

130 FERC ¶ 61,127
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;
Marc Spitzer, Philip D. Moeller,
and John R. Norris.

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. EL09-77-001

ORDER DENYING “REQUESTS FOR REHEARING, RECONSIDERATION OR
CLARIFICATION”

(Issued February 19, 2010)

1. On November 19, 2009, the Commission issued an order responding to a petition for enforcement under section 210(h) of the Public Utilities Regulatory Policies Act of 1978 (PURPA) filed by 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 (collectively, JD Wind).¹ In the November 19 Order, the Commission gave notice that it declined to initiate an enforcement action pursuant to the section 210(h) of the Public Utility Regulatory Policies Act of 1978 (PURPA).² In the November 19 Order, in response to JD Wind’s petition for declaratory order, the Commission also declared that the May 1, 2009 decision of the Public Utility Commission of Texas (Texas Commission)³ -- which determined that JD Wind’s wind-powered generation is not entitled to a legally enforceable obligation and an avoided cost

¹ *JD Wind 1, LLC*, 129 FERC ¶ 61,148 (2009) (November 19 Order).

² 16 U.S.C. § 824a-3(h) (2006).

³ *JD Wind I, LLC v. Southwestern Public Service Co.*, Texas Commission Docket No. 3442 (May 1, 2009) (Texas Commission Order).

rate calculated at the time that obligation is incurred -- is inconsistent with the requirements of PURPA and our regulations implementing PURPA.⁴

2. Occidental Permian Ltd. (Occidental) and Xcel Energy Services, Inc. (Xcel) each filed pleadings styled as requests for rehearing, reconsideration, or clarification of the November 19 Order. Occidental and Xcel claim that the November 19 Order erred by declaring that the Texas Commission Order was inconsistent with PURPA and the Commission's regulations implementing PURPA. As discussed below, Occidental and Xcel have raised nothing in their requests that warrants changing our decision in the November 19 Order; we accordingly deny the requests.

Background

3. As discussed more fully in the November 19 Order, 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 (QF). 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) of the Commission's regulations,⁵ which gives QFs the option of selling energy "as available"⁶ or selling "energy or capacity pursuant to a legally enforceable obligation for the delivery of energy or capacity over a specified term."⁷ 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,⁸ or based on avoided costs calculated at the time the obligation is incurred.⁹ In the complaint before the Texas Commission,

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

⁵ 18 C.F.R. § 292.304(d) (2009).

⁶ *Id.* § 292.304(d)(1).

⁷ *Id.* § 292.304(d)(2).

⁸ *Id.* § 292.304(d)(2)(i).

⁹ *Id.* § 292.304(d)(2)(ii).

JD Wind sought both a legally enforceable obligation, and rates based on avoided costs calculated at the time the obligation was incurred.

4. A Texas Commission Administrative Law Judge issued a Proposal for Decision on March 25, 2009. As relevant here, the Administrative Law Judge 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.”¹⁰ The Administrative Law Judge’s decision was largely based on a finding of fact that “Wind-Generated Power is not readily available.”¹¹ 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.¹²

5. JD Wind then came to this Commission, petitioning the Commission to enforce the requirements of our regulations, and to issue a declaratory order as to the meaning of the Commission’s regulations. The November 19 Order resulted.

November 19 Order

6. The Commission exercised its discretion and declined to go to court to enforce PURPA on JD Wind’s behalf. The Commission, however, declared that JD Wind has the right to a legally enforceable obligation. The Commission pointed out that its regulations implementing PURPA include an express requirement that *each* QF has the option to sell not only on an “as available” basis, but also has the option to sell pursuant to legally enforceable obligations over specified terms.¹³ The Commission specifically pointed to section 292.304(d),¹⁴ which provides:

(d) Purchases “as available” or pursuant to a legally enforceable obligation. Each qualifying facility shall have the option either:

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

¹¹ *Id.* at 40.

¹² Texas Commission Order at 1.

¹³ November 19 Order, 129 FERC ¶ 61,148 at P 25-29.

¹⁴ *Id.*; 18 C.F.R. § 292.304(d) (2009).

- (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 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.

