

142 FERC ¶ 61,187
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Grouse Creek Wind Park, LLC
Grouse Creek Wind Park II, LLC

Docket Nos. EL13-39-000

Grouse Creek Wind Park, LLC

QF11-32-001

Grouse Creek Wind Park II, LLC

QF11-33-001

NOTICE OF INTENT TO ACT
AND DECLARATORY ORDER

(Issued March 15, 2013)

1. As discussed below, we conclude that the Idaho Public Utilities Commission's (Idaho Commission's) June 8, 2011 and September 7, 2012 Orders,¹ which reject

¹ *In the Matter of the Application of Idaho Power Company for a Determination Regarding the Firm Energy Sales Agreement for the Sale and Purchase of Electric Energy between Idaho Power Company and Grouse Creek Wind Park, LLC (10-61) and Grouse Creek Wind Park II, LLC (10-62)*, Order No. 32365, Case Nos. IPC-E-10-61 and IPC-E-10-62 (Idaho Commission Sept. 7, 2012) (September 7 Order); *In the Matter of the Application of Idaho Power Company for a Determination Regarding a Firm Energy Sales Agreement between Idaho Power and Grouse Creek Wind Park, LLC*, Order No. 32257, Case No. IPC-E-10-61, *In the Matter of the Application of Idaho Power Company for a Determination Regarding a Firm Energy Sales Agreement between Idaho Power and Grouse Creek Wind Park II, LLC*, Order No. 32257, Case No. IPC-E-10-62 (Idaho Commission June 8, 2011) (June 8 Order).

Petitioners' two Firm Energy Sales Agreements,² are inconsistent with the requirements of the Public Utility Regulatory Policies Act of 1978 (PURPA)³ and our regulations implementing PURPA.⁴ In this order, we also give notice that we will initiate an enforcement action pursuant to section 210(h) of PURPA, as requested by Petitioners. We will bring this enforcement action in conjunction with our enforcement action in *Murphy Flat Power, LLC (Murphy Flat)*.⁵

Background and Related Commission Proceedings

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.⁶ 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.⁷ On November 8, 2010, Petitioners filed a complaint against Idaho Power, accusing Idaho Power of negotiating the terms of a power purchase agreement in bad faith. Petitioners and Idaho Power later settled the issues underlying that complaint.⁸

² In this order, we refer to Grouse Creek Wind Park, LLC and Grouse Creek Wind Park II, LLC as the Petitioners. Agreements, as used here, refer to Firm Energy Sales Agreements between Idaho Power Company (Idaho Power) and Petitioners.

³ 16 U.S.C. § 824a-3 (2006).

⁴ 18 C.F.R. Part 292 (2012).

⁵ *Murphy Flat Power, LLC*, 141 FERC ¶ 61,145 (2012) (*Murphy Flat*).

⁶ June 8 Order at 2-3.

⁷ *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).

⁸ September 7 Order at 7, 14-15.

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, 2010.⁹

4. On December 29, 2010, Idaho Power submitted the Agreements to the Idaho Commission, seeking the Idaho Commission's acceptance.¹⁰ The Agreements are two separate 20-year power purchase agreements between Idaho Power and Grouse Creek Wind Park, LLC and Grouse Creek Wind Park II, LLC, which are located near Lynn, Utah, and are managed by Wasatch Wind Intermountain, LLC.¹¹ Per these Agreements, each project will have a maximum capacity of 21 MW and, under normal and/or average conditions, will not exceed 10 aMW on a monthly basis.¹² According to Petitioners, these Agreements were the products of negotiations that were conducted at varied levels of intensity between February and early December 2010.¹³

5. On February 7, 2011, the Idaho Commission issued Order No. 32176, wherein 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.¹⁴

⁹ *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).

¹⁰ See June 8 Order at 1.

¹¹ *Id.*

¹² *Id.* at 3.

¹³ See Petition at 7-9.

¹⁴ *Id.* at 9; 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).

