

157 FERC ¶ 61,134  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Norman C. Bay, Chairman;  
Cheryl A. LaFleur, and Colette D. Honorable.

Windham Solar LLC and Allco Finance Limited	Docket Nos. EL16-115-000
Windham Solar LLC	QF16-362-002
Windham Solar LLC	QF16-363-002
Windham Solar LLC	QF16-364-002
Windham Solar LLC	QF16-365-002
Windham Solar LLC	QF16-366-002
Windham Solar LLC	QF16-367-002
Windham Solar LLC	QF16-368-002
Windham Solar LLC	QF16-369-002
Windham Solar LLC	QF16-370-002
Windham Solar LLC	QF16-371-002
Windham Solar LLC	QF16-372-002
Windham Solar LLC	QF16-373-002
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Windham Solar LLC	QF16-380-002
Windham Solar LLC	QF16-381-002
Windham Solar LLC	QF16-382-002
Windham Solar LLC	QF16-383-002
Windham Solar LLC	QF16-384-002
Windham Solar LLC	QF16-385-002
Windham Solar LLC	QF16-386-002
Windham Solar LLC	QF16-387-002

NOTICE OF INTENT NOT TO ACT AND DECLARATORY ORDER

(Issued November 22, 2016)

1. On September 12, 2016, as supplemented on September 26, 2016, Windham Solar LLC (Windham) and Allco Finance Limited (together, Petitioners) filed a petition for enforcement against Connecticut Public Utilities Regulatory Authority (Connecticut Authority) pursuant to section 210(h)(2)(B) of the Public Utility Regulatory Policies Act

of 1978 (PURPA).<sup>1</sup> Petitioners claim that the Connecticut Authority's August 24, 2016 final decision (Final Decision) violates the Commission's PURPA regulations regarding a qualifying facility's (QF) ability to sell pursuant to a legally enforceable obligation at a forecasted avoided cost rate.

2. Notice is hereby given that the Commission declines to initiate an enforcement action pursuant to section 210(h)(2)(A) of PURPA.<sup>2</sup> Our decision not to initiate an enforcement action means that Petitioners may themselves bring an enforcement action against the Connecticut Authority in the appropriate court.<sup>3</sup> We issue a declaratory ruling below, however, providing our views on a number of the substantive questions raised by the parties' pleadings.<sup>4</sup>

3. Petitioners argue that the Connecticut Authority erred by concluding that Windham is not entitled to a legally enforceable obligation at a forecasted avoided cost rate. Petitioners also disagree with the Connecticut Authority's determination that Eversource has no need for capacity.

4. The Commission's regulations expressly provide that "each" QF has the option to provide energy or capacity pursuant to a legally enforceable obligation.<sup>5</sup> Section 292.304(d)(1) of the Commission's regulations addresses the option to sell energy as available, while section 292.304(d)(2) of the Commission's regulations addresses the option to sell energy or capacity pursuant to a legally enforceable obligation over a specified term. Moreover, the former provides for an energy price based on avoided costs calculated at the time of delivery, while the latter provides (*at the QF's option*) for pricing based on either avoided costs calculated at the time of delivery

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<sup>1</sup> 16 U.S.C. § 824a-3(h)(2)(B) (2012).

<sup>2</sup> 16 U.S.C. § 824a-3(h)(2)(A) (2012).

<sup>3</sup> 16 U.S.C. § 824a-3(h)(2)(B) (2012).

<sup>4</sup> The Administrative Procedure Act expressly provides for agencies to issue declaratory rulings, 5 U.S.C. § 554(e) (2012), and the Commission's regulations similarly provide for the Commission to issue such rulings. 18 C.F.R. § 385.207(a)(2) (2016).

<sup>5</sup> 18 C.F.R. § 292.304(d) (2016) ("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 which case the rates for such purchases, 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.").

or at the time the obligation is incurred.<sup>6</sup> Thus, regardless of whether a QF can provide firm output, that QF has the option to sell its output pursuant to a legally enforceable obligation with a forecasted avoided cost rate.<sup>7</sup>

5. In its Final Decision, the Connecticut Authority concluded that Windham is only entitled to sell its output to Eversource pursuant to Rate 980, which provides an avoided cost rate that amounts to the real-time energy price for ISO-New England. The avoided cost rate provided by Rate 980 is the type of rate within the scope of section 292.304(d)(1) of the Commission's regulations. However, Windham has not opted to sell its output pursuant to section 292.304(d)(1) of the Commission's regulations. Rather, Windham has opted to sell its output pursuant to section 292.304(d)(2)(ii) of the Commission's regulations, which it is entitled to do (and at a rate based on avoided costs calculated at the time the legally enforceable obligation is incurred – which it is also entitled to do),<sup>8</sup> and, therefore, the Connecticut Authority must recognize that a legally enforceable obligation exists and calculate the appropriate forecasted avoided cost rate pursuant to section 292.304(d)(2)(ii) of the Commission's regulations.<sup>9</sup>

6. That being said, although state regulatory authorities cannot preclude a QF – even an intermittent QF – from obtaining a legally enforceable obligation with a forecasted avoided cost rate, we remind the parties that the Commission's regulations allow state

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<sup>6</sup> Compare 18 C.F.R. § 292.304(d)(1) (2016) with 18 C.F.R. § 292.304(d)(2) (2016).

