

129 FERC ¶ 61,148  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;  
Sudeen G. Kelly, Marc Spitzer,  
and Philip D. Moeller.

JD Wind 1, LLC  
JD Wind 2, LLC  
JD Wind 3, LLC  
JD Wind 4, LLC  
JD Wind 5 LLC  
JD Wind 6, LLC

Docket No. EL09-77-000

NOTICE OF INTENT NOT TO ACT AND DECLARATORY ORDER

(Issued November 19, 2009)

1. In this order, we give notice that we decline to initiate an enforcement action pursuant to the section 210(h) of the Public Utility Regulatory Policies Act of 1978 (PURPA).<sup>1</sup> However, as discussed below, we conclude that the May 1, 2009 decision of the Public Utility Commission of Texas (Texas Commission),<sup>2</sup> which determined that the wind-powered generation of JD Wind 1, LLC, JD Wind 2, LLC, JD Wind 3, LLC, JD Wind 4, LLC, JD Wind 5, LLC and JD Wind 6, LLC (JD Wind) is not entitled to a legally enforceable obligation and an avoided cost rate calculated at the time that obligation is incurred, is inconsistent with the requirements of PURPA and our regulations implementing PURPA.<sup>3</sup>

**Background**

2. JD Wind 1, LLC, JD Wind 2, LLC, JD Wind 3, LLC, JD Wind 4, LLC, JD Wind 5, LLC and JD Wind 6, LLC are each a wholly-owned subsidiary of John Deere Renewables, LLC; each of the companies that comprise JD Wind owns and operates small power production facilities that have been self-certified as qualifying facilities

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<sup>1</sup> 16 U.S.C. § 824a-3(h) (2006).

<sup>2</sup> *JD Wind I, LLC, et al. v. Southwestern Public Service Company*, Texas Commission Docket No. 3442 (May 1, 2009) (Texas Commission Order).

<sup>3</sup> 16 U.S.C. § 824a-3 (2006); 18 C.F.R. Part 292 (2009).

(QF).<sup>4</sup> JD Wind sought to enter into contracts with Southwestern Public Service Company (SPS) to sell the electric energy output from its QFs pursuant to long-term contracts at avoided cost rates. When negotiations failed, JD Wind sought to establish legally enforceable obligations pursuant to the procedures of the Texas Commission. On June 27, 2007, JD Wind filed a complaint with the Texas Commission seeking a legally enforceable obligation from SPS and seeking rates based on the avoided costs calculated at the time that obligation was incurred. JD Wind pointed to section 292.304(d)<sup>5</sup> of the Commission's regulations, which gives QFs the option of selling energy "as available"<sup>6</sup> or selling "energy or capacity pursuant to a legally enforceable obligation for the delivery of energy or capacity over a specified term."<sup>7</sup> If a QF chooses the second option, i.e., to sell energy or capacity over a specified term pursuant to a legally enforceable obligation, it has the option to sell at rates either based on avoided costs calculated at the time of delivery,<sup>8</sup> or based on avoided costs calculated at the time the obligation is incurred.<sup>9</sup> In the complaint before the Texas Commission, JD Wind sought both a legally enforceable obligation, and rates based on avoided costs calculated at the time the obligation was incurred.

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<sup>4</sup> On May 18, 2005, J.D.Wind 1, LLC filed a notice of self-certification in Docket No. QF05-114-000; on September 12, 2007, JD Wind 1, LLC filed a notice of self-recertification. On May 18, 2005, J.D.Wind 2, LLC filed a notice of self-certification in Docket No. QF05-116-000; on September 14, 2007, JD Wind 2, LLC filed a notice of self-recertification. On April 29, 2005, J.D.Wind 3, LLC filed a notice of self-certification in Docket No. QF05-115-000; on September 14, 2007 JD Wind 3, LLC filed a notice of self-recertification. On November 18, 2002, J.D.Wind 4, LLC filed a notice of self-certification in Docket No. QF03-13-000; JD Wind 4, LLC filed notices of self-recertification on May 30, 2006, and on September 21, 2007. On June 30, 2006, J.D.Wind 5, LLC filed a notice of self-certification in Docket No. QF06-289-000; JD Wind 5, LLC filed a notice of self-recertification on September 18, 2007. On June 30, 2006, J.D.Wind 6, LLC filed a notice of self-certification in Docket No. QF06-290-000; JD Wind 6, LLC filed a notice of self-recertification on September 18, 2007. All of the J.D.Wind QFs are 10 MW, except for J.D.Wind 4, LLC which is 79.8 MW.

