers provided IPPC-MI member Hillman Power Company, LLC ("Hillman") with notice of termination of Hillman's PPA effective December 31, 2015.[5]

13. Similarly, Consumers is planning to terminate its PPA with IPPC-MI member White's Bridge Hydro Company ("White's Bridge") effective December 31, 2016.[6]

14. Consumers has stated that it is planning to offer White's Bridge a new short-term contract of five years, which "will be based on the actual market price of energy (Locational

[5] Case No. U-17918, Testimony of Ronk, p. 12

[6] Case No. U-17918, Testimony of Ronk, p. 13:7-8.

Marginal Price), as well as a forecasted capacity expense, based on [Consumers'] recent purchase of capacity for the next five years."[7]

15. The market price of energy proposed by Consumers is substantially less than the rate that White's Bridge is receiving under its existing contract, and the shortened proposed contract term violates the rights of White's Bridge under PURPA, as Consumers lacks approval from the Federal Energy Regulatory Commission ("FERC") to require Michigan's QF providers under 20 MWs to be subject to market pricing for energy and/or capacity.[8]

16. In Case No. U-17678, a Consumers' witness has testified that the company "plans to follow a similar approach for other Public Utility Regulatory Policies Act contracts with capacity less than 20 MW, at the time of their current contract expiration."[9]

17. Similar statements have been made to other members of IPPC-MI when they have approached Consumers about renegotiating the contracts for their QFs as the dates of expiration begin to approach.

18. On October 27, 2015, the Commission, on its own Motion, commenced an investigation under Case No. U-17973 and is establishing a Technical Advisory Committee to "assess the continuing appropriateness of the Commission's current regulatory implementation regarding the Public Utility Regulatory Policies Act of 1978, and to report its findings and recommendations to the Commission by filing a report in this docket no later than April 8, 2016."[10]

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[7] U-17918, Testimony of Ronk, p. 13:9-13.

[8] PURPA section 210(m); 16 U.S.C. § 824a-3(m).

[9] Case No. U-17678, testimony of David Ronk, p. 15.

[10] Order in U-17973, October 27, 2015, p. 5.

19. While the members of IPPC-MI very much appreciate the Commission's initiative in looking into the pressing issues surrounding the implementation of PURPA obligations in Michigan, that inquiry presumably will not address the violations of PURPA and Commission orders that are alleged herein, and so is not a substitute for this Complaint. It is also noteworthy that the Order in Case No. U-17973 does not call for the establishment of a new avoided cost rate applicable to any of the members of IPPC-MI.

20. Furthermore, the Commission's process to review its PURPA obligations and its past determinations on avoided costs will not be completed in time to avoid the harms that will be suffered when Consumers terminates Hillman's contract in December 2015 or provides notice of termination to White's Bridge or otherwise acts in ways that are harmful to the credit ratings, economics, and/or sustainability of other IPPC-MI members.

21. Because Hillman and White's Bridge will suffer immediate harm, IPPC-MI is simultaneous with this Complaint filing a Motion for Temporary Order seeking Commission action to hold these two members harmless as the Commission proceedings on this Complaint and in Case No. U-17973 go forward.

IV. COMPLAINT

A. Count I: Consumers' Termination of the PPAs Violates PURPA and Commission Orders.

22. PURPA imposes a mandatory purchase obligation on each "electric utility." PURPA §3(4); 16 USC 2602(4). Pursuant to 18 CFR 292.303, "[e]ach electric utility *shall*

purchase . . . any energy and capacity which is made available from a qualifying facility." (emphasis added). [11]

23. Consumers, which is an "electric utility" under PURPA, has sought and received a waiver from FERC, which has relieved it of its mandatory purchase obligation for QFs over 20 MWs.[12] However, there has been no such waiver granted for smaller QFs.

24. All the members of IPPC-MI are QFs under 20 MW, for which Consumers continues to have a federal, mandatory purchase obligation. PURPA § 3(4); 16 USC 2602(4).

25. IPPC-MI members all have energy and capacity offered to and available for purchase by Consumers.

26. Despite this, Consumers either has terminated, or has proposed to terminate the PPAs of IPPC-MI members.

27. By terminating the PPA for Hillman, Consumers has effectively refused to purchase the energy and capacity made available by that QF at either the established avoided cost rate or at an otherwise just and reasonable rate under PURPA. As the FERC has stated:

> Thus, under [FERC's] regulations, a QF has the option to commit itself to sell all or part of its electric output to an electric utility. **While this may be done through a contract, if the electric utility refuses to sign a contract, the QF may seek state regulatory authority assistance to enforce the PURPA-imposed obligation on the electric utility to purchase from the QF, and a non-contractual, but still legally enforceable obligation will be created pursuant to the state's implementation of PURPA.** Accordingly, a QF, by committing itself to sell to an electric utility, also commits the electric utility to buy from the

[11] *Public Service Co. of New Hampshire v. New Hampshire Electric Cooperative, Inc.* 83 FERC ¶ 61,224, *reh'g denied,* 85 FERC ¶ 61,0444 (1998). ("Section 210(a) of PURPA provides generally that electric utilities must offer to purchase electric energy from any QF that can deliver power to the utility.").

[12] 18 CFR 292.309(e) & 292.311; *Consumers Energy* Company, FERC Docket No. QM12-3-000, Order dated April 24, 2012 granting application to terminate mandatory purchase obligation for facilities over 20 MW.

> QF; these commitments result either in contracts or in non-contractual, but binding, legally enforceable obligations. **For purposes of section 210(m) of PURPA and termination of the requirement that an electric utility enter into new contracts or obligation to purchase from a QF, the Commission has stated that the term obligation means "legally enforceable obligation."** The Commission has also stated that a utility may not avoid the creation of an obligation, which cannot be terminated in a proceeding under section 210(m) of PURPA, by refusing to sign a contract. [Emphasis added].[13]

Thus, if Consumers refuses to contract with these QFs on terms required by PURPA, then the Commission must enforce the federal obligation on the utility.

28. Hillman's PPA was approved by the Commission, relies on the currently effective Commission order for avoided costs, and contains provisions allowing for continuance of its term beyond December 31, 2015. Consumers' threatened termination of Hillman's PPA, without replacing it with another avoided cost PPA or other binding obligation, is a violation of Consumers' obligations and the rights of Hillman under PURPA.

29. Consumers is without authority to unilaterally dictate rates for QFs that are neither Commission-approved as avoided costs, or otherwise deemed just and reasonable to the QF. As FERC has stated:

> [O]ne of the principal reasons Congress adopted section 210 of PURPA was because electric utilities had refused to purchase power from non-utility producers. Congress thus required the Commission to prescribe rules that the Commission "determines necessary to encourage cogeneration and small power production." In section 210(a) of PURPA, Congress also required electric utilities to purchase electric energy from QFs, which the Commission, in section 292.303 of its regulations, interpreted as imposing on electric utilities an obligation to purchase all electric energy and capacity made available from QFs.[14]

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[13] *Virginia Electric Power Company*, FERC Docket No. QM15-1-000; 151 FERC ¶ 61,038, Order dated April 16, 2015 (citations omitted) ("*VEPCO*").

[14] *Cedar Creek Wind, LLC*, 137 FERC ¶ 61,006 at P 30 (2011), ("*Cedar Creek*"), citing FERC v. Mississippi, 456 U.S. at 750 (emphasis added); 16 USC 824a-3(a) (2006); 18 CFR 292.303 (2011).

30. Consumers' proposed termination of its contract with White's Bridge is similarly a violation of Consumers' obligations under PURPA and the Commission's standing avoided costs order, as determined in Case No. U-6798. Instead, Consumers offers to replace the existing contract with one that pays less than avoided costs and is of insufficient term to satisfy PURPA.

31. Each of the members of IPPC-MI has been similarly put on notice by Consumers' public statements and in private discussions that its PPA will be terminated.

32. Therefore, for the reasons set forth herein, IPPC-MI requests that the Commission require Consumers to extend its existing PPAs with IPPC-MI members to purchase their available energy and capacity as required by federal law, or else establish new contracts consistent with Consumers' PURPA obligations.

B. Count II: Consumers Must Buy Capacity and Energy from Qualifying Facilities at Avoided Cost and Not Discriminate Against Them.

33. Federal rules require electric utilities to purchase energy and capacity from qualify facilities at "avoided cost." 18 CFR 292.304.

34. "Avoided costs" are defined as "the incremental costs to an electric utility of electric energy or capacity or both which, but for the purchase from the qualifying facility or qualifying facilities, such utility would generate itself or purchase from another source." 18 CFR 292.101(b)(6).

35. Section 210 of PURPA requires the Commission to establish the avoided cost that a utility must pay to a QF. The avoided cost must be set at a rate that is "just and reasonable to the electric consumer of the electric utility and in the public interest," and does "[n]ot discriminate against qualifying cogeneration and small power production facilities." 16 USC 824a-3(b); see also 18 CFR 292.304(a)(1).

36. The Commission approved avoided costs rates on August 27, 1982, in its *Final Order in the Proceedings to Implement Provisions Set Forth in Title II, Section 210 of the Public Utility Regulatory Policies Act (PURPA) of 1978 Re: Cogeneration and Small Power Production*, Case No. U-6798.

37. In contrast, the market rate proposed by Consumers for its new contracts with IPPC-MI members is not consistent with the avoided costs rate established by the Commission. As such, Consumers' proposed rates have not been shown to be "just and reasonable to the electric consumer of the electric utility and in the public interest." Nor is it in the public interest to drive these QFs out of business by paying them power costs that are unreasonably low.

38. In violation of PURPA, Consumers' proposed rate does "discriminate against qualifying cogeneration and small power production facilities," as the market rate proposed by Consumers does not reflect a just and reasonable rate to the QF for purposes of PURPA.

39. Consumers' new unilateral PPA contract offers are also discriminatory in the shortened length of their terms. The terms offered are not long enough to allow IPPC-MI members to obtain financing to keep their Facilities operational.

40. Therefore, for the reasons set forth herein, IPPC-MI requests that the Commission reject Consumers' proposal to terminate the PPAs and order Consumers to purchase IPPC-MI members' available energy and capacity at avoided cost and for a reasonable contract period, as required by federal law and Commission order.

C. Count III: Consumers' Proposal to Purchase Capacity and Energy at Market Price is an Attempt to Usurp the Authority of the Commission to Establish the Avoided Cost.

41. As noted above, 18 CFR 292.303 states that each electric utility *must* purchase any energy and capacity made available from a qualifying facility. Likewise, 18 CFR 292.304(a) requires each electric utility to purchase energy and capacity at avoided cost.

42. Section 210 of PURPA clearly delegates to the Commission (not the utility) the authority to establish the avoided cost at a rate that is "just and reasonable to the electric consumer of the electric utility and in the public interest," and does "[n]ot discriminate against qualifying cogeneration and small power production facilities." 16 USC 824a-3(b); see also 18 CFR § 292.304(a)(1).

43. The Commission approved avoided cost rates in August of 1982, in Case No. U-6798. Absent the Commission setting a new avoided cost rate, this rate, as implemented in IPPC-MI contracts, remains legally enforceable and available to QFs after termination of their PPAs.

44. Consumers' pronouncement that it will unilaterally set the cost it will pay under the new contracts it offers, ignoring the Commission's order approving avoided costs for Consumers, is a violation of the Commission's order and an attempt to usurp the authority and jurisdiction of the Commission under PURPA.

45. By proposing to use the current and imminent contract expirations for the QFs of IPPC-MI members as an opportunity to either cancel and not renew existing contracts, or otherwise offer new contracts at shortened terms and rates below avoided costs, Consumers is unlawfully leveraging its market power in violation of the spirit and letter of PURPA and the Commission's Orders under it.

46. Given that Consumers has refused to negotiate in good faith with IPPC-MI members, in part by proposing a market-based rate it does not have the authority to impose, and which is otherwise unjust and unreasonable to QFs, the Commission must exercise its jurisdiction under federal law and require that a just and reasonable avoided cost rate be set for IPPC-MI member Facilities.[15]

47. It is worth noting that IPPC-MI members have invested hundreds of millions of dollars in diversified, renewable electric generation facilities in Michigan and continue to invest in upgrades to the Facilities. The very same certainty and stability of return on its investments that Consumers seeks in its rate cases, and is currently seeking from the Legislature in order to make additional investment in infrastructure, is what the utility is denying to IPPC-MI members in its offers. For example, in Case No. U-17735, Consumers is seeking $400 million for upgrades to its Ludington Pumped Storage Plant.[16]

48. As Consumers has unilaterally determined to not offer a rate that is either a Commission-approved avoided cost rate, nor to offer a rate to members of IPPC-MI that is otherwise just and reasonable, the Commission must exercise its authority under PURPA to set a just and reasonable avoided cost rate for QFs in Michigan, including IPPC-MI members.[17]

49. Federal law and FERC rules envision that the state public regulatory commissions implement PURPA, in part, to protect QFs in their state. As such, FERC has noted that:

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[15] *Consumers Power Co. v Public Service Com'n*, 472 N.W. 2d 77, 189 Mich. App. 151, (1991) appeal denied 479 N.W.2d 644, amended on reconsideration, 503 N.W.2d 446, appeal denied 479 N.W.2d 644, 439 Mich. 922, amended on reconsideration, 503 N.W.2d 446 Mich 911, appeal denied 479 N.W.2d 645, appeal denied 479 N.W.2d 646, on remand.

[16] Testimony of Poppe, Case No. U-17735, p.15.

[17] *VEPCO*, supra.

> PURPA directs the [FERC] to prescribe "such rules as it determines necessary to encourage cogeneration and small power production." PURPA, in turn, directs the states to "implement" the rules adopted by the Commission. A "state commission 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 FERC's] rules."[18]

50. Therefore, for the reasons set forth herein, IPPC-MI requests that the Commission take affirmative action and resolve the dispute between IPPC-MI members and Consumers by, in part, ordering Consumers to purchase IPPC-MI members' available energy and capacity at avoided cost, or at a rate determined by the Commission to be just and reasonable to the electric consumer of the electric utility and in the public interest, and to cease and desist from attempting to unilaterally set PURPA rates through its testimony in its PSCR dockets and other filings.

V. PRAYER FOR RELIEF

51. For the foregoing reasons, IPPC-MI hereby respectfully requests that this Commission take the following actions:

a. Enter an order denying Consumers' attempts to terminate the PPAs of IPPC-MI members without entering into replacement contracts consistent with PURPA requirements;

b. Require Consumers to purchase capacity and energy from IPPC-MI members at a just and reasonable avoided cost, and which is "just and reasonable to the electric consumer of the electric utility and in the public interest," and does "[n]ot discriminate against qualifying cogeneration and small power production facilities";

c. Require Consumers to cease attempting to set PURPA policy for Michigan and making avoided cost determinations unilaterally through its filings with the Commission, and instead to comply with Commission orders and the requirements of federal law with respect to PURPA and avoided costs;

d. Grant such other and further relief as is deemed lawful and appropriate.

[18] *Cedar Creek,* 137 FERC ¶ 61,006 at P 30 (2011) (citations omitted, brackets added).