7. Noting that section 292.304(d) and its 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 concluded that, under the language of its regulations, a QF has the option to commit itself to sell all or part of its electric output to an electric utility through a contract or a non-contractual, but still legally enforceable, obligation.¹⁵ The Commission concluded that a QF, by committing itself to sell to an electric utility, also commits the electric utility to buy from the QF. The Commission explained that these commitments result either in contracts or in non-contractual, but binding, legally enforceable obligations.¹⁶

8. The Commission concluded that the Texas Commission Order, denying JD Wind's request to establish a legally enforceable obligation and finding that the award of a legally enforceable obligation is limited to only those QFs that provide "firm" power, is inconsistent with the Commission's regulations implementing PURPA.¹⁷ Under these regulations, each QF, including each QF owned by JD Wind, has the right to choose to

¹⁵ November 19 Order, 129 FERC ¶ 61,148 at P 25, 29; *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).

¹⁶ November 19 Order, 129 FERC ¶ 61,148 at P 25, 29.

¹⁷ *Id.* P 26-29.

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.¹⁸

Requests for Rehearing, Reconsideration or Clarification

9. In its request, Xcel argues that the Commission has reinterpreted section 292.304 of the Commission's regulations in a manner that is inconsistent with PURPA and Congressional intent. Xcel also argues that this allegedly new interpretation of the regulations will result in rates that exceed avoided costs, in violation of PURPA.¹⁹ Finally Xcel argues that the Commission should have instituted a rulemaking before re-interpreting its regulations. Xcel also asks the Commission to clarify that its November 19 Order is "of no legal moment." Xcel further asks the Commission to clarify that its order is not binding on the Texas Commission.

10. In its request, Occidental argues that the Commission's November 19 Order relies on what Occidental characterizes as a newly-announced interpretation of section 292.304(d) of its regulations that, Occidental argues, misconstrues the language of that provision and is contrary to PURPA. Occidental also argues that the decision of whether a legally enforceable obligation has been established is the responsibility of the state regulatory authority, and not the Commission. Occidental also argues that the November 19 Order is inconsistent with PURPA's requirement that payments to QFs may not exceed a utility's avoided costs; Occidental argues that the November 19 Order assumes that utilities must treat "as available" resources as though they are firm for purposes of calculating avoided costs. Finally, Occidental argues that the Commission can not extend legally enforceable pricing options to intermittent, non-firm QF power, in the context of a declaratory order; Occidental argues that, to extend the right of establishing legally enforceable obligations to intermittent resources, the Commission should have acted in the context of a rulemaking. Occidental also asks the Commission to clarify that the Commission: (1) made no findings about whether JD Wind satisfied Texas procedural requirements for establishing a legally enforceable obligation; and (2) did not address the appropriate avoided cost rate that JD Wind should be paid.

11. JD Wind filed a response to the requests of Occidental and Xcel asking the Commission to summarily dismiss the requests on the ground that rehearing does not lie.

¹⁸ *Id.*

¹⁹ Xcel also argues that the Commission has engaged in a rulemaking in this proceeding, rather than in a declaration of the meaning of an existing rule, and that rehearing of the November 19 Order lies under the Federal Power Act.

Discussion

Procedural Matters

12. Because this proceeding arises under section 210(h) of PURPA, formal rehearing does not lie, either on a mandatory or a discretionary basis.²⁰ We will, however, address the requests, as provided below.

13. The Commission's Rules of Practice and Procedure, although silent with respect to requests for reconsideration and answers to requests for reconsideration, do not normally permit answers to requests for rehearing.²¹ We have previously indicated that the concerns that militate against answers to requests for rehearing similarly should apply to answers to requests for reconsideration.²² Accordingly, we will reject JD Wind's answer.

Commission Determination

14. We deny Occidental and Xcel's requests. Nothing raised in the requests warrants a change to our November 19 Order.

15. Both Occidental and Xcel argue that the Commission's November 19 Order represents a change to its interpretation of section 292.304(d) of its regulations.²³ Both also argue, relying primarily on a portion of the legislative history of PURPA,²⁴ that the alleged change to the interpretation contained in the November 19 Order is inconsistent with PURPA. We disagree.

16. As an initial matter, we do not believe that our interpretation of section 292.304(d) of our regulations represents a change. As pointed out in the November 19 Order, our decision was based primarily on the express language of section 292.304(d) of our regulations, which gives "each" QF the option to choose to sell on what is known as an "as available" basis (section 292.304(d)(1)), or to sell pursuant to a legally enforceable

²⁰ See *Southern California Edison Co.*, 71 FERC ¶ 61,090, at 61,305 (1995); *New York State Electric & Gas Corp.*, 72 FERC ¶ 61,067, at 61,340 (1995).