<sup>5</sup> 18 C.F.R. § 292.304(d) (2009).

<sup>6</sup> *Id.* § 292.304(d)(1).

<sup>7</sup> *Id.* § 292.304(d)(2).

<sup>8</sup> *Id.* § 292.304(d)(2)(i).

<sup>9</sup> *Id.* § 292.304(d)(2)(ii).

3. A Texas Commission Administrative Law Judge issued a Proposal for Decision on March 25, 2009. The Administrative Law Judge found that, while JD Wind had satisfied the procedural requirements for establishing a legally enforceable obligation, i.e., that it had given the proper notice under Texas law of its intent to establish a legally enforceable obligation, it had not established a legally enforceable obligation.<sup>10</sup> The Administrative Law Judge also found that, under Texas law, a legally enforceable obligation requires a showing that the QF is capable of providing “firm power,” and that, in the absence of that showing, “the JD Wind Companies cannot create a legally enforceable obligation.”<sup>11</sup> The Administrative Law Judge’s decision was largely based on a finding of fact that “Wind-Generated Power is not readily available.”<sup>12</sup> The Texas Commission affirmed the Administrative Law Judge’s decision with the exception of the latter finding that “Wind-Generated Power is not readily available.” The Texas Commission concluded that the Administrative Law Judge’s decision otherwise supported a finding that JD Wind did not offer “firm power,” and the Texas Commission affirmed and adopted the Administrative Law Judge’s decision.<sup>13</sup>

4. JD Wind asks the Commission to enforce PURPA. JD Wind states that the Texas Commission has acted inconsistently with the requirements of section 292.304(d) of our regulations in failing to award JD Wind a legally enforceable obligation at rates calculated based on SPS’s avoided costs determined at the time of creation of a legally enforceable obligation. JD Wind argues that section 210(h)(2) of PURPA<sup>14</sup> authorizes the Commission to enforce the requirements of PURPA against a state regulatory authority, such as the Texas Commission. JD Wind also argues, quoting from the Commission’s *Policy Statement Regarding the Commission’s Enforcement Role Under Section 210 of the Public Utilities Regulatory Policies Act of 1978*,<sup>15</sup> that the Commission’s enforcement authority extends to situations where state regulatory authority implementation actions under PURPA “are inconsistent with or contrary to the Commission’s regulations.” JD Wind concludes that the Commission should exercise its

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<sup>10</sup> *JD Wind I, LLC, et al. v. Southwestern Public Service Company*, Texas Commission Docket No. 3442 at 32-38 (March 25, 2009).

<sup>11</sup> *Id.*

<sup>12</sup> *Id.* at 40.

<sup>13</sup> Texas Commission Order at 1.

<sup>14</sup> 16 U.S.C. § 824a-3(h)(2) (2006).

<sup>15</sup> 23 FERC ¶ 61,204 at 61,644 (1983) (1983 Policy Statement).

authority under section 210(h)(2) of PURPA because the Texas Commission's order implements PURPA in a manner inconsistent with section 292.304(d) of the Commission's regulations.

5. JD Wind also asserts that its petition has general applicability to the development of intermittent resources, particularly wind-powered and solar-powered generation. JD Wind argues that the requirement for the establishment of legally enforceable obligations, at rates based on avoided costs determined at the time of the establishment of the obligation, was intended to encourage the development of QFs, including QFs making use of intermittent resources, by providing greater certainty and predictability as to the return of investment which will allow such QFs to obtain the funding necessary to assure that such facilities are built. JD Wind further argues that, in the absence of state regulatory authority implementation of the requirements of section 292.304(d) of the Commission's regulations, i.e., allowing a legally enforceable obligation and the payment of a rate based on avoided costs established at the time of the establishment of the obligation, developers and financiers would not have a way to accurately predict the revenue stream that a QF would receive; the resultant uncertainty undermines the willingness of investors to fund the construction of QFs making use of intermittent resources.

