

141 FERC ¶ 61,145
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Murphy Flat Power, LLC	Docket Nos. EL12-108-000
Murphy Flat Energy, LLC	QF11-46-001
Murphy Flat Mesa, LLC	QF11-47-001
Murphy Flat Wind, LLC	QF11-48-001

NOTICE OF INTENT TO ACT
AND DECLARATORY ORDER

(Issued November 20, 2012)

1. As discussed below, we conclude that the Idaho Public Utilities Commission's (Idaho Commission's) June 8, 2011 order¹ rejecting Petitioners' three Firm Energy Sales Agreements² is inconsistent with the requirements of the Public Utility Regulatory Policies Act of 1978 (PURPA) and our regulations implementing PURPA.³ In this order,

¹ *In the Matter of the Application of Idaho Power Company for a Determination Regarding a Firm Energy Sales Agreement between Idaho Power and Murphy Flat Mesa, LLC*, Order No. 32255, Case No. IPC-E-10-56, *In the Matter of the Application of Idaho Power Company for a Determination Regarding a Firm Energy Sales Agreement between Idaho Power and Murphy Flat Energy, LLC*, Order No. 32255, Case No. IPC-E-10-57, *In the Matter of the Application of Idaho Power Company for a Determination Regarding a Firm Energy Sales Agreement between Idaho Power and Murphy Flat Wind, LLC*, Order No. 32255, Case No. IPC-E-10-58 (Idaho Commission June 8, 2011) (June 8 Order).

² In this order, we refer to Murphy Flat Power, LLC, Murphy Flat Energy, LLC, Murphy Flat Mesa, LLC, and Murphy Flat Wind, LLC as the Petitioners. Agreements, as used here, refer to Firm Energy Sales Agreements between Idaho Power Company (Idaho Power) and Petitioners.

³ 18 C.F.R. Part 292 (2012).

we also give notice that we will initiate an enforcement action pursuant to section 210(h) of PURPA,⁴ as requested by Petitioners.

Background

2. The Idaho Commission's findings at issue in this proceeding developed from an earlier Idaho Commission proceeding. A November 5, 2010 joint petition filed with the Idaho Commission by Idaho Power, Avista Corporation, and PacifiCorp d/b/a Rocky Mountain Power (Idaho Utilities) requested that the Idaho Commission initiate an investigation into various avoided cost issues.⁵ The Idaho Utilities urged the Idaho Commission to lower the published avoided cost rate eligibility cap for a qualifying facility (QF) from 10 aMW down to 100 kW, effective immediately.⁶

3. On December 3, 2010, the Idaho Commission issued Order No. 32131, and announced it would commence an investigation into the Idaho Utilities' assertions, but it did not immediately reduce the eligibility cap to 100 kW. The Idaho Commission, however, gave notice that it would make a decision on the eligibility cap after its investigation and that its decision would be effective, retroactively, on December 14, 2010.⁷

⁴ 16 U.S.C. § 824a-3(h) (2006).

⁵ June 8 Order at 2-3.

⁶ *Id.* at 2. Per the Idaho Commission, "average megawatts" (aMW) refers to a measurement that distinguishes between a QF 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." *U.S. Geothermal, Inc. v. Idaho Power Co.*, Order No. 29632, Case No. IPC-E-04-8 *et al.*, at 14 (Idaho Commission Nov. 22, 2004).

⁷ *In the Matter of the Joint Petition of Idaho Power Co., Avista Corp., and PacifiCorp dba Rocky Mountain Power to Address Avoided Cost Issues and to Adjust the Published Avoided Cost Rate Eligibility Cap*, Order No. 32131, Case No. GNR-E-10-04, at 4-6 (Idaho Commission Dec. 3, 2010).

