

166 FERC ¶ 61,090
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Neil Chatterjee, Chairman;
Cheryl A. LaFleur, Richard Glick,
and Bernard L. McNamee.

Great Divide Wind Farm 2 LLC
Great Divide Wind Farm 3 LLC

Docket Nos. EL19-25-000
QF18-1748-001
QF18-1749-001

NOTICE OF INTENT NOT TO ACT AND DECLARATORY ORDER

(Issued February 4, 2019)

1. On December 6, 2018, Great Divide Wind Farm 2 LLC and Great Divide Wind Farm 3 LLC (together, Great Divide) filed a petition for enforcement against the New Mexico Public Regulation Commission (New Mexico Commission) pursuant to section 210(h)(2)(B) of the Public Utility Regulatory Policies Act of 1978 (PURPA).¹ Great Divide claims that Part 570 of the New Mexico Administrative Code (Rule 570), as interpreted and implemented by the New Mexico Commission, violates this Commission's requirements under its PURPA regulations by requiring QF construction and readiness to interconnect before creation of a legally enforceable obligation.

2. Notice is hereby given that the Commission declines to initiate an enforcement action pursuant to section 210(h)(2)(A) of PURPA.² Our decision not to initiate an enforcement action means that Great Divide may itself bring an enforcement action against the New Mexico Commission in the appropriate court.³ While we have chosen not to initiate an enforcement action, we find it appropriate to further comment on the matters at issue.

¹ 16 U.S.C. § 824a-3(h)(2)(B) (2012).

² *Id.* § 824a-3(h)(2)(A).

³ *Id.* § 824a-3(h)(2)(B).

I. Background

3. Great Divide is developing two 80 MW qualifying facilities (QF) that will interconnect with El Paso Electric Company's (El Paso) transmission grid in 2020. Great Divide filed Form No. 556 self-certifications for the two QFs in August of 2018.⁴ In 2018, Great Divide filed a complaint before the New Mexico Commission, requesting that the New Mexico Commission find that El Paso had a legally enforceable obligation to purchase the output of Great Divide's QFs beginning in 2020, at El Paso's avoided cost calculated as of the time the obligations were incurred.⁵

4. On November 7, 2018, the New Mexico Commission issued a final order dismissing Great Divide's Complaint without prejudice due to lack of probable cause and finding that "a legally enforceable obligation is not created in New Mexico until the QF is ready to interconnect to the utility."⁶ The New Mexico Commission relied on Part 570 of the New Mexico Administrative Code (Rule 570), which states in relevant part:

Each utility shall purchase power from a qualifying facility from the date of interconnection at the utility's avoided cost. ... The qualifying facility shall give the utility at least sixty (60) days written advance notice to interconnect. Such notice shall specify the date the qualifying facility will be ready for interconnection, the date the qualifying facility will be able to commence testing, and the anticipated date of operation after testing.⁷

⁴ Great Divide Wind Farm 2, LLC, Form 556 Certification of Qualifying Facility (QF) Status for a Small Power Production or Cogeneration Facility, Docket No. QF18-1748-000 (filed Aug. 7, 2018); Great Divide Wind Farm 3, LLC, Form 556 Certification of Qualifying Facility (QF) Status for a Small Power Production or Cogeneration Facility, Docket No. QF18-1749-000 (filed Aug. 7, 2018).

⁵ *In the Matter of the Formal Complaint of Great Divide Wind Farm 2 and Great Divide Wind Farm 3 Against El Paso Electric Company*, Complaint, Case No. 18-00268-UT (N.M. Pub. Regulation Comm'n Aug. 24, 2018) (Complaint).

⁶ *In the Matter of the Formal Complaint of Great Divide Wind Farm 2 and Great Divide Wind Farm 3 Against El Paso Electric Company*, Final Order, Case No. 18-00268-UT, at ¶ 12 (N.M. Pub. Regulation Comm'n Nov. 7, 2018) (Great Divide Final Order).

⁷ N.M. Code R. § 17.9.570.9(A) (2018).