²¹ 18 C.F.R. § 385.713(d) (2009).

²² See *CGE Fulton, L.L.C.*, 71 FERC ¶ 61,232, at 61,880-81 (1995); *Connecticut Light & Power Co.*, 71 FERC ¶ 61,035, at 61,151 (1995).

²³ 18 C.F.R. § 292.304(d) (2009).

²⁴ H.R. Rep. No. 95-1750, at 99 (1978).

obligation (section 292.304(d)(2)).²⁵ If the QF chooses to sell pursuant to a legally enforceable obligation, it has the express right to choose a rate based on either the avoided costs calculated at the time of delivery,²⁶ or the avoided costs calculated at the time the obligation is incurred.²⁷ Because the Commission relied on the express language of the regulation, the November 19 Order in no way represents a breaking of new ground, or in any sense a change of policy. Occidental and Xcel, moreover, do not point to Commission precedent that interpreted section 292.304(d) differently.²⁸

17. Any suggestion that the preamble to the Commission's order adopting its original regulations could be read to prohibit the award of a legally enforceable obligation to a nonfirm resource must equally fail. The Commission, in its November 19 Order, pointed out that doing so reads the language concerning firmness out of context; that language, in fact, provides no reasonable basis for an understanding that legally enforceable obligations are limited to firm resources.²⁹ The preamble to its adoption of the regulation at issue here expressly contemplated that QFs could receive a capacity payment.³⁰ And, in fact, the Commission recognized the possibility that intermittent QF resources, including solar and wind resources, which would not be considered "firm" using traditional utility concepts, could still enable a utility to avoid capacity, and that "the aggregate capacity value of such facilities must be considered in the calculation of rates

²⁵ 18 C.F.R. § 292.304(d) (2009) (emphasis added). The difference between these options is: when a QF chooses to sell pursuant to a legally enforceable obligation, it commits ahead of time to sell all or some part (e.g., during certain hours) of its output to an electric utility; when a QF chooses instead to sell on an "as available" basis, it makes no such advance commitment to the electric utility and may choose to make sales to the electric utility essentially at its discretion.

²⁶ 18 C.F.R. § 292.304(d)(2)(i) (2009).

²⁷ 18 C.F.R. § 292.304(d)(2)(ii) (2009).

²⁸ The fact that Texas may have implemented section 292.304(d) of our regulations inconsistently with the express language of the regulation is not evidence as to the proper interpretation of the regulation. Nor is the fact that the inconsistent implementation may have been long standing. We do not routinely review the states' implementation of PURPA for consistency with our regulations; review typically occurs, as here, when we are presented with a petition for enforcement.

²⁹ November 19 Order, 129 FERC ¶ 61,148 at P 28.

³⁰ *Id.*

for purchases.”³¹ As capacity payments are available under section 292.304(d) only to those facilities that have chosen the legally enforceable obligation, even aside from the express language of the regulation, the preamble to the order adopting the regulation supports a finding that the Commission always intended that nonfirm, intermittent QF resources are included in the phrase “each qualifying facility” that has the option to choose to sell pursuant to a legally enforceable obligation.

18. In sum, our interpretation of section 292.302(d) is based on the express language of the regulation, and is also consistent with the preamble to the regulation issued at the time the regulation was enacted. We, accordingly, conclude that our interpretation of section 292.302(d) of our regulations is in no way a new interpretation of the regulation.

19. Occidental and Xcel’s remaining arguments largely depend on the argument that the Commission in the November 19 Order has reinterpreted section 292.304(d) of its regulations. In this regard, Occidental and Xcel claim that the Commission should have announced this interpretation of section 292.304(d) in the context of a rulemaking because the interpretation constitutes a change to the regulation which, they claim, can be accomplished only by a rulemaking. Because our interpretation of section 292.304(d) does not represent a change, however, Occidental and Xcel’s argument that the Commission should have instituted a rulemaking must fail.

20. Similarly, Xcel’s argument that the Commission should look to PURPA’s legislative history to limit section 292.304(d) is misplaced. Section 292.304(d) constitutes part of the Commission’s original implementation of PURPA in 1980, which was appealed to the Supreme Court, and was affirmed.³² Xcel’s arguments about the legislative history are, in effect, a very belated collateral attack on the original rulemaking; to the extent that a party wished to raise the issue of the consistency of our regulations with PURPA, including the issue of the consistency of our regulation granting a QF the option of selling pursuant to a legally enforceable obligation with PURPA, the issue should have been raised in the context of that rulemaking and the appeal of that rulemaking.

