

151 FERC ¶ 61,038
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Virginia Electric and Power Company

Docket No. QM15-1-000

ORDER DENYING APPLICATION TO TERMINATE MANDATORY PURCHASE
OBLIGATION

(Issued April 16, 2015)

1. On October 31, 2014, as amended on December 19, 2014, and February 11, 2015, Virginia Electric and Power Company (VEPCO) filed an application¹ pursuant to section 210(m) of the Public Utility Regulatory Policies Act of 1978 (PURPA)² and section 292.309(a) of the Commission's regulations,³ requesting to be relieved of its requirement to enter into new contracts or obligations to purchase electric energy with respect to nine qualifying facilities (QF), with each having a net capacity of 4.99 MW, located in North Carolina and owned by Community Energy Solar, LLC (Community Energy).⁴ In this order, we deny VEPCO's request to terminate its mandatory purchase obligation for the Community Energy QFs, as discussed below.

¹ A deficiency letter was issued by Commission staff on November 25, 2014, with VEPCO submitting the additional information on December 19, 2014. The Commission also noticed an answer filed by VEPCO on February 11, 2015 as an amendment to VEPCO's application.

² 16 U.S.C. § 824a-3(m) (2012).

³ 18 C.F.R. § 292.309(a) (2014).

⁴ The nine Community Energy QFs are: (1) Tarboro Solar LLC self-certified on August 29, 2013 in Docket No. QF13-624-000; (2) Aulander Solar LLC self-certified on September 25, 2013 in Docket No. QF13-682-000; (3) Woodland Solar LLC self-certified on September 26, 2013 in Docket No. QF13-683-000; (4) Winton Solar LLC self-certified on September 26, 2013 in Docket No. QF13-684-000; (5) Garysburg Solar LLC self-certified on September 26, 2013 in Docket No. QF13-685-000; (6) Gaston Solar

(continued ...)

I. Background

2. In 2008, the Commission terminated VEPCO's mandatory purchase obligation to purchase capacity and energy from QFs larger than 20 MW in its service territory within PJM Interconnection, LLC (PJM).⁵ The termination of VEPCO's mandatory purchase obligation was based on a finding, codified in 18 C.F.R. § 292.309(e) (2014), that the PJM markets qualify as markets that warrant termination of the mandatory purchase obligation and on the rebuttable presumption, also codified in 18 C.F.R. § 292.309(e) (2014), that QFs larger than 20 MW have nondiscriminatory access to the PJM markets.

3. Notwithstanding the above, the Commission in Order No. 688 also created another rebuttable presumption; that QFs with a net capacity of 20 MW or below do not have nondiscriminatory access to markets sufficient to warrant termination of the mandatory purchase obligation.⁶ In creating this rebuttable presumption the Commission found persuasive arguments that some QFs may, in practice, not have nondiscriminatory access to markets in light of their small size.⁷ To overcome this rebuttable presumption that smaller QFs lack nondiscriminatory access to markets, the electric utility seeking termination of its purchase obligation must make additional showings to demonstrate on a QF by QF basis, that each small QF, in fact, has nondiscriminatory access to the relevant wholesale markets.⁸ Additionally, Order No. 688 placed the burden of proof on the electric utility to demonstrate that a small QF has nondiscriminatory access to the markets of which the electric utility is a member (i.e., in this case, PJM).

LLC self-certified on October 29, 2013 in Docket No. QF14-45-000; (7) Seaboard Solar LLC self-certified on November 13, 2013 in Docket No. QF14-73-000; (8) Jamesville Solar LLC self-certified on December 12, 2013 in Docket No. QF14-144-000; and (9) Weldon Solar LLC self-certified on December 31, 2013 in Docket No. QF14-215-000. Community Energy Protest at 1-2, n.2, n.6.

⁵ *Virginia Electric and Power Co.*, 124 FERC ¶ 61,045 (2008).