Respectfully submitted,

Varnum, LLP
Attorneys for the Independent Power Producer's Coalition of Michigan

Timothy J. Lundgren

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November 4, 2015

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FERC Cases

83 FERC P 61224 (F.E.R.C.), 1998 WL 272964

FEDERAL ENERGY REGULATORY COMMISSION
**1 Commission Opinions, Orders and Notices

Public Service Company of New Hampshire
V.
New Hampshire Electric Cooperative, Inc.,

Docket No. EL95-71-000
Order Denying Complaint and Declining to Initiate Purpa Enforcement Action
(Issued May 29, 1998)

**61995 Before Commissioners: James J. Hoecker, Chairman; Vicky A. Bailey, William L. Massey, Linda Breathitt, and Curt H (acute)ebert, Jr.

In this order, we act on a complaint filed by Public Service Company of New Hampshire (PSNH) seeking an interpretation of the power purchase obligations of New Hampshire Electric Cooperative, Inc. (NHEC) under the Amended and Restated Partial Requirements Service Agreement (APRA), under which NHEC purchases electricity from PSNH. [1] We hold that NHEC is obligated under Section 210 of the Public Utility Regulatory Policies Act of 1978 (PURPA), 16 U.S.C. § 824a-3 (1988) to purchase power from any qualifying facility (QF) that can deliver its power to NHEC, whether the QF is directly or indirectly interconnected with NHEC, and that any such purchases are not subject to PSNH's consent.

In addition, we will decline to initiate an enforcement action to invalidate orders of the New Hampshire Public Utilities Commission (New Hampshire Commission) determining NHEC's avoided costs.

I. Background

A. *PSNH's Complaint*

On August 14, 1995, PSNH filed a complaint against NHEC alleging that certain actions by NHEC constitute an anticipatory breach of the APRA. [2] Specifically, PSNH alleges that NHEC seeks to displace purchases from PSNH under the APRA with purchases at a lower cost from QFs to which NHEC is not directly connected. PSNH states that the APRA requires NHEC to purchase its entire electric power requirements from PSNH other than certain retained entitlements in the Seabrook and Maine Yankee nuclear plants and power it is compelled to obtain from non-utility suppliers "pursuant to the requirements of governmental authorities." PSNH submits that the exception for compelled purchases does not apply in this case. It asks the Commission to find that Section 210 of PURPA, 16 U.S.C. § 824a-3 (1988), does not compel NHEC to purchase QF power in the circumstances presented because PSNH stands ready to purchase the QF power at PSNH's avoided cost rates. Given PSNH's willingness to purchase the QF power, PSNH contends that there is adequate encouragement of cogeneration and small power production to permit waiver of NHEC's PURPA Section 210 purchase obligations. PSNH also asserts that under the Commission's regulations at 18 C.F.R. § 292.303 (1997), NHEC is not compelled to obtain power from QFs to which it is not directly connected unless PSNH consents **61996 to the transaction by volunteering not to purchase power itself from the QF.

If, on the other hand, the Commission finds that NHEC is required by PURPA and the Commission's implementing regulations to purchase power from any non-interconnected QF, PSNH asks the Commission to find that NHEC is a full-requirements customer of PSNH, that its avoided cost is the avoided cost of PSNH, and that charges under the APRA should be adjusted to put PSNH in the same financial position it would have been had it purchased the QF power directly at its own avoided cost rate.

****2** PSNH notes that NHEC has obtained an order from the New Hampshire Commission authorizing it to issue a request for proposals (RFP) from QF suppliers to establish NHEC's long-run avoided costs for such purchases. [3] PSNH requests that if the Commission permits NHEC to establish an avoided cost through an RFP as approved by the New Hampshire Commission, the Commission also direct NHEC to include bids from all sources, rather than QFs only.

Finally, PSNH requests that the Commission revisit the continued appropriateness of Section 292.303(d) of our regulations in light of the Energy Policy Act of 1992, Pub. L. No. 102-486, 106 Stat. 2776 (1992) (EPAct) and an open transmission access environment. Section 292.303(d) provides that when a utility directly connected to a QF transmits the QF's power to another utility, the utility to which the power is transmitted must purchase the QF's power as if it were directly connected. PSNH states that the rule could be employed to permit QFs to shop for the utility with the highest administratively determined avoided cost to which they can economically transmit power, and limit that utility's access to lower priced power by forcing it to purchase QF power.

B. *Notice and Responses*

Notice of PSNH's complaint was published in the *Federal Register*, 60 *Fed. Reg.* 44,866 (1995), with comments, protests and motions to intervene due on or before September 22, 1995.

NHEC filed an answer in opposition and request for summary dismissal, a motion for leave to file an answer one day out of time, and a motion for alternative relief if PSNH's complaint is not summarily dismissed. NHEC contends that the APRA clearly contemplates QF purchases by NHEC and that the Commission's regulations at Section 292.303(a) clearly establish NHEC's QF purchase obligation. It further contends that cases cited by PSNH are distinguishable, that Section 292.303(d) is not relevant, and that PSNH is required to provide transmission service for QFs as a condition of the Commission's approval of the Northeast Utilities (NU) and PSNH merger. [4] NHEC characterizes PSNH's challenge to a QFs-only RFP for determining NHEC's avoided cost as an impermissible collateral attack on the New Hampshire Commission's final order. Finally, NHEC states that there is no need to revisit the need for Section 292.303(d) of our regulations. If PSNH's complaint is not dismissed, NHEC requests a review of PSNH's compliance with the merger conditions.

PSNH filed an answer to NHEC's request for summary dismissal and motion for alternative relief. PSNH equates NHEC's request for summary dismissal with a motion to dismiss the complaint, to which PSNH may respond. Alternatively, PSNH seeks leave to answer NHEC's filing. PSNH's answer also incorporates its answer to NHEC's motion for alternative relief.

NHEC responded with a motion to strike PSNH's answer to NHEC's request for summary dismissal and, in the alternative, a response opposing PSNH's motion for leave to file pleading. PSNH then filed an answer to NHEC's motion to strike.

****3** On November 27, 1995, PSNH filed a motion for expedition, citing a request by a QF for transmission service to NHEC. NHEC filed a response in support of PSNH's motion, asserting that PSNH is frustrating an agreement between the QF and NHEC by failing to provide transmission service.

The New Hampshire Commission filed a notice of intervention raising no substantive issues.

A motion to intervene was filed by Baldwin Hydroelectric Corporation (BHC). BHC is the licensee for the 4 MW Baldwin Hydroelectric Project No. 7962. BHC has commenced construction of its project, but indicates that completion of construction has been stalled by the ***61997** lack of a power purchase contract. BHC states that it is in NHEC's service territory and that it has offered to sell the output of its project to NHEC, but that NHEC has refused to negotiate with BHC owing to the dispute with PSNH. BHC avers that PSNH is trying to thwart the purposes of PURPA, thereby jeopardizing BHC's project and its investment. [5]

An untimely motion to intervene and for expedition was filed on July 30, 1997, by Waste Management of New Hampshire, Inc. (WMNH) and Bio-Energy Partners (BEP). WMNH and BEP state that WMNH owns and operates a landfill in Rochester, New Hampshire, and that gas is extracted from the landfill to fuel a QF at the landfill owned by BEP. They further state that WMNH is constructing additional generating units at the Rochester landfill which will increase the QF's generating capacity. They state that WMNH executed a power purchase agreement with NHEC in January 1997, under which power from the facility expansion will be sold to NHEC. They state that WMNH's sale to NHEC cannot commence until this proceeding has been resolved, because the QF is outside NHEC's service area and output from the facility expansion will be transmitted to NHEC via PSNH's transmission system. WMNH and BEP support NHEC's position.

WMNH and BEP state that the Commission should permit their late intervention because they had no interest in this proceeding until WMNH and NHEC executed the power purchase agreement in January 1997. They state that they will take the record as they find it, and that their intervention will not disrupt the proceeding or unduly burden the existing parties. They urge expedition in light of the proposed schedule for the facility expansion, and argue that PSNH's complaint should be dismissed.

PSNH filed a timely answer to WMNH's and BEP's motion. PSNH does not oppose their intervention, but disputes their arguments in support of NHEC's position.

On March 23, 1998, NHEC filed a motion for expedited action in this proceeding.

II. Discussion

A. *Procedural Matters*

Under Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (1997), the notice of intervention by the New Hampshire Commission and timely, unopposed motion to intervene of BHC serve to make them parties to this proceeding. Given the stage of the proceeding, their interest in the proceeding and the absence of any undue prejudice or delay, we find good cause to grant WMNH's and BEP's untimely, unopposed motion to intervene. 18 C.F.R. § 385.214(d) (1997).

****4** We find good cause to grant NHEC's late- filed answer to PSNH's complaint, given its direct interest in this proceeding and the absence of any undue prejudice or delay. We further find good cause to waive the provisions of Rule 213 of the Commission's Rules of Practice and Procedure, which prohibits answers to answers, and accept PSNH's answer and motion for alternative relief, because they assist in our understanding of the case. We therefore deny NHEC's October 25, 1995 motion to strike. We further accept the other answers to pleadings filed in this proceeding because they similarly assist in our understanding of the case.

B. *NHEC's Purchase Obligation under PURPA and the APRA*

The threshold issue in this proceeding is the extent of NHEC's obligation under the APRA, Section 210 of PURPA, and the Commission's regulations to purchase power from QFs (or other entities) to which it is not directly interconnected. Section II of the APRA provides, in relevant part:

> [PSNH] is obligated to provide, and [NHEC] is obligated to purchase, the entire electric power requirements ("Resale Service") of [NHEC] and its retail customers at all points of delivery identified in Exhibit D hereto . for use in all areas of [NHEC's] service territory served by such delivery points, less the amount of power equal to the power secured by [NHEC] from (I) [NHEC's] 0.7356% interest in the Maine Yankee unit, (ii) *an independent power producer or other non-utility supplier, where [NHEC's] purchase from the supplier is pursuant to the requirements of governmental authorities,* (iii) [NHEC's] 2.17391% interest in the Seabrook unit. (emphasis added)

PSNH contends that clause (ii) requires NHEC to purchase from PSNH its entire [6] electric requirements, with the exception of the retained ownership entitlements in the Seabrook ***61998** and Maine Yankee plants and non-utility generation it is "compelled" to purchase. PSNH construes the explicit reference to non- utility generation as simply reflecting the QF purchase obligation of Section 210 of PURPA and our regulations. [7] PSNH interprets Section 292.303(d) of our regulations [8] as not requiring NHEC to purchase power from QFs to which it is not directly interconnected, unless PSNH consents to the transaction by agreeing to transmit the QF's power in lieu of purchasing the power at its own avoided cost rate.

NHEC responds that Section 292.303(d) is not relevant because it applies only to permit a directly connected utility otherwise obligated to purchase QF power to escape that obligation, with the QF's consent, by transmitting the QF power to another purchaser. The rule was not intended, states NHEC, to create in the directly connected utility a "right of first refusal" to purchase QF power. It further avers that PSNH is obligated to provide transmission service for QFs as a condition of the Commission's approval of the NU and PSNH merger.

PSNH replies that, however Section 292.303(d) is interpreted, NHEC has bargained away in the APRA whatever opportunity it might have had for voluntary purchases from QFs outside of its service territories. PSNH argues that the language in Section II of the APRA, stating that NHEC is obligated to purchase "the entire electric power requirements" from PSNH less its purchases from Maine Yankee and Seabrook and less its purchases from "an independent power producer or other non-utility supplier, where [NHEC's] purchase from the supplier is pursuant to the requirements of governmental authorities," means that NHEC may purchase QF power only when "compelled." PSNH further states that its transmission tariffs filed pursuant to approval of the NU/PSNH merger apply only to support purchases NHEC may lawfully make. Thus, PSNH does not concede any transmission obligation with respect to voluntary purchases from such QFs.

****5** Pursuant to the terms of Section II of the APRA, PSNH "is obligated to provide, and [NHEC] is obligated to purchase, the entire electric power requirements of [NHEC] and its retail customers." The only exceptions to this broad requirement are NHEC's non-discretionary power interests in Maine Yankee and Seabrook and its non-discretionary power purchases from independent power producers and other non-utility suppliers. Thus, NHEC must purchase all of its, and its retail power customers', remaining power needs from PSNH, and any non-discretionary power purchases from independent power producers and other non-utility suppliers can only serve to reduce the amount of power PSNH is obligated to provide.

However, there is nothing on the face of the APRA to indicate that QF purchases by NHEC are limited to QFs directly connected to NHEC. Nor does Section 210(a) of PURPA contain such a limitation. Instead, Section 210(a) of PURPA provides generally that electric utilities must offer to purchase electric energy from any QF that can deliver power to the utility. If PSNH had intended to impose a restriction on the generally applicable purchase obligation of PURPA, it should have insisted that the contract so provide. [9] However, even if PSNH had such a limitation in mind when the APRA was negotiated, PSNH and NHEC cannot lawfully bargain away any portion of the rights QFs enjoy under PURPA or NHEC's statutory purchase obligation under PURPA, ***61999** our implementing regulations, or any rights QFs may subsequently have obtained in the context of the NU/PSNH merger or the open transmission access requirements of Order No. 888. [10]

C. *Whether PSNH Must Consent to Transmit QF Power*

We do not agree with PSNH's view that NHEC's purchase obligation to QFs to which it is not directly interconnected comes into play only when PSNH is willing to transmit QF power. Neither Section 210 of PURPA nor Section 292.303(d) of the Commission's regulations provides any such limitation. Section 210(a) of PURPA requires electric utilities to purchase electric energy from QFs pursuant to regulations promulgated by the Commission. Section 292.303 provides:
Electric utility obligations under this subpart.

(a) *Obligation to purchase from qualifying facilities*. Each electric utility shall purchase . any energy and capacity which is made available from a qualifying facility:

(1) Directly to the electric utility; or

(2) Indirectly to the electric utility in accordance with paragraph (d) of this section.

CTR***

(d) *Transmission to other electric utilities*. If a qualifying facility agrees, an electric utility which would otherwise be obligated to purchase energy or capacity from such qualifying facility may transmit the energy or capacity to any other electric utility. Any electric utility to which such energy or capacity is transmitted shall purchase such energy or capacity under this subpart as if the qualifying facility were supplying energy or capacity directly to such electric utility. The rate for purchase by the electric utility to which such energy is transmitted shall be adjusted up or down to reflect line losses . and shall not include any charges for transmission.

****6** 18 C.F.R. § 292.303 (1997). Moreover, Section 292.101(b)(2) defines purchase as:

Purchase means the purchase of electric energy or capacity or both from a qualifying facility by an electric utility.

18 C.F.R. § 292.101(b)(2) (1997).

Section 292.303(d) in no way narrows this broad requirement to purchase. The section creates no "right to purchase" in the directly connected utility, nor does it create an obligation on the part of the QF to sell to the directly connected utility. It provides only that a utility obligated to purchase power from a QF may seek, with the QF's consent, to transmit the energy to another utility.

