

143 FERC ¶ 61,282
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Otter Creek Solar LLC

Docket Nos. EL13-60-000
QF13-402-001

NOTICE OF INTENT NOT TO ACT

(Issued June 27, 2013)

1. On May 1, 2013, Otter Creek Solar LLC (Otter Creek) filed a petition requesting that the Commission initiate an enforcement action under section 210(h)(2)(A) of the Public Utility Regulatory Policies Act of 1978 (PURPA)¹ against the Vermont Public Service Board (Vermont Commission), arguing that the avoided cost rate pricing determination and mechanism in the Vermont Commission's feed-in tariff program, referred to as the Sustainably Priced Energy Enterprise Development (SPEED) program, violates PURPA and the Federal Power Act (FPA).² Alternatively, in the event the Commission decides not to pursue an enforcement action against the Vermont Commission, Otter Creek requests that the Commission issue an order invalidating the Vermont Commission's SPEED program.
2. 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 the Otter Creek may itself bring an enforcement action against the Vermont Commission in the appropriate court.³

¹ 16 U.S.C. § 824a-3(h)(2)(A) (2006).

² 16 U.S.C. §§ 824, *et al.* (2006).

³ 16 U.S.C. § 824a-3(h)(2)(B) (2006).

3. Otter Creek is a 2 MW solar farm in Rutland County, Vermont that filed a Form 556 self-certification as a small power production qualifying facility (QF) in Docket No. QF13-402-000. Otter Creek alleges that the Vermont statute-enacted standard-offer SPEED program⁴ violates PURPA and the FPA because: (1) it fixes the wholesale price for the purchase of power from a QF at a price that has not been determined to be the utility's avoided costs, because it bases avoided cost rates for renewable resources on the avoided costs of other renewable resources available to the purchasing utility, (2) it sets a wholesale price for energy for utilities that are not subject to PURPA, (3) it creates a policy, which constitutes a *de facto* rule with respect to rates under PURPA section 210(f)(1),⁵ that eliminates a QF's ability to seek a long-run avoided cost rate pursuant to 18 C.F.R. § 292.304(d)(2)(ii)(2012) except through the SPEED program, (4) it forces QFs to contract with an entity that is not the utility that has the obligation to purchase under PURPA, and (5) it sets aside a certain amount of new capacity for utility-owned projects, thus eliminating the ability of QFs to specifically displace that new capacity.⁶

4. The standard offer SPEED program is an optional program available to certain small renewable QFs.⁷ QFs also may participate in the Vermont Commission's longstanding Rule 4.100 program.⁸ The Vermont Commission's Rule 4.100 program is the Vermont Commission's implementation of PURPA and Rule 4.100 has been found by the Commission to be consistent with PURPA.⁹ In Vermont, QFs thus still have the option to participate in a program that has been found consistent with PURPA. Those Vermont QFs that choose to participate in the SPEED program are agreeing to the rates

⁴ Vermont Energy Act of 2009, Public Act 45 (2009 Vt., Bien. Sess.) *codified in* 30 V.S.A. § 8005(b) (subsequently amended by Vermont Energy Act of 2012, Public Act No. 170 (2012 Vt. Adj. Sess.) *codified in* 30 V.S.A. § § 8005a and 8006a).

⁵ 16 U.S.C. § 824a-3(f)(1) (2006).

⁶ Otter Creek Petition at 1-2.

⁷ Standard offers are available to QFs with a plant capacity of 2.2 MW or less. Otter Creek Petition at Exhibit A, Vermont Energy Act of 2009, § 4, *codified in* 30 V.S.A. § 8005(b)(2).

⁸ Vermont Department of Public Service Protest and Motion to Dismiss at 3, 12-13.

⁹ *Vermont Electric Coop., Inc. v. State of Vermont Pub. Service Board and Vermont Dep't of Pub. Service*, 25 FERC ¶ 61,273 (1983); *Barnet Hydro Co. v. Central Vermont Pub. Service Corp.*, 95 FERC ¶ 61,257 (2001); *North Hartland, LLC v. Central Vermont Pub. Service Corp.*, 105 FERC ¶ 61,037 (2003).

that result from that program. Nothing in the Commission's regulations limits the authority of either an electric utility or a QF to agree to rates for any purchases or terms or conditions relating to any purchases which differ from the rates or terms or conditions which would otherwise be required by the Commission's regulations.¹⁰

By the Commission.

Nathaniel J. Davis, Sr.,
Deputy Secretary.

¹⁰ 18 C.F.R. § 292.301(b) (2012).