⁶ 18 C.F.R. § 292.309(d)(1) (2014); *see also New PURPA Section 210(m) Regulations Applicable to Small Power Production and Cogeneration Facilities*, Order No. 688, FERC Stats. & Regs. ¶ 31,233 at P 72, *et seq.* (2006), *order on reh'g*, Order No. 688-A, FERC Stats. & Regs. ¶ 31,250 at P 94, *et seq.* (2007), *appeal denied sub nom. American Forest and Paper Assoc. v. FERC*, 550 F.3d 1179 (D.C. Cir. 2008) (Order No. 688).

⁷ Order No. 688, FERC Stats. & Regs. ¶ 31,233 at P 103.

⁸ *Id.* P 9 (B)-(C) and n.9.

4. In addition to the aforementioned, as relevant here, the Commission has previously explained, when Congress enacted PURPA it required the Commission to prescribe rules necessary to encourage cogeneration and small power production. Section 210(a) of PURPA requires electric utilities to purchase electric energy from QFs. Thus, in promulgating its regulations, the Commission clearly established, in section 292.304(d),⁹ that a QF has the option to commit itself to sell all or part of its electric output to an electric utility through contract, or by a legally enforceable obligation to prevent utilities from circumventing the PURPA purchase requirement.

II. VEPCO Application

5. For each of the nine Community Energy QFs, which are currently under development, VEPCO seeks to terminate its PURPA obligation based on the theory that they have nondiscriminatory access to the wholesale markets in PJM. VEPCO claims its application provides evidence that satisfies the evidentiary standard set forth in *PPL Electric Utilities Corporation*,¹⁰ to sufficiently rebut the Order No. 688 presumption for 20 MW and below QFs, noting that: (1) affiliates of the Community Energy QFs are sophisticated market participants in PJM; (2) each of the Community Energy QFs has nondiscriminatory access to the wholesale markets of PJM; and (3) there are no operational constraints, transmission, distribution, or interconnection issues/ barriers preventing any of the Community Energy QFs from participating in the PJM markets.

III. Notices and Responsive Pleadings

6. Notice of VEPCO's application was published in the *Federal Register*, 79 Fed. Reg. 66,712 (2014); notice of VEPCO's deficiency response was published in the *Federal Register*, 79 Fed. Reg. 78,849 (2014); and notice of VEPCO's amended application was published in the *Federal Register*, 80 Fed. Reg. 8862 (2015). Notices of VEPCO's application were mailed by the Commission to each of the potentially-affected QFs identified by VEPCO on October 31, 2014, and notices of VEPCO's amended application were mailed on February 12, 2015.

7. The North Carolina Utilities Commission (North Carolina Commission) filed a notice of intervention. A Motion to Intervene accompanied with separate comments was submitted by North Carolina Sustainable Energy Association. A Motion to Intervene and Protest was submitted by North Carolina Clean Energy Business Alliance. Community

⁹ 18 C.F.R. § 292.304(d) (2014).

¹⁰ 148 FERC ¶ 61,207, at P 23, n.25 (2014) (*PPL*).

Energy submitted Answers to VEPCO's application on January 14, 2015 and February 20, 2015.¹¹

A. Community Energy

8. Community Energy raises three arguments in response to VEPCO's application. First, that VEPCO's application is deficient in that it fails to contain the project-specific showings necessary to prove that Community Energy's QFs will in practice have actual access to PJM markets without facing physical constraints, upgrade costs, or other obstacles and administrative burdens.¹² Second, that if the application is granted, Community Energy would be adversely harmed if it has to start *de novo* under the PJM's interconnection process, in that it would be placed in a later queue which will imperil its qualification for certain investment tax credits.¹³ Third, that the nine QFs have existing contracts and legally enforceable obligations with VEPCO which are grandfathered if the mandatory purchase obligation is terminated by the Commission.¹⁴

9. Community Energy states that VEPCO's standard Rate Schedule 19-FP (Power Purchases From Cogeneration and Small Power Production Qualifying Facilities) obligates VEPCO to purchase the output from a QF, under a 15-year contract at the North Carolina Commission-approved avoided cost rate, that has obtained a certificate of public convenience and necessity (CPCN) for its facility by November 1, 2014, and has indicated in writing that it commits to selling its output to VEPCO pursuant to the terms

¹¹ A letter was submitted by Albert J. LaRose of Rocky Mount, NC, noting his opposition to the application and a letter was submitted by Halifax County Economic Development Commission requesting that the Commission carefully review the application in that solar energy provides numerous environmental benefits to the state, especially when it is sold at a utility's avoided cost.