In Order No. 69, which promulgated Section 292.303, the Commission commented on the extent of a utility's obligation under PURPA to purchase QF power. The Commission stated:

> Section 210(a) of PURPA provides that the Commission prescribe rules requiring electric utilities to offer to purchase electric energy from qualifying facilities. The Commission interprets this provision to impose on electric utilities an obligation to purchase all electric energy and capacity made available from qualifying facilities with which the electric utility is *directly or indirectly interconnected*. (emphasis added). [11]

Because at that time a QF could not compel a directly connected utility to transmit its power to another utility, the Commission provided that if a directly connected utility did not wish to purchase particular QF power, it could transmit the power to another utility with the consent of the QF. The Commission also provided that if any directly connected utility chooses not to transmit power, it retains the purchase obligation. [12]

The regulatory context is now quite different from that which existed when Section 292.303(d) was promulgated. Virtually all public utilities that own interstate transmission facilities now provide open access transmission services pursuant to Order No. 888 and QFs are among the entities eligible to receive such service. [13] Order No. 888 in no way limits an electric utility's statutory purchase obligations under PURPA. Thus, the situation addressed ***62000** in Section 292.303(d) no longer exists=the directly connected utility no longer can prevent the sale of QF power to an indirectly connected utility by refusing transmission service. QFs are no longer dependent on the directly connected utilities' agreement to provide transmission service to sell to indirectly connected utilities. Any QF may employ NU's or the New England Power Pool's open access transmission tariff to reach NHEC and require NHEC to purchase that QF's power. [14] Thus, the dispute between PSNH and NHEC over whether

NHEC can, under the APRA, solicit power from QFs has little or no meaning. That NHEC is not directly connected to the QF does not obviate its purchase obligation under PURPA. Similarly, NHEC's desire or lack thereof to purchase a QF's power in no way affects the QF's right to sell power.

****7** PSNH's reliance on *Florida Power and Light* and *Utah Power and Light Company*, 57 FERC P 61,363 (1991), *reh'g denied*, 59 FERC P 61,035 (1992) (*Utah Power and Light I*) in this regard is misplaced. *Florida Power and Light* is a declaratory order that resolved several questions concerning transmission of QF power. In *Utah Power and Light I* the Commission reaffirmed on remand from the court its decision to exclude QFs from the transmission access requirements imposed on the merger between PacifiCorp and Utah Power and Light.[15] PSNH cites language in these orders, following Order No. 69, indicating that a utility directly interconnected with a QF has the discretion to determine whether to purchase QF power itself or to transmit it to another utility.[16] This language simply interpreted the boundaries of the purchase obligation reflected in Section 292.303(d) in light of the state of transmission access at that time and predates *Utah Power and Light II* [which as noted reversed the Commission's earlier determination (*see* n.15 *supra*), the NU/PSNH merger, and Order No. 888.

D. *Waiver of NHEC's Purchase Obligation*

PSNH also contends that the Commission would, if requested, waive any obligation of NHEC to purchase QF power that PSNH would itself purchase. PSNH reasons that because it stands willing to purchase QF power, purchases by NHEC are unnecessary to promote cogeneration and small power production. In this connection, it cites *Oglethorpe Power Corporation*, 32 FERC P 61,103 (1985), *aff'd* 35 FERC P 61,069 (1986), *aff'd sub nom. Greensboro Lumber Company v. FERC*, 825 F.2d 518 (D.C. Cir. 1987) (*Oglethorpe*), and *Seminole Electric Cooperative, Inc.*, 39 FERC P 61,354 (1987) (*Seminole*). In those cases, we waived the purchase obligation of distribution cooperative utilities at their request where purchases from QFs would be made on behalf of those utilities by their generation and transmission cooperative utility acting on behalf of its member cooperatives. We found that as long as no QF would be deprived of a market for its power at the purchasing utility's avoided cost, the statutory purpose of promoting cogeneration and small power production was served.[17]

NHEC responds that its purchase obligation applies unless it has sought and failed to obtain a waiver, that even if it applied for a waiver there is no assurance one would be granted, and that PSNH has no standing to seek a waiver on behalf of NHEC. NHEC states that unlike *Oglethorpe* and *Seminole*, PSNH cannot be said to be acting on NHEC's behalf or in its interest. PSNH dismisses this, stating that the critical factor is that the entity responsible for supplying power to the member cooperatives ensured a market for QF power, and PSNH is likewise obligated to procure power to meet NHEC's requirements and will purchase QF power.

Even if PSNH provides a market for QF power that might otherwise be sold directly to NHEC, the waivers in *Oglethorpe* and *Seminole* were requested by the entities with a purchase obligation and mutual interests. NHEC has no obligation to seek a waiver and we would not impose one upon it at another party's request.[18] Moreover it would be inconsistent with our open access policies to prevent QFs from seeking to participate fully in the competitive market. In this connection, although NHEC has an obligation to purchase from any QF which can transmit power to it, our rules provide that the parties to QF purchases are free to negotiate purchase rates ***62001** other than avoided cost.[19] A more competitive environment is expected to foster such outcomes.[20]

E. *NHEC's Avoided Cost*

****8** PSNH believes that the New Hampshire Commission has erroneously determined NHEC's avoided costs.[21] [22] In essence, PSNH is requesting that this Commission bring an action in federal district court pursuant to Section 210(h)(2) of PURPA against the New Hampshire Commission for violating PURPA. We decline to do so. While our precedent makes clear that a state must take into account all potential sources of capacity in determining avoided costs,[23] the New Hampshire Commission

has explicitly recognized that precedent. Accordingly, we view PSNH's arguments to involve the details of the state's avoided cost implementation. We will not institute an enforcement action in this circumstance.

Conclusion

As discussed above, we deny PSNH's request to find that NHEC's QF purchase obligation with respect to QFs to which NHEC is not directly connected applies only when PSNH consents to transmit the QF power. Rather, NHEC's purchase obligation applies whenever a QF is able to have its power transmitted to NHEC.

The Commission orders:

(A) All motions are granted or denied as discussed in the body of this order.

(B) PSNH's complaint is denied as discussed in the body of this order.

12 Order No. 69, *FERC Statutes and Regulations 1977-1981* P 30,128, at pp. 30,870-72. *See also* *Florida Power & Light Company, et al.*, 29 FERC P 61,140, at p. 61,293 (1984) (*Florida Power and Light*).

Footnotes

1 In a related order issued this same day in Docket No. EL96-53-000, we act on another complaint by PSNH against NHEC. That docket concerns NHEC's obligations and PSNH's charges under the APRA. Although the same contract is at issue in Docket No. EL96-53-000, the issues raised are different. *See Public Service Company of New Hampshire v. New Hampshire Electric Cooperative, Inc.*, 83 FERC P << (1998).

2 The APRA is on file with the Commission as Northeast Utilities/Public Service Company of New Hampshire, FERC Rate Schedule No. 142.

3 New Hampshire Electric Cooperative, Inc., *Order Approving Offer of Settlement and Addressing Calculation of Long-Term Avoided Costs*, Order No. 21,767 (July 31, 1995), Docket No. DR 94-160 (N.H.P.U.C.). That order is attached as Appendix A to PSNH's complaint.

4 *See* *Northeast Utilities Service Company*, 56 FERC P 61,269 (1991), *order on reh'g*, 58 FERC P 61,070, *reh'g denied*, 59 FERC P 61,042 (1992), *order granting motion to vacate and dismissing request for rehearing*, 59 FERC P 61,089 (1992), *aff'd in part and remanded in part*, *Northeast Utilities Service Company v. FERC*, 993 F.2d 937 (1st. Cir. 1993). Of course, PSNH is also required to provide transmission service for QFs under Order No. 888. *See* n.10 *infra*.

5 Orders granting extensions of time for BHC to complete construction were issued under delegated authority by the Commission's Office of Hydropower Licensing on March 15, 1995, and December 6, 1996. In a January 14, 1998 status report, BHC reports that it is still actively pursuing a power purchase agreement.

6 The APRA applies only to certain delivery points of NHEC, but these evidently constitute the great bulk of NHEC's load, and deliveries from other suppliers at other delivery points are not at issue in this proceeding.

7 New Hampshire's Limited Electric Energy Producers Act, N.H. Rev. Stats. Ann. §362-A:3 (LEEPA) requires utilities to purchase power from certain smallpower producers. The parties use the term “QF” to apply to purchases made pursuant either to PURPA or to LEEPA. For convenience, we will do the same.

8 Section 292.303(d) states, in relevant part:
(D) *Transmission to other electric utilities*. If a qualifying facility agrees, an electric utility which would otherwise be obligated to purchase energy or capacity from such qualifying facility may transmit the energy or capacity to any other electric utility. Any electric utility to which such energy or capacity is transmitted shall purchase such energy or capacity under this subpart as if the qualifying facility were supplying energy or capacity directly to such electric utility.
18 C.F.R. § 292.303(d) (1997).

9 NHEC offers extrinsic evidence in the form of statements made by PSNH officials in various fora to support its position that the APRA contemplates purchases from QFs wherever located. NHEC Answer at 22-27. PSNH responds that none of the statements refer to QF purchases from outside of NHEC's service territories and that it is not merely the APRA that restricts NHEC's ability to purchase from “off-system” QFs, but the APRA's reference to NHEC's obligation to purchase from a non-utility supplier pursuant

to the requirements of governmental authorities. PSNH states that any obligation of NHEC to purchase under PURPA is limited by Section 292.303(d). PSNH Answer of October 10, 1995, at 14-16. As we have concluded that the contract is sufficiently clear in this regard, and that, in any event, parties cannot contract away non-parties' rights under PURPA or under Order No. 888, we see no need to resort to NHEC's extrinsic evidence.

10 *See Promoting Wholesale Competition Through Open Acess Non-Discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities*, Order No. 888, 61 *Fed. Reg.* 21,540 (1996), *FERC Statutes and Regulations, Regulations Preambles January 1991-June 1996* P 31,036 (1996), *order on reh'g*, Order No. 888-A, 62 *Fed. Reg.* 12,274 (1997), *FERC Statutes and Regulations* P 31,048 (1997), *order on reh'g*, Order No. 888-B, 81 FERC P 61,248 (1997), *order on reh'g*, Order No. 888-C, 82 FERC P 61,046 (1998).

11 Order No. 69, *FERC Statutes and Regulations 1977-1981* P 30,128, at p. 30,870.

13 Order No. 888, *FERC Statutes and Regulations* at p. 31,688.

14 For this reason, we need not address PSNH's argument that its transmission tariffs filed pursuant to the NU/PSNH merger do not require it to provide transmission of QF power to NHEC.

15 The Commission subsequently reversed its decision in this regard in light of changes in the Commission's statutory authority with regard to wheeling in EPAct. *See Utah Power and Light Company, et al.*, 62 FERC P 61,018 (1993), *reh'g denied*, 62 FERC P 61,236 (1993) (*Utah Power and Light II*).

16 *See* 29 FERC at p. 61,293 (*Florida Power and Light*) and 57 FERC at pp. 62,183 and 62,188 (*UtahPower and Light I*).

17 32 FERC at p. 61,285 (*Oglethorpe*); 39 FERC at p. 62,112 (*Seminole*).

18 NHEC's purchases under the APRA are governed by the rates set forth in that agreement. There is no indication that the ARPA rates are the same as PSNH's avoided costs.

19 A negotiated rate for the QF sale is always permitted.
18 C.F.R. § 292.301(b) (1997) provides:
Negotiated rates or terms. Nothing in this subpart:
(1) Limits the authority of any electric utility or any qualifying facility to agree to a rate for any purchase, or terms or conditions relating to any purchase, which differ from the rate or terms or conditions which would otherwise be required by this subpart.

20 The New Hampshire Commission noted:
As a matter of general policy, with the evolution of wholesale competition we believe that utilities should be allowed to lower their power costs through transactions which fall within the parameters of their legal obligations, even if those actions negatively affect a utility's other suppliers. If NHEC can implement competitive bidding procedures that enable it to lower its supply costs consistent with itsobligations under APRA, then it may proceed to issue the proposed RFP. It is in the public good and consistent with least cost planning principles to encourage utilities to allow their customers to share in the benefits of the competitive wholesale market.
Order No. 21,767, Attachment A to complaint, at 19.

21 New Hampshire Electric Cooperative, Inc., Long-Term Avoided Cost Rates, *Order Approving Competitive Bidding Methodology to Determine Long-Term Avoided Costs*, Order No. 21,398 (Oct. 23,1994), Docket No. DR 94-004 (N.H.P.U.C.) attached as Appendix B to NHEC's answer; New Hampshire Electric Cooperative, Inc., Least Cost Integrated Plan, *Order Approving Offer of Settlement and Addressing Calculation of Long-Term Avoided Costs*, Order No. 21,767, (implementing Order No. 21,398) (July 31, 1995), Docket No. DR 94-160 (N.H.P.U.C.) attached as Attachment A to PSNH's complaint.

22 And as noted above, a negotiated rate for the QF sale is always permitted.

23 *See Southern California Edison Company and San Diego Gas and Electric Company*, 70 FERC P 61,215 (1995), *order on reconsideration*, 71 FERCP 61,269 (1995).

83 FERC P 61224 (F.E.R.C.), 1998 WL 272964

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139 FERC P 61069 (F.E.R.C.), 2012 WL 1448248

FEDERAL ENERGY REGULATORY COMMISSION
**1 Commission Opinions, Orders and Notices

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

Consumers Energy Company

Docket No. QM12-3-000
ORDER GRANTING APPLICATION TO TERMINATE MANDATORY PURCHASE OBLIGATION
(Issued April 24, 2012)

*61471 1. On January 25, 2012,[1] Consumers Energy Company (Consumers) submitted an application pursuant to section 210(m) of the Public Utility Regulatory Policies Act of 1978 (PURPA)[2] and section 292.310 of the Commission's regulations[3] to terminate the requirement under section 292.303(a) of the Commission's regulations[4] to enter into new power purchase obligations or contracts to purchase electric energy and capacity from any qualifying cogeneration or small power production facilities (QF) with a net capacity greater than 20 MW in its service territory using transmission service over the facilities of Michigan Electric Transmission Company, LLC (METC) under the control of the Midwest Independent Transmission System Operator, Inc. (MISO).

2. In this order, we grant Consumers' request to terminate the mandatory purchase obligation pursuant to section 210(m) of PURPA and section 292.310 of the Commission's regulations on a service territory-wide basis for QFs that have a net capacity greater than 20 MW effective January 25, 2012.

I. Background

3. On October 20, 2006, the Commission issued Order No. 688,[5] revising its regulations governing utilities' obligations to purchase electric energy produced by QFs. Order No. 688 implements PURPA section 210(m),[6] which provides for termination of the requirement that an electric utility enter into new power purchase obligations or contracts to purchase electric energy from QFs, if the Commission finds that the QFs have nondiscriminatory access to markets. The Commission found in Order No. 688 that the markets administered by MISO were one of the markets that satisfy the criteria of PURPA section 210(m)(1)(A).[7] Accordingly, section 292.309(e) of the Commission's regulations established a rebuttable presumption that MISO provides large QFs (over 20 MW net capacity) interconnected with member electric utilities with nondiscriminatory access to markets described in section 210(m)(1)(A).[8] The Commission also established a second rebuttable presumption, contained in section 292.309(d)(1) of the regulations, that a QF with a net capacity at or below 20 MW does not have nondiscriminatory access to markets.[9]

II. Application to Terminate Mandatory Purchase Obligation

4. Consumers states that, as a member of MISO and a transmission dependent utility, it takes network transmission service from MISO under MISO's Open Access Transmission Tariff (OATT).