4. On December 16, 2010, Idaho Power submitted the Agreements to the Idaho Commission seeking the Idaho Commission's acceptance.⁸ The Agreements are three separate 20-year power purchase agreements between Idaho Power and Murphy Flat Mesa, LLC, Murphy Flat Energy, LLC, and Murphy Flat Wind, LLC.⁹ Per these Agreements, each project will have a maximum capacity of 25 MW and, under normal and/or average conditions, will not exceed 10 aMW on a monthly basis.¹⁰ According to Petitioners, these Agreements were the products of negotiations conducted during November and December 2010.¹¹

5. On February 7, 2011, the Idaho Commission issued Order No. 32176, where it dictated that the eligibility cap for wind and solar QFs to receive published avoided cost rates would be temporarily reduced from 10 aMW down to 100 kW, effective after December 14, 2010, pending the Idaho Commission's investigation of the issue.¹²

6. On June 8, 2011, the Idaho Commission rejected the Agreements because they exceeded the eligibility cap changes implemented in Order No. 32176, which reduced that 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."¹³ The Idaho Commission explained that the Agreements were for projects in excess of its recently-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., before December 14, 2010. The Idaho Commission, noting its new rule, found that, while Petitioners had signed on December 13, 2010, Idaho Power had not signed the Agreements until December 15, 2010. Thus, based on these findings, the Idaho Commission rejected the Agreements.

⁸ See June 8 Order at 1.

⁹ *Id.*

¹⁰ See *id.* at 9.

¹¹ See Petition at 6-7.

¹² *Id.* at 7; see also *In the Matter of the Joint Petition of Idaho Power Co., Avista Corp., and PacifiCorp dba 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 8-12 (Idaho Commission Feb. 7, 2011).

¹³ June 8 Order at 9.

Related Commission Proceedings

7. On October 4, 2011, in a similar case where another petitioner brought an enforcement petition after the Idaho Commission denied approval of agreements due to its “bright line rule,” the Commission gave notice of its intent not to initiate an enforcement action pursuant to section 210(h) of PURPA. In its order, the Commission also concluded that the Idaho Commission action, in rejecting five Firm Energy Sales Agreements between Cedar Creek Wind, LLC and PacifiCorp d/b/a Rocky Mountain Power, was inconsistent with the requirements of PURPA and the regulations implementing PURPA.¹⁴

8. On April 30, 2012, in another similar case involving the Idaho Commission’s rejection of agreements due to the Idaho Commission’s “bright line rule,” the Commission again gave notice of its intent not to initiate an enforcement action, this time brought by Rainbow Ranch Wind, LLC and Rainbow West Wind, LLC, pursuant to section 210(h) of PURPA. In its order, the Commission again also concluded that the Idaho Commission’s June 8, 2011 order rejecting the petitioners’ two Firm Energy Sales Agreements was inconsistent with the requirements of PURPA and our regulations implementing PURPA.¹⁵

Petition for Enforcement

9. On September 25, 2012, Petitioners filed a petition for enforcement asking the Commission to initiate an enforcement action against the Idaho Commission to overturn the Idaho Commission’s June 8 Order and August 30 Order,¹⁶ which rejected Petitioners’ Agreements with Idaho Power.¹⁷

¹⁴ *Cedar Creek Wind, LLC*, 137 FERC ¶ 61,006, at P 1 (2011) (*Cedar Creek*).

¹⁵ *Rainbow Ranch Wind, LLC*, 139 FERC ¶ 61,077, at PP 1, 22-23 (2012) (*Rainbow Ranch*).

¹⁶ The Idaho Commission’s order issued August 30, 2012, denied Petitioners’ request for expedited action on their request for modification, but set up a briefing schedule for pleadings subsequent to their request. *In the Matter of the Petition of Murphy Flat Mesa, LLC to Modify Order No. 32255 and Approve a Firm Energy Sales Agreement Entered into between Itself and Idaho Power Co.*, Case No. IPC-E-10-56, *In the Matter of the Petition of Murphy Flat Energy, LLC to Modify Order No. 32255 and Approve a Firm Energy Sales Agreement Entered into between Itself and Idaho Power Co.*, Case No. IPC-E-10-57, *In the Matter of the Petition of Murphy Flat Wind, LLC to Modify Order No. 32255 and Approve a Firm Energy Sales Agreement Entered into*

(continued...)