6. On June 8, 2011, the Idaho Commission in Order No. 32257 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.¹⁵ 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.”¹⁶ 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 Petitioners signed on December 20, 2010, and Idaho Power signed the Agreements on December 28, 2010. The Idaho Commission read the Agreements to be effective as of the date on which they had been executed by both parties, December 28, 2010, which came after the December 14, 2010 date that mandated a capacity eligibility cap exceeded by the Grouse Creek QFs. Thus, the Idaho Commission rejected the Agreements.

Related Commission Proceedings

7. On October 4, 2011, in a similar case wherein 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.¹⁷

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 concluded that the

¹⁵ The June 8 Order was issued on the same day that, in separate orders and in separate dockets, the Idaho Commission rejected agreements between the Idaho Utilities and other QFs. Three of those other cases are described *infra* PP 7-9.

¹⁶ June 8 Order at 10.

¹⁷ *Cedar Creek Wind, LLC*, 137 FERC ¶ 61,006, at P 1 (2011) (*Cedar Creek*).

Idaho Commission's June 8 Order rejecting the petitioners' two Firm Energy Sales Agreements was inconsistent with the requirements of PURPA and our regulations implementing PURPA.¹⁸

9. On November 20, 2012, in yet another similar case involving the Idaho Commission's rejection of agreements due to the Idaho Commission's "bright line rule," the Commission again declared the Idaho Commission's rejection of petitioners' three Firm Energy Sales Agreements inconsistent with the requirements of PURPA and our regulations implementing PURPA. The Commission went one step further than it did in the prior two cases, however, by giving notice that it intended to bring an enforcement action against the Idaho Commission pursuant to section 210(h) of PURPA.¹⁹

Procedural History at Idaho Commission after June 8 Order

10. Petitioners in this case sought reconsideration of the June 8 Order. After the Idaho Commission denied reconsideration on July 27, 2011, Petitioners appealed the Idaho Commission's decisions to the Idaho Supreme Court. In response to this Commission's October 2011 decision in *Cedar Creek*, on November 22, 2011, the Idaho Supreme Court granted a stipulated motion filed by Petitioners, Idaho Power, and the Idaho Commission to suspend the appeal and to remand the case back to the Idaho Commission.

11. On September 7, 2012, the Idaho Commission again rejected Petitioners' Agreements. It stated that a QF has two options for obtaining avoided cost rates from a utility: "Either the parties enter into a contract or, if the utility is failing to negotiate or refusing to enter into a contract with a QF, the QF can file a complaint with [the Idaho] Commission, at which time the [Idaho] Commission will make a determination as to whether and when a legally enforceable obligation arose."²⁰ The Idaho Commission determined that a legally enforceable obligation did not exist because the Petitioners and Idaho Power chose the path of entering into the Agreements. Because the Agreements stated an effective date after the December 14, 2010 deadline, the Idaho Commission interpreted the Agreements' as not intending to satisfy that cut-off date. Moreover, even though Petitioners filed a complaint to establish a legally

¹⁸ *Rainbow Ranch Wind, LLC*, 139 FERC ¶ 61,077, at PP 1, 22-23 (2012) (*Rainbow Ranch*).

¹⁹ *Murphy Flat Power, LLC*, 141 FERC ¶ 61,145 at P 1.

²⁰ September 7 Order at 13.

enforceable obligation before the Idaho Commission in November 2010, the Idaho Commission found that irrelevant due to the contract negotiated and executed after the December 14, 2010 deadline.

12. Petitioners appealed the Idaho Commission's September 7 Order to the Idaho Supreme Court. Oral argument is currently scheduled for August 2013.

Petition for Enforcement

13. On January 15, 2013, 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 September 7 Order, which rejected Petitioners' Agreements with Idaho Power.