**2 5. Consumers requests relief from the mandatory purchase obligation stating it satisfies the condition in section 292.309(a) of the Commission's.[10] Specifically, Consumers states it is relying on the rebuttable presumption contained in section 292.309(e) of the regulations for markets administered by MISO.[11] Consumers further claims that it satisfies the requirements

of PURPA section 210(m)(1) and sections 292.309 and 292.310 of the Commission's regulations. [12] Moreover, Consumers asserts similar relief has been granted on this basis to other public utilities in MISO. [13]

6. Consumers also requests a blanket waiver of section 292.310(c) of the Commission's regulations [14] to identify in Attachment A-1 any QFs 1 MW or smaller as potentially affected QFs. Consumers states that the number of QFs that are 1 MW or smaller has increased significantly as a result of Michigan's net metering program, and that it is seeking blanket waiver because of the burden associated with identifying and listing the information for these small QFs. Nevertheless, Consumers also states that it has included in Attachment A-1 QFs that are 1 MW or smaller where information was readily available.

III. Notice of Filing and Responsive Pleadings

7. Notice of the application was published in the *Federal Register*, 77 Fed. Reg. 5006 (2012). Interventions and protests were due on or before ***61472** February 22, 2012. Notice of the application was also mailed by the Commission on January 26, 2012 to each of the potentially-affected QFs identified in the application.

8. On February 14, 2012, Midland Cogeneration Venture Limited Partnership (Midland) filed a motion to intervene. In its intervention, Midland comments that the Commission has yet to rule on the termination of Midland's Facilities Agreement with Consumers in Docket No. ER12-420-000, leaving Midland's access to non-discriminatory interconnection service under the MISO tariff unresolved. [15]

9. On February 21, 2012, Michigan QFs [16] filed a motion to intervene. Subsequently, on February 22, 2012, Michigan QFs filed a response to Consumers' application. Michigan QFs state the wording of the last sentence of Consumers' application differs from that of Section 210(m)(1) of PURPA, [17] and that it is not clear whether Consumers intends to terminate or modify existing QF agreements. Michigan QFs argue that Consumers' requested relief should more closely parallel the language of PURPA, i.e., that Consumers shall no longer be required to enter into any new contracts or obligations to purchase electric energy from qualifying cogeneration or small power production facilities with a generating capacity greater than 20 MW.

****3** 10. On February 22, 2012, Fremont Community Digester LLC (Fremont) filed a letter commenting that Fremont's QF generating capacity is 2.85 MW and that Consumers' application is not applicable to Fremont and will not affect the existing Renewable Energy Purchase Agreement between Fremont and Consumers.

11. On February 29, 2012, Consumers filed an answer stating that that the only relief it is seeking is with regard to entering into new contracts or obligations; it does not intend to terminate or modify existing agreements. [18] Additionally, Consumers indicates that because Fremont's capacity falls below the 20 MW threshold, the termination of the mandatory purchase obligation would not apply to Fremont. In response to Midland, Consumers states that a Generation Interconnection Agreement (GIA) has already been accepted by the Commission and will go into effect once the Facilities Agreement is terminated or appropriately amended. [19] Consumers concludes that the termination of the Facilities Agreement will not threaten Midland's access to the transmission system.

IV. Discussion

A. Procedural Matters

12. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2011), the timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding.

13. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2011), prohibits an answer to a protest unless otherwise ordered by the decisional authority. We will accept Consumers' answer because it has provided information that assisted us in our decision-making process.

B. Commission Determination

14. Consumers, as a member of MISO, relies upon the rebuttable presumption set forth in section 292.309(e) of the Commission's regulations, namely, that MISO provides QFs larger than 20 MW net capacity 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 and electric energy. [20] We find that MISO provides QFs larger than 20 MW non-discriminatory 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 and electric energy. Therefore, we grant Consumers' request to terminate the mandatory purchase obligation pursuant to section 210(m) of PURPA to enter into new contracts or obligations to purchase energy or capacity from QFs that have a net capacity greater than 20 MW net capacity in its service territory.

15. We also note that Consumers has affirmed that it is only seeking to terminate the obligation to enter into new power purchase obligations or contracts to purchase electric energy and capacity from any qualifying cogeneration or small power production facilities (QF) with a net capacity greater than 20 MW, and that it is not seeking to terminate or modify existing agreements.

****4** 16. Consumers' answer also states that the termination of the mandatory purchase obligation would not apply to Fremont because its 2.85 MW QF is below the 20 MW threshold, and we note that Consumers has not sought to rebut, and has not rebutted, the presumption contained in section 292.309(d)(1) of the regulations, that a QF with a ***61473** net capacity at or below 20 MW does not have nondiscriminatory access to markets. [21]

17. With regard to Midland's arguments that there are unresolved issues relating to access to nondiscriminatory interconnection service, Consumers correctly points out that a GIA has already been filed and accepted by the Commission, [22] and that terminating the Facilities Agreement will not affect access because there is thus a successor GIA that will go into effect. In short, Midland's continued access to interconnection service is not threatened. [23]

18. Finally, Consumers requests a blanket waiver of section 292.310(c) of the Commission's regulations with respect to the need to identify in Attachment A-1 of its application any QFs that are 1 MW or smaller as potentially affected QFs. Consumers states that the number of QFs that are 1 MW or smaller has increased because of a Michigan net metering program. Consumers also claims there is a burden associated with identifying and listing the information for these small QFs that are 1 MW or less because Consumers may not possess the information required by section 292.310 of the regulations.

19. Even though QFs 1 MW or less are no longer required to file self-certifications with the Commission, [24] we explained in *Commonwealth Edison Company*, [25] that our regulations regarding notice do not draw size-based distinctions as to which QFs should be considered potentially affected QFs and which should not, and do not draw distinctions based on whether they are self-certified as QFs, Commission-certified as QFs, or not yet certified as QFs. In *ComEd*, we further stated that applying utilities should err on the side of broader identification and inclusion in, rather than exclusion from, the list of potentially affected QFs. Here Consumers sought to identify all QFs smaller than 1 MW. The only QFs not identified are those QFs smaller than 1 MW that participate in a net metering program and for which Consumers does not have the required information. Under these circumstances, we find Consumers' listing of potentially affected QFs sufficient and we will not require Consumers to do more. Our finding does not constitute a waiver of the notice requirements of section 292.310, though, but rather a determination that Consumers has complied; we will not grant a blanket waiver of the notice requirements in section 292.310 of the Commission's regulations.

The Commission orders:

**5 (A) Consumers' request to terminate the mandatory purchase obligation, pursuant to section 210(m) of PURPA and section 292.310 of the Commission's regulations, on a service territory-wide basis to enter into new contracts or obligations to purchase energy or capacity from QFs with a net capacity larger than 20 MW is hereby granted, effective January 25, 2012, as discussed in the body of this order.

(B) Consumers' request for blanket waiver of section 292.310(c) of the Commission's regulations as it relates to QFs that are 1 MW or smaller is hereby denied.

By the Commission.

(SEAL)

Kimberly D. Bose
Secretary

Footnotes

1 On January 26, 2012, Consumers corrected the name of the county associated with one of the potentially affected QFs, namely Scenic Valley Dairy, LLC, which was listed incorrectly on page 6 of Attachment A-1 to the application.

2 16 U.S.C. § 824a-3(m) (2006).

3 18 C.F.R. § 292.310 (2011).

4 18 C.F.R. § 292.303(a) (2011).

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

6 Section 210(m) was added to PURPA by section 1253 of the Energy Policy Act of 2005 (EPAct 2005). *See* Pub. L. No. 109-58, § 1253, 119 Stat. 594, 967-69 (2005).

7 16 U.S.C. § 842a-3(m)(1)(A) (2006); *see* 18 C.F.R. § 292.309(a)(1) (2011).

8 18 C.F.R. § 292.309(e) (2011).

9 18 C.F.R. § 292.309(d)(1) (2011).

10 18 C.F.R. § 292.309(a) (2011).

11 18 C.F.R. §§ 292.309(a), .309(e) (2011); *accord New PURPA Section 210(m) Regulations Applicable to Small Power Production and Cogeneration Facilities*, Order No. 688, FERC Stats. & Regs. ¶ 31,233 (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).

12 18 C.F.R. § 292.309-.310 (2011).

13 Consumers' Transmittal Letter at 5 (*citing Detroit Edison Co.*, 131 FERC ¶ 61,039 (2010); *Northern States Power Co.*, 136 FERC ¶ 61,093 (2011); and *Southern Indiana Gas & Electric Co.*, 137 FERC ¶ 62,134 (2011)).

14 18 C.F.R. § 292.310(c) (2011) (requiring the application to include a list of all potentially affected QFs).

15 Midland Motion to Intervene at 2. As noted below, the Commission has since acted on that filing.

16 Michigan QFs include: Cadillac Renewable Energy, LLC, Genesee Power Station Limited Partnership, Grayling Generating Station Limited Partnership, Hillman Power Company, LLC, TES Filer City Station Limited Partnership, Viking Energy of Lincoln, Inc., and Viking Energy of McBain, Inc.

17 Michigan QFs Response to Consumers at 2.

18 Consumers' Answer at 1.

19 *Id.* at 2 (*citing Midwest Indep. Trans. Sys. Operator, Inc.*, 132 FERC ¶ 61,241, at P 35 (2010)).

20 18 C.F.R. §§ 292.309(a)(1), 292.309(e) (2011); Order No. 688, FERC Stats. & Regs. ¶ 31,233 at P 117; *see generally Public Service Company of New Hampshire*, 131 FERC ¶ 61,027, at PP 17-22 (2010), *reh'g denied*, 134 FERC ¶ 61,041 (2011) (*PSNH*).

21 18 C.F.R. § 292.309(d)(1) (2011).

22 *Midwest Indep. Trans. Sys. Operator, Inc.*, 132 FERC ¶ 61,241 (2010).

23 Moreover, we note that we have since acted in Docket No. ER12-420-000. *Consumers Energy Company*, 139 FERC ¶ 61,014 (2012). The Commission accepted the cancellation filing effective January 15, 2012.

24 18 C.F.R. § 292.203(d)(1)(2011); *see Revisions to Form, Procedures, and Criteria for Certification of Qualifying Facility Status for a Small Power Production or Cogeneration Facility*, Order No. 732, FERC Stats. & Regs. ¶ 31,306, at P 15, 35-40 (2010).

25 *Commonwealth Edison Co.*, 135 FERC ¶ 61,005 (2011) at PP 41-44 (*ComEd*).

139 FERC P 61069 (F.E.R.C.), 2012 WL 1448248

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151 FERC ¶ 61,038
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.

Virginia Electric and Power Company Docket No. QM15-1-000

ORDER DENYING APPLICATION TO TERMINATE MANDATORY PURCHASE OBLIGATION

(Issued April 16, 2015)

1. On October 31, 2014, as amended on December 19, 2014, and February 11, 2015, Virginia Electric and Power Company (VEPCO) filed an application[1] pursuant to section 210(m) of the Public Utility Regulatory Policies Act of 1978 (PURPA)[2] and section 292.309(a) of the Commission's regulations,[3] requesting to be relieved of its requirement to enter into new contracts or obligations to purchase electric energy with respect to nine qualifying facilities (QF), with each having a net capacity of 4.99 MW, located in North Carolina and owned by Community Energy Solar, LLC (Community Energy).[4] In this order, we deny VEPCO's request to terminate its mandatory purchase obligation for the Community Energy QFs, as discussed below.

[1] A deficiency letter was issued by Commission staff on November 25, 2014, with VEPCO submitting the additional information on December 19, 2014. The Commission also noticed an answer filed by VEPCO on February 11, 2015 as an amendment to VEPCO's application.

[2] 16 U.S.C. § 824a-3(m) (2012).

[3] 18 C.F.R. § 292.309(a) (2014).

[4] The nine Community Energy QFs are: (1) Tarboro Solar LLC self-certified on August 29, 2013 in Docket No. QF13-624-000; (2) Aulander Solar LLC self-certified on September 25, 2013 in Docket No. QF13-682-000; (3) Woodland Solar LLC self-certified on September 26, 2013 in Docket No. QF13-683-000; (4) Winton Solar LLC self-certified on September 26, 2013 in Docket No. QF13-684-000; (5) Garysburg Solar LLC self-certified on September 26, 2013 in Docket No. QF13-685-000; (6) Gaston Solar

(continued ...)

I. Background

2. In 2008, the Commission terminated VEPCO's mandatory purchase obligation to purchase capacity and energy from QFs larger than 20 MW in its service territory within PJM Interconnection, LLC (PJM).[5] The termination of VEPCO's mandatory purchase obligation was based on a finding, codified in 18 C.F.R. § 292.309(e) (2014), that the PJM markets qualify as markets that warrant termination of the mandatory purchase obligation and on the rebuttable presumption, also codified in 18 C.F.R. § 292.309(e) (2014), that QFs larger than 20 MW have nondiscriminatory access to the PJM markets.

3. Notwithstanding the above, the Commission in Order No. 688 also created another rebuttable presumption; that QFs with a net capacity of 20 MW or below do not have nondiscriminatory access to markets sufficient to warrant termination of the mandatory purchase obligation.[6] In creating this rebuttable presumption the Commission found persuasive arguments that some QFs may, in practice, not have nondiscriminatory access to markets in light of their small size.[7] To overcome this rebuttable presumption that smaller QFs lack nondiscriminatory access to markets, the electric utility seeking termination of its purchase obligation must make additional showings to demonstrate on a QF by QF basis, that each small QF, in fact, has nondiscriminatory access to the relevant wholesale markets.[8] Additionally, Order No. 688 placed the burden of proof on the electric utility to demonstrate that a small QF has nondiscriminatory access to the markets of which the electric utility is a member (i.e., in this case, PJM).

LLC self-certified on October 29, 2013 in Docket No. QF14-45-000; (7) Seaboard Solar LLC self-certified on November 13, 2013 in Docket No. QF14-73-000; (8) Jamesville Solar LLC self-certified on December 12, 2013 in Docket No. QF14-144-000; and (9) Weldon Solar LLC self-certified on December 31, 2013 in Docket No. QF14-215-000. Community Energy Protest at 1-2, n.2, n.6.

[5] *Virginia Electric and Power Co.*, 124 FERC ¶ 61,045 (2008).

[6] 18 C.F.R. § 292.309(d)(1) (2014); *see also New PURPA Section 210(m) Regulations Applicable to Small Power Production and Cogeneration Facilities*, Order No. 688, FERC Stats. & Regs. ¶ 31,233 at P 72, *et seq.* (2006), *order on reh'g*, Order No. 688-A, FERC Stats. & Regs. ¶ 31,250 at P 94, *et seq.* (2007), *appeal denied sub nom. American Forest and Paper Assoc. v. FERC*, 550 F.3d 1179 (D.C. Cir. 2008) (Order No. 688).