10. According to Petitioners, between May and December 2010, they engaged in negotiations with Idaho Power to reach the Agreements at issue in this proceeding. Petitioners state that Idaho Power first sent them initial contracting information in August 2010 and then provided first draft contracts on November 23, 2010. Then, on December 13, 2010, Idaho Power delivered to Petitioners unexecuted copies of the Agreements, which Petitioners signed and returned to Idaho Power that same day. As mentioned above, the Idaho Commission's June 8 Order rejected the Agreements at issue in this proceeding as exceeding eligibility caps due to their failure to be executed before December 14, 2010; Idaho Power executed them on December 15, 2010.

11. On August 16, 2012, Petitioners asked the Idaho Commission for prompt modification of its June 8 Order in light of this Commission's decisions in *Cedar Creek* and *Rainbow Ranch*. On August 30, 2012, the Idaho Commission declined to act promptly but provided opportunities for Idaho Power to respond to Petitioners' request and for Petitioners to reply to that response. On October 12, 2012, the Idaho Commission rejected as time-barred Petitioners' request to modify the Idaho Commission's June 8 Order, due to Petitioners' failure to seek reconsideration and/or appeal. The Idaho Commission also deemed Petitioners' request barred by the doctrine of *res judicata* in light of the completed litigation over Petitioners' claims in state fora, in addition to the Idaho Commission's jurisdiction exclusive to the Commission over as-applied PURPA claims.¹⁸

12. In the alternative, Petitioners request that the Commission make a number of findings, each, in their view, consistent on all fours with the Commission's findings in

between Itself and Idaho Power Co., Case No. IPC-E-10-58, Order No. 32629 (Idaho Commission Aug. 30, 2012) (August 30 Order).

¹⁷ The instant petition was filed September 25, 2012, before the Idaho Commission's order denying Petitioners' request for modification on October 12, 2012. In addition to the Idaho Commission's June 8 Order and August 30 Order, we assume Petitioners seek an invalidation of the Idaho Commission's October 12 Order.

¹⁸ See *In the Matter of the Petition of Murphy Flat Mesa, LLC to Modify Order No. 32255 and Approve a Firm Energy Sales Agreement Entered into between Itself and Idaho Power Co.*, Case No. IPC-E-10-56, *In the Matter of the Petition of Murphy Flat Energy, LLC to Modify Order No. 32255 and Approve a Firm Energy Sales Agreement Entered into between Itself and Idaho Power Co.*, Case No. IPC-E-10-57, *In the Matter of the Petition of Murphy Flat Wind, LLC to Modify Order No. 32255 and Approve a Firm Energy Sales Agreement Entered into between Itself and Idaho Power Co.*, Case No. IPC-E-10-58, Order No. 32664 (Idaho Commission Oct. 12, 2012) (October 12 Order).

Cedar Creek and Rainbow Ranch. Specifically, Petitioners request that the Commission find that: (1) the Idaho Commission violated PURPA inasmuch as it held that the date Petitioners created a legally enforceable obligation was the date on which Idaho Power chose to sign the Agreements; (2) the Idaho Commission's June 8 Order violated federal law, despite Petitioners' failure to seek reconsideration or judicial review of that order; (3) Petitioners are entitled to receive the published avoided cost rates in effect when they incurred legally enforceable obligations to sell and when Idaho Power incurred legally enforceable obligations to purchase from Petitioners' projects; (4) Idaho Power's legally enforceable obligation to purchase from Petitioners arose no later than December 13, 2010 (the date on which Petitioners executed the Agreements); and (5) under PURPA and the Commission's regulations, despite the fact that states may determine what constitutes a legally enforceable obligation, the Commission's findings as to when such a legally enforceable obligation arose is determinative in any judicial enforcement proceeding.

13. Before the Idaho Commission acts on the substance of Petitioners' request for modification, Petitioners ask this Commission to commence an enforcement action against the Idaho Commission because the Idaho Commission has repeatedly acted on a similar issue in violation of federal law. Petitioners argue that enforcement is warranted at this juncture because the Idaho Commission has demonstrated on multiple occasions its inclination to ignore federal law. Petitioners contend that their current predicament is similar to that of the petitioners in *Cedar Creek and Rainbow Ranch* because: (1) Petitioners have self-certified as QFs; (2) Petitioners commenced formal negotiations to enter into and signed the instant Agreements with Idaho Power before December 14, 2010; (3) the Idaho Commission rejected the instant Agreements on the grounds that they went into effect after the December 14, 2010 deadline because they were signed by Idaho Power after the December 14, 2010 deadline, and were thus ineligible for the pre-December 14, 2010 avoided cost rates; and (4) Petitioners did not seek rehearing or appeal the Idaho Commission's orders in their case.