¹² Community Energy Answer at 2.

¹³ *Id.* at 19. Community Energy explains that PJM's required feasibility study report would leave insufficient time to construct and interconnect the QFs before the expiration of a state tax credit-- equal to 35 percent of the project cost spread out over five years, available to solar facilities placed in service prior to December 31, 2015. Community Energy also notes a federal investment tax credit that reduces from 30 percent to 10 percent of project costs for projects not in service by December 31, 2016 (Community Energy Answer at 20).

¹⁴ *Id.* at 3, n.7 (citing Order No. 688, FERC Stats. & Regs. ¶ 31,233 at PP 209-213, Order No. 688-A, FERC Stats. & Regs. ¶ 31,250 at PP 136-138).

of the rate schedule.¹⁵ Community Energy provided copies of nine CPCNs and letters to VEPCO for its nine QFs to demonstrate that it has met the North Carolina Commission requirements for Rate Schedule 19-FP obligating VEPCO to purchase its QFs' output.¹⁶ Moreover, Community Energy states that it timely tendered executed Power Purchase Agreements (PPAs) to VEPCO, but that VEPCO refused to enter into the PPAs, stating it would countersign only if the PPAs contained a non-standard provision affording VEPCO "the unilateral right to terminate this Agreement upon 30 days written notice to Operator...," if the Commission grants the Application.¹⁷

10. Community Energy also claims VEPCO has significantly delayed processing of the interconnection requests for the Community Energy QFs.¹⁸ Community Energy further explains that, on December 30, 2014, Community Energy and its QFs filed a complaint and request for declaratory judgment in North Carolina Commission Docket No. E-22, Sub18, in which they seek to enforce their entitlement under VEPCO's Rate Schedule 19-FP to have VEPCO enter into the long-term, standard-form PPA associated with Rate Schedule 19-FP with each Community Energy QF. Community Energy additionally seeks a declaration from the North Carolina Commission that each Community Energy QF has fulfilled the requirements that establish a legally enforceable obligation under PURPA with regard to the sale of electric power to VEPCO.¹⁹

11. Additionally, countering VEPCO's contention that Community Energy's affiliates have significant expertise in the wholesale market, Community Energy asserts that neither it or its affiliates have ever operated facilities that sold in the wholesale market nor has its competitive retail electricity supplier, which is obligated under retail choice laws to obtain market-based rate authority, been able to transact business on a retail basis with PJM without the aid of an unaffiliated contractor and that VEPCO's lists of various

¹⁵ *Id.* at 4. *See also* Affidavit of Christopher G. Killenberg (Killenberg Affidavit) at PP 5-6, n.4 (citing North Carolina Commission Order dated February 21, 2014 in Docket No. E-100, Sub 136).

¹⁶ *Id.* at Exh. 4.

¹⁷ *Id.* at 7 and Exh. 10.

¹⁸ *Id.* at 6.

¹⁹ Community Energy Response to VEPCO Amended Application at 7 and Exh. 11 (citing Docket No. E-22, Sub 518 Complaint and Request for Declaratory Judgment before the North Carolina Utilities Commission).

