139 FERC ¶ 61,077
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Rainbow Ranch Wind, LLC and	Docket Nos.	EL12-41-000
Rainbow West Wind, LLC		QF11-44-001
		QF11-45-001

NOTICE OF INTENT NOT TO ACT AND DECLARATORY ORDER

(Issued April 30, 2012)

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] as requested by Petitioners.[2] However, we conclude that the Idaho Public Utilities Commission's (Idaho Commission) June 8, 2011 order[3] rejecting Petitioners' two Firm Energy Sales Agreements (Agreements)[4] is inconsistent with the requirements of PURPA and our regulations implementing PURPA.[5]

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[1] 16 U.S.C. § 824a-3(h) (2006).

[2] In this order, we refer to Rainbow Ranch Wind, LLC and Rainbow West Wind, LLC as the Petitioners.

[3] *In the Matter of the Application of Idaho Power Company for a Determination Regarding a Firm Energy Sales Agreement Between Idaho Power and Rainbow Ranch Wind, LLC*, Order No. 32256, Case No. IPC-E-10-59; *In the Matter of the Application of Idaho Power Company for a Determination Regarding a Firm Energy Sales Agreement Between Idaho Power and Rainbow West Wind, LLC*, Order No. 32256, Case No. IPC-E-10-60, (Idaho Commission June 8, 2011) (Idaho June 8 Order).

[4] Agreements, as used here, refer to a Firm Energy Sales Agreement between Idaho Power Company (Idaho Power) and Rainbow Ranch Wind, LLC, and a Firm Energy Sales Agreement between Idaho Power and Rainbow West Wind, LLC.

[5] 18 C.F.R. Part 292 (2011).

Background

2. The Idaho Commission's findings at issue in this proceeding developed from an earlier Idaho Commission proceeding. In a November 5, 2010 joint petition filed with the Idaho Commission by a number of Idaho utilities, including Idaho Power,[6] requesting the Idaho Commission to initiate an investigation into various avoided cost issues.[7] The Idaho utilities urged the Idaho Commission to lower the published avoided cost rate eligibility cap for a qualifying facility (QF) from 10 aMW to 100 kW effective immediately.[8]

3. On December 3, 2010, the Idaho Commission 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 Commission 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 December 16, 2010, Idaho Power submitted the Agreements to the Idaho Commission seeking the Idaho Commission's acceptance.[11] The Agreements, two 20-year power purchase agreements (PPA), one agreement between Idaho Power and Rainbow Ranch Wind, LLC, and the other agreement between Idaho Power and Rainbow West Wind, LLC, were the product of negotiations conducted during November and December 2010.[12]

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[6] Parties to the joint petition included Idaho Power, Avista Corporation, and PacifiCorp d/b/a Rocky Mountain Power. Idaho June 8 Order at 1-2.

[7] Idaho June 8 Order at 1-2.

[8] *Id.* at 2. "Average megawatts" (aMW) is a concept used by the Idaho Commission 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 Commission Nov. 22, 2004).

[9] Idaho June 8 Order at 2.

[10] *Id.*

[11] *Id.* at 1.

[12] *See* Petition at 5-10.

5. On February 7, 2011, the Idaho Commission 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 Commission further investigated the issue.[13] The Idaho Commission 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 methodology.[14]

6. Finally, the Idaho Commission issued its June 8 Order, assessing whether it should accept the Agreements submitted to it by Idaho Power on December 16, 2010. The Idaho Commission 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. In making this finding, the Idaho Commission 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."[15] The Idaho Commission explained that the Agreements were for projects in excess of its just-adopted 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, i.e., by December 14, 2010. The Idaho Commission, noting its new rule, found that, while Rainbow Ranch Wind, LLC and Rainbow West Wind, LLC had signed on December 13, Idaho Power had not signed until December 14.[16] Thus, based on these findings, the Idaho Commission rejected the Agreements.[17]

Petition for Enforcement

7. On March 1, 2012, Petitioners filed a petition for enforcement (Petition) asking the Commission to initiate an enforcement action against the Idaho Commission to address changes to the Idaho Commission's published avoided cost rates and implementation of

[13] Petition at 10; *see also In the Matter of the Joint Petition of Idaho Power Company, Avista Corporation, and PacifiCorp d/b/a Rocky Mountain Power to Address Avoided Cost Issues and to Adjust the Published Avoided Cost Rate Eligibility Cap*, Order No. 32176, Case No. GNR-E-10-04, at 18 (Idaho Commission Feb. 7, 2011).