6. Notice of JD Wind's filing was published in the *Federal Register*, 74 Fed. Reg. 51147 (2009), with interventions and protests due on or before October 22, 2009.

7. The Texas Commission filed a timely notice of intervention and protest. The Texas Commission argues that an enforcement proceeding pursuant to section 210(h) of PURPA does not lie; instead the Texas Commission suggests JD Wind should pursue a challenge to the Texas Commission's decision pursuant to section 210(g) of PURPA in state court. The Texas Commission also suggests that the Commission has no role in the Texas implementation of PURPA once the Texas Commission has adopted rules to implement PURPA. The Texas Commission also argues that its decision regarding JD Wind is limited to the facts of JD Wind, and thus does not warrant a declaratory order of general applicability. Finally, the Texas Commission argues that its decision is consistent with PURPA and the Commission's regulations implementing PURPA.

8. Xcel Energy Services, Inc. (Xcel), on behalf of itself and its public utility operating company affiliate, SPS, filed a timely motion to intervene and protest. Xcel argues that JD Wind properly belongs in state court, pursuant to section 210(g) of PURPA, instead of seeking enforcement pursuant to section 210(h) of PURPA. Xcel states that this is particularly true where, as here, JD Wind is pursuing an appeal of the Texas Commission order in state court. Xcel also argues that JD Wind has mischaracterized the Texas Commission order. Xcel states that, while Texas law contemplates that legally enforceable obligations can only be created by QFs delivering "firm power," the Texas Commission expressly disagreed with the notion that all wind-powered generation is non-firm. Xcel also argues that the Texas Commission's

limitation of the right to a legally enforceable obligation to those QFs that deliver “firm power” is consistent with section 292.304(d) of the Commission’s regulations. Finally, Xcel states that its own development of wind power, as well as its other purchases of wind-powered generation, demonstrates that it is not trying to inhibit the development of wind power. Xcel concludes that this case is merely a dispute between JD Wind and SPS about rates; accordingly, there are no generic issues which require a Commission decision.

9. Occidental Permian Ltd. (Occidental) filed a timely motion to intervene and protest. Occidental explains that it is SPS’s largest retail customer and purchases substantial quantities of electric energy from SPS in connection with Occidental’s oil and gas operations in Texas and New Mexico. Occidental states that a Commission decision in this case will affect the retail rates it pays SPS. Occidental argues that the dispute is not ripe for Commission decision because JD Wind has filed an appeal of the Texas Commission order in state court. Occidental also argues that the determination of whether and under what circumstances a legally enforceable obligation has been created is solely a state function in which the Commission plays no role. Occidental argues that the Texas Commission’s finding that JD Wind Companies did not satisfy the requirement that a QF must have the capability to provide firm power to the utility before the QF can establish a legally enforceable obligation, involves a fact-specific application of Texas law which is not subject to Commission enforcement jurisdiction. Occidental further argues that the Texas Commission decision is not inconsistent with PURPA or with the Commission’s regulations implementing PURPA. Occidental argues that JD Wind’s arguments that the Texas Commission will have a devastating impact on the development of wind-powered and solar-powered generation across the United States are “hyperbolic claims” and “absurd on their face.”<sup>16</sup>

10. The American Wind Energy Association (AWEA) and the Solar Energy Industries Association (SEIA) filed a motion to intervene, and joined by the Project for Sustainable FERC Energy Policy, also submitted comments in support of JD Wind’s request for a declaratory order, stating that wind, solar and other intermittent resource QFs are not prohibited from selling their output pursuant to legally enforceable obligations based on forecast avoided costs. AWEA states that it is a national trade association representing a broad range of entities with a common interest in encouraging the expansion and facilitation of wind energy resources in the United States. SEIA states that it is a national trade association for the solar industry. They argue that the Texas Commission decision is inconsistent with the Commission’s regulations and that the Texas Commission does not have the authority, under PURPA, to act inconsistently with the Commission’s regulations. They argue that the Texas Commission’s decision that states that a legally

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<sup>16</sup> Occidental Motion to Intervene at 25.

enforceable obligation does not apply to wind generation because it is intermittent, or “non-firm” in the language of the Texas Commission, prohibits all intermittent resources from establishing legally enforceable obligations for the delivery of energy or capacity over specified terms. They argue that, by eliminating the option for intermittent resource QFs to create legally enforceable obligations, such QFs are denied the ability to have rates based on avoided costs calculated at the time the obligations are incurred. They argue that rates based on avoided costs calculated at the time the obligations are incurred encourages development of intermittent resources by making financing more available. They ask the Commission to grant the relief requested by JD Wind.