Commission dockets and wholesale market agreements only captures the Community Energy QFs' affiliates' pre-construction development efforts within PJM.²⁰

B. North Carolina Sustainable Energy Association

12. North Carolina Sustainable Energy Association (NCSEA) explains that, although VEPCO's application expressly does not seek to have its purchase obligation terminated with respect to any other potentially-affected QF, there appears to be no bar to VEPCO filing future applications to terminate its purchase obligation with respect to additional QFs, including NCSEA's, if the Commission were to grant VEPCO's current requested relief.²¹ In addition to asserting that VEPCO has failed to meet its burden for the requested relief, NCSEA takes issue with VEPCO's assertion that "there are no . . . interconnection issues that would prevent any of the Community Energy QFs from participating in the PJM markets."²² NCSEA points out that VEPCO's interconnection process is not operating efficiently and that the existence of extended interconnection study timeframes undisputedly presents an effective barrier to nondiscriminatory access to any market that might otherwise exist and VEPCO's application, thus should be denied.²³

C. North Carolina Clean Energy Business Alliance

13. North Carolina Clean Energy Business Alliance (NCCEBA) argues that VEPCO's application is broader in scope than the nine Community Energy QFs, and that, if the Commission grants VEPCO's application, it may open the door for VEPCO to seek a further blanket termination of its purchase obligation to small QFs in a future proceeding.²⁴ Additionally, NCCEBA argues that VEPCO's application ignores the difficulties that many QFs in North Carolina have experienced in interconnecting with VEPCO (a process which all QFs seeking to interconnect with PJM will ultimately have to use).²⁵ NCCEBA further explains that difficulty in obtaining interconnection service

²⁰ *Id.* at 30-31.

²¹ NCSEA Comments at 2.

²² NCSEA Protest at 2 (citing VEPCO's Application at 2).

²³ *Id.* at 6-9.

²⁴ NCCEBA Comments at 1.

²⁵ *Id.* at 6-9.

in a timely manner will cause many QF projects to miss the North Carolina Business and Energy Tax Credits deadline. Further, NCCEBA contends that VEPCO failed to show that QFs have access to competitive markets in light of VEPCO's existing interconnection practices. According to NCCEBA, VEPCO's application is premature as some of the matters are currently being addressed by the North Carolina Commission.²⁶ In conclusion, NCCEBA contends that VEPCO can neither show the absence of interconnection obstacles nor accessibility to competitive markets with meaningful opportunities for small QFs to participate.²⁷

D. VEPCO Amended Application

14. On February 11, 2015, VEPCO filed an amended application in which it asserts that Community Energy has failed to refute its *prima facie* case that its QFs have nondiscriminatory access to PJM markets.²⁸ Moreover, VEPCO asserts that it agrees to enter into all necessary agreements to allow the Community Energy QFs to sell their power to VEPCO up until the date that the Commission grants its application to terminate its purchase obligation and the QFs have the physical and contractual ability to participate in the PJM markets.²⁹

15. VEPCO maintains, contrary to Community Energy's contention, that it has produced all of the project-specific documentation necessary to overcome the Order No. 688 rebuttable presumption, in that Community Energy will not face any obstacles or burdens to sell into the PJM markets and the North Carolina Commission will determine whether Community Energy has established a legally enforceable obligation. Additionally, VEPCO argues that the Commission's regulation regarding formation of a legally enforceable obligation applies only when an electric utility is attempting to avoid its PURPA obligations "by refusing to sign a contract, so that a later and lower avoided cost is applicable," and here, VEPCO is offering to purchase Community Energy QFs power until they have physical and contractual ability to sell into the PJM market.³⁰ Thus, notwithstanding the pending complaint before the North Carolina Commission.

²⁶ *Id.* at 10.

²⁷ *Id.* at 11-14.

²⁸ VEPCO Amended Application 1.

²⁹ *Id.* at 1-2, 16.

³⁰ *Id.* at 15-16.