14. According to Petitioners, beginning in February 2010, they engaged in negotiations with Idaho Power to reach the Agreements at issue in this proceeding.²¹ In relevant part, Petitioners represent that during this process, on October 1, 2010, they "notified Idaho Power of their intent to obligate their projects to sell and Idaho Power to purchase their output under PURPA."²² On November 1, 2010, Idaho Power provided draft standard agreements to Petitioners. As mentioned above, on November 5, 2010, the Idaho Utilities (including Idaho Power) requested that the Idaho Commission limit the avoided cost rate eligibility cap, and on November 8, 2010, Petitioners filed their complaint at the Idaho Commission against Idaho Power. Petitioners later withdrew that complaint upon settling with Idaho Power.²³ After further negotiation on other issues related to the draft agreements, on November 24, 2010, Idaho Power asked Petitioners to return the draft agreements with "final site-specific information" filled in so that Idaho Power could generate an acceptable draft

²¹ Petitioners first formally contacted Idaho Power in February 2010 to describe their project. In April 2010, Petitioners asked Idaho Power for a PURPA contract for a project up to 65 MW. Petitioners lowered the size of the project to two single 10 aMW projects in a June 2010 e-mail to Idaho Power, which was formalized in a July 2010 request for PURPA contracts and a follow-up clarification of that request in August 2010 based on discussions with Idaho Power. *See* Petition, Ex. 6, Reply Legal Brief of Grouse Creek Wind Park, LLC and Grouse Creek Wind Park II before Idaho Supreme Court, Case Nos. IPC-E-10-61 and IPC-E-10-62 at 8-11 (Feb. 27, 2012).

²² Petition at 8.

²³ *See supra* P 2.

for signatures.²⁴ Petitioners returned the drafts on December 2, 2010, and on December 9, 2010, asked Idaho Power to “extend the First Energy Date and Commercial Operation Date (‘In-Service Date’).”²⁵ Idaho Power returned executable agreements to Petitioners on December 16, 2010.

15. Petitioners contend that “all material terms had been agreed upon and Grouse Creek Parties had already returned the proposed contracts to Idaho Power for finalization” by December 9, 2010, and that “[t]he information exchanges after December 14, 2010 were simple clarifications of the projects’ precise geographic coordinates and that the transmission entity would be [Bonneville Power Administration].”²⁶ Therefore, Petitioners conclude that they had established legally enforceable obligations before the December 14, 2010 deadline, and describe any “information exchanges” negotiated after that deadline as “simple clarifications of data needed to memorialize certain facts surrounding an already established legally enforceable obligation.”²⁷

16. Petitioners argue that the Idaho Commission’s June 8 and September 7 Orders are inconsistent with PURPA and the Commission’s decision in *Cedar Creek* generally because the Idaho Commission’s Orders (1) add the filing of a complaint as a condition precedent to establishing a legally enforceable obligation under PURPA and (2) preclude the creation of a legally enforceable obligation prior to contract finalization and execution where a QF elects to negotiate and execute a contract.

17. Should the Commission decline to take up an enforcement action, Petitioners request that the Commission make a number of findings, each, in their view, consistent on all fours with the Commission’s findings in *Cedar Creek*, *Rainbow Ranch*, and *Murphy Flat*. Specifically, Petitioners request that the Commission find that: (1) the Idaho Commission violated PURPA inasmuch as it held that the date Petitioners first created a legally enforceable obligation was the date by which both parties had signed the Agreements; (2) Petitioners are entitled to receive the published avoided cost rates in effect when they earlier incurred their legally enforceable obligations to sell and when Idaho Power incurred its legally enforceable obligations to purchase from Petitioners’ projects; (3) Idaho Power’s legally enforceable

²⁴ Petition at 8-9.

²⁵ *Id.* at 9.

²⁶ *Id.* at 13.

²⁷ *Id.*

obligation to purchase from Petitioners arose no later than December 9, 2010 (the date on which all material terms between the parties had been agreed); and (4) 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 are determinative in any judicial enforcement proceeding.