[14] Idaho June 8 Order at 2.

[15] *Id.* at 8.

[16] *Id.*

[17] *Id.* at 9.

PURPA as determined in the Idaho Commission's June 8 order, which rejected Petitioners' Agreements.[18]

8. In the alternative, Petitioners request the Commission to make a number of findings, each, in their view, consistent with the Commission's findings in *Cedar Creek Wind, LLC*.[19] Petitioners request the Commission to determine that the new rule contained in the Idaho Commission's June 8 order, i.e., requiring firm energy sales agreements or PPAs to be executed by both parties to the agreement before a legally enforceable obligation arises: (1) is inconsistent with PURPA; (2) limits the ways a legally enforceable obligation may be incurred to a fully-executed contract, which is inconsistent with PURPA; (3) ignores that a legally enforceable obligation may arise before the formal memorialization of an agreement in a writing; (4) was unnecessary given the Petitioners' circumstances; and (5) ignores that Petitioners committed themselves to sell electricity to Idaho Power sometime during the period of December 9 to December 13, 2010.[20]

9. Petitioners assert that their and Idaho Power's conduct throughout November and December of 2010 resulted in a legally enforceable obligation between the entities.[21] Petitioners explain that they were managed by American Wind Group LLC (American Wind) during the period relevant to the Petition. Petitioners state that, on November 3, 2010, American Wind initiated negotiations with Idaho Power to enter into two, 20-year PPAs for two wind-powered generation projects near Declo, Idaho, each with a net generating capacity of approximately 20 MW.

10. On November 5, 2010, Petitioners state that Idaho Power provided American Wind with standard PPAs and information requests. On November 9, Petitioners state that American Wind provided the requested information to Idaho Power, and on November 10, 2010, it provided Idaho Power with finalized PPAs. Petitioners state that American Wind attempted to discuss the PPAs with Idaho Power on November 15, 2010, and received word from Idaho Power on November 17, 2010, that Idaho Power intended to work with American Wind to negotiate the PPAs. Petitioners state that four days after a meeting between American Wind and Idaho Power, on November 23, 2010, American Wind received new, unpopulated PPAs from Idaho Power. Petitioners state that it provided completed PPAs to Idaho Power on December 3, 2010, followed by Idaho

[18] Petition at 11.

[19] *Id.* at 15; *Cedar Creek Wind, LLC*, 137 FERC ¶ 61,006 (2011) (*Cedar Creek*).

[20] Petition at 15-16.

[21] *Id.* at 9.

Power sending completed PPAs to American Wind for final review on December 8, 2010.

11. Petitioners explain that American Wind contacted Idaho Power on December 9, 2010, via email, indicating that it was ready to sign the PPAs; however, Idaho Power did not acknowledge American Wind's email until December 13, 2010, when it informed American Wind that finalized PPAs would be available at 2:00 p.m. that afternoon. Petitioners state that American Wind collected the PPAs from Idaho Power that afternoon, signed and returned them the same day. Petitioners state that, upon returning the PPAs, Idaho Power informed American Wind that it would sign the PPAs within the next few days. Petitioners explain that American Wind contacted Idaho Power on December 14, 2010, to inquire whether the PPAs had been signed but by late morning they had not. Petitioners state that Idaho Power signed the PPAs on December 14, 2010 and submitted them to the Idaho Commission for approval on December 16, 2010.