11. Distributed Wind Systems, LLC (Distributed Wind Systems) filed a timely motion to intervene and comments in support of JD Wind’s petition for declaratory order and enforcement of PURPA. Distributed Wind Systems is a QF developer that provides management and consulting services to JD Wind. Distributed Wind Systems argues that the application of the Texas Commission policy throughout the United States would undermine all QF renewable resource generation that is intermittent in nature and urges the Commission to grant JD Wind’s petition.

12. Golden Spread Electric Cooperative (Golden Spread) filed a timely motion to intervene. Golden Spread suggests that the Commission hold a hearing to determine the potential impact on SPS customers of the relief that JD Wind requests.

13. Montana Small Independent Renewable Generators (Montana Renewables) filed a timely motion to intervene. Montana Renewables states that its members are hydropower and wind developers owning both proposed facilities, and facilities in operation, throughout Montana and the Pacific Northwest. Montana Renewables states that the Texas Commission’s interpretation of when legally enforceable obligations can be established will negatively affect all intermittent resource QFs in the United States.

14. The Texas Renewable Energy Industries Association (Texas Renewables) filed comments in support of JD Wind’s petition. Texas Renewables states that the Texas Commission decision will adversely affect the development of renewable resource electric generation in Texas. Reversal of the Texas Commission decision is necessary, Texas Renewables argues, for potential facilities to obtain project financing, which is critical to developing new renewable resource generation.

15. NRG Energy, Inc. filed a timely motion to intervene.

16. The Wind Coalition filed an untimely motion to intervene and comments in support of JD Wind’s petition. The Wind Coalition states that it is concerned about the harm the Texas Commission’s decision will cause to the development of renewable resources. The Wind Coalition argues that the Texas Commission order is inconsistent with the plain language of both PURPA and the Commission’s regulations implementing PURPA.

17. JD Wind filed an answer to the protests filed by Xcel, Occidental, the Texas Commission and Golden Spread. Xcel and Occidental filed answers to JD Wind's answer.

## **Discussion**

### **Procedural Matters**

18. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2009), the notice of intervention and the timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding. Furthermore, we find that good cause exists to grant the untimely intervention of the Wind Coalition, given the constituency which it represents, the early stage of this proceeding, and the apparent absence of any undue prejudice or delay. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2009), prohibits an answer to a protest or answer unless otherwise ordered by the decisional authority. We are not persuaded to accept the answers of JD Wind, Xcel and Occidental and will, therefore, reject them.

### **Commission Determination**

19. JD Wind asks the Commission to declare that a Texas Commission order is in conflict with PURPA and the Commission's regulations implementing PURPA. Specifically, JD Wind asks the Commission to declare that the Texas Commission finding limiting the creation of a legally enforceable obligation only to QFs that provide "firm power," as defined by the Texas Commission, is in conflict with section 292.304.(d)(1) of our regulations.<sup>17</sup> That section, JD Wind argues, gives all QFs the option of selling pursuant to a legally enforceable obligation and, in turn, the option of selling either at avoided costs calculated at the time of delivery, or at avoided costs calculated at the time the legally enforceable obligation was incurred.

20. PURPA directs the Commission to prescribe "such rules as it determines necessary to encourage cogeneration and small power production."<sup>18</sup> PURPA, in turn, directs the states to "implement" the rules adopted by the Commission.<sup>19</sup> A "state

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<sup>17</sup> 18 C.F.R. § 292.304(d)(1) (2009).

<sup>18</sup> 16 U.S.C. §§ 824a-3(a)-(b) (2006).

<sup>19</sup> 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*

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 Commission's] rules.”<sup>20</sup> 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.