³¹ *Id.* P 28 & n.42. (citing Order No. 69, FERC Stats. & Regs. ¶ 30,128 at 30,882.)

³² *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 (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 Corp. v. FERC*, 675 F.2d 1226 (D.C. Cir. 1982), *rev'd in part*, *American Paper Institute, Inc. v. American Electric Power Service Corp.*, 461 U.S. 402 (1983).

21. Nonetheless, we will address the argument here and we find that the legislative history cited by Xcel does not support a finding that section 292.304(d) is inconsistent with PURPA. Xcel points to the following language to support its argument that Congress intended that nonfirm power cannot qualify for a legally enforceable obligation:

The conferees expect that the Commission, in judging whether the electric power supplied by the [qualifying facility] will replace future power which the utility would otherwise have to generate itself either through existing capacity or additions to capacity or purchase from other sources, will take into account the reliability of the power supplied by the [qualifying facility] by reason of any legally enforceable [sic] obligation of such [qualifying facility] to supply firm power to the utility.^{33]}

This language, however, does not address the issue of whether a QF has the option of selling nonfirm power pursuant to legally enforceable obligation. Rather this language reflects the Congressional conferees' concern that the firmness of power be considered in determining the rate for that power – particularly the capacity component of the rate.³⁴ The Commission's regulations, discussed above, addressing both the right to a legally enforceable obligation as well as, separately, consideration of the firmness of the power in developing the rate for that power, are consistent with this concern.

22. We next turn to Occidental and Xcel's arguments that our interpretation of section 292.304(d) will result in rates for intermittent QF resources that exceed the utility's avoided costs. As an initial matter, we note that Occidental is correct that the Texas Commission, because it ruled that the JD Wind facilities were not entitled to a legally enforceable obligation, never calculated a rate based on the utility's avoided cost calculated at the time the obligation was incurred. Nor did JD Wind's petition ask us to address the issue of how to calculate avoided costs, other than asking the Commission to declare that JD Wind was entitled to rates based on avoided costs calculated at the time the legally enforceable obligation was incurred. Consequently, this Commission has not in this proceeding addressed the calculation of an avoided cost rate for the JD Wind facilities. The Commission, in the November 19 Order, ruled only that the JD Wind facilities are entitled to a legally enforceable obligation, and thus, under section 292.304(d)(2), to an avoided cost rate calculated at the time the obligation is incurred; the Commission did not address any proposed calculation of avoided costs. Occidental and

³³ H.R. Rep. No. 95-1750, at 99 (1978).

³⁴ November 19 Order, 129 FERC ¶ 61,148 at P 28; *see* Order No. 69, FERC Stats. & Regs. ¶ 30,128 at 30,881-83. The Commission has, in fact, indicated that firm capacity can be provided by dispersed wind systems. *Id.* at 30,882.

Xcel nonetheless suggest that an avoided cost rate cannot be accurately calculated for intermittent resources at the time the obligation is incurred.

23. The Commission's regulations, from the beginning, have given QFs the option of choosing to have rates calculated at the time the obligation is incurred. The intention of the Commission was to enable a QF "to establish a fixed contract price for its energy and capacity at the outset of its obligation."³⁵ The Commission recognized that:

[I]n order to be able to evaluate the financial feasibility of a cogeneration or small power production facility, an investor needs to be able to estimate, with reasonable certainty, the expected return on a potential investment before construction of a facility.^[36]

The Commission recognized that avoided costs could change over time, and that the avoided costs and rates determined at the time a legally enforceable obligation was incurred could differ from the avoided costs at the time of delivery.³⁷ The Commission has, since then, consistently affirmed the right of QFs to long-term avoided cost contracts or other legally enforceable obligations with rates determined at the time the obligation is incurred, even if the avoided costs at the time of delivery ultimately differ from those calculated at the time the obligation is originally incurred.³⁸ Rates based on avoided costs at the time the obligation is originally incurred are consistent with the requirements of PURPA, and we see no impediment to accurately determining such rates for QFs powered by intermittent resources.

24. Occidental argues that the Commission should not have commented on this case on the ground that the Commission's longtime practice has been to leave to state commissions the issue of when a legally enforceable obligation is created. Occidental is correct that the Commission generally does leave to state commissions the issue of when and how a legally enforceable obligation is created.³⁹ However, that the Commission

³⁵ *Id.* at 30,880.