5. The New Mexico Commission also relied on its precedent in *Western Water and Power Production, Limited, LLC v. Public Service Company of New Mexico*,⁸ where it dismissed Western Water and Power Production, Limited, LLC's (WWPP) complaint, stating that Rule 570.9⁹ requires a QF to demonstrate that it is ready to interconnect and deliver energy before a legally enforceable obligation is recognized. In the New Mexico Commission's WWPP Order, the New Mexico Commission therefore ruled that no legally enforceable obligation is created until the facility is ready to be interconnected.¹⁰

6. WWPP previously filed a petition for enforcement pursuant to section 210(h)(2)(B) of PURPA before this Commission regarding the New Mexico Commission's WWPP Order.¹¹ In response, on January 6, 2017, this Commission issued a Notice of Intent Not to Act, stating that this Commission did not intend to go to court to enforce PURPA on behalf of WWPP and that WWPP thus could bring its own enforcement action against the New Mexico Commission in the appropriate United States district court. The Notice of Intent Not to Act did not include a declaratory order.¹² In the Great Divide Final Order, the New Mexico Commission stated that the import of this Commission's January 2017 Notice of Intent Not to Act, even though it included no declaratory order, "stands as well as [the New Mexico Commission's] interpretation of Rule 570.9 to mean that a legally enforceable obligation is not created in New Mexico until the QF is ready to interconnect to the utility."¹³ The New Mexico Commission further noted that its ruling was not declared by this Commission to be contrary to PURPA and this Commission's regulations.¹⁴

⁸ *W. Water and Power Prod. Ltd. LLC v. Pub. Serv. Co. of N.M.*, Final Order, Case No. 11-00466-UT, at ¶ 12 (N.M. Pub. Regulation Comm'n Aug. 3, 2016) (New Mexico Commission's WWPP Order).

⁹ N.M. Code R. § 17.9.570.9(A) (2018).

¹⁰ New Mexico Commission's WWPP Order, Case No. 11-00466-UT at ¶ 12.

¹¹ *W. Water and Power Prod. Ltd. LLC, Petition for Enforcement Under the Public Utility Regulatory Policies Act of 1978*, Docket No. EL17-17-000, et al. (filed Nov. 7, 2016).

¹² *W. Water and Power Prod. Ltd. LLC*, 158 FERC ¶ 61,015 (2017) (January 2017 Notice of Intent Not to Act).

¹³ Great Divide Final Order, Case No. 18-00268-UT ¶ 12.

¹⁴ *Id.*

II. Petition

7. Great Divide argues that Rule 570, as interpreted and implemented by the New Mexico Commission, violates this Commission's requirements under its PURPA regulations by requiring QF construction and readiness to interconnect before a legally enforceable obligation is created. Great Divide asserts that the effect of the New Mexico Commission's requirement is to deny Great Divide the right to the legally enforceable obligation needed to provide the certainty required to obtain the financing to construct the QFs.¹⁵ Great Divide explains that the Commission has stated that "a requirement for a facilities study or an interconnection agreement ... as a predicate for a legally enforceable obligation is inconsistent with PURPA and the Commission's regulations under PURPA" because a "utility can delay the facilities study or delay tendering an executable interconnection agreement" to avoid creating a legally enforceable obligation.¹⁶ Great Divide argues that it is the QF's commitment to sell, not its operational status or interconnection, that creates a legally enforceable obligation.¹⁷ Great Divide also asserts that the New Mexico Commission violated this Commission's regulations by not accepting Great Divide's rate calculations or establishing a methodology for determining avoided cost rates at the time a legally enforceable obligation is created.¹⁸

8. Great Divide requests that the Commission: (1) initiate an enforcement action against the New Mexico Commission; and (2) direct the New Mexico Commission either to adopt Great Divide's proposed methodology for calculating avoided cost rates calculated at the time the obligation is incurred or to develop a methodology of its own, in accordance with the Commission's regulations.¹⁹

¹⁵ Petition at 3, 6, 8.

¹⁶ *Id.* at 9 (citing *FLS Energy, Inc.*, 157 FERC ¶ 61,211, at P 20 (2016) (*FLS Energy*)). See also *Cedar Creek Wind, LLC*, 137 FERC ¶ 61,006, at P 35 (2011) ("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.").