21. The Commission has enforcement authority under section 210(h)(2) of PURPA when a state commission's (or a nonregulated electric utility's) implementation of PURPA is “inconsistent or contrary to the Commission's regulations.”<sup>21</sup> Section 210(h)(2)(B) of PURPA<sup>22</sup> permits any qualifying small power producer, among others, to petition the Commission to act under section 210(h)(2)(A) of PURPA<sup>23</sup> 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.”<sup>24</sup> 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 nonregulated electric utility in the appropriate United States district court.<sup>25</sup>

22. Here, we give notice that we do not intend to go to court to enforce PURPA on behalf of JD Wind; JD Wind thus may bring its own enforcement action against the Texas Commission in the appropriate United States district court.

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*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).

<sup>20</sup> *FERC v. Mississippi*, 456 U.S. 742, 751 (1982); *see also* 1983 Policy Statement, 23 FERC ¶ 61,304, at 61,643 (1983).

<sup>21</sup> 1983 Policy Statement, 23 FERC ¶ 61,304 at 61,644.

<sup>22</sup> 16 U.S.C. § 824a-3(h)(2)(B) (2006).

<sup>23</sup> 16 U.S.C. § 824a-3(h)(2)(A) (2006).

<sup>24</sup> 1983 Policy Statement, 23 FERC ¶ 61,304 at 61,645.

<sup>25</sup> 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.*

23. Notwithstanding our decision not to go to court to enforce PURPA on behalf of JD Wind, we find that the Texas Commission's decision denying JD Wind a legally enforceable obligation, and the requirement in Texas law that legally enforceable obligations are only available to sellers of "firm power," as defined by Texas law, are inconsistent with PURPA and our regulations implementing PURPA, particularly section 292.304(d) of our regulations.<sup>26</sup>

24. 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.<sup>27</sup> Congress thus required the Commission to prescribe rules that the Commission "determines necessary to encourage cogeneration and small power production."<sup>28</sup> In section 210(a) of PURPA,<sup>29</sup> 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.<sup>30</sup>

25. 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.<sup>31</sup> Section 292.304(d)<sup>32</sup> 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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<sup>26</sup> 18 C.F.R. § 292.304(d) (2009).

<sup>27</sup> *FERC v. Mississippi*, 456 U.S. 742, 750 (1982).

<sup>28</sup> 16 U.S.C. § 824a-3(a) (2006).

<sup>29</sup> *Id.*

<sup>30</sup> 18 C.F.R. § 292.303 (2009).

<sup>31</sup> *Id.* § 292.304(d)(2).

<sup>32</sup> *Id.* § 292.304(d).

(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.

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.<sup>[33]</sup>

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.<sup>34</sup> Accordingly, a QF, by

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<sup>33</sup> Order No. 69, FERC Stats. & Regs. ¶ 30,128 at 30,880 (1980); *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”).

<sup>34</sup> *New PURPA Section 210(m) Regulations Applicable to Small Power Production and Cogeneration Facilities*, Order No. 688, FERC Stats. & Regs. ¶ 31,233, at P 212 (2006), *order on reh’g*, Order No. 688-A, FERC Stats. & Regs. ¶ 31,250, at P 136-37 (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).

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.

26. JD Wind sought a legally enforceable obligation, pursuant to the procedures set forth in Texas law. JD Wind notified SPS that it sought a legally enforceable obligation to sell the entire output of its wind facilities to SPS, selected the rate option of avoided costs calculated at the time the obligation was incurred, and began delivering 100 percent of the net output of its wind-powered facilities to SPS. SPS refused to acknowledge a legally enforceable obligation, and instead paid JD Wind for the output of the facilities pursuant to a Texas rate schedule implementing the Commission's "as available" option;<sup>35</sup> SPS took JD Wind's output, but paid JD Wind an "as available" rate. SPS took the position that intermittent resources were "non-firm" and that legally enforceable obligations were limited to sales of "firm" resources. JD Wind Companies filed a complaint with the Texas Commission, which, as discussed above, agreed with SPS, and found that only firm resources were entitled to a legally enforceable obligation and that JD Wind's resources were not firm resources.