14. Despite Petitioners' thus far unsuccessful attempts during the last year, since *Cedar Creek*, to convince the Idaho Commission to modify its June 8 Order, Petitioners maintain that they should not be obstructed for procedural reasons from seeking relief before this Commission. Petitioners ask the Commission to act no later than November 10, 2012, because of uncertainty relating to project development and financing related to the instant Agreements.

Notice of Filing and Responsive Pleadings

15. Notice of Petitioners' filing was published in the *Federal Register*, 77 Fed. Reg. 60,420 (2012), with interventions and protests due on or before October 15, 2012. The Idaho Commission filed an answer. Idaho Power filed a motion to intervene and protest. Exelon Corporation filed a motion to intervene.

16. The Idaho Commission, in its answer, describes Petitioners' claims as precluded from resolution by this Commission due to Petitioners' failure to exhaust administrative remedies at the state level in a timely fashion, the doctrine of *res judicata*, and the Idaho Commission's exclusive jurisdiction over as-applied PURPA claims. The Idaho Commission states that its June 8 Order is a final order because Petitioners failed to seek reconsideration of that order or to appeal that order before the Idaho Supreme Court within the time allotted by Idaho law. The Idaho Commission explains that, in the absence of a statute of limitations in PURPA section 210(h), the state statute of limitations period applies to this Commission, thus rendering Petitioners' claims procedurally defective under both state and federal law. Consequently, because Petitioners' claims in this proceeding directly parallel the same adjudication that already has resulted in a fully-litigated final order, the Idaho Commission views Petitioners' claims before this Commission as barred by the doctrine of *res judicata*.

17. Construing the declaratory orders granted by this Commission in *Rainbow Ranch* and *Cedar Creek* as ruling on the Idaho Commission's implementation of PURPA, the Idaho Commission also asserts that Petitioners' challenges to its June 8 Order concern the Idaho Commission's application of PURPA. The Idaho Commission maintains that such challenges to a state commission's application of PURPA are beyond this Commission's purview.

18. Idaho Power's motion to intervene and protest echoes the Idaho Commission's arguments that Petitioners' enforcement petition is barred by the state statute of limitations, *res judicata*, and the nature of Petitioners' challenges as "as-applied" PURPA claims. Should the Commission decline to bring an enforcement action, Idaho Power adds that a declaratory order by the Commission would be inappropriate because the Idaho Commission is aware of and has considered the Commission's holding in *Cedar Creek* regarding when legally enforceable obligations arise. Finally, Idaho Power maintains that the Idaho Commission's rejection of the Agreements on public interest grounds, after weighing the interests of Idaho citizens, the national interest of developing alternative energy resources, and the language of the Agreements, indicates that Commission action in favor Petitioners' would be contrary to the public interest.

Discussion

Procedural Matters

19. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2012), the timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding.

Commission Determination

20. Petitioners request that the Commission initiate an enforcement action against the Idaho Commission under section 210(h) of PURPA to enforce the Commission's PURPA regulations. Specifically, Petitioners ask the Commission to bring an enforcement action that overturns the Idaho Commission's finding in its June 8 Order; that order rejected Petitioners' Agreements with Idaho Power as ineligible for pre-December 14, 2010 published avoided cost rates because these Agreements were not executed by both parties until December 15, 2010.

21. The intended result of such desired enforcement action for Petitioners would be a declaration that legally enforceable obligations arose by December 13, 2010, and that, therefore, Petitioners were entitled to receive pre-December 14, 2010 published avoided cost rates. Alternatively, should this Commission decline to institute an enforcement action, Petitioners ask the Commission to make findings consistent with the Commission's orders in *Cedar Creek* and *Rainbow Ranch*, thus entitling them to the pre-December 14, 2010 published avoided cost rates.

