

157 FERC ¶ 61,211
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

FLS Energy, Inc.	Docket Nos. EL17-5-000
Bear Gulch Solar, LLC	QF16-876-001
Fox Farm Solar, LLC	QF16-877-001
Couch Solar, LLC	QF16-879-001
Glass Solar, LLC	QF16-880-001
Janney Solar, LLC	QF16-881-001
Malt Solar, LLC	QF16-882-001
Martin Solar, LLC	QF16-883-001
Middle Solar, LLC	QF16-884-001
Ulm Solar, LLC	QF16-885-001
Valley View Solar, LLC	QF16-886-001
River Solar, LLC	QF16-887-001
Sage Creek Solar, LLC	QF16-888-001
Sypes Canyon Solar, LLC	QF16-889-001
Canyon Creek Solar, LLC	QF16-899-001

NOTICE OF INTENT NOT TO ACT AND DECLARATORY ORDER

(Issued December 15, 2016)

1. On October 17, 2016, FLS Energy, Inc. (FLS) filed a petition (Petition) requesting that the Commission initiate an enforcement action pursuant to section 210(h)(2)(A) of the Public Utility Regulatory Policies Act of 1978 (PURPA)¹ against the Montana Public Service Commission (Montana Commission) and NorthWestern Corporation (NorthWestern). FLS argues that the Montana Commission and NorthWestern failed to implement PURPA in a manner consistent with the statute and the Commission's regulations.

¹ 16 U.S.C. § 824a-3(h)(2)(A) (2012).

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 FLS may itself bring an enforcement action against the Montana Commission and NorthWestern in the appropriate court. While we have chosen not to initiate an enforcement action, we also find it appropriate to further comment on the matters at issue.

I. Petition

3. FLS states that, in a Notice of Commission Action issued on June 16, 2016, (June 16, 2016 Decision) and later memorialized in Order 7500,² the Montana Commission granted a motion for emergency suspension (Emergency Motion) of NorthWestern's obligations to pay the QF-1 Tariff Option 1(a) Standard Rate for any new solar qualifying facilities (QFs) greater than 100 kW pending the issuance of a final order by the Montana Commission. FLS also notes that the Montana Commission used the legally enforceable obligation standard it had created in its 2010 order, *Whitehall Wind*,³ to provide an exemption from the suspension for solar QFs with a nameplate capacity between 100 kW and three MWs, if, prior to June 16, 2016, the solar QF had both tendered a signed power purchase agreement (PPA) and executed an interconnection agreement.⁴

4. FLS asserts that, during the last year, FLS has been working to develop a portfolio of solar QFs in Montana, and that in May 2016, FLS and NorthWestern reached an agreement on all material terms of a standard form QF-1 PPA intended for use on all FLS standard-offer projects seeking to contract with NorthWestern. FLS asserts that fourteen FLS QFs⁵ had tendered PPAs to NorthWestern prior to the Montana Commission's June 16, 2016 Decision, but have not received interconnection agreements from

² *In the Matter of Northwestern Energy's Application for Interim and Final Approval of Revised Tariff No. QF-1, Qualifying Facility Power Purchase*, Order No. 7500, Dkt. D2016.5.39 (Montana Commission July 25, 2016) (Order 7500).

³ *In the Matter of Whitehall Wind LLC, for QF Rate Determination*, Docket No. D2002.8.100 (Montana Commission June 4, 2010) (*Whitehall Wind*).

⁴ Petition at 9.

⁵ FLS filed Form 556 notices of self-certification in Docket Nos. QF16-876-001, QF16-877-001, QF16-879-001, QF16-880-001, QF16-881-001, QF16-882-001, QF16-883-001, QF16-884-001, QF16-885-001, QF16-886-001, QF16-887-001, QF16-888-001, QF16-889-001, QF16-899-001.

NorthWestern.⁶ FLS further contends that six of the fourteen QFs had requested executable interconnection agreements from NorthWestern and, pursuant to the terms of its Open Access Transmission Tariff (OATT), were entitled to receive interconnection agreements before the Montana Commission held its June 9, 2016 hearing on the Emergency Motion.⁷ FLS argues that, if NorthWestern had not violated the terms of its OATT, these six projects would have qualified under the Montana Commission's legally enforceable obligation standard.⁸ FLS asserts that, as a result of the QF-1 Tariff Option 1(a) Standard Rate suspension, FLS has been precluded from continuing the development of its QFs and faces the loss of more than \$750,000.⁹