¹⁷ *Id.* at 8 (citing *FLS Energy*, 157 FERC ¶ 61,211 at P 24).

¹⁸ *Id.* at 11.

¹⁹ *Id.* at 3.

III. Notice of Filing and Responsive Pleadings

9. Notice of the Petition was published in the *Federal Register*, 83 Fed. Reg. 64,119 (2018), with interventions and protests due on or before December 27, 2018.

10. Timely motions to intervene were filed by Portland General Electric Company, Edison Electric Institute (EEI), El Paso, Xcel Energy Services Inc. (Xcel), and PacifiCorp. The New Mexico Commission filed a Notice of Intervention. The New Mexico Commission, El Paso, and Xcel filed protests. EEI filed comments. Great Divide filed an answer to the protests.

11. The New Mexico Commission, El Paso, Xcel, and EEI assert that the Commission has granted state regulatory authorities great latitude and discretion in setting parameters for legally enforceable obligations.²⁰ The New Mexico Commission, Xcel, and EEI argue that allowing a QF to lock the utility into purchasing energy from a proposed facility that may never be built would interfere with the utility's ability to plan properly for future resource needs.²¹

12. The New Mexico Commission argues that Great Divide's concerns are misplaced because in the Great Divide Final Order, the New Mexico Commission dismissed Great Divide's Complaint without prejudice and did not preclude future filings with the New Mexico Commission at the time Great Divide is ready to interconnect. The New Mexico Commission also argues that Great Divide failed to exhaust its remedies, by failing to file a motion for rehearing with the New Mexico Commission and by failing to timely appeal the Great Divide Final Order's interpretation of New Mexico law to the New Mexico Supreme Court.²² The New Mexico Commission notes that the facts at issue in the New Mexico Commission's WWPP Order are substantially the same as the facts here.²³ The New Mexico Commission also requests that any Commission Notice of Intent Not to Act

²⁰ New Mexico Commission Protest at 3, 10-12; El Paso Protest at 2, 7-11; Xcel Protest at 4-5; EEI Comments at 4.

²¹ New Mexico Commission Protest at 10; EEI Comments at 6-7; Xcel Protest at 5-6.

²² New Mexico Commission Protest at 4, 14.

²³ *Id.* at 5.

in response to the instant Petition provide substantive guidance regarding New Mexico's Rule 570.²⁴

13. El Paso states that Great Divide has never submitted a proposal or other written documentation that could be construed as a commitment to sell energy from Great Divide's QFs to El Paso.²⁵ El Paso explains that in 2017, before Great Divide self-certified its facilities as QFs, Great Divide offered to sell El Paso energy from a proposed 251.6 MW facility. El Paso asserts that it appears this facility was later certified as two 80 MW QFs, although Great Divide never withdrew its interconnection request for the 251.6 MW project²⁶ El Paso argues that even if a "commitment" to sell could suffice to create a legally enforceable obligation, Great Divide has not taken the basic steps that would constitute such a commitment and that, therefore, the Commission need not reach Great Divide's request to set an avoided cost methodology because that request is premature.²⁷ Furthermore, El Paso argues, the Commission would have no authority to dictate that the New Mexico Commission adopt a particular avoided cost rate or methodology.²⁸

14. EEI states that Great Divide is asking the Commission to limit the ability of state regulatory authorities to determine when a legally enforceable obligation is created. EEI asserts that the instant Petition raises issues of broad import that would be better handled in a generic proceeding rather than in response to the instant Petition.²⁹

15. In its answer to the protests, Great Divide argues that it is not required to file a motion for rehearing with the New Mexico Commission or a timely appeal of the Great Divide Final Order at the New Mexico Supreme Court prior to filing a petition for enforcement at this Commission because PURPA does not impose a limitation on a petitioner's right to initiate an enforcement action with the Commission.³⁰ Great Divide also states that, contrary to the New Mexico Commission's argument, this Commission's

²⁴ *Id.* at 16-17.

²⁵ El Paso Protest at 2-3.

²⁶ *Id.* at 2.