22. Section 210(h)(2)(B) of PURPA¹⁹ permits any electric utility, qualifying cogenerator, or qualifying small power producer to petition the Commission to act under section 210(h)(2)(A) of PURPA²⁰ to enforce the requirement that a state commission implement this Commission's regulations. As the Commission stated in its 1983 Policy Statement, we have discretion in choosing whether to exercise that enforcement authority under section 210(h)(2)(A) of PURPA.²¹ We may choose to exercise our enforcement authority, or, where the Commission refuses to bring an enforcement action within 60 days of the filing of a petition, under section 210(h)(2)(B) of PURPA, the petitioner may bring its own enforcement action directly against the state regulatory authority or non-regulated electric utility in the appropriate United States district court.²²

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

²⁰ *Id.* § 824a-3(h)(2)(A).

²¹ *Policy Statement Regarding the Commission's Enforcement Role Under Section 210 of the Public Utility Regulatory Policies Act of 1978*, 23 FERC ¶ 61,304, at 61,645 (1983) (1983 Policy Statement).

²² In those circumstances where the Commission refuses to act, the Commission may intervene as of right in an enforcement action brought by such a petitioner. 16 U.S.C. § 824a-3(h)(2)(B) (2006).

23. Here, we give notice that, given the Idaho Commission's continued reliance on its "bright line rule" in its June 8, 2011 decision, despite the Commission's orders in *Cedar Creek* and *Rainbow Ranch*, we intend to go to court to enforce PURPA.

24. We find that the similarities between the facts presented here by Petitioners to those discussed in *Cedar Creek* and *Rainbow Ranch* cause us to reiterate our findings from those cases in this case. As we stated in *Cedar Creek*, "a QF, by committing itself to sell to an electric utility, 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."²³ We found that the Idaho Commission's orders in those proceedings, by limiting the circumstances under which a legally enforceable obligation arose, made a fully-executed contract a condition precedent to a legally enforceable obligation. We held that such a condition precedent is inconsistent with PURPA and our regulations implementing PURPA, however, because state restrictions mandating that a legally enforceable obligation may be created only by a fully-executed contract are inconsistent with PURPA and the Commission's regulations implementing PURPA.²⁴ In addition, we found that the Idaho Commission's orders' limitation on the conditions for legally enforceable obligation formation overlooked "the fact that a legally enforceable obligation may be incurred before the formal memorialization of a contract to writing."²⁵ Indeed, we stressed that:

[T]he 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, delaying the signing of a contract, so that a later and lower avoided cost is applicable.²⁶

25. Several factual similarities exist between the facts before the Commission in *Cedar Creek* and *Rainbow Ranch* and the facts presented here. In all three cases, the petitioners, all self-certified QFs, entered formal negotiations to enter into power purchase agreements with electric utilities in November and December of 2010, and executed these agreements prior to the new rules concerning eligibility for published

²³ *Cedar Creek*, 137 FERC ¶ 61,006 at P 32.

²⁴ *Id.* P 35.

²⁵ *Id.* P 36.

²⁶ *Id.*

avoided cost rates went into effect, i.e., before December 14, 2010, while the utility executed the agreements on or after December 14, 2010.²⁷ Each agreement was rejected by the Idaho Commission in an order dated June 8, 2011, where the Idaho Commission adopted a new rule dictating that “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.”²⁸ Given the material factual similarities between the three cases, we find the Idaho Commission’s June 8 Order at issue here is inconsistent with PURPA, our regulations implementing PURPA, and our findings in *Cedar Creek* and *Rainbow Ranch*, for the same reasons given in those orders.

26. Apart from the more substantive issue of whether the Idaho Commission’s June 8 Order at issue here is inconsistent with PURPA (which, as just noted, we decide here in favor of Petitioners), the Idaho Commission and Idaho Power offer here the same basic procedural arguments that they provided in *Rainbow Ranch*, i.e., *res judicata* and the Commission’s jurisdiction over “as-applied” PURPA claims, as obstacles to our finding in favor of Petitioners.