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

[8] *Id.* P 9 (B)-(C) and n.9.

4. In addition to the aforementioned, as relevant here, the Commission has previously explained, when Congress enacted PURPA it required the Commission to prescribe rules necessary to encourage cogeneration and small power production. Section 210(a) of PURPA requires electric utilities to purchase electric energy from QFs. Thus, in promulgating its regulations, the Commission clearly established, in section 292.304(d),[9] that a QF has the option to commit itself to sell all or part of its electric output to an electric utility through contract, or by a legally enforceable obligation to prevent utilities from circumventing the PURPA purchase requirement.

II. VEPCO Application

5. For each of the nine Community Energy QFs, which are currently under development, VEPCO seeks to terminate its PURPA obligation based on the theory that they have nondiscriminatory access to the wholesale markets in PJM. VEPCO claims its application provides evidence that satisfies the evidentiary standard set forth in *PPL Electric Utilities Corporation*,[10] to sufficiently rebut the Order No. 688 presumption for 20 MW and below QFs, noting that: (1) affiliates of the Community Energy QFs are sophisticated market participants in PJM; (2) each of the Community Energy QFs has nondiscriminatory access to the wholesale markets of PJM; and (3) there are no operational constraints, transmission, distribution, or interconnection issues/ barriers preventing any of the Community Energy QFs from participating in the PJM markets.

III. Notices and Responsive Pleadings

6. Notice of VEPCO's application was published in the *Federal Register,* 79 Fed. Reg. 66,712 (2014); notice of VEPCO's deficiency response was published in the *Federal Register,* 79 Fed. Reg. 78,849 (2014); and notice of VEPCO's amended application was published in the *Federal Register*, 80 Fed. Reg. 8862 (2015). Notices of VEPCO's application were mailed by the Commission to each of the potentially-affected QFs identified by VEPCO on October 31, 2014, and notices of VEPCO's amended application were mailed on February 12, 2015.

7. The North Carolina Utilities Commission (North Carolina Commission) filed a notice of intervention. A Motion to Intervene accompanied with separate comments was submitted by North Carolina Sustainable Energy Association. A Motion to Intervene and Protest was submitted by North Carolina Clean Energy Business Alliance. Community

[9] 18 C.F.R. § 292.304(d) (2014).

[10] 148 FERC ¶ 61,207, at P 23, n.25 (2014) (*PPL*).

Energy submitted Answers to VEPCO's application on January 14, 2015 and February 20, 2015.[11]

A. Community Energy

8. Community Energy raises three arguments in response to VEPCO's application. First, that VEPCO's application is deficient in that it fails to contain the project-specific showings necessary to prove that Community Energy's QFs will in practice have actual access to PJM markets without facing physical constraints, upgrade costs, or other obstacles and administrative burdens.[12] Second, that if the application is granted, Community Energy would be adversely harmed if it has to start *de novo* under the PJM's interconnection process, in that it would be placed in a later queue which will imperil its qualification for certain investment tax credits.[13] Third, that the nine QFs have existing contracts and legally enforceable obligations with VEPCO which are grandfathered if the mandatory purchase obligation is terminated by the Commission.[14]

9. Community Energy states that VEPCO's standard Rate Schedule 19-FP (Power Purchases From Cogeneration and Small Power Production Qualifying Facilities) obligates VEPCO to purchase the output from a QF, under a 15-year contract at the North Carolina Commission-approved avoided cost rate, that has obtained a certificate of public convenience and necessity (CPCN) for its facility by November 1, 2014, and has indicated in writing that it commits to selling its output to VEPCO pursuant to the terms

[11] A letter was submitted by Albert J. LaRose of Rocky Mount, NC, noting his opposition to the application and a letter was submitted by Halifax County Economic Development Commission requesting that the Commission carefully review the application in that solar energy provides numerous environmental benefits to the state, especially when it is sold at a utility's avoided cost.

[12] Community Energy Answer at 2.

[13] *Id.* at 19. Community Energy explains that PJM's required feasibility study report would leave insufficient time to construct and interconnect the QFs before the expiration of a state tax credit-- equal to 35 percent of the project cost spread out over five years, available to solar facilities placed in service prior to December 31, 2015. Community Energy also notes a federal investment tax credit that reduces from 30 percent to 10 percent of project costs for projects not in service by December 31, 2016 (Community Energy Answer at 20).

[14] *Id.* at 3, n.7 (citing Order No. 688, FERC Stats. & Regs. ¶ 31,233 at PP 209-213, Order No. 688-A, FERC Stats. & Regs. ¶ 31,250 at PP 136-138).

of the rate schedule.[15] Community Energy provided copies of nine CPCNs and letters to VEPCO for its nine QFs to demonstrate that it has met the North Carolina Commission requirements for Rate Schedule 19-FP obligating VEPCO to purchase its QFs' output.[16] Moreover, Community Energy states that it timely tendered executed Power Purchase Agreements (PPAs) to VEPCO, but that VEPCO refused to enter into the PPAs, stating it would countersign only if the PPAs contained a non-standard provision affording VEPCO "the unilateral right to terminate this Agreement upon 30 days written notice to Operator... ," if the Commission grants the Application. [17]

10. Community Energy also claims VEPCO has significantly delayed processing of the interconnection requests for the Community Energy QFs.[18] Community Energy further explains that, on December 30, 2014, Community Energy and its QFs filed a complaint and request for declaratory judgment in North Carolina Commission Docket No. E-22, Sub18, in which they seek to enforce their entitlement under VEPCO's Rate Schedule 19-FP to have VEPCO enter into the long-term, standard-form PPA associated with Rate Schedule 19-FP with each Community Energy QF. Community Energy additionally seeks a declaration from the North Carolina Commission that each Community Energy QF has fulfilled the requirements that establish a legally enforceable obligation under PURPA with regard to the sale of electric power to VEPCO.[19]

11. Additionally, countering VEPCO's contention that Community Energy's affiliates have significant expertise in the wholesale market, Community Energy asserts that neither it or its affiliates have ever operated facilities that sold in the wholesale market nor has its competitive retail electricity supplier, which is obligated under retail choice laws to obtain market-based rate authority, been able to transact business on a retail basis with PJM without the aid of an unaffiliated contractor and that VEPCO's lists of various

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[15] *Id.* at 4. *See also* Affidavit of Christopher G. Killenberg (Killenberg Affidavit) at PP 5-6, n.4 (citing North Carolina Commission Order dated February 21, 2014 in Docket No. E-100, Sub 136).

[16] *Id.* at Exh. 4.

[17] *Id.* at 7 and Exh. 10.

[18] *Id.* at 6.

[19] Community Energy Response to VEPCO Amended Application at 7 and Exh. 11 (citing Docket No. E-22, Sub 518 Complaint and Request for Declaratory Judgement before the North Carolina Utilities Commission).

Commission dockets and wholesale market agreements only captures the Community Energy QFs' affiliates' pre-construction development efforts within PJM.[20]

B. North Carolina Sustainable Energy Association

12. North Carolina Sustainable Energy Association (NCSEA) explains that, although VEPCO's application expressly does not seek to have its purchase obligation terminated with respect to any other potentially-affected QF, there appears to be no bar to VEPCO filing future applications to terminate its purchase obligation with respect to additional QFs, including NCSEA's, if the Commission were to grant VEPCO's current requested relief.[21] In addition to asserting that VEPCO has failed to meet its burden for the requested relief, NCSEA takes issue with VEPCO's assertion that "there are no . . . interconnection issues that would prevent any of the Community Energy QFs from participating in the PJM markets."[22] NCSEA points out that VEPCO's interconnection process is not operating efficiently and that the existence of extended interconnection study timeframes undisputedly presents an effective barrier to nondiscriminatory access to any market that might otherwise exist and VEPCO's application, thus should be denied.[23]

C. North Carolina Clean Energy Business Alliance

13. North Carolina Clean Energy Business Alliance (NCCEBA) argues that VEPCO's application is broader in scope than the nine Community Energy QFs, and that, if the Commission grants VEPCO's application, it may open the door for VEPCO to seek a further blanket termination of its purchase obligation to small QFs in a future proceeding.[24] Additionally, NCCEBA argues that VEPCO's application ignores the difficulties that many QFs in North Carolina have experienced in interconnecting with VEPCO (a process which all QFs seeking to interconnect with PJM will ultimately have to use).[25] NCCEBA further explains that difficulty in obtaining interconnection service

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[20] *Id.* at 30-31.

[21] NCSEA Comments at 2.

[22] NCSEA Protest at 2 (citing VEPCO's Application at 2).

[23] *Id.* at 6-9.

[24] NCCEBA Comments at 1.

[25] *Id.* at 6-9.

in a timely manner will cause many QF projects to miss the North Carolina Business and Energy Tax Credits deadline. Further, NCCEBA contends that VEPCO failed to show that QFs have access to competitive markets in light of VEPCO's existing interconnection practices. According to NCCEBA, VEPCO's application is premature as some of the matters are currently being addressed by the North Carolina Commission.[26] In conclusion, NCCEBA contends that VEPCO can neither show the absence of interconnection obstacles nor accessibility to competitive markets with meaningful opportunities for small QFs to participate.[27]

D. VEPCO Amended Application

14. On February 11, 2015, VEPCO filed an amended application in which it asserts that Community Energy has failed to refute its *prima facie* case that its QFs have nondiscriminatory access to PJM markets.[28] Moreover, VEPCO asserts that it agrees to enter into all necessary agreements to allow the Community Energy QFs to sell their power to VEPCO up until the date that the Commission grants its application to terminate its purchase obligation and the QFs have the physical and contractual ability to participate in the PJM markets.[29]

15. VEPCO maintains, contrary to Community Energy's contention, that it has produced all of the project-specific documentation necessary to overcome the Order No. 688 rebuttable presumption, in that Community Energy will not face any obstacles or burdens to sell into the PJM markets and the North Carolina Commission will determine whether Community Energy has established a legally enforceable obligation. Additionally, VEPCO argues that the Commission's regulation regarding formation of a legally enforceable obligation applies only when an electric utility is attempting to avoid its PURPA obligations "by refusing to sign a contract, so that a later and lower avoided cost is applicable," and here, VEPCO is offering to purchase Community Energy QFs power until they have physical and contractual ability to sell into the PJM market.[30] Thus, notwithstanding the pending complaint before the North Carolina Commission.

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[26] *Id.* at 10.

[27] *Id.* at 11-14.

[28] VEPCO Amended Application 1.

[29] *Id.* at 1-2, 16.

[30] *Id.* at 15-16.

VEPCO requests the Commission to grant its petition to terminate its obligation to enter into new contracts or obligations.[31]

16. To support its contentions, VEPCO maintains it has made a *prima facie* case that the only additional costs for Community Energy QFs to sell into the PJM markets will be the additional cost of metering equipment required by PJM, which VEPCO contends is not an obstacle or burden to Community Energy's market participation.[32] VEPCO also asserts that Community Energy misunderstood the PJM's generator interconnection process in that Community Energy would maintain its queue priority once the state interconnection process is complete and an Interconnection Agreement has been issued.[33]

17. VEPCO also points to several Interconnection Service Agreements providing for interconnection of Community Energy affiliated QFs to the PJM system and a pleading in a PJM docket, as proof that Community Energy has a sophisticated affiliate in the PJM Market.[34]

E. Community Energy's Response to VEPCO's Amended Application

18. Community Energy asserts that the two procedural delays caused by VEPCO, i.e., VEPCO's initial deficiency and the amended application, potentially rewards VEPCO and could potentially harm the Community Energy QFs if the Commission would defer issuing its ruling to May 12, 2015.[35] That is, the delayed issuance would substantially cause risk of Community Energy running out of time and losing the state investment tax credits necessary to finance its projects.[36] Thus, Community Energy urges the Commission to issue an order by March 19, 2015.[37] Community Energy also notes that VEPCO's application should be rejected because in its own response, VEPCO

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[31] *Id.* at 3.

[32] *Id.*

[33] *Id.* at 4-5.

[34] *Id.* at 12-13.

[35] Community Energy Response to VEPCO Amended Application at 2.

[36] *Id.* at 4.

[37] *Id.*

concedes that the same study process for its interconnection process and that of PJM's differs significantly in that PJM's is broader than a state-specific process.[38]

19. Moreover, Community Energy states that while VEPCO changes its position, it relies on a "conclusory assertion in [a witness' affidavit] that 'based on a high-level review of the transmission system configuration…it is highly unlikely that the PJM studies will require additional upgrades as the result of any planning assessment.'"[39] Based on the speculative nature of the response as well as the affidavit, Community Energy maintains that VEPCO still has not met its burden in this proceeding.[40] Next, Community Energy points out that VEPCO's argument that it would retain its queue position in the PJM interconnection process if it has to start over *de novo*, is based on an ambiguous email from PJM.[41] Finally, Community Energy asserts that VEPCO's offer to enter into provisional Interconnection Agreements with Community Energy is paradoxical in that VEPCO's proposal would defer to "a future date the determination as to whether and when [Community Energy's QFs will] actually have nondiscriminatory access to PJM markets, while asking the Commission to give advance or anticipatory approval to termination of the mandatory purchase obligation [in this proceeding].[42]

IV. Discussion

A. Procedural Matters

20. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2014), the notice of intervention and timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding. Further, Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2014), prohibits an answer to a protest or answer unless otherwise ordered by the decisional authority. We will accept the answers because they have provided information that assisted us in our decision-making process.

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[38] *Id.* at 7.

[39] *Id.* at 8.

[40] *Id.*

[41] *Id.* at 9.

[42] *Id.* at 11.

B. Determination

21. As discussed below, we find that the nine Community Energy QFs established legally enforceable obligations under PURPA prior to VEPCO's filing of its application to terminate its mandatory purchase obligation for those QFs, and we therefore deny VEPCO's application.

22. Section 210(m)(1) of PURPA,[43] which was codified in the Commission's regulations as section 292.309(a),[44] provides for the termination of a utility's PURPA mandatory purchase obligation if certain criteria are met. However, any termination granted applies only to the requirement to enter into a *new contract or obligation*. In addition, section 210(m)(6) of PURPA,[45] which was codified as section 292.314 of the Commission's regulations,[46] provides that certain contracts or obligations in effect or pending approval before a state regulatory authority are not affected by any termination order; that is, no contract or obligation in effect or pending approval prior to a utility's filing a petition to terminate its obligation will be subject to a termination order under these provisions.

23. The Commission's regulations under PURPA include a requirement that QFs have the option to sell not only on an "as available" basis, but also pursuant to legally enforceable obligations over specified terms.[47] Specifically, section 292.304(d) provides:

> (d) *Purchases "as available" or pursuant to a legally enforceable obligation.* Each qualifying facility shall have the option either:
>
> (1) To provide energy as the qualifying facility determines such energy to be available for such purchases, in which case the rates for such purchases shall be based on the purchasing utility's avoided costs calculated at the time of delivery; or

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[43] 16 U.S.C. § 824 a-3(m)(1) (2012).

[44] 18 C.F.R. § 292.309(a) (2014).