VEPCO requests the Commission to grant its petition to terminate its obligation to enter into new contracts or obligations.³¹

16. To support its contentions, VEPCO maintains it has made a *prima facie* case that the only additional costs for Community Energy QFs to sell into the PJM markets will be the additional cost of metering equipment required by PJM, which VEPCO contends is not an obstacle or burden to Community Energy's market participation.³² VEPCO also asserts that Community Energy misunderstood the PJM's generator interconnection process in that Community Energy would maintain its queue priority once the state interconnection process is complete and an Interconnection Agreement has been issued.³³

17. VEPCO also points to several Interconnection Service Agreements providing for interconnection of Community Energy affiliated QFs to the PJM system and a pleading in a PJM docket, as proof that Community Energy has a sophisticated affiliate in the PJM Market.³⁴

E. Community Energy's Response to VEPCO's Amended Application

18. Community Energy asserts that the two procedural delays caused by VEPCO, i.e., VEPCO's initial deficiency and the amended application, potentially rewards VEPCO and could potentially harm the Community Energy QFs if the Commission would defer issuing its ruling to May 12, 2015.³⁵ That is, the delayed issuance would substantially cause risk of Community Energy running out of time and losing the state investment tax credits necessary to finance its projects.³⁶ Thus, Community Energy urges the Commission to issue an order by March 19, 2015.³⁷ Community Energy also notes that VEPCO's application should be rejected because in its own response, VEPCO

³¹ *Id.* at 3.

³² *Id.*

³³ *Id.* at 4-5.

³⁴ *Id.* at 12-13.

³⁵ Community Energy Response to VEPCO Amended Application at 2.

³⁶ *Id.* at 4.

³⁷ *Id.*

concedes that the same study process for its interconnection process and that of PJM's differs significantly in that PJM's is broader than a state-specific process.³⁸

19. Moreover, Community Energy states that while VEPCO changes its position, it relies on a "conclusory assertion in [a witness' affidavit] that 'based on a high-level review of the transmission system configuration...it is highly unlikely that the PJM studies will require additional upgrades as the result of any planning assessment.'"³⁹ Based on the speculative nature of the response as well as the affidavit, Community Energy maintains that VEPCO still has not met its burden in this proceeding.⁴⁰ Next, Community Energy points out that VEPCO's argument that it would retain its queue position in the PJM interconnection process if it has to start over *de novo*, is based on an ambiguous email from PJM.⁴¹ Finally, Community Energy asserts that VEPCO's offer to enter into provisional Interconnection Agreements with Community Energy is paradoxical in that VEPCO's proposal would defer to "a future date the determination as to whether and when [Community Energy's QFs will] actually have nondiscriminatory access to PJM markets, while asking the Commission to give advance or anticipatory approval to termination of the mandatory purchase obligation [in this proceeding]."⁴²

IV. Discussion

A. Procedural Matters

20. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2014), the notice of intervention and timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding. Further, Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2014), prohibits an answer to a protest or answer unless otherwise ordered by the decisional authority. We will accept the answers because they have provided information that assisted us in our decision-making process.

³⁸ *Id.* at 7.

³⁹ *Id.* at 8.

⁴⁰ *Id.*

⁴¹ *Id.* at 9.

⁴² *Id.* at 11.

B. Determination

21. As discussed below, we find that the nine Community Energy QFs established legally enforceable obligations under PURPA prior to VEPCO's filing of its application to terminate its mandatory purchase obligation for those QFs, and we therefore deny VEPCO's application.

22. Section 210(m)(1) of PURPA,⁴³ which was codified in the Commission's regulations as section 292.309(a),⁴⁴ provides for the termination of a utility's PURPA mandatory purchase obligation if certain criteria are met. However, any termination granted applies only to the requirement to enter into a *new contract or obligation*. In addition, section 210(m)(6) of PURPA,⁴⁵ which was codified as section 292.314 of the Commission's regulations,⁴⁶ provides that certain contracts or obligations in effect or pending approval before a state regulatory authority are not affected by any termination order; that is, no contract or obligation in effect or pending approval prior to a utility's filing a petition to terminate its obligation will be subject to a termination order under these provisions.