12. Petitioners assert that the conduct occurring during the time period of December 9 through December 13, 2010 demonstrates that parties to the PPAs incurred a legally enforceable obligation and that the Idaho Commission's June 8 order rejecting the PPAs is inconsistent with PURPA as explained in the Commission's *Cedar Creek* order.[22] Petitioners argue that their circumstances are similar to those in *Cedar Creek*, where, they state, the Commission found that, "as a general matter, when a state limits the methods though 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."[23]

Notice of Filing and Responsive Pleadings

13. Notice of Petitioners' filing was published in the *Federal Register*, 77 Fed. Reg. 14,011 (2012), with interventions and protests due on or before March 22, 2012. The Idaho Commission filed an answer. Idaho Power filed a motion to intervene and protest. Exelon filed a motion to intervene. On March 29, 2012, Petitioners filed an answer to the Idaho Commission's answer and Idaho Power's protest.

14. In its answer, the Idaho Commission states that it does not contest the Commission's interpretation of PURPA, including the Commission's determinations regarding legally enforceable obligations, as explained in *Cedar Creek*.[24] Instead, the

[22] *Id.* at 13.

[23] *Id.* at 14 (internal quotations omitted).

[24] Idaho Commission Answer at 9.

Idaho Commission argues that Petitioners' request for relief with the Commission constitutes an "as applied" claim because, in its view, Petitioners assert that the Idaho Commission's actions were unlawful.[25] The Idaho Commission states that an "as applied" dispute is reserved to state courts pursuant to section 210(g) of PURPA, and as such, the Commission should deny Petitioners' request.[26]

15. The Idaho Commission also asserts that the Petition is an impermissible collateral attack on the Idaho Commission's Order on Reconsideration.[27] The Idaho Commission states that, under Idaho state law, an aggrieved party may preserve its right to appeal by filing a notice of appeal of an order on reconsideration within 42 days, and it may also seek a stay of such order.[28] The Idaho Commission states that, because Petitioners failed to file a notice of appeal, "[t]he July 27 Order must be afforded finality and is not [subject] to collateral attack."[29] Thus, the Idaho Commission argues that the Commission should dismiss the Petition.[30] For support, the Idaho Commission cites to *New York State Elec. & Gas Corp. v. Saranac Power Partners*, 117 F. Supp. 2d 211 (D.N.Y. 2000) (*NYSEG*), asserting that it stands for the proposition that section 210(h)(2) of PURPA does not empower the Commission to set aside Idaho state law, specifically those provisions setting a time limitation on appeals.[31]

16. In its protest, Idaho Power closely follows the arguments set forth by the Idaho Commission, for example, presenting arguments that the Petitioners' request is an "as applied" claim, and an impermissible collateral attack. Additionally, Idaho Power asserts that a petition for enforcement under section 210(h) of PURPA is time barred.[32] Idaho

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[25] *Id.* at 7.

[26] *Id.*

[27] *In the Matter of the Application of Idaho Power Company for a Determination Regarding a Firm Energy Sales Agreement Between Idaho Power and Rainbow Ranch Wind, LLC*, Order No. 32300, Case No. IPC-E-10-59; *In the Matter of the Application of Idaho Power Company for a Determination Regarding a Firm Energy Sales Agreement Between Idaho Power and Rainbow West Wind, LLC*, Order No. 32300, Case No. IPC-E-10-60, (Idaho Commission July 27, 2011) (Order on Reconsideration).

[28] Idaho Commission Answer at 10-11.

[29] *Id.* at 11.

[30] *Id.*

[31] *Id.* at 14.

[32] Idaho Power Protest at 9.

Power also points to *NYSEG's* stating that, if Congress fails to attach a statute of limitations to a statute, a court should apply a statue of limitations of state origin most closely related in its stead.[33] Idaho Power explains that the Idaho statute of limitations most closely related to section 210(h) of PURPA requires the aggrieved party to file a notice of appeal within 42 days of the Idaho Commission's denial of reconsideration. Idaho Power states that because Petitioners failed to file a notice of appeal in accordance with Idaho state law, the Order on Reconsideration is final and the Commission must deny the Petition.