[45] 16 U.S.C. § 824 a-3(m)(6) (2012).

[46] 18 C.F.R. § 292.314 (2014).

[47] *Id.* § 292.304(d)(2).

> (2) To provide energy or capacity *pursuant to a legally enforceable obligation* for the delivery of energy or capacity over a specified term, in which case the rates for such purchases shall, at the option of the qualifying facility exercised prior to the beginning of the specified term, be based on either:
>
> (i) The avoided costs calculated at the time of delivery; or
>
> (ii) The avoided costs calculated at the time the obligation is incurred.[48]

24. Section 292.304(d) and the requirement that a QF can sell and a utility must purchase pursuant to a legally enforceable obligation were specifically adopted to prevent utilities from circumventing the requirement of PURPA that utilities purchase energy and capacity from QFs. The Commission explained:

> Paragraph (d)(2) permits a qualifying facility to enter into a contract or other legally enforceable obligation to provide energy or capacity over a specified term. Use of the term "legally enforceable obligation" is intended to prevent a utility from circumventing the requirement that provides capacity credit for an eligible facility merely by refusing to enter into a contract with a qualifying facility.[49]

25. Thus, under the Commission's regulations, a QF has the option to commit itself to sell all or part of its electric output to an electric utility. While this may be done through a contract, if the electric utility refuses to sign a contract, the QF may seek state regulatory authority assistance to enforce the PURPA-imposed obligation on the electric utility to purchase from the QF, and a non-contractual, but still legally enforceable,

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[48] *Id.* § 292.304(d) (emphasis added).

[49] *Small Power Production and Cogeneration Facilities; Regulations implementing Section 210 of the Public Utility Regulatory Policies Act of 1978*, Order No. 69, FERC Stats. & Regs. ¶ 30,128, at 30,880 *order on reh'g*, Order No. 69-A, FERC Stats. & Regs. ¶ 30,160 (1980), *aff'd in part and vacated in part, Am. Elec. Power Serv. Corp. v. FERC*, 675 F.2d 1226 (D.C. Cir. 1982), *rev'd in part, Am. Paper Inst., Inc. v. Am. Elec. Power Serv. Corp.*, 461 U.S. 402 (1983); *accord id.* (noting "the need for qualifying facilities to be able to enter into contractual commitments" and agreeing to "the need for certainty with regard to return on investment in new technologies").

obligation will be created pursuant to the state's implementation of PURPA.[50] Accordingly, a QF, by committing itself to sell to an electric utility, also commits the electric utility to buy from the QF; these commitments result either in contracts or in non-contractual, but binding, legally enforceable obligations. For purposes of section 210(m) of PURPA and termination of the requirement that an electric utility enter into new contracts or obligation to purchase from a QF, the Commission has stated that the term obligation means "legally enforceable obligation."[51] The Commission has also stated that a utility may not avoid the creation of an obligation, which cannot be terminated in a proceeding under section 210(m) of PURPA, by refusing to sign a contract.[52]

26. While the determination of whether a legally enforceable obligation exists is a matter of state law[53] that is generally made by a state regulatory authority (or a non-regulated utility) that implements the requirements of PURPA,[54] the Commission, pursuant to PURPA and Order No. 688-A, may consider claims by a QF on a case-by-case basis that the QF has created a legally enforceable obligation under state law or pursuant to other proceedings.[55] Here, Community Energy requests that the Commission reject VEPCO's application because the Community Energy QFs established legally enforceable obligations for the sale of their power to VEPCO prior to the filing of VEPCO's application. Based on the record before us, we agree that the Community Energy QFs have established legally enforceable obligations requiring VEPCO to

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[50] Order No. 688, FERC Stats. & Regs. ¶ 31,233 at P 212, *order on reh'g*, Order No. 688-A, FERC Stats. & Regs. ¶ 31,250 at PP 136-137; *see also Midwest Renewable Energy Projects, LLC*, 116 FERC ¶ 61,017 (2006).

[51] Order No. 688, FERC Stats. & Regs. ¶ 31,233 at PP 210-213.

[52] *Id.* P 212; *see also Cedar Creek Wind, LLC*, 137 FERC ¶ 61,006 at P 30 (2011); *Rainbow Ranch Wind, LLC*, 139 FERC ¶ 61,077 (2012), *notice of intent to act*, 144 FERC 61,005 (2013); *Murphy Flat Power, LLC*, 141 FERC ¶ 61,145 (2012), *notice of intent to act*, 142 FERC 61,187 (2013), *FERC v Idaho Pub. Utils. Comm'n* (D. Idaho No. 1:13-cv-141 (order approving stipulation of agreement issued Dec. 27, 2013); *Grouse Creek Wind Park, LLC*, 142 FERC ¶ 61,187 (2013), *notice of intent to act*, 144 FERC 61,005 (2013), *FERC v Idaho Pub. Utilis. Comm'n* (D. Idaho No. 1:13-cv-141 (order approving stipulation of agreement issued Dec. 27, 2013).

[53] Order No. 688-A, FERC Stats. & Regs. ¶ 31,250 at P 138.

[54] *Id.* P 139.

[55] *Id.*

purchase the output of the Community Energy QFs and that these obligations are grandfathered pursuant to sections 210(m)(1) and 210(m)(6) of PURPA[56] and sections 292.309(a) and 292.314 of the Commission's regulations.[57]

27. Community Energy explains that, pursuant to Schedule 19-FP, the avoided cost rate under that schedule is available to any QF that, by November 1, 2014, has (1) obtained a CPCN from the North Carolina Commission, and (2) indicated to VEPCO in writing that it is committed to sell the output of the QF pursuant to the terms of that schedule.[58] Community Energy provides documentation that it (1) received CPCNs from the North Carolina Commission for its nine QF projects between February 20, 2014 and October 14, 2014,[59] and (2) notified VEPCO in writing, on October 28, 2014, of Community Energy's commitment to sell the output of those QFs to VEPCO pursuant to the terms and conditions of Schedule 19-FP. Accordingly, based on the record before us, Community Energy availed itself of the right to establish contracts under a state tariff to sell the output of its QFs to VEPCO prior to VEPCO's October 31, 2014 application at the Commission to terminate its purchase obligation from the Community Energy QFs.

28. We disagree with VEPCO's claim that the Commission need not address the question of whether the Community Energy QFs have a legally enforceable obligation where VEPCO has not refused to sign a contract with Community Energy. As the Commission has made clear, section 292.304(d) of the Commission's regulations grants to a QF the *option* to "provide energy or capacity *pursuant to a legally enforceable obligation*,"[60] which we find above has, in fact, been established here, and does not vest a

[56] 16 U.S.C. § 824a-3(m)(1) and (6) (2012).

[57] 18 C.F.R. §§ 292.309(a), 292.314 (2014).

[58] Community Energy Protest at 35.

[59] Community Protest at Exhibit 10 notes the specific dates for each QF's approved CPCN: Taboro Solar LLC – February 20, 2014; Winton Solar LLC – April 28, 2014; Woodland Solar LLC – April 28, 2014; Garysburg Solar LLC – September 3, 2014; Aulander Solar LLC – September 23, 2014; Gaston Solar LLC – September 23, 2014; Jamesville Solar LLC – September 23, 2014; Weldon Solar LLC – September 23, 2014; and Seaboard Solar LLC – October 14, 2014..

[60] 18 C.F.R. § 292.304(d) (2014) (emphasis added).

utility with the authority to delay creation of that legally enforceable obligation by insisting that a QF enter into a contract.[61]

29. We are not persuaded by VEPCO's argument that the Commission's ruling on this issue is an infringement on the North Carolina Commission's authority. VEPCO filed to terminate its purchase obligation for the Community Energy QFs, and pursuant to section 210(m) of PURPA, the Commission's regulations, and Order No. 688, that termination does not apply to grandfathered legally enforceable obligations or contracts. It is therefore appropriate for the Commission to determine, given the facts of this case, that the Community Energy QFs had legally enforceable obligations prior to the date that VEPCO filed to terminate its purchase obligation. Furthermore, we note that the complaint filed by Community Energy before the North Carolina Commission is based on VEPCO's alleged failure to comply with its filed and approved state tariff provision, Schedule 19-FP, which has as its basis the state's PURPA regulatory framework. That determination remains for the North Carolina Commission to make.

30. Given our findings above, the Commission does not need to address the other issues raised in this proceeding to dispense of this matter.

The Commission orders:

VEPCO's application to terminate its PURPA mandatory purchase obligation to purchase energy and capacity from Community Energy QFs is hereby denied, as discussed in the body of this order.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.

[61] *Supra* n. 53.

Document Content(s)

137 FERC ¶ 61,006
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Cedar Creek Wind, LLC Docket No. EL11-59-000

NOTICE OF INTENT NOT TO ACT AND DECLARATORY ORDER

(Issued October 4, 2011)

1. In this order, we give notice that we decline to initiate an enforcement action pursuant to section 210(h) of the Public Utility Regulatory Policies Act of 1978 (PURPA).[1] However, as discussed below, we conclude that the June 8, 2011 decision of the Idaho Public Utilities Commission (Idaho PUC),[2] which rejected five Firm Energy Sales Agreements (Agreements) between Cedar Creek Wind, LLC (Cedar Creek) and PacifiCorp[3] d/b/a Rocky Mountain Power (Rocky Mountain Power), is inconsistent with the requirements of PURPA and our regulations implementing PURPA,[4] as discussed further below.

Background

2. The Idaho PUC findings at issue in this proceeding developed from a November 5, 2010 filing with the Idaho PUC by a number of Idaho utilities, including Rocky

[1] 16 U.S.C. § 824a-3(h) (2006).

[2] *In the Matter of the Application of PacifiCorp dba Rocky Mountain Power for a Determination Regarding a Firm Energy Sales Agreement Between Rocky Mountain Power and Cedar Creek Wind, LLC*, Order No. 32260, Case No. PAC-E-11-01 et al., (Idaho PUC June 8, 2011) (June 8 Order).

[3] June 8 Order at 10.

[4] 16 U.S.C. § 824a-3 (2006); 18 C.F.R. Part 292 (2011).

Mountain Power,[5] requesting the Idaho PUC to initiate an investigation into various avoided cost issues.[6] The Idaho utilities also urged the Idaho PUC to lower the published avoided cost rate eligibility cap for a qualified facility (QF) from 10 aMW[7] to 100 kW effective immediately.[8]

3. On December 3, 2010, the Idaho PUC issued Order No. 32131, finding probable cause to investigate the Idaho utilities' assertions, but did not immediately reduce the eligibility cap to 100 kW.[9] This order, however, gave notice that the Idaho PUC would make a decision on the eligibility cap after its investigation and that its decision would be effective, retroactively, on December 14, 2010.[10]

4. On February 7, 2011, the Idaho PUC issued Order No. 32176, holding that the eligibility cap for wind and solar QFs to receive published avoided cost rates should be temporarily reduced from 10 aMW to 100 kW while the Idaho PUC further investigates the issue.[11] The Idaho PUC noted that while published avoided cost rates are not available to projects exceeding the eligibility cap, such projects may establish an avoided cost rate by using the Integrated Resource Plan (IRP) methodology.[12]

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[5] The filing parties included Idaho Power Company (Idaho Power), Avista Corporation, and Rocky Mountain Power. June 8 Order at 2.

[6] Cedar Creek Petition at 4; June 8 Order at 2.

[7] "Average megawatts" is a concept used by the Idaho PUC to distinguish between a project's nameplate capacity and its actual monthly output. To satisfy the 10 aMW limitation, a QF must "demonstrate that under normal or average design conditions the project will generate at no more than 10 aMW in any given month," and the maximum monthly generation eligible for the published rates is capped "at the total number of hours in the month multiplied by 10 MW." Order No. 29632, Case No. IPC-E-04-8 et al., at 14 (Idaho PUC Nov. 22, 2004).

[8] Cedar Creek Petition at 4; June 8 Order at 2.

[9] Cedar Creek Petition at 5; June 8 Order at 3.

[10] Cedar Creek Petition at 5; June 8 Order at 3.

[11] Order No. 32176 was affirmed on reconsideration by the Idaho PUC in Order No. 32212, issued March 28, 2011.

[12] June 8 Order at 3.

5. Finally, on June 8, 2011, the Idaho PUC issued Order No. 32260, assessing whether it should accept the Agreements submitted to it by Rocky Mountain Power on January 10, 2011. Idaho PUC rejected the Agreements because they did not conform with the eligibility cap changes implemented in Order No. 32176, reducing the cap from 10 aMW to 100 kW.[13] In making this finding, the Idaho PUC adopted a "bright line rule: a Firm Energy Sales Agreement/Power Purchase Agreement must be executed, i.e., signed by both parties to the agreement, prior to the effective date of the change in eligibility criteria."[14] The Idaho PUC explained that the Agreements were for projects in excess of the 100 kW eligibility cap and in order to be eligible for published avoided cost rates, the Agreements must be in effect before the date of the eligibility cap change, or, December 14, 2010. The Idaho PUC, noting its new rule, found that the Agreements were not signed by both Cedar Creek and Rocky Mountain Power until December 22, 2010, well after December 14, 2010. Thus, based on these findings, the Idaho PUC rejected the Agreements.[15]

Cedar Creek Petition

6. On August 5, 2011, Cedar Creek[16] filed a Petition for Enforcement (Petition) asking the Commission to initiate an enforcement action against the Idaho PUC to address changes to Idaho PUC's published avoided cost rates and their implementation of PURPA as a result of orders issued by the Idaho PUC "insofar as the Idaho PUC Orders impermissibly held that a QF's right under PURPA to charge at the then-existing avoided cost rates exists only upon the execution of a contract by both parties."[17]

7. In the alternative, if the Commission refuses to initiate an enforcement action, Cedar Creek requests the Commission to make the following findings:

- The Commission's PURPA regulations expressly permit a QF to sell energy and capacity pursuant to a legally enforceable

[13] Cedar Creek Petition at 6; June 8 Order at 10.

[14] June 8 Order at 10.

[15] Order No. 32260 was affirmed on reconsideration by the Idaho PUC in Order No. 32302, issued July 27, 2011.

[16] Cedar Creek is a developer of five wind farms in Bingham County, Idaho.

[17] Cedar Creek Petition at 2.

obligation, and to sell at rates established as of the date that the obligation is incurred;

- A state commission tasked with implementing the Commission's PURPA regulations may not require that a QF have a fully executed contract to establish a legally enforceable obligation under the Commission's PURPA regulations; and

- A state commission to which the task of implementing the Commission's regulations has been delegated may not hold the date upon which a legally enforceable obligation arose, for the purpose of establishing a QF's entitlement to an avoided-cost rate, to be the date on which the utility signed the contract with the QF. Rather, the state commission must determine the date upon which the legally enforceable obligation first arose.[18]

8. Cedar Creek states that the Idaho PUC mistakenly rejected the Agreements on the basis that there was no legally enforceable obligation under PURPA until the time the contract was fully executed on December 22, 2010, notwithstanding the fact that Cedar Creek had executed the Agreements on December 13, 2010. Cedar Creek asserts that the Idaho PUC rule, issued in the June 8 Order, stating that a legally enforceable obligation was created only at the time the contract was fully executed, i.e., signed by the QF and electric utility, is inconsistent with the Commission's PURPA regulations. Thus, Cedar Creek states that the Idaho PUC incorrectly concluded that a legally enforceable obligation under PURPA was not incurred until December 22, 2010, rendering Cedar Creek ineligible for published avoided cost rates.