23. The Commission's regulations under PURPA include a requirement that QFs have the option to sell not only on an "as available" basis, but also pursuant to legally enforceable obligations over specified terms.⁴⁷ Specifically, 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

⁴³ 16 U.S.C. § 824 a-3(m)(1) (2012).

⁴⁴ 18 C.F.R. § 292.309(a) (2014).

⁴⁵ 16 U.S.C. § 824 a-3(m)(6) (2012).

⁴⁶ 18 C.F.R. § 292.314 (2014).

⁴⁷ *Id.* § 292.304(d)(2).

(2) To provide energy or capacity *pursuant to a legally enforceable obligation* for the delivery of 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.^[48]

24. Section 292.304(d) and the requirement that a QF can sell and a utility must purchase pursuant to a legally enforceable obligation were specifically adopted to prevent utilities from circumventing the requirement of PURPA that utilities purchase energy and capacity from QFs. The Commission explained:

Paragraph (d)(2) permits a qualifying facility to enter into a contract or other legally enforceable obligation to provide energy or capacity over a specified term. Use of the term “legally enforceable obligation” is intended to prevent a utility from circumventing the requirement that provides capacity credit for an eligible facility merely by refusing to enter into a contract with a qualifying facility.^[49]

25. Thus, under the Commission’s regulations, 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,

⁴⁸ *Id.* § 292.304(d) (emphasis added).

⁴⁹ *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 30,880 *order on reh’g*, Order No. 69-A, 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); *accord id.* (noting “the need for qualifying facilities to be able to enter into contractual commitments” and agreeing to “the need for certainty with regard to return on investment in new technologies”).

obligation will be created pursuant to the state's implementation of PURPA.⁵⁰ 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. For purposes of section 210(m) of PURPA and termination of the requirement that an electric utility enter into new contracts or obligation to purchase from a QF, the Commission has stated that the term obligation means "legally enforceable obligation."⁵¹ The Commission has also stated that a utility may not avoid the creation of an obligation, which cannot be terminated in a proceeding under section 210(m) of PURPA, by refusing to sign a contract.⁵²

26. While the determination of whether a legally enforceable obligation exists is a matter of state law⁵³ that is generally made by a state regulatory authority (or a non-regulated utility) that implements the requirements of PURPA,⁵⁴ the Commission, pursuant to PURPA and Order No. 688-A, may consider claims by a QF on a case-by-case basis that the QF has created a legally enforceable obligation under state law or pursuant to other proceedings.⁵⁵ Here, Community Energy requests that the Commission reject VEPCO's application because the Community Energy QFs established legally enforceable obligations for the sale of their power to VEPCO prior to the filing of VEPCO's application. Based on the record before us, we agree that the Community Energy QFs have established legally enforceable obligations requiring VEPCO to

⁵⁰ Order No. 688, FERC Stats. & Regs. ¶ 31,233 at P 212, *order on reh'g*, Order No. 688-A, FERC Stats. & Regs. ¶ 31,250 at PP 136-137; *see also Midwest Renewable Energy Projects, LLC*, 116 FERC ¶ 61,017 (2006).

⁵¹ Order No. 688, FERC Stats. & Regs. ¶ 31,233 at PP 210-213.

⁵² *Id.* P 212; *see also Cedar Creek Wind, LLC*, 137 FERC ¶ 61,006 at P 30 (2011); *Rainbow Ranch Wind, LLC*, 139 FERC ¶ 61,077 (2012), *notice of intent to act*, 144 FERC 61,005 (2013); *Murphy Flat Power, LLC*, 141 FERC ¶ 61,145 (2012), *notice of intent to act*, 142 FERC 61,187 (2013), *FERC v Idaho Pub. Utils. Comm'n* (D. Idaho No. 1:13-cv-141 (order approving stipulation of agreement issued Dec. 27, 2013)); *Grouse Creek Wind Park, LLC*, 142 FERC ¶ 61,187 (2013), *notice of intent to act*, 144 FERC 61,005 (2013), *FERC v Idaho Pub. Utilis. Comm'n* (D. Idaho No. 1:13-cv-141 (order approving stipulation of agreement issued Dec. 27, 2013)).