27. The Texas Commission and other protesters argue that the Texas Commission decision is consistent with our regulations. They believe that the option contained in section 292.304(d)(2)<sup>36</sup> is available *only* to QFs that can deliver "firm" power, and that the option in section 292.304(d)(1)<sup>37</sup> must be chosen by those QFs that cannot deliver "firm" power. We do not agree. As a starting point, we note that section 292.304(d) does not draw such a distinction; it does not contain the words "firm" or "non-firm." Protesters, however, point to the use of the words "as available" in the title, and to the language of section 292.304(d)(1), as suggesting that section 292.304(d)(1) is intended to be applied to all "non-firm" sales. This is contrary to the language of the regulation which provides that "[e]ach qualifying facility shall have the option either:"<sup>38</sup> to choose the section 292.304(d)(1) method of sale, or the section 292.304(d)(2) method of sale; i.e., the QF may choose either: (1) to sell as-available energy whenever it determines such energy is available, or (2) sell capacity or energy for a fixed term, pursuant to a mutually agreed-to contract, or pursuant to a contract or other legally enforceable obligation imposed on the utility by the state regulatory authority. No limitation based on firmness is mentioned. Indeed, in Order No. 69, the Commission explained that an "as

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<sup>35</sup> See 18 C.F.R. § 292.304(d)(1) (2009).

<sup>36</sup> *Id.* § 292.304(d)(2).

<sup>37</sup> *Id.* § 292.304(d)(1).

<sup>38</sup> *Id.* § 292.304(d) (emphasis added).

available” basis merely means “without legal obligation.”<sup>39</sup> Thus, section 292.304(d) gives each QF, even those using an intermittent resource, the option of choosing to sell: (1) energy, on an “as available” basis, i.e., not pursuant to a legal obligation, when the QF determines such energy to be available for purchases, or (2) energy or capacity, pursuant to a legally enforceable obligation over a specified term. If the QF chooses the latter option, as JD Wind seeks to do, it then has the option to choose a rate based on avoided costs calculated at the time the obligation is incurred.

28. Both the Texas Administrative Law Judge and the protesters in this proceeding have pointed to language in Order No. 69,<sup>40</sup> which they believe justifies their reading into section 292.304(d) of our regulations a requirement that legally enforceable obligations may be awarded only to those QFs that deliver “firm” power. The discussion they point to, however, has been taken out of context. It does not involve the section of our regulations at issue here, section 292.304(d), which gives QFs the option to choose to sell pursuant to a legally enforceable obligation, but is discussing a different section of our regulations, titled “*Factors affecting rates for purchases.*”<sup>41</sup> There, the Commission stated that the calculation of avoided costs, which are used to determine an avoided cost rate, can include a recognition of the capacity value provided by QFs. The Commission explained that QF sales to utilities did not fit neatly into traditional utility concepts of “firm” and “non-firm” power and so discussed how to calculate the capacity component of rates for energy from various types of QFs, including those utilizing what are called “intermittent” resources, such as wind, solar, and hydro.<sup>42</sup> The discussion of “firm” power in Order No. 69 thus provides no basis for concluding that the Commission intended legally enforceable obligations to be available only to QFs that provide “firm” resources.

29. In conclusion, we find that the Texas Commission’s order, limiting the award of a legally enforceable obligation to only those QFs that provide “firm” power, is inconsistent with our regulations implementing PURPA. Under our regulations, JD Wind has the right to choose to sell pursuant to a legally enforceable obligation, and, in turn, has the right to choose to have rates calculated at avoided costs calculated at the time that obligation is incurred.

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<sup>39</sup> Order No. 69, FERC Stats. & Regs. ¶ 30,128 at 30,880.

<sup>40</sup> *Id.* at 30,881-83.

<sup>41</sup> *See* 18 C.F.R. § 292.304(e) (2009).

<sup>42</sup> Order No. 69, FERC Stats. & Regs. ¶ 30,128, at 30,881-82 (1980). In fact, the Commission also expressly found that wind generators can provide “firm capacity.” *Id.* at 30,882.

The Commission orders:

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

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

By the Commission.

( S E A L )

Kimberly D. Bose,  
Secretary.