17. Petitioners filed an answer to the Idaho Commission's answer and Idaho Power's protest, stating that neither the Idaho Commission nor Idaho Power dispute the fact that Petitioners: (1) are QFs under PURPA, (2) signed PPAs with Idaho Power before December 14, 2010; and (3) had their PPAs rejected by the Idaho Commission based on the Idaho Commission's findings that the PPAs must be fully executed. Based on these facts, Petitioners state that they are entitled to the same findings contained in *Cedar Creek*. Petitioners state that, after the Commission issued *Cedar Creek*, the Idaho Commission had reinstated certain PPAs it previously rejected, but only if the PPA was associated with a pending appeal proceeding.[34] Petitioners argue that the Idaho Commission should not condition reinstatement on appeal status, but should reinstate all similarly situated PPAs, including Petitioners' PPAs.[35]

18. Petitioners, in their answer, also argue that section 210(g) and section 210(h) of PURPA provide separate state and federal rights to an entity to challenge a state's implementation of PURPA and explain that they interpret PURPA not to limit an entity's ability to file a petition for enforcement under section 210(h).[36] Petitioners state that the court in *NYSEG* explained that an exception to the rule regarding statutory interpretation and limitation periods exists, and that the circumstances here require the Commission to follow it.[37]

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[33] *Id.* In its protest, Idaho Power cites *NYSEG*, 117 F. supp. 2d 211 at 247.

[34] Petitioners' Answer at 5-6.

[35] *Id.* Petitioners note that the Idaho Commission asked the Idaho Supreme Court to remand a pending appeal by Grouse Creek Wind Farm, LLC for reconsideration. *Id.* at 6-7.

[36] *Id.* at 8-9.

[37] *Id.* at 11-12.

Discussion

Procedural Matters

19. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2011), timely, unopposed motions 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 Petitioners' answer because it has provided information that assisted us in our decision-making process.

Commission Determination

20. Petitioners ask the Commission to institute an enforcement action against the Idaho Commission to enforce PURPA and this Commission's PURPA regulations. Specifically, Petitioners ask the Commission to enforce section 292.304(d)(2) of its regulations[38] against the Idaho Commission as it relates to the Idaho Commission's 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,"[39] as promulgated in its June 8 order.[40] In the alternative, if the Commission refuses to initiate an enforcement action, Petitioners request the Commission to make a number of findings, each, in their view, consistent with the Commission's *Cedar Creek* order.[41]

21. Section 210(h)(2)(B) of PURPA[42] permits any electric utility, qualifying cogenerator, or qualifying small power producer to petition the Commission to act under section 210(h)(2)(A) of PURPA[43] 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

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[38] 18 C.F.R. § 292.304(d)(2) (2011).

[39] Idaho June 8 Order at 8.

[40] Petition at 2.

[41] *Id.* at 15.

[42] 16 U.S.C. § 824a-3(h)(2)(B) (2006).

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

in its 1983 Policy Statement, "the Commission is not required to undertake enforcement action."[44] 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.[45]

22. Here, we give notice that we do not intend to go to court to enforce PURPA on behalf of Petitioners; Petitioners thus may bring their own enforcement action against Idaho Commission in the appropriate court.

23. Notwithstanding our decision not to go to court to enforce PURPA on behalf of Petitioners, we find that the similarities between the circumstances present in *Cedar Creek* and in this proceeding, cause us to reiterate our findings in *Cedar Creek*, notably, that "the requirement in the June 8 Order that a Firm Energy Sales Agreement/Power Purchase Agreement must be executed by both parties to the agreement before a legally enforceable obligation arises, is inconsistent with PURPA and our regulations implementing PURPA, particularly section 292.304(d)(2)."[46]

24. Several similarities exist between the two proceedings that cause us to apply *Cedar Creek* in this proceeding. First, the Petitioners had certified themselves as QFs.[47] Second, the Petitioners had entered into formal negotiations to enter into PPAs with electric utilities prior to the new rules concerning eligibility for published avoided cost rates went into effect.[48] Third, the Petitioners signed the PPAs prior to that date as well.[49] Last, the Idaho Commission had rejected the PPAs in orders issued on June 8, 2011, where both orders explained that the Idaho Commission had adopted a new rule limiting methods that may be used to create a legally enforceable obligation.[50]

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[44] *Policy Statement Regarding the Commission's Enforcement Role Under Section 210 of the Public Utilities Act of 1978*, 23 FERC ¶ 61,304, at 61,645 (1983) (1983 Policy Statement).

