

156 FERC ¶ 61,042  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

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

Windham Solar LLC and Allco Finance Limited

Docket Nos. EL16-69-000  
QF16-362-001  
QF16-363-001  
QF16-364-001  
QF16-365-001  
QF16-366-001  
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QF16-383-001  
QF16-384-001  
QF16-385-001  
QF16-386-001  
QF16-387-001

## NOTICE OF INTENT NOT TO ACT AND DECLARATORY ORDER

Issued July 21, 2016

1. On May 19, 2016, as supplemented on May 25, 2016, Windham Solar LLC (Windham) and Allco Finance Limited (Allco) (together, Petitioners) filed a petition for enforcement against the Connecticut Public Utilities Regulatory Authority (Connecticut Authority) pursuant to section 210(h)(2)(B) of the Public Utility Regulatory Policies Act of 1978 (PURPA).<sup>1</sup> Petitioners claim that Connecticut law and the Connecticut Authority's regulations violate the Commission's PURPA regulations regarding an electric utility's mandatory purchase obligation and a qualifying facility's (QF) ability to sell pursuant to a legally enforceable obligation.<sup>2</sup>
2. Notice is hereby given that the Commission declines to initiate an enforcement action pursuant to section 210(h)(2)(A) of PURPA.<sup>3</sup> Our decision not to initiate an enforcement action means that Petitioners may themselves bring an enforcement action against the Connecticut Authority in the appropriate court.<sup>4</sup> We issue a declaratory ruling below, however.
3. Petitioners allege that they are being required by the Connecticut Authority either to offer a bundled product that includes renewable energy credits (RECs), or to sell energy pursuant to short-term contracts; that is, under Connecticut law, a QF that has already separately sold its RECs cannot now sell energy and capacity pursuant to a legally enforceable obligation at avoided cost rates calculated at the time the obligation is incurred. Petitioners also claim that the Connecticut Authority's regulations impermissibly require a QF to participate in a request for proposals as a condition to obtaining a legally enforceable obligation.

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

<sup>2</sup> 18 C.F.R. §§ 292.303(a)(1); 292.304(d) (2015).

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

<sup>4</sup> 16 U.S.C. § 824a-3(h)(2)(B) (2012).

4. The Commission has previously addressed issues regarding the relationship between state-created RECs and PURPA.<sup>5</sup> The Commission has stated that the states have the authority to determine who owns RECs in the initial instance and how they are transferred, and has explained that the automatic transfer of RECs within a sale of power at wholesale must find its authority in state law, not PURPA.<sup>6</sup> The Commission has also held, however, that a state regulatory authority may not assign ownership of RECs to utilities based on a logic that the avoided cost rates in PURPA contracts already compensate QFs for RECs in addition to compensating QFs for energy and capacity, because the avoided cost rates are, in fact, compensation just for energy and capacity.<sup>7</sup> Moreover, while the Commission has made clear that states have the authority to regulate RECs, states cannot impede a QF's ability to sell its output to an electric utility pursuant to PURPA. Thus, regardless of whether a QF has previously sold its RECs under a separate contract, that QF has the right to sell its output pursuant to a legally enforceable obligation.<sup>8</sup>

5. The Commission has also held that “requiring a QF to win a competitive solicitation as a condition to obtaining a long-term contract imposes an unreasonable obstacle to obtaining a legally enforceable obligation.”<sup>9</sup> The Commission likewise has determined a state regulation to be inconsistent with PURPA and the Commission's PURPA regulations “to the extent that it offers the competitive solicitation process as the

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<sup>5</sup> See *American Ref-Fuel Co.*, 105 FERC ¶ 61,004 (2003), *reh'g denied*, 107 FERC ¶ 61,016 (2004) (*American Ref-Fuel*); *Morgantown Energy Assocs.*, 139 FERC ¶ 61,066 (2012), *reconsid. denied*, 140 FERC ¶ 61,223 (2012) (*Morgantown*).

<sup>6</sup> *American Ref-Fuel*, 105 FERC ¶ 61,004 at PP 23-24 (“RECs are created by the States. They exist outside the confines of PURPA. . . . And the contracts for sales of QF capacity and energy, entered into pursuant to PURPA, . . . do not control the ownership of RECs.”).

<sup>7</sup> *Morgantown*, 140 FERC ¶ 61,223 at P 24.

<sup>8</sup> 18 C.F.R. § 292.304(d)(2) (2015) (“...such purchases [pursuant to a legally enforceable obligation] shall, at the option of the qualifying facility exercised prior to the beginning of the specified term, be based on either: (1) The avoided costs calculated at the time of delivery; or (2) The avoided costs calculated at the time the obligation is incurred.”).

<sup>9</sup> *Hydrodynamics Inc.*, 146 FERC ¶ 61,193, at P 32 (2014).

only means by which a QF . . . can obtain long-term avoided cost rates.”<sup>10</sup> Accordingly, regardless of whether a QF has participated in a request for proposal, that QF has the right to obtain a legally enforceable obligation.<sup>11</sup>

By direction of the Commission.

Kimberly D. Bose,  
Secretary.

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<sup>10</sup> *Id.* P 33. However, the Commission has explained that “as long as a state provides QFs the opportunity to enter into long-term legally enforceable obligations at avoided cost rates, a state may also have alternative programs that QFs and electric utilities may agree to participate in . . . .” *Winding Creek Solar LLC*, 151 FERC ¶ 61,103, at P 6 (2015), *reconsid. denied*, 153 FERC ¶ 61,027 (2015).

<sup>11</sup> *See supra* note 8.