9. Cedar Creek argues that, with respect to the Commission's PURPA regulations, the Idaho PUC is attempting to substitute a fully-executed contract requirement for that of a legally enforceable obligation.[19] Cedar Creek also argues that this substitution is prohibited by the Commission's regulations and its interpretation of those regulations.

10. Cedar Creek states that the Commission has previously made clear that a legally enforceable obligation and an executed contract are neither synonymous nor interchangeable, and while all contracts constitute legally enforceable obligations, not all

[18] *Id.* at 15.

[19] *Id.* at 10.

legally enforceable obligations arise in the form of fully executed contracts.[20] Furthermore, Cedar Creek argues that the Commission has long held that: a legally enforceable obligation can, and does, exist in the absence of a contract; a QF may negotiate a contact at an electric utility's avoided cost rate and obligate itself to offer power to that electric utility before the parties sign a contract; and a legally enforceable obligation is available in the Commission's PURPA regulations to prevent an electric utility from circumventing such regulations merely by refusing to sign a contract.[21] Thus, Cedar Creek acknowledges that while a state regulatory authority has the authority to determine the date on which a legally enforceable obligation is incurred, a state regulatory authority may not condition a legally enforceable obligation on the execution of a contract document. To do so, Cedar Creek argues, would nullify the authority delegated to them.

11. Lastly, Cedar Creek argues that the Idaho PUC's "bright line rule" not only is contrary to the meaning and intent of the Commission's regulations in 18 C.F.R. § 292.304(d), but also means that no matter how extreme the bad faith tactics of the utility, the QF cannot create a legally enforceable obligation and that an electric utility may prevent the creation of a legally enforceable obligation simply by refusing to sign a contract.[22]

12. Cedar Creek presents several facts to support its argument that a legally enforceable obligation was incurred prior to December 14, 2010. Cedar Creek states that the Agreements' terms and conditions, including the stated rates, had been fully negotiated and agreed upon in the six months prior to the December 13, 2010 eligibility cap deadline. Cedar Creek also provides a detailed timeline of events leading up to and including December 2010 by way of the Zentz affidavit.[23] Furthermore, Cedar Creek states that the financing for its projects, substantial deposits for contracts associated with

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[20] *Id.* at 10 (citing *Midwest Renewable Energy Projects, LLC*, 116 FERC ¶ 61,017, at P 15 (2006); *JD Wind 1, LLC*, 129 FERC ¶ 61,148, at P 25 (2009), *order denying "requests for rehearing, reconsideration or clarification,"* 130 FERC ¶ 61,127 (2010)) (*JD Wind 1*).

[21] Cedar Creek Petition at 10-11.

[22] Cedar Creek Petition at 11 ("To conclude otherwise and allow the [electric] utility's inaction to define whether a legally enforceable obligation existed would allow a QF's rights to be held hostage to a signature . . . .").

[23] Cedar Creek Petition, Exhibit 4, Affidavit of Dana Zentz.

the projects, as well as forty year leases for the five project sites, are at risk due to the uncertainty of the situation.[24]

13. Cedar Creek makes two ancillary arguments in addition to those directly addressing the Commission's PURPA regulations. First, Cedar Creek asserts that the Idaho PUC failed to provide notice to those entities affected by the lowering of the eligibility cap because the new eligibility cap was not announced until six months after the effective date of the lowered eligibility cap was established.[25] Second, Cedar Creek asserts that the Idaho PUC failed to follow its own precedent in that it did not grandfather any agreements made before the eligibility cap reduction.[26] Cedar Creek states that the Idaho PUC applied its grandfathering criteria as recently as November 2010, just over a month before the new eligibility cap went into effect.

Notice of Filing and Responsive Pleadings

14. Notice of Cedar Creek's filing was published in the *Federal Register*, 76 Fed. Reg. 50,212 (2011), with interventions and protests due on or before August 26, 2011.

15. On August 26, 2011, the Idaho PUC filed a notice of intervention and protest. The Idaho PUC argues that Cedar Creek's Petition fails to make out a case for enforcement under PURPA Section 210(h), and that even if the Commission were to accept Cedar Creek's mischaracterization of the proceedings, this case properly should be decided by the Idaho Supreme Court on review of the Idaho PUC's orders, rather than the Commission in the context of a Section 210(h) petition. Idaho PUC argues that by failing to preserve its right to seek review of the Idaho PUC's adjustment of the eligibility cap for published avoided cost rates in the Idaho Supreme Court, Cedar Creek cannot now resurrect its claim through a Commission action.

16. The Idaho PUC argues that its finding in the June 8 Order was properly within its authority. The Idaho PUC cites to the Commission's finding in *West Penn*[27] to support its argument that the states have the authority to determine the parameters of power purchase agreements, including the date when a legally enforceable obligation is

[24] Cedar Creek Petition at 13.

[25] *Id.* at 7.

[26] *Id.* at 7.

[27] *West Penn Power Co.*, 71 FERC ¶ 61,153 (1995) (*West Penn*).

incurred.[28] The Idaho PUC also argues that for it to now approve the Agreements, and allow Cedar Creek to ignore the deadline associated with the eligibility cap, would not be in the public interest because, in effect, Cedar Creek would enjoy rates in excess of the electric utility's avoided cost.

17. The Idaho PUC further argues that Cedar Creek cannot rely on the Commission's findings in *JD Wind 1*.[29] Idaho PUC asserts that this is not a question of whether a legally enforceable obligation was created. Idaho PUC states that given the existence of the Agreements, there is no need for a determination of when or whether a legally enforceable obligation arises. Idaho PUC points out that there are indeed two methods under Idaho law that a QF may use to preserve an avoided cost rate: "(1) entering into a signed contract with the utility; or (2) filing a meritorious complaint with the Idaho PUC alleging that a 'legally enforceable obligation' has arisen and but for the conduct of the utility, there would be a contract."[30] According to the Idaho PUC, the Agreements themselves are evidence of the legally enforceable obligation. The Idaho PUC states that the terms of the Agreements specify that the effective date of the Agreements would be after execution by both parties and approval by the Idaho PUC. Idaho PUC notes that it did not approve the Agreements. Moreover, Idaho PUC states that Cedar Creek cannot now argue against the terms of the Agreements simply because those terms do not provide it with a favorable outcome.

18. On August 26, 2011, Idaho Power filed a timely motion to intervene and protest. Idaho Power supports Idaho PUC's implementation of PURPA and the Commission's PURPA regulations, including the June 8 Order. Most significantly, Idaho Power argues

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[28] The Idaho PUC quotes the following excerpt from *West Penn*:

> It is up to the States, not this Commission, to determine the specific parameters of individual QF power purchase agreements, including the date at which a legally enforceable obligation is incurred under State law. Similarly, whether the particular facts applicable to an individual QF necessitate modifications of other terms and conditions of the QF's contract with the purchasing utility is a matter for the States to determine. This Commission does not intend to adjudicate the specific provisions of individual QF contracts.

Idaho PUC Answer at 20 (citing *West Penn*, 71 FERC ¶ 61,153 at 61,495).

[29] *JD Wind 1*, 129 FERC ¶ 61,148.

[30] Idaho PUC Answer at 7.

that the Agreements are exactly the types of projects that the Idaho PUC was concerned with as they were not reflective of the utility's avoided costs, and thus causing the Idaho PUC to lower the eligibility cap to 100 kW. Therefore, in exercising the authority delegated to it by PURPA and the Commission, Idaho Power maintains that the Idaho PUC properly rejected the Agreements.

19. Idaho Power further states that Cedar Creek's reliance on a legally enforceable obligation argument is misplaced as the Idaho PUC's decision in rejecting the Agreements was related to setting policy pertaining to the availability of the published avoided cost rate. Idaho Power argues that the Idaho PUC did nothing to obfuscate or eliminate an electric utility's obligation to purchase energy from a QF. Instead, Idaho Power states that the Idaho PUC simply set avoided cost pricing policy which comports with PURPA and this Commission's regulations.

20. On August 26, 2011, PacifiCorp[31] filed a timely motion to intervene and comment. PacifiCorp supports the Idaho PUC's June 8 Order and opposes any effort by Cedar Creek to enforce the Agreements. PacifiCorp first argues that the Idaho PUC's actions are not subject to Commission review because the act of lowering the eligibility cap was an application of PURPA, not a matter of implementation. Second, PacifiCorp asserts that even if the Commission does have jurisdiction, that the states have the authority to determine the specific parameters associated with power purchase agreements. Last, PacifiCorp argues that Cedar Creek has mischaracterized Idaho contract law by asserting that a fully executed contract is the only method by which a legally enforceable obligation may incur. PacifiCorp argues that there are in fact two paths by which a QF may establish a legally enforceable obligation under PURPA in Idaho: (1) when the Idaho PUC approves a power purchase agreement that has been executed by the electric utility and the QF; or (2) when the QF files a complaint alleging that but for the utility's inappropriate refusal to execute an agreement the QF would have obtained a power purchase agreement.

21. On August 26, 2011, Northwest and Intermountain Power Producers Coalition (NIPPC) filed a timely motion to intervene and comment in support of Cedar Creek's Petition. NIPPC argues that the Idaho PUC's "bright line rule" vests all power to decide when a legally enforceable obligation is created in the hands of the electric utility, thereby abdicating the Idaho PUC's responsibility to implement the Commission's PURPA regulations. In essence, NIPPC argues the Idaho PUC has repealed the must-buy provision of PURPA and states that should an electric utility choose not to sign a

[31] PacifiCorp is referred to as Rocky Mountain Power throughout this order and in the relevant Idaho proceedings.

contract, under the Idaho bright-line rule, there will be no legally enforceable obligation and hence no must-buy requirement.

22. On September 7, 2011, Cedar Creek filed a motion for leave to answer and answer to the comments of Idaho PUC, Idaho Power, and PacifiCorp. Cedar Creek disagrees with PacifiCorp's argument that the Commission does not have jurisdiction because Idaho PUC's actions constituted an application of PURPA, rather than the implementation of PURPA. Cedar Creek maintains that the actions by the Idaho PUC constitute an implementation of PURPA. Cedar Creek also asserts that the Idaho PUC misstates the law because, in Cedar Creek's view, a contract is not a necessary precondition to a legally enforceable obligation.

23. On September 9, 2011, Idaho PUC filed a motion for leave to answer and answer to NIPPC's comments. Idaho PUC asserts that NIPPC failed to disclose certain facts in its comment, including the fact that NIPPC was not a party to the underlying Idaho PUC orders and as a result does not have standing to challenge the Idaho PUC orders. Idaho PUC further asserts that NIPPC failed to recognize the two methods, listed in the Idaho PUC answer, available to a QF to preserve an avoided cost rate, and states that a legally enforceable obligation may be incurred in the absence of a contract.

24. On September 14, 2011, Exelon filed a motion for leave to answer and answer to Idaho PUC's September 9, 2011 Answer. Exelon supports Cedar Creek's Petition. Exelon argues that the Idaho PUC incorrectly found that the trigger for creating a legally enforceable obligation is the date that the electric utility finally executes a contract accepting the QF's written commitment, rather than the date that the QF committed to sell its power to the electric utility under PURPA. Exelon argues that the Commission addressed this issue in Order No. 69, where, according to Exelon, the Commission recognized that if a signed contract were a condition precedent to a legally enforceable obligation under PURPA, an electric utility could thwart the statute's purpose simply by refusing to sign. Thus, Exelon asserts, under Order No. 69 the action of an electric utility in agreeing or not agreeing to execute a contract cannot be the trigger creating a legally enforceable obligation.

Discussion

Procedural Matters

25. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2011), timely, unopposed motion to intervene serve to make the entities that filed them parties to this proceeding. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2011), prohibits an answer to a protest or answer unless otherwise ordered by the decisional authority. We will accept Cedar Creek's, Idaho PUC's, and Exelon's answer because they have provided information that assisted us in our decision-making process.

Commission Determination

26. Cedar Creek asks the Commission to institute an enforcement action against the Idaho PUC to enforce the Commission's PURPA regulations. Specifically, Cedar Creek petitions the Commission to enforce section 292.304(d)(2) of our regulations against the Idaho PUC as it relates to the Idaho PUC finding limiting the creation of a legally enforceable obligation only to QFs that have a "Firm Energy Sales Agreement/Power Purchase Agreement [that is] executed, i.e., signed by both parties to the agreement, prior to the effective date of the change in eligibility criteria,"[32] as promulgated in its June 8 Order.[33] Alternatively, if the Commission does not institute an enforcement action, Cedar Creek asks the Commission to make the following declarations: (1) the Commission's PURPA regulations permit QFs to sell energy pursuant to a legally enforceable obligation; (2) a state commission may not limit legally enforceable obligations to fully executed contracts; and (3) a state commission cannot determine the date that a legally enforceable obligation arises based solely on the date that the electric utility signs a contract with the QF.[34]

27. PURPA directs the Commission to prescribe "such rules as it determines necessary to encourage cogeneration and small power production."[35] PURPA, in turn, directs the states to "implement" the rules adopted by the Commission.[36] A "state commission 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

[32] June 8 Order at 10.

[33] Cedar Creek Petition at 14.

[34] *Id.* at 15.

[35] 16 U.S.C. §§ 824a-3(a)-(b) (2006).

[36] 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 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).

to give effect to [the Commission's] rules."[37] As a result, a state may take action under PURPA only to the extent that that action is in accordance with the Commission's rules.

28. The Commission has enforcement authority under section 210(h)(2) of PURPA when a state commission's (or a non-regulated electric utility's) implementation of PURPA is "inconsistent or contrary to the Commission's regulations."[38] Section 210(h)(2)(B) of PURPA[39] permits any qualifying small power producer, among others, to petition the Commission to act under section 210(h)(2)(A) of PURPA[40] 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."[41] 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.[42]

29. Here, we give notice that we do not intend to go to court to enforce PURPA on behalf of Cedar Creek; Cedar Creek thus may bring its own enforcement action against the Idaho PUC in the appropriate court.

30. Notwithstanding our decision not to go to court to enforce PURPA on behalf of Cedar Creek, we find that the Idaho PUC decision denying Cedar Creek a legally enforceable obligation, specifically the requirement in the June 8 Order that a Firm Energy Sales Agreement/Power Purchase Agreement must be executed by both parties to

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[37] *FERC v. Mississippi*, 456 U.S. 742, 751 (1982); *see also Policy Statement Regarding the Commission's Enforcement Role Under Section 210 of the Public Utilities Act of 1978*, 23 FERC ¶ 61,304, at 61,643 (1983) (1983 Policy Statement).

[38] 1983 Policy Statement, 23 FERC ¶ 61,304 at 61,644.

[39] 16 U.S.C. § 824a-3(h)(2)(B) (2006).

[40] 16 U.S.C. § 824a-3(h)(2)(A).