²⁷ *Id.* at 3, 15.

²⁸ *Id.* at 3-4.

²⁹ EEI Comments at 4, 7.

³⁰ Great Divide Answer at 7.

January 2017 Notice of Intent Not to Act cannot be taken as an affirmation of the New Mexico Commission's WWPP Order because a Commission order declining to file suit does not fix the rights of any party and is of no legal consequence.³¹

IV. Commission Determination

A. Procedural Matters

16. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2018), the notices of intervention and timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding.

17. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2018), prohibits an answer to a protest unless otherwise ordered by the decisional authority. We accept Great Divide's answer because it has provided information that assisted us in our decision-making process

B. Substantive Matters

18. In this order, we give notice that we decline to initiate an enforcement action pursuant to section 210(h)(2)(A) of PURPA on behalf of Great Divide; Great Divide thus may bring its own enforcement action against the New Mexico Commission in the appropriate United States district court. Notwithstanding our decision not to initiate an enforcement action on behalf of Great Divide, we elect to also issue a declaratory order regarding the effect and import of a Notice of Intent Not to Act, in the circumstances where the Commission issues only a Notice of Intent Not to Act without the addition of a declaratory order.³²

19. Section 210(h)(2)(B) of PURPA requires an electric utility, qualifying cogenerator, or qualifying small power producer to first petition the Commission to enforce the requirements of PURPA before that petitioner may itself bring an action in the appropriate United States district court against the state regulatory authority or non-regulated electric utility.³³ If, in response to a petition for enforcement, the Commission issues a Notice of Intent Not to Act without an associated declaratory order, this issuance

³¹ *Id.* at 6 (citing *Indus. Cogenerators v. FERC*, 47 F.3d 1231, 1234 (D.C. Cir. 1995)).

³² These circumstances are the circumstances presented by the January 2017 Notice of Intent Not to Act, which the New Mexico Commission cited in its Great Divide Final Order.

³³ 16 U.S.C. § 824a-3(h)(2)(B) (2012).

merely notifies the petitioner that the Commission does not itself intend to undertake an enforcement action, i.e., file a complaint in district court, and that the petitioner may proceed on its own to bring an action in district court. Thus, the Commission's Notices of Intent Not to Act typically state:

Notice is hereby given that the Commission declines to initiate an enforcement action pursuant to section 210(h)(2)(A) of PURPA. Our decision not to initiate an enforcement action means that petitioners may themselves bring an enforcement action against the [state regulatory authority or non-regulated electric utility] in the appropriate court.³⁴

20. Notices of Intent Not to Act in the absence of an associated declaratory order cannot be read to mean that the Commission has accepted or agreed with (or alternatively, rejected or disagreed with) any argument made by any party, or with any substantive determination by a state regulatory authority or unregulated electric utility described in the petition for enforcement. The Commission's silence is not evidence of a Commission determination on the merits of the parties' arguments.³⁵ That is, the Commission has not ruled on the issues, and such issues may not be considered as having been so decided as to constitute precedents.³⁶ In sum, a Notice of Intent Not to Act, without an associated declaratory order, does not mean anything other than what it says – that the Commission declines to initiate an enforcement action under PURPA in response to the petition for enforcement.

21. Thus, as relevant here, the New Mexico Commission should not rely on the January 2017 Notice of Intent Not to Act as a ruling that the New Mexico Commission has correctly interpreted or applied the Commission's regulations, or that the New Mexico Commission's actions complained of here are consistent with (or, alternatively, are inconsistent with) this Commission's regulations.

³⁴ See, e.g., *Red Lake Falls Community Hybrid, LLC*, 165 FERC ¶ 61,156 (2018); *Franklin Energy Storage One, LLC*, 162 FERC ¶ 61,110 (2018); *Otter Creek Solar LLC*, 158 FERC ¶ 61,001 (2017).

³⁵ See *PJM Interconnection, LLC*, 153 FERC ¶ 61,308, at P 13 (2015) (“silence is not evidence of Commission policy.”).

³⁶ See, e.g., *Webster v. Fall*, 266 U.S. 507, 511 (1925).

The Commission orders:

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

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.