18. Petitioners contend that their current predicament is similar to that of the petitioners in *Cedar Creek*, *Rainbow Ranch*, and *Murphy Flat* because: (1) Petitioners have self-certified as QFs; (2) Petitioners commenced formal negotiations to enter into the Agreements with Idaho Power before December 14, 2010; (3) the Idaho Commission rejected the Agreements on the grounds that they went into effect after the December 14, 2010 deadline because they were not signed by both parties until after the December 14, 2010 deadline, and were thus ineligible for the pre-December 14, 2010 avoided cost rates; and (4) "all material terms of the Agreements were finalized before December 14, 2010."²⁸

Notice of Filing and Responsive Pleadings

19. Notice of Petitioners' filing was published in the *Federal Register*, 78 Fed. Reg. 5798 (2013), with interventions and protests due on or before February 4, 2013. The Idaho Commission filed an answer and a motion to dismiss. Idaho Power filed a timely motion to intervene and protest.

20. On February 8, 2013, Petitioners filed a motion for leave to answer and answer to the Idaho Commission's answer and motion to dismiss and Idaho Power's motion to intervene and protest. On February 22, 2013, the Idaho Commission moved to lodge an order by the Idaho Supreme Court, which expedites Petitioners' appeal of the Idaho Commission's Orders and schedules oral argument for August 2013.

21. The Idaho Commission explains that its September 7 Order made specific factual findings that: (1) because Petitioners and Idaho Power were still negotiating as of the December 14, 2010 deadline and Petitioners had withdrawn their complaint filed in November 2010, neither a contract nor a legally enforceable obligation existed between Petitioners and Idaho Power as of the December 14, 2010 deadline; and (2) the merger clause and the December 28, 2010 "effective date" stated in the Agreements show that neither party intended the Agreements to be effective before the December 14, 2010 deadline. The Idaho Commission denies that its September 7 Order relied on the "bright line" rule rejected by this Commission in *Cedar Creek*;

²⁸ *Id.* at 12.

instead, the Idaho Commission states that, based on its fact-intensive adjudication and pursuant to Idaho law, the Idaho Commission determined that Petitioners lacked a legally enforceable obligation. The Idaho Commission argues that its rejection of Petitioners' Agreements was a proper exercise of its case-by-case PURPA adjudicatory authority, and that this Commission has no power to adjudicate such "as-applied" claims in the PURPA context.

22. The Idaho Commission urges this Commission to dismiss Petitioners' petition without prejudice, pending resolution of Petitioners' appeal on the merits before the Idaho Supreme Court. The Idaho Commission maintains that allowing this case to proceed through the Idaho state court system avoids conflicting piecemeal litigation across multiple fora, respects the role of state law and institutions in the PURPA context, and protects Petitioners' PURPA rights adequately.

23. Idaho Power states that this Commission should abstain from acting on Petitioners' enforcement request and defer to the process that is pending currently before the Idaho Supreme Court. Idaho Power asserts that Petitioners have an adequate process to remedy their concerns under state law through state institutions and that this Commission's involvement in that process would unduly interfere with those institutions' roles in that process. Therefore, Idaho Power insists that the principles of equity, comity, and federalism restrain this Commission's ability to bring an enforcement action on Petitioners' behalf.

24. Idaho Power likens Petitioners' requested relief to impermissible collateral attacks on the decisions of the Idaho Commission and the Idaho state appellate process. Idaho Power believes that Commission action on Petitioners' request would also improperly occupy the fact-finding role assigned to the Idaho Commission by PURPA. According to Idaho Power, such improper action by this Commission would yield uncertainty to the finality of the Idaho Commission's decisions and "frustrate the ability of the [Idaho] Commission to ensure that standard rates are just and reasonable and frustrate Idaho Power's ability to accurately plan how it will serve its load."²⁹ Idaho Power emphasizes that this Commission should refrain from disturbing the Idaho Commission's factual findings that Idaho Power was not dilatory in negotiating with Petitioners in December 2010 and that approval of the Agreements would be neither in the public interest of the State of Idaho nor in the interest of Idaho Power's customers.