[41] 1983 Policy Statement, 23 FERC ¶ 61,304 at 61,645.

[42] 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.*

the agreement before a legally enforceable obligation arises, is inconsistent with PURPA and our regulations implementing PURPA, particularly section 292.304(d)(2).[43]

31. When Congress enacted PURPA in 1978, there was very little non-utility generation; virtually all new generating capacity was provided by traditional electric utilities. In fact, one of the principal reasons Congress adopted section 210 of PURPA was because electric utilities had refused to purchase power from non-utility producers.[44] Congress thus required the Commission to prescribe rules that the Commission "determines necessary to encourage cogeneration and small power production."[45] In section 210(a) of PURPA,[46] Congress also required electric utilities to purchase electric energy from QFs, which the Commission, in section 292.303 of its regulations interpreted as imposing on electric utilities an obligation to purchase all electric energy and capacity made available from QFs.[47]

32. The Commission's regulations under PURPA also include a requirement that QFs have the option to sell not only as available but pursuant to legally enforceable obligations over specified terms.[48] Section 292.304(d)[49] provides:

> (d) *Purchases "as available" or pursuant to a legally enforceable obligation.* Each qualifying facility shall have the option either:
>
> (1) To provide energy as the qualifying facility determines such energy to be available for such purchases, in which case the rates for such purchases shall be based on the purchasing utility's avoided costs calculated at the time of delivery; or
>
> (2) To provide energy or capacity pursuant to a legally enforceable obligation for the delivery of energy or capacity over a specified term, in

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[43] 18 C.F.R. § 292.304(d)(2) (2011).

[44] *FERC v. Mississippi*, 456 U.S. at 750.

[45] 16 U.S.C. § 824a-3(a) (2006).

[46] *Id.*

[47] 18 C.F.R. § 292.303 (2011).

[48] *Id.* § 292.304(d)(2).

[49] *Id.* § 292.304(d).

> which case the rates for such purchases shall, at the option of the qualifying facility exercised prior to the beginning of the specified term, be based on either:
>
> (i) The avoided costs calculated at the time of delivery; or
>
> (ii) The avoided costs calculated at the time the obligation is incurred.

Section 292.304(d) and the requirement that a QF can sell and a utility must purchase pursuant to a legally enforceable obligation were specifically adopted to prevent utilities from circumventing the requirement of PURPA that utilities purchase energy and capacity from QFs. The Commission explained:

> Paragraph (d)(2) permits a qualifying facility to enter into a contract or other legally enforceable obligation to provide energy or capacity over a specified term. Use of the term "legally enforceable obligation" is intended to prevent a utility from circumventing the requirement that provides capacity credit for an eligible facility merely by refusing to enter into a contract with a qualifying facility.[[50]]

Thus, under our regulations, a QF has the option to commit itself to sell all or part of its electric output to an electric utility. While this may be done through a contract, if the electric utility refuses to sign a contract, the QF may seek state regulatory authority assistance to enforce the PURPA-imposed obligation on the electric utility to purchase from the QF, and a non-contractual, but still legally enforceable, obligation will be created pursuant to the state's implementation of PURPA.[51] Accordingly, a QF, by committing itself to sell to an electric utility, also commits the electric utility to buy from

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[50] Order No. 69, FERC Stats. & Regs. ¶ 30,128 at 30,880; *accord id.* (noting "the need for qualifying facilities to be able to enter into contractual commitments" and agreeing to "the need for certainty with regard to return on investment in new technologies").

[51] *New PURPA Section 210(m) Regulations Applicable to Small Power Production and Cogeneration Facilities*, Order No. 688, FERC Stats. & Regs. ¶ 31,233, at P 212 (2006), *order on reh'g*, Order No. 688-A, FERC Stats. & Regs. ¶ 31,250, at P 136-137 (2007), *aff'd sub nom. American Forest and Paper Association v. FERC*, 550 F.3d 1179 (D.C. Cir. 2008); *see also Midwest Renewable Energy Projects, LLC*, 116 FERC ¶ 61,017 (2006).

the QF; these commitments result either in contracts or in non-contractual, but binding, legally enforceable obligations.[52]

33. Idaho PUC, joined by other protesters, supports the findings in the June 8 Order, arguing that the Agreements between Rocky Mountain Power and Cedar Creek are not eligible for published avoided cost rates because the contracts were not executed, or signed, on or before December 13, 2010, the cutoff date for the use of published avoided cost rates with the corresponding 10 aMW limit. In the June 8 Order, Idaho PUC relied on an Idaho Supreme Court opinion,[53] which, in turn, cited to a Commission order, *West Penn*,[54] as supporting its decision. The June 8 Order provides that "[Idaho PUC] does not consider a utility and its ratepayers obligated until both parties have completed their final reviews and signed the agreement."[55]

34. As an initial matter, we disagree with respondent's use of the Commission's determination in *West Penn*. In *West Penn*, petitioner West Penn, an electric utility serving retail customers, entered into a power purchase agreement with the owner of a QF for the sale of power at a specified rate. West Penn sought a declaratory order from the Commission that would abrogate the power purchase agreement. The Commission denied the petition, refusing to disturb the power purchase agreement because, prior to the petition before the Commission, the agreement was subject to a course of litigation that culminated with a denial of certiorari from the United States Supreme Court.

35. Idaho PUC and other protesters[56] interpret *West Penn's* discussion to give broad discretion to the states as to what constitutes a legally enforceable obligation and when such obligation is incurred. We disagree. While *West Penn* stands for the notion that the Commission gives deference to the states to determine the date on which a legally enforceable obligation is incurred,[57] such deference is subject to the terms of the Commission's regulations. *West Penn* does not, as Idaho PUC argues, give states the

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[52] *JD Wind 1*, 129 FERC ¶ 61,148 at P 25.

[53] *Rosebud Enterprises, Inc. v. Idaho Pub. Util. Comm.*, 917 P.2d 766, 780-81 (Idaho 1996) (citing *West Penn Power Co.*, 71 FERC ¶ 61,153 (1995) (*West Penn*)).

[54] *West Penn*, 71 FERC ¶ 61,153.

[55] June 8 Order at 9.

[56] June 8 Order at 9; Idaho PUC Answer at 20; Idaho Power Protest at 13-14; PacifiCorp Comment at 15.

[57] *See West Penn*, 71 FERC ¶ 61,153 at 61,495.

unlimited discretion to limit the ways a legally enforceable obligation is incurred.[58] Indeed, Commission regulations and Order No. 69 expressly use the terms "contract" and "legally enforceable obligation" in the disjunctive to demonstrate that a legally enforceable obligation includes, but is not limited to, a contract. Additionally, Order No. 69 specifically addressed the problem of an electric utility avoiding PURPA requirements simply by refusing to enter into a contract with a QF.[59] The June 8 Order, if left effective, would exacerbate this problem because the June 8 Order makes a fully-executed contract a condition precedent to the creation of a legally enforceable obligation. Therefore, when a state limits the methods through which a legally enforceable obligation may be created to only a fully-executed contract, the state's limitation is inconsistent with PURPA, and our regulations implementing PURPA.[60]

36. Next, Idaho PUC argues that *JD Wind 1* does not support Cedar Creek's position that the Agreements resulted in a legally enforceable obligation as of December 13, 2010, or before. Idaho PUC argues that *JD Wind 1* does not apply because a contract between Cedar Creek and Rocky Mountain Power was formed on December 22, 2010, the date that Rocky Mountain Power signed the Agreements.[61] We disagree with Idaho PUC and find our discussion of PURPA in *JD Wind 1* particularly applicable, that the phrase legally enforceable obligation is broader than simply a contract between an electric utility and a QF and that the phrase is used to prevent an electric utility from avoiding its PURPA obligations by refusing to sign a contract, or as here, from delaying the signing of a contract, so that a later and lower avoided cost is applicable. We further find that Idaho PUC's June 8 Order ignores the fact that a legally enforceable obligation may be incurred before the formal memorialization of a contract to writing.[62]

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[58] *See also* Exelon Answer at 11-13.

[59] Order No. 69, FERC Stats. & Regs. ¶ 30,128 at 30,880; *see also* NIPPC Comment at 10 ("If left intact, the Idaho PUC's new [rule] means that no matter how extreme the bad faith tactics of the utility, the QF cannot create a legally enforceable obligation . . . .").

[60] Order No. 69, FERC Stats. & Regs. ¶ 30,128 at 30,880.

[61] Idaho PUC Answer at 17-18.

[62] Courts have recognized that negotiations regarding terms that parties to the negotiations intend to become a finalized or written contract, may in some circumstances result in legally enforceable obligations on those parties notwithstanding the absence of a writing. *See generally Burbach Broadcasting Company of Delaware v. Elkins Radio Corp.*, 278 F.3d 401, 407-09 (4th Cir. 2002); *Adjustrite Systems, Inc. v. GAB Business*

(continued…)

37. Like the Public Utility Commission of Texas (Texas PUC) in *JD Wind 1*, the Idaho PUC has imposed requirements on QFs seeking to enter into agreements to sell electricity that are in addition to those contained in the Commission's regulations. In *JD Wind 1*, the Texas PUC refused to find that a legally enforceable obligation existed because, in its view, the QF was unable to provide "firm" power. The Commission disagreed with the Texas PUC and explained that the Commission's PURPA regulations do not contain any reference to "firm" power, and that Texas PUC's reliance on certain language in the regulatory text was incorrect. Similarly, Idaho PUC requires that a legally enforceable obligation can result from only a fully-executed contract. Like the requirement that a QF must provide "firm" power, the requirement of a fully-executed contract is absent from the Commission's regulations. We accordingly find that the Idaho PUC's requirement that an executed contract was necessary to create a legally enforceable obligation in these circumstances is inconsistent with PURPA and the Commission's regulations implementing PURPA.

38. Whether the conduct of Cedar Creek and Rocky Mountain Power constituted a legally enforceable obligation subject to the Commission's PURPA regulations is not before us. We note, however, that over the course of 2010, Cedar Creek and Rocky Mountain Power negotiated and drafted the Agreements through which Cedar Creek sought to sell electricity generated by its QFs to Rocky Mountain Power. Cedar Creek first entered into negotiations with Rocky Mountain Power regarding two agreements for wind projects in January 2010.[63] After a three-month period, in April 2010, Rocky Mountain Power provided Cedar Creek with avoided-cost pricing calculated using an IRP method. Cedar Creek found the avoided-cost pricing calculated via that method to be below market prices for other wind generated electricity purchased by Rocky Mountain Power.[64] Cedar Creek did not pursue these two contracts, and instead, in May 2010, it informed Rocky Mountain Power that it wished to negotiate five separate agreements that met Idaho PUC's 10 aMW threshold limit.[65] Over the next six months, negotiations and drafting continued with Cedar Creek providing information as requested by Rocky Mountain Power.[66] On November 29, 2010, Rocky Mountain Power provided Cedar

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Services, Inc., 145 F.3d 543, 547-50 (2d Cir. 1998); *Miller Construction Co. v. Stresstek*, 697 P.2d 1201, 1202-04 (Idaho 1985).

[63] Zentz Affidavit at P 5.

[64] *Id.* at P 10-11.

[65] *Id.* P 12.

[66] *Id.* P 13-15.

Creek with a draft agreement containing a final round of revisions.[67] Cedar Creek returned the draft, with annotations, the next day.[68] Between November 30 and December 9, 2011, communications between the parties continued; however, Rocky Mountain Power did not deliver final versions of the Agreements to Cedar Creek until December 9, citing credit approvals and management reviews.[69] Although Rocky Mountain Power had provided final versions of the five agreements to Cedar Creek, Rocky Mountain Power's management continued their review.[70] Cedar Creek executed and delivered the Agreements to Rocky Mountain Power on December 13, 2011; notwithstanding having documents signed by Cedar Creek, Rocky Mountain Power management refused to sign.[71] Rocky Mountain Power held the Agreements for over a week, making no changes, before they signed them on December 22, 2010.[72]

39. While we are not ruling on the issue of whether a legally enforceable obligation was incurred, we note that these extensive negotiations between the parties are persuasive and point to the reasonable conclusion that Cedar Creek did commit itself to sell electricity to Rocky Mountain Power.[73] Such commitment to sell to an electric utility,

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[67] *Id.* P 15.

[68] Zentz Affidavit at P 15.

[69] *Id.* P 16-18.

[70] *Id.* P 18.

[71] *Id.* P 19.

[72] *Id.* P 20.

[73] The record in this proceeding also suggests that provisions of section 292.301(b) of the Commission's regulations, 18 C.F.R. § 292.301(b), may be applicable to Idaho PUC's decision in the June 8 Order. Section 292.301(b)(1) permits a QF and an electric utility to enter into a contract containing agreed-to rates, terms, or conditions that may differ from those that would otherwise be required by the Commission's regulations concerning the determination of avoided–cost rates. The Commission reasoned that a contracted-for-rate would never exceed true avoided costs and would thus be consistent with PURPA. Order No. 69, FERC Stats. & Regs. ¶ 30,128 at 30,868. Moreover, section 292.301(b)(2) provides that the Commission's avoided cost regulations (and a state's implementation of those regulations) do not affect the validity of any contract entered into between a QF and an electric utility. Accordingly, the Idaho PUC's rejection of the contract entered into by Rocky Mountain Power and Cedar Creek, on the ground that the

(continued…)

the Commission has found, "also commits the electric utility to buy from the QF; these commitments result either in contracts or in non-contractual, but binding, legally enforceable obligations."[74]

40. Lastly, we find that the arguments concerning notice and the grandfathering of agreements are beyond the scope of this order, and accordingly, we take no position as to their validity. Cedar Creek may pursue such arguments, if it so chooses, in the appropriate court.

41. In conclusion, we find that the Idaho PUC's June 8 Order, limiting the methods by which a legally enforceable obligation may be incurred to only a fully-executed contract, is inconsistent with our regulations implementing PURPA.

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.

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avoided-cost rate contained in the contract is excessive, appears inconsistent with PURPA and the Commission's regulations implementing PURPA.

Based on the record, it is highly probable that Cedar Creek and Rocky Mountain Power are bound by a contract that specifies the use of published avoided cost rates. On December 9, 2010, Rocky Mountain Power sent Cedar Creek the final version of the Agreements. The Agreements specified the use of published avoided cost rates, not the IRP methodology. *See* June 8 Order at 3. On December 13, 2010, Cedar Creek executed the Agreements and returned them to Rocky Mountain Power. On December 22, 2010, Rocky Mountain Power executed the Agreements. In its answer, Idaho PUC states that "[t]he Idaho PUC previously found that the Agreements between Cedar Creek and Rocky Mountain [Power] were executed, and therefore a legally enforceable obligation was incurred, on December 22, 2010." Idaho PUC Answer at 21. Thus, it is likely that these entities are bound by a contract requiring the use of published avoided cost rates.

[74] *JD Wind 1*, 129 FERC ¶ 61,148 at P 25; *see also* Exelon Answer at 9; NIPPC Comment at 8.

(B) Cedar Creek's petition for a declaratory order is hereby granted, as discussed in the body of this order.

By the Commission. Commissioner Spitzer is not participating.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.