³⁶ *Id.* at 30,868.

³⁷ *Id.* at 30,880.

³⁸ *See, e.g., New York State Electric & Gas Corp.*, 71 FERC ¶ 61,027, at 61,115-16 (1995), *order denying reconsideration*, 72 FERC ¶ 61,067 (1995), *appeal dismissed sub nom. New York State Electric & Gas Corp. v. FERC*, 117 F.3d 1473 (D.C. Cir. 1997).

³⁹ Occidental is also correct that the Commission has twice refused to prematurely address certain issues between Xcel and JD Wind. *See Xcel Energy Services, Inc.*, 122 FERC ¶ 61,048, at P 45 (2008) (the Commission, because it was denying Xcel's PURPA
(continued...))

generally leaves this issue to the states (and to nonregulated utilities when applicable), does not mean that a state commission is free to ignore the requirements of PURPA or the Commission's regulations. Under PURPA, the Commission has prescribed "such rules as it determines necessary to encourage cogeneration and small power production."⁴⁰ PURPA, in turn, directs the states to "implement" the rules adopted by the Commission.⁴¹ When a state commission ignores the requirements of PURPA, as implemented in our regulations, the QF has the right under PURPA to seek enforcement of its PURPA rights.⁴² The first step in the enforcement process is the QF's filing of a petition pursuant to section 210(h)(2)(B) of PURPA.⁴³ Section 210(h)(2)(B) of PURPA permits any qualifying small power producer, among others, to petition the Commission to act under section 210(h)(2)(A) of PURPA⁴⁴ to enforce the requirement that a state commission implement the Commission's regulations. JD Wind filed such a petition, and, in response, in the November 19 Order, the Commission declined to go to court on JD Wind's behalf. When the Commission declines to go to court, it can do so with or without making a statement as to its position on the issues. Here, the Commission chose

section 210(m) petition to terminate the mandatory purchase obligation, declined to address whether a legally enforceable obligation had been established); *Xcel Energy Services, Inc. v. Southwest Power Pool, Inc.*, 118 FERC ¶ 61,232, at P 27 (2007) (the dispute between Xcel and JD Wind concerning the particular rate for, and the terms and conditions governing, a sale were a matter to be resolved pursuant to Texas' implementation of PURPA). In each of these cases, the Commission left certain PURPA implementation issues to the Texas Commission. Our decisions in those two cases, however, did not authorize the Texas Commission to resolve issues in a manner inconsistent with our regulations. The Texas Commission having done so, however, it is now appropriate for the Commission to give guidance on the meaning of our regulations.

⁴⁰ 16 U.S.C. §§ 824a-3(a)-(b) (2006).

⁴¹ 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).

⁴² November 19 Order, 129 FERC ¶ 61,148 at P 21.

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

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

to provide a statement of its position on the issues. We have done so before, and there was nothing unusual or inappropriate in our doing so here.⁴⁵

25. Where, as here, 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.⁴⁶ Our November 19 Order, as well as the instant order, serve as a statement of our position regarding the right under PURPA of each QF to enter into a legally enforceable obligation.⁴⁷

The Commission orders:

Occidental's and Xcel's requests are hereby denied.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.

⁴⁵ See, e.g., *MidAmerican Energy Co.*, 85 FERC ¶ 61,470 (1998) (Notice of Intent Not to Act, stating that the Commission would issue a later declaratory order), and, 94 FERC ¶ 61,340 (2001) (later declaratory order where the Commission found that Iowa's net metering law does not conflict with PURPA); *Connecticut Light & Power Co.*, 70 FERC ¶ 61,012 (1995), *reconsideration denied*, 71 FERC ¶ 61,012 (state adder to avoided cost rate conflicts with PURPA).

⁴⁶ 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.*

⁴⁷ Cf. 18 C.F.R. § 385.207(a)(2) (2009) (providing for petitions for declaratory orders or rulings to terminate controversy or remove uncertainty). To the extent that Xcel has argued that a declaratory order has no legal effect and is of no legal moment, we note that Xcel itself has on at least one recent occasion sought a declaratory order from the Commission. See, e.g., *Tri-County Electric Cooperative, Inc., Xcel Energy Services, Inc., and Southwestern Public Service Co.*, 117 FERC ¶ 61,280, at P 1 (2006).