25. Separate from the Commission bringing an enforcement action, Idaho Power also states that a declaratory order would be impermissible. Idaho Power believes that

²⁹ Idaho Power Protest at 13.

the Commission's decisions in *Cedar Creek*, *Rainbow Ranch*, and *Murphy Flat*, along with the Idaho Commission's acknowledgement of the Commission's views in its September 7 Order, exhaustively addressed Petitioners' concerns. Therefore, Idaho Power maintains that there is no longer any controversy or uncertainty associated with the instant Petition.

26. Regarding the substance of the instant Petition, Idaho Power maintains that PURPA allows a state to create preconditions to the creation of a legally enforceable obligation, such as a requirement that a QF file a complaint to establish a legally enforceable obligation, "so long as those conditions do not allow the utility to block the QF's attempts to form a legally enforceable obligation."³⁰ Idaho Power states that the conditions established by the Idaho Commission are reasonable, objective criteria that lend predictability to the Idaho PURPA process.

27. In their answer, Petitioners argue that, because sections 210(g) and (h) of PURPA "provide for separate state and federal rights," the Commission should not abstain from bringing an enforcement suit against the Idaho Commission.³¹ Petitioners reject as "plainly wrong" the notion that their concerns are "as-applied" PURPA claims that are limited to resolution in state fora.³² Petitioners, disagreeing with the Idaho Commission, also argue that the September 7 Order continues to rely improperly on the same "bright line" rule that was rejected by this Commission in *Cedar Creek*, *Rainbow Ranch*, and *Murphy Flat*. Petitioners describe the Idaho Commission as failing to consider that all material terms were agreed to by both parties to the Agreements by the December 14, 2010 deadline. Petitioners add that even the Idaho Commission's staff recognized that legally enforceable obligations were incurred no later than December 9, 2010.

Discussion

Procedural Matters

28. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2012), the timely, unopposed motion to intervene serves to make the entity that filed it a party to this proceeding.

³⁰ *Id.* at 22.

³¹ Petitioners Answer at 3.

³² *Id.* at 5.

29. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2012), prohibits an answer to a protest 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.

30. Motions to lodge decisions from other proceedings may be appropriate in some instances to supplement the Commission's record. Here, we find that the Idaho Supreme Court order has assisted us in our decision-making, and we therefore grant the Idaho Commission's motion to lodge.

Commission Determination

31. 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 findings in its June 8 and September 7 Orders; these Orders rejected Petitioners' Agreements with Idaho Power as ineligible for pre-December 14, 2010 published avoided cost rates because these parties did not have an agreement until December 28, 2010, the Agreements' effective date, and because Petitioners did not submit a meritorious complaint that would have triggered a legally enforceable obligation by December 14, 2010.

32. The Petitioners' intended result of such enforcement action would be a declaration that Petitioners had established a legally enforceable obligation that entitled them 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*, *Rainbow Ranch*, and *Murphy Flat*, thus entitling them to the pre-December 14, 2010 published avoided cost rates.

33. PURPA directs the Commission to prescribe "such rules as it determines necessary to encourage cogeneration and small power production."³³ PURPA, in turn, directs the states to "implement" the regulations adopted by the Commission.³⁴

³³ 16 U.S.C. § 824a-3(a)-(b) (2006).

³⁴ *Id.* § 824a-3(f); *accord FERC v. Miss.*, 456 U.S. 742, 751 (1982); *Ind. Energy Producers Ass'n, Inc. v. Cal. Pub. Util. Comm'n*, 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, *order on reh'g*, Order No. 69-A,

A “state [c]ommission may comply with the statutory requirements by issuing regulations, by resolving disputes on a case-by-case basis, or by taking any other action reasonably designed to give effect to [the Commission’s] rules.”³⁵ As a result, a state may take action under PURPA only to the extent that that action is in accordance with the Commission’s regulations.

