

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 PacifiCorp³ 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 aMW⁷ 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

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 Creek¹⁶ 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

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

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, PacifiCorp³¹ 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 PURPA³⁹ permits any qualifying small power producer, among others, to petition the Commission to act under section 210(h)(2)(A) of PURPA⁴⁰ 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

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

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

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 protesters⁵⁶ 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

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 I* 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 I* 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 I* 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

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*

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

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,

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.

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.