5. FLS requests that the Commission issue an order finding: (i) that the Montana Commission's legally enforceable obligation standard originally established in *Whitehall Wind*, and adopted here, violates PURPA; and (ii) that the Montana Commission violated PURPA by improperly suspending the QF-1 Tariff Option 1(a) Standard Rate for solar QFs between 100 kW and 3 MW.¹⁰

6. Additionally, FLS requests that the Commission issue an order finding that NorthWestern has improperly refused to comply with the timelines and study procedures set forth in section 3.5.7 of Attachment N (Small Generation Interconnection Procedures) to its OATT and refused to issue interconnection agreements to small solar QFs that have satisfied all the requirements of NorthWestern's Small Generator Interconnection Procedures.¹¹

II. Notice of Filings and Responsive Pleadings

7. Notice of the Petition was published in the *Federal Register*, 81 Fed. Reg. 74,423 (2016), with interventions and protests due on or before November 7, 2016, which was later extended to November 10, 2017.¹²

⁶ Petition at 7, 13.

⁷ *Id.* at 13.

⁸ *Id.* at 15.

⁹ *Id.* at 1, 4.

¹⁰ *Id.* at 2.

¹¹ *Id.*

¹² On November 2, 2016, the Commission issued a Notice of Extension of Time granting in part the Montana Commission's request for an extension of time to respond to

8. Timely motions to intervene were filed by the Montana Consumer Counsel, NorthWestern, Pacific Northwest Solar, LLC, Renewable Northwest, the Southern Environmental Law Center, and Vote Solar and Montana Environmental Information Center (together, Vote Solar). Southern California Edison Company (SoCal Edison) filed a motion to intervene out-of-time.

9. The Montana Commission filed a motion to dismiss. The Montana Commission, NorthWestern, and the Montana Consumer Counsel filed protests. Renewable Northwest, Vote Solar, and the Southern Environmental Law Center filed comments. FLS filed an answer to the protests.

10. Pacific Northwest Solar, LLC, the Southern Environmental Law Center, Renewable Northwest, and Vote Solar (collectively, Supporting Parties) separately filed comments in support of FLS' Petition. Supporting Parties agree that the Montana Commission's legally enforceable obligation standard violates PURPA by impermissibly restricting the formation of legally enforceable obligations.¹³ They assert that this Commission has found that requiring a signed contract as a pre-requisite to the formation of a legally enforceable obligation is inconsistent with PURPA, and argue that the Montana Commission's requirement of an executed interconnection agreement, in addition to requiring a signed PPA, is even more limiting than standards the Commission has rejected in the past.¹⁴

11. Supporting Parties claim that the Montana Commission's suspension of the QF-1 Tariff Option 1(a) Standard Rate for new solar QFs undermines PURPA's mandate of encouraging small power production because the suspension is contrary to the Montana Commission's own previous findings that all QFs up to three MW in capacity must be eligible for a standard rate to encourage small power production.¹⁵ Supporting Parties argue that the availability of standard offer contracts with favorable terms is often determinative of QF viability because QFs require long-term, fixed rates in order to obtain financing.¹⁶

the Petition.

¹³ Southern Environmental Law Center Comments at 11; Renewable Northwest Comments at 3, 7; Vote Solar Comments at 1, 24.

¹⁴ Southern Environmental Law Center Comments at 12; Renewable Northwest Comments at 7.

¹⁵ Vote Solar Comments at 10.

¹⁶ Southern Environmental Law Center Comments at 7.

12. The Montana Commission, NorthWestern, and the Montana Consumer Counsel (collectively, Protesting Parties) separately filed protests opposing the Petition. The Protesting Parties argue that the Montana Commission's legally enforceable obligation standard complies with PURPA,¹⁷ and is less onerous than the standards in other states, some of which effectively require the QF to be nearly completed before a legally enforceable obligation can be established.¹⁸ The Protesting Parties also contend that FLS' claims against NorthWestern are "as-applied" PURPA claims subject to Montana Commission jurisdiction and that this Commission lacks jurisdiction over those claims.¹⁹ They further assert that FLS' allegations that NorthWestern violated its OATT have no bearing on the lawfulness of the Montana Commission's decision.²⁰

13. Protesting Parties also argue that the Montana Commission's suspension of the QF-1 Tariff Option 1(a) Standard Rate is consistent with the Montana Commission's obligation under PURPA to protect Montana ratepayers from excessive costs and is not prohibited by the Commission's regulations.²¹ Protesting Parties assert that PURPA and the Commission's regulations do not require the Montana Commission to establish or maintain standard rates for QFs with a design rating that exceeds 100 kW, and therefore characterize such rates as "optional standard rates."²² Furthermore, Protesting Parties state that the Montana Commission's action is not discriminatory against solar facilities because differing policies can be applied to differing QF technologies.²³

¹⁷ Montana Commission Protest at 6; Montana Consumer Counsel Protest at 2.