34. Section 210(h)(2)(B) of PURPA³⁶ permits any electric utility, qualifying cogenerator, or qualifying small power producer to petition the Commission to act under section 210(h)(2)(A) of PURPA³⁷ 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.³⁸ 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.³⁹

35. Here, we give notice that, given the Idaho Commission’s reliance on its “bright line rule” in its June 8 decision and additional barriers to establishment of legally enforceable obligations in its September 7 decision, despite the Commission’s orders

FERC Stats. & Regs. ¶ 30,160 (1980), *aff’d in part and vacated in part*, *Am. Elec. Power Serv. Corp. v. FERC*, 675 F.2d 1226 (D.C. Cir. 1982), *rev’d in part*, *Am. Paper Inst., Inc. v. Am. Elec. Power Serv. Corp.*, 461 U.S. 402 (1983).

³⁵ *FERC v. Miss.*, 456 U.S. at 751; *see also 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 61,643 (1983) (1983 Policy Statement).

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

³⁷ *Id.* § 824a-3(h)(2)(A).

³⁸ 1983 Policy Statement, 23 FERC ¶ 61,304 at 61,645.

³⁹ 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).

in *Cedar Creek* and *Rainbow Ranch*,⁴⁰ we intend to go to court to enforce PURPA. We will bring this enforcement action in conjunction with our enforcement action in *Murphy Flat*.

36. We find that the similarities between the facts presented here by Petitioners to those discussed in *Cedar Creek*, *Rainbow Ranch*, and *Murphy Flat* 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.”⁴¹ 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.⁴² In addition, we found that the Idaho Commission’s 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.”⁴³ 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.⁴⁴

⁴⁰ Unlike the Commission’s decisions in *Cedar Creek* and *Rainbow Ranch*, *Murphy Flat* was issued after the Idaho Commission’s September 7 Order. Thus, *Murphy Flat* could have played no role in the Idaho Commission’s September 7 Order.

⁴¹ *Cedar Creek*, 137 FERC ¶ 61,006 at P 32.

⁴² *Id.* P 35.

⁴³ *Id.* P 36.

⁴⁴ *Id.*

37. Several similarities exist between the facts before the Commission in *Cedar Creek*, *Rainbow Ranch*, and *Murphy Flat* and the facts presented here. In all four cases, the petitioners, all self-certified QFs, had engaged in formal negotiations to enter into power purchase agreements with electric utilities during November and December 2010, and all four QF petitioners had unequivocally committed themselves to sell to the utilities prior to the new rules concerning eligibility for published avoided cost rates went into effect, i.e., before December 14, 2010.⁴⁵ 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.”⁴⁶ Given the material factual similarities between the four 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*, *Rainbow Ranch*, and *Murphy Flat* for the same reasons given in those orders.

38. Despite these similarities, we acknowledge a significant distinction between this case and the other three. In the other three cases, the contracts had not been signed by both parties prior to the December 14, 2010 deadline. Here, all parties agree that the Agreements were not signed by any party until at least December 20, 2010, and that the Agreements were not signed by both parties until December 28, 2010. The Idaho Commission’s June 8, 2011 rejection rests on the fact that neither party signed the Agreements, and thus no Agreement existed, until after the December 14, 2010 deadline. As our decisions in *Cedar Creek*, *Rainbow Ranch*, and *Murphy Flat* point out, however, a legally enforceable obligation between a QF and a utility may exist regardless of the existence of a contract. The Idaho Commission’s June 8 Order is thus defective under PURPA and our PURPA precedent.

39. Nevertheless, the Idaho Commission and Idaho Power both claim that the Idaho Commission’s September 7 Order cures any such defects. But when faced with our rejection in *Cedar Creek* and *Rainbow Ranch* of barriers to the establishment of a legally enforceable obligation, the Idaho Commission’s September 7 Order rested on

⁴⁵ See *Murphy Flat*, 141 FERC ¶ 61,145 at PP 4, 10, 25; *Rainbow Ranch*, 139 FERC ¶ 61,077 at PP 4, 6; *Cedar Creek*, 137 FERC ¶ 61,006 at PP 5, 38; Petition at 7-9, 12-13. In addition, in all four cases, all material terms of the power purchase agreements at issue had been established prior to the December 14, 2010 deadline. See *id.*