⁵³ Order No. 688-A, FERC Stats. & Regs. ¶ 31,250 at P 138.

⁵⁴ *Id.* P 139.

⁵⁵ *Id.*

purchase the output of the Community Energy QFs and that these obligations are grandfathered pursuant to sections 210(m)(1) and 210(m)(6) of PURPA⁵⁶ and sections 292.309(a) and 292.314 of the Commission's regulations.⁵⁷

27. Community Energy explains that, pursuant to Schedule 19-FP, the avoided cost rate under that schedule is available to any QF that, by November 1, 2014, has (1) obtained a CPCN from the North Carolina Commission, and (2) indicated to VEPCO in writing that it is committed to sell the output of the QF pursuant to the terms of that schedule.⁵⁸ Community Energy provides documentation that it (1) received CPCNs from the North Carolina Commission for its nine QF projects between February 20, 2014 and October 14, 2014,⁵⁹ and (2) notified VEPCO in writing, on October 28, 2014, of Community Energy's commitment to sell the output of those QFs to VEPCO pursuant to the terms and conditions of Schedule 19-FP. Accordingly, based on the record before us, Community Energy availed itself of the right to establish contracts under a state tariff to sell the output of its QFs to VEPCO prior to VEPCO's October 31, 2014 application at the Commission to terminate its purchase obligation from the Community Energy QFs.

28. We disagree with VEPCO's claim that the Commission need not address the question of whether the Community Energy QFs have a legally enforceable obligation where VEPCO has not refused to sign a contract with Community Energy. As the Commission has made clear, section 292.304(d) of the Commission's regulations grants to a QF the *option* to "provide energy or capacity pursuant to a legally enforceable obligation,"⁶⁰ which we find above has, in fact, been established here, and does not vest a

⁵⁶ 16 U.S.C. § 824a-3(m)(1) and (6) (2012).

⁵⁷ 18 C.F.R. §§ 292.309(a), 292.314 (2014).

⁵⁸ Community Energy Protest at 35.

⁵⁹ Community Protest at Exhibit 10 notes the specific dates for each QF's approved CPCN: Taboro Solar LLC – February 20, 2014; Winton Solar LLC – April 28, 2014; Woodland Solar LLC – April 28, 2014; Garysburg Solar LLC – September 3, 2014; Aulander Solar LLC – September 23, 2014; Gaston Solar LLC – September 23, 2014; Jamesville Solar LLC – September 23, 2014; Weldon Solar LLC – September 23, 2014; and Seaboard Solar LLC – October 14, 2014..

⁶⁰ 18 C.F.R. § 292.304(d) (2014) (emphasis added).

utility with the authority to delay creation of that legally enforceable obligation by insisting that a QF enter into a contract.⁶¹

29. We are not persuaded by VEPCO's argument that the Commission's ruling on this issue is an infringement on the North Carolina Commission's authority. VEPCO filed to terminate its purchase obligation for the Community Energy QFs, and pursuant to section 210(m) of PURPA, the Commission's regulations, and Order No. 688, that termination does not apply to grandfathered legally enforceable obligations or contracts. It is therefore appropriate for the Commission to determine, given the facts of this case, that the Community Energy QFs had legally enforceable obligations prior to the date that VEPCO filed to terminate its purchase obligation. Furthermore, we note that the complaint filed by Community Energy before the North Carolina Commission is based on VEPCO's alleged failure to comply with its filed and approved state tariff provision, Schedule 19-FP, which has as its basis the state's PURPA regulatory framework. That determination remains for the North Carolina Commission to make.

30. Given our findings above, the Commission does not need to address the other issues raised in this proceeding to dispense of this matter.

The Commission orders:

VEPCO's application to terminate its PURPA mandatory purchase obligation to purchase energy and capacity from Community Energy QFs is hereby denied, as discussed in the body of this order.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.

⁶¹ *Supra* n. 53.