27. As we stated in *Rainbow Ranch*, “[s]ection 210(g) and section 210(h) of PURPA provide for separate state and federal rights to challenge a state’s implementation of PURPA.”²⁹ We went on to conclude 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).”³⁰ Petitioners’ decision to challenge the Idaho Commission’s June 8 Order before this Commission is a separate proceeding from actions they have (or have not) taken after issuance of the Idaho Commission’s June 8 Order. Although the Idaho Commission, in its October 12 Order, characterizes their petition as an impermissible collateral attack on its original order,³¹ Petitioners’ enforcement petition here is a federal proceeding separate from the state proceeding. This federal proceeding is against the Idaho Commission’s implementation of PURPA, which, as relevant here, has manifested

²⁷ See *Rainbow Ranch*, 139 FERC ¶ 61,077 at PP 4, 6; *Cedar Creek*, 137 FERC ¶ 61,006 at PP 5, 38; Petition at 7.

²⁸ June 8 Order at 9; see also *Rainbow Ranch*, 139 FERC ¶ 61,077 at P 6; *Cedar Creek*, 137 FERC ¶ 61,006 at P 5.

²⁹ *Rainbow Ranch*, 139 FERC ¶ 61,077 at P 27.

³⁰ *Id.* P 29.

³¹ See October 12 Order at 18-22.

itself consistently across three cases: *Cedar Creek*, *Rainbow Ranch*, and now in the case of the Petitioners. Therefore, neither *res judicata* nor our jurisdiction over a state's implementation of PURPA serve as impediments to Petitioners' claims.

28. Finally, despite the fact that Petitioners brought their enforcement petition after over one year since the Idaho Commission's June 8 Order, no statutory or regulatory deadline precluded them from filing here.³² Petitioners' description of their ongoing settlement discussions with the Idaho Commission shows that they were not sitting on their rights regarding the Agreements at issue in this proceeding. We disagree with the Idaho Commission's position that Petitioners' summary of their settlement discussions with the Idaho Commission³³ constitutes an attempt to offer improper evidence in violation of Rule 602(e)(2) of the Commission's Rules of Practice and Procedure.³⁴ Instead, Petitioners' summary of these discussions merely demonstrates that the instant Petition has not arisen out of a vacuum and is an issue that should come as no surprise to the Idaho Commission. In any event, the details of the offers and counteroffers mentioned in that back-and-forth between Petitioners and the Idaho Commission play no part in our evaluation of their petition and thus serve no improper evidentiary purpose.

29. A separate, procedural matter bears mention. Idaho Power suggests that Petitioners' alternative request for a declaratory order from the Commission should be conditioned on Petitioners' payment of the declaratory order fee mandated by 18 C.F.R. § 381.302(a) (2012). We disagree. PURPA's parallel enforcement tracks, in sections 210(h) (via the Commission) and 210(g) (through state courts), contemplate two different methods of ensuring state commission compliance with PURPA and this Commission's regulations implementing PURPA. Section 210(g) is a track that does not involve this Commission. Section 210(h) requires that an aggrieved party, before bringing an enforcement petition in federal district court, first petition this Commission to bring its own enforcement action against the state commission. The Commission can and often does issue a declaratory order in response to an enforcement petition.³⁵ That

³² See *Rainbow Ranch*, 139 FERC ¶ 61,077 at P 29 n.52.

³³ See Petition at 10-12.

³⁴ See Idaho Commission Answer at 12 n.7 (referencing 18 C.F.R. § 385.602(e)(2) (2012)).

³⁵ See, e.g., *Rainbow Ranch*, 139 FERC ¶ 61,077; *Morgantown Energy Associates*, 139 FERC ¶ 61,066 (2012), *denying reconsideration*, 140 FERC ¶ 61,223 (2012); *Cedar Creek*, 137 FERC ¶ 61,006; *Southern California Edison Co.*, 70 FERC ¶ 61,215, *order on reconsideration*, 71 FERC ¶ 61,269 (1995).

declaratory order, issued separate from the Commission's authority under PURPA's section 210(h) enforcement regime, is within the Commission's purview to issue "to remove uncertainty,"³⁶ despite the failure of a party to pay the fee for seeking a declaratory order.³⁷ A declaratory order accompanying a notice of intent to act or not to act on an enforcement petition represents both the Commission's exercise of its discretion to bring such an enforcement action, as well as the Commission's position on the matter; that statement of position by the Commission can provide assistance to a court on the Commission's thinking in the event that the Commission and/or such petitioner decide to bring enforcement cases.³⁸

The Commission orders:

(A) Notice is hereby given that the Commission will 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. Commissioner Clark is dissenting with a separate statement attached.