⁴⁶ June 8 Order at 10; see also *Murphy Flat*, 141 FERC ¶ 61,145 at P 6; *Rainbow Ranch*, 139 FERC ¶ 61,077 at P 6; *Cedar Creek*, 137 FERC ¶ 61,006 at P 5.

another barrier to the establishment of a legally enforceable obligation: should a QF fail to secure a utility's commitment to purchase the QF's power, the Idaho Commission would require a QF to have filed a meritorious complaint as a condition precedent to acquiring a legally enforceable obligation.⁴⁷ The Idaho Commission found that Petitioners and Idaho Power negotiated the Agreements and thus Petitioners never filed (or never needed to file) a complaint to establish a legally enforceable obligation. Although the Idaho Commission acknowledged that Petitioners filed a complaint before the December 14, 2010 deadline, the Idaho Commission found this fact irrelevant because Petitioners asked the Idaho Commission to rescind that complaint and Petitioners later ended up signing the Agreements with Idaho Power. Therefore, the Idaho Commission concluded that a legally enforceable obligation did not exist and that the Agreements were defective due, as relevant here, to missing the deadline.⁴⁸

40. We explained in *Cedar Creek* that, through the Commission's regulations implementing PURPA, namely 18 C.F.R. § 292.304(d)(1)-(2), there are two vehicles through which a QF may provide energy and capacity to a utility: a contract or a legally enforceable obligation. Section 292.304(d) 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

⁴⁷ September 7 Order at 12-13 ("We have a long history of recognizing two methods by which a QF can obtain an avoided cost rate in Idaho: (1) by entering into a signed contract with the utility; or (2) by filing a meritorious complaint alleging that a 'legally enforceable obligation' has arisen and, but for the conduct of the utility, there would be a contract.") (referencing *Rosebud Enter. v. Idaho Pub. Util. Comm'n*, 951 P.2d 521 (Idaho 1997); *A.W. Brown v. Idaho Power Co.*, 828 P.2d 841 (Idaho 1992)).

⁴⁸ *See id.* at 13-17.

energy or capacity over a specified term, in 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.

This option to sell via legally enforceable obligation was “specifically adopted to prevent utilities from circumventing the requirement of PURPA that utilities purchase energy and capacity from QFs.”⁴⁹ Likewise, the Commission has also stated that

[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. Accordingly, 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.⁵⁰

Petitioners are thus entitled to a legally enforceable obligation in those situations where, for example, a utility has refused to negotiate a contract. In order to protect the rights of a QF, once a QF makes itself available to sell to a utility, a legally

⁴⁹ *Cedar Creek*, 137 FERC ¶ 61,006 at P 32.

⁵⁰ *JD Wind 1, LLC*, 129 FERC ¶ 61,148, at P 25 (2009) (internal footnotes omitted) (citing *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 PP 136-137 (2007), *aff’d sub nom. Am. Forest and Paper Ass’n v. FERC*, 550 F.3d 1179 (D.C. Cir. 2008)); *accord Cedar Creek*, 137 FERC ¶ 61,006 at P 32.

enforceable obligation may exist prior to the formation of a contract. A contract serves to limit and/or define bilaterally the specifics of the relationship between the QF and the utility. A contract may also limit and/or define bilaterally the specifics of the legally enforceable obligation at the heart of that relationship. But the obligation can pre-date the signing of the contract. Moreover, the tool of “seek[ing] state regulatory authority assistance to enforce the PURPA-imposed obligation” does not mean that seeking such assistance is a necessary condition precedent to the existence of a legally enforceable obligation. The Idaho Commission’s requirement that a QF formally complain “meritorious[ly]” to the Idaho Commission before obtaining a legally enforceable obligation would both unreasonably interfere with a QF’s right to a legally enforceable obligation⁵¹ and also create practical disincentives to amicable contract formation. Such obstacles to QFs are at odds with the Commission’s regulations implementing PURPA. They are not reasonable conditions for a state PURPA process.