<sup>7</sup> *Exelon Wind 1, L.L.C. v. Nelson*, 766 F.3d 380, 400 (5th Cir. 2014), suggested that, because only “firm power” QFs can provide certainty that “promised power actually will be produced and readily available,” “it makes sense that only they should be able to select between the rate options” of avoided cost at the time of delivery and avoided cost when a legally enforceable obligation is incurred. This distinction, though, is not found in the Commission's regulations, and the states, as recognized by the court, are required to implement those regulations. *See id.* at 384-85; *accord* 16 U.S.C. § 824a-3(f) (2012). Rather, section 292.304(d) expressly provides that “[e]ach qualifying facility shall have the option...[t]o provide energy or capacity pursuant to a legally enforceable obligation for the delivery of energy or capacity over a specified term,” and “at the option of the qualifying facility” the rate may be based on “[t]he avoided costs calculated at the time the obligation is incurred.” 18 C.F.R. § 292.304(d) (2016) (emphasis added).

<sup>8</sup> 18 C.F.R. § 292.304(d)(2) (2016).

<sup>9</sup> *Allco Renewable Energy Ltd., v. Mass. Elec. Co.*, No. 15-13515-PBS, 2016 WL 5346937, at \*22 (D. Mass. Sept. 23, 2016) (even in restructured state, the risk is shared; as in any contract, the purchasing utility bears the risk that prices will decrease in the future below the originally set level, and the selling QF bears the corresponding risk that prices will increase above the originally set level).

regulatory authorities to consider a number of factors in establishing an avoided cost rate.<sup>10</sup> These factors which include, among others, the availability of capacity, the QF's dispatchability, the QF's reliability, and the value of the QF's energy and capacity, allow state regulatory authorities to establish lower avoided cost rates for purchases from intermittent QFs than for purchases from firm QFs.

7. The Connecticut Authority also has concluded that Eversource has no need for capacity because it is located in a restructured state and its capacity needs are met by ISO-New England Inc.'s forward capacity auction. However, to the extent that Eversource's capacity needs can be satisfied by Windham's QFs rather than through the capacity auction, the avoided cost rates available to Windham should include an estimate of Eversource's avoided cost of capacity. Connecticut Authority stated in its Final Decision that Eversource can self-manage up to 20 percent of its load, which suggests that Eversource may well have capacity needs that can be met outside of the capacity auction. Moreover, independent of Eversource's ability to self-manage, Eversource's reliance on ISO-New England Inc.'s forward capacity auction does not mean that Eversource has no need for capacity, but rather its reliance on the capacity auction demonstrates only that Eversource acquires capacity through that auction, and there is no indication that Eversource would be unable to realize the appropriate value of any capacity it acquires from a QF by simultaneously offering that capacity into the auction with its bids to purchase capacity from the auction.

8. Finally, the Commission has long held that its regulations pertaining to legally enforceable obligations "are intended to reconcile the requirement that the rates for purchases equal to the utilities' avoided cost with the need for qualifying facilities to be able to enter into contractual commitments, by necessity, on estimates of future avoided costs" and has explicitly agreed with previous commenters that "stressed the need for certainty with regard to return on investment in new technologies."<sup>11</sup> Given this "need for certainty with regard to return on investment," coupled with Congress' directive that

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<sup>10</sup> 18 C.F.R. §§ 292.304(e)-(f) (2016).

<sup>11</sup> *Small Power Production and Cogeneration Facilities; Regulations Implementing Section 210 of the Public Utility Regulatory Policies Act of 1978*, Order No. 69, FERC Stats. & Regs. ¶ 30,128, at 30,880, *order on reh'g sub nom.* Order No. 69-A, FERC Stats. & Regs. ¶ 30,160 (1980), *aff'd in part vacated in part*, *Am. Elec. Power Serv. Corp. v. FERC*, 675 F.2d 1226 (D.C. Cir. 1982), *rev'd in part sub nom.* *Am. Paper Inst. v. Am. Elec. Power Serv. Corp.*, 461 U.S. 402 (1983).

the Commission “encourage” QFs,<sup>12</sup> a legally enforceable obligation should be long enough to allow QFs reasonable opportunities to attract capital from potential investors.<sup>13</sup>

By the Commission.

Kimberly D. Bose,  
Secretary.

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<sup>12</sup> 16 U.S.C. § 824a-3(a) (2012).

<sup>13</sup> 18 C.F.R. § 292.304(d)(2) (2016) our regulations, do not, however, specify a particular number of years for such legally enforceable obligations.