(S E A L)

Kimberly D. Bose,
Secretary.

³⁶ See 5 U.S.C. § 554(e) (2006); 18 C.F.R. § 385.207(a)(2) (2012).

³⁷ Fees for *filing* petitions for declaratory orders are set at 18 C.F.R. § 381.302(a) (2012). That regulation does not mandate a fee for *receipt* of a declaratory order without one's filing a petition for a declaratory order.

³⁸ *Industrial Cogenerators v. FERC*, 47 F.3d 1231, 1234-35 (D.C. Cir. 1995) (comparing a declaratory order to "a memorandum of law prepared by the FERC staff in anticipation of a possible enforcement action; the only difference is that the Commission itself formally used the document as its own statement of position"); see also *Niagara Mohawk Power Corp. v. FERC*, 117 F.3d 1485, 1488 (D.C. Cir. 1997).

UNITED STATES OF AMERICA
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(Issued November 20, 2012)

CLARK, Commissioner, *dissenting*:

Contrary to longstanding policy, in this order the Commission decides to exercise its enforcement authority against a state regulatory commission.

“The Commission’s established policy is to leave to state regulatory authorities or non-regulated electric utilities and to appropriate judicial fora issues relating to the specific application of PURPA requirements to the circumstances of individual QFs”¹

The instant case comes on the heels of two other cases dealing with similar factual situations where the Commission made a legal determination but declined to enforce PURPA by its own action.² It is important to note, when the Commission declines to enforce PURPA, the entity petitioning the Commission has access to federal courts to pursue its own enforcement efforts. In this order, the Commission has chosen to expend federal resources to enforce the claims of a single wind developer. I would prefer to follow long standing policy: the Commission makes a legal determination but then allows the developer to fight its own fight, rather than the Commission initiating judicial proceedings on a developer’s behalf against a

¹ *Gregory Swecker v. Midland Power Coop.*, 114 FERC ¶ 61,205 at P 5 (2006). The only other time the Commission has acted under PURPA 210(h) was against a non-regulated utility (*Gregory Swecker v. Midland Power Coop.*, 111 FERC ¶ 61,365 (2005)), and in that case, the Commission ultimately reversed itself.

² *Cedar Creek Wind, LLC*, 137 FERC ¶ 61,006 (2011) and *Rainbow Ranch Wind, LLC*, 139 FERC ¶ 61,077 (2012). In at least one of the earlier instances, after the Commission’s decision not to enforce its PURPA authority, the wind developer and the utility came to a settlement agreement that the Idaho Public Utility Commission approved. *See*, http://www.puc.state.id.us/internet/press/122111_CedarCreek.htm.

state commission that is attempting to carry out its mandate to protect its consumers. While PURPA establishes certain legal requirements, this Commission has discretion over initiating enforcement actions and we should use that discretion prudently.

More broadly, while PURPA was designed as a foot in the door for emerging renewable resources and small generators, I sympathize with concerns that PURPA is increasingly being used as a cudgel that could force consumers to bear undue burdens. For all of the positive attributes of renewable resources, the PURPA construct itself creates a challenge for states charged with balancing the integration of variable resources with the needs of end use consumers. Given that context, it seems unwise for the Commission to now reverse course without defining some set of limiting principles by which it will decline future entreaties to become enmeshed in cases that, whatever their legal merits, may not ultimately benefit consumers.

The Commission's decision seems to be mostly an act of exasperation at a string of cases within a single state, but exasperation alone is not a rationale for abandoning a sound Commission practice. In sum, this action may be within the Commission's legal discretion, but that does not necessarily make it advisable. The Commission has now put itself in an awkward position. It will invoke the power of the federal government to proactively champion a private interest that may contradict the best interests of the consumers of a state.

Accordingly, I respectfully dissent.

Tony Clark
Commissioner