[45] 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.*

[46] *Cedar Creek*, 137 FERC ¶ 61,006 at P 30.

[47] *See id.* P 6.

[48] *See id.* P 12.

[49] *See id.* P 8. Similarly to the Petitioners in this proceeding, the petitioner in *Cedar Creek* signed its PPAs on December 13, 2010. *Id.*

[50] *See id.*

Therefore, we find the Idaho Commission's June 8 Order is inconsistent with PURPA, our regulations implementing PURPA, and our findings in *Cedar Creek* for the reasons given in *Cedar Creek.*

25. The Idaho Commission and Idaho Power nevertheless assert that the Idaho Commission's June 8 order and the Order on Reconsideration are final and, as such, Petitioners are barred from initiating a proceeding under section 210(h) of PURPA with the Commission. We disagree.

26. The Idaho Commission and Idaho Power argue that the Petition constitutes an impermissible collateral attack because, as the Idaho Commission and Idaho Power claim, Petitioners failed to file a notice of appeal with the Idaho Supreme Court to preserve Petitioners' appeal. The Idaho Commission and Idaho Power argue that, because Petitioners failed to file such notice of appeal, the Idaho Commission's June 8 order and the Order on Reconsideration are final, and cannot be challenged at the Commission. Additionally, the Idaho Commission and Idaho Power argue that the Petition constitutes an "as applied" claim, thus prohibiting Petitioners from seeking relief in federal court.

27. We are not persuaded by these arguments and find that the Petition is appropriately before the Commission. Section 210(g) and section 210(h) of PURPA provide for separate state and federal rights to challenge a state's implementation of PURPA. A state's implementation of PURPA and the Commission's rules implementing PURPA may be challenged either through the state courts under section 210(g) of PURPA, or separately at the Commission under section 210(h) of PURPA, or both. The Commission has stated that, in section 210 of PURPA:

> Congress has provided not only for private causes of action in State courts to obtain judicial review and enforcement of the implementation of the Commission's rules under Section 210, but also provided that the Commission may serve as a forum for review and enforcement of the implementation of this program.[51]

[51] *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 30,893, *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).

28. There is, in fact, no language in section 210(h) that suggests that section 210(h) rights are only available to challenge state actions if section 210(g) rights are first exercised. To the contrary, each is a separate grant of rights to challenge state actions—as the Commission noted in 1980, as just quoted above, when first adopting its regulations implementing PURPA.

29. Therefore, we find that, regardless of the procedural posture of a petition brought in a proceeding under section 210(g) of PURPA, and, regardless even of a decision not to proceed under section 210(g), a petitioner may still pursue relief under section 210(h).[52]

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) The Commission hereby finds that the Idaho Commission's June 8 Order is inconsistent with PURPA and the Commission's regulations as discussed in the body of the order.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.

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[52] With respect to the Idaho Commission's and Idaho Power's reliance on *NYSEG*, the court itself acknowledged that the rule of statutory construction it relied on is not absolute but rather is subject to certain exceptions, in particular stating that "[a]n exception to this rule applies when application of a state limitations period would frustrate or interfere with the implementation of national policies or be at odds with the purpose or operation of federal substantive law." *NYSEG*, 117 F.Supp. 2d at 246-47.

We do not mean to suggest, on the other hand, however, that a party upset with a particular state action has an unlimited time in which to challenge that action under section 210(h). Whether any such challenge is time-barred is a matter to be resolved based on the facts of the case. Here, on these facts, we do not find it appropriate to rule Petitioners' filing with us was so delayed as to warrant our finding it time-barred.