41. We recognize that “[i]t 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.”⁵² Yet, we are within our authority to bring an enforcement action, as we will do here, to correct a state’s misreading of the Commission’s PURPA regulations and precedent. Our bringing an enforcement action here (and our bringing a similar enforcement action in *Murphy Flat*) will address the defects in the PURPA rules adopted by the Idaho Commission and challenged by Grouse Creek (and *Murphy Flat*).

42. The Idaho Commission and Idaho Power argue that our involvement in this case improperly usurps the role of both the Idaho Commission and the Idaho Supreme Court. These parties call for us to defer to the state institutions’ role in PURPA and the Idaho Commission’s fact-finding responsibilities over “as-applied” PURPA claims. As we stated in response to similar claims in *Rainbow Ranch* and *Murphy Flat*,⁵³ we disagree. Section 210(g) of PURPA is one avenue for Petitioners to pursue remedies--through the *state* administrative and judicial systems. Petitioners have

⁵¹ *JD Wind 1*, 129 FERC ¶ 61,148 at P 29 (“Under our regulations, [a QF] has the right to choose to sell pursuant to a legally enforceable obligation, and, in turn, has the right to choose to have rates calculated at avoided costs calculated at the time that obligation is incurred.”).

⁵² *W. Penn Power Co.*, 71 FERC ¶ 61,153, at 61,495 (1995).

⁵³ *Murphy Flat*, 141 FERC ¶ 61,145 at PP 27, 29; *Rainbow Ranch*, 139 FERC ¶ 61,077 at PP 27-29.

exercised that right to seek state court review of the Idaho Commission's orders. Regardless of the procedural posture of Petitioners' state court petition, they are also entitled to bring an enforcement petition pursuant to section 210(h) of PURPA to pursue remedies--through the *federal* administrative and judicial systems. Because those are two separate and distinct, and permissible, paths, our enforcement action need not be delayed or tempered by a separate state proceeding.

The Commission orders:

(A) Notice is hereby given that the Commission will initiate an enforcement action under section 210(h)(2)(A) of PURPA, in conjunction with the Commission's enforcement action in *Murphy Flat*.

(B) The Commission hereby finds that the Idaho Commission's June 8 and September 7 Orders are 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.

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Grouse Creek Wind Park, LLC
Grouse Creek Wind Park II, LLC

Docket Nos. EL13-39-000

Grouse Creek Wind Park, LLC

QF11-32-001

Grouse Creek Wind Park II, LLC

QF11-33-001

(Issued March 15, 2013)

CLARK, Commissioner, *dissenting*:

This order flows from the Commission's earlier decision to exercise its enforcement authority against a state regulatory commission, contrary to longstanding Commission policy.¹ The concerns expressed in my dissent in *Murphy Flat* persist here.

The petitioners in the instant case are currently before the Supreme Court of the State of Idaho challenging the very same Idaho Commission decision at issue in this order.² The Commission's *Murphy Flat* decision has now, unfortunately, encouraged a party currently pursuing its remedy in state court also to invoke the Commission's enforcement authority.³

The Commission's initiation of a parallel federal process on behalf of a plaintiff with an ongoing case in the State Supreme Court of Idaho demonstrates the results that occur when the Commission departs from the principles of judicial economy and long-established regulatory precedent. Therefore, I respectfully dissent.

Tony Clark
Commissioner

¹ *Murphy Flat Power, LLC*, 141 FERC ¶ 61,145 (2012) (*Murphy Flat*); *contra Gregory Swecker v. Midland Power Coop.*, 114 FERC ¶ 61,205 at P 5 (2006).

² *Grouse Creek Wind Park LLC v. Idaho Pub. Utility Comm.*, (Sup.Ct. Idaho, No. 39151-2011).

³ The instant petition was not filed until January 15, 2013, after the Commission's November 20, 2012 *Murphy Flat* decision.