¹⁸ Montana Commission Protest at 9-12.

¹⁹ Montana Consumer Counsel Protest at 3, 14-15; *accord* NorthWestern Protest at 6.

²⁰ Montana Consumer Counsel Protest at 17.

²¹ NorthWestern Protest at 34-35.

²² Montana Commission Protest at 16-17; Montana Consumer Counsel Protest at 6, 9; NorthWestern Protest at 22.

²³ Montana Commission Protest at 20 (citing *California Public Utilities Commission*, 133 FERC ¶ 61,059 (2010)); NorthWestern Protest at 5 (citing *In re Southern California Edison Co.*, 70 FERC ¶ 61,215, at 61,676 (1995)).

14. NorthWestern asserts that it is still bound by PURPA's must-purchase obligation and that solar QFs over 100 kW can still negotiate individual PPAs with NorthWestern, just as other QFs not eligible for standard rates must do.²⁴ NorthWestern admits that it will not agree to an avoided cost rate equal to its suspended QF-1 Tariff Option 1(a) Standard Rate, but states that, if a QF and NorthWestern cannot agree on a PPA's power sales rate, then the QF can seek relief at the Montana Commission.²⁵

15. In its answer, FLS largely reiterates arguments it raised in the Petition. Additionally, FLS argues that the Montana Commission's decision to revise the eligibility criteria for the QF-1 Tariff Option 1(a) Standard Rate prevents a small solar QF from electing an avoided cost rate at the time the obligation is incurred, and, while the Montana Commission holds out the possibility of its determining the avoided cost rate, the Montana statute deprives the Montana Commission of jurisdiction to hear a request for individual determination of an avoided cost rate for any QF that is eligible to sell electricity to a utility pursuant to a rate schedule approved by the Montana Commission.²⁶

III. Commission Determination

A. Procedural Matters

16. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2016), the timely, unopposed interventions serve to make the entities that filed them parties to this proceeding. Pursuant to Rule 214(d) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214(d) (2016), the Commission will grant SoCal Edison's late-filed motion to intervene given its interest in the proceeding, the early stage of the proceeding, and the absence of undue prejudice or delay.

17. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2016), prohibits an answer to a protest unless otherwise ordered by the decisional authority. We will accept the answer filed by FLS because it has provided information that assisted us in our decision-making process.

²⁴ NorthWestern Protest at 5.

²⁵ *Id.* at 23.

²⁶ FLS Answer at 11-12 (citing Montana Commission Protest at 19-21; NorthWestern Protest at 22-24; Mont. Code Ann. § 69-3-603).

B. Substantive Matters

18. Section 210(h)(2)(B) of PURPA²⁷ permits any electric utility, qualifying cogenerator, or qualifying small power producer to petition the Commission to act under section 210(h)(2)(A) of PURPA²⁸ to enforce the requirement that a state commission implement this Commission's regulations. As the Commission stated in its 1983 Policy Statement,²⁹ it has discretion in choosing whether to exercise that enforcement authority under section 210(h)(2)(A) of PURPA. 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.³⁰

19. The Commission also can and sometimes does issue a declaratory order in response to an enforcement petition.³¹ That declaratory order, issued separately from the Commission's authority under PURPA's section 210(h) enforcement regime, is within the Commission's discretion to issue an order "to remove uncertainty."³² A notice of intent not to act and an accompanying declaratory order represent both the Commission's exercise of its discretion on such an enforcement action, as well as a statement of the Commission's position on the matters addressed. The statement of position by the Commission, in a case where, as here, the Commission decides not to go to court on

²⁷ 16 U.S.C. § 824a-3(h)(2)(B) (2012).

²⁸ *Id.* § 824a-3(h)(2)(A).

²⁹ *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).

³⁰ In those circumstances where the Commission refuses to bring its own enforcement action, 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) (2012).

³¹ *See, e.g., Rainbow Ranch Wind, LLC*, 139 FERC ¶ 61,077 (2012); *Morgantown Energy Associates*, 139 FERC ¶ 61,066 (2012), *denying reconsideration*, 140 FERC ¶ 61,223 (2012); *Cedar Creek Wind, LLC*, 137 FERC ¶ 61,006 (2011) (*Cedar Creek*); *Southern California Edison Co.*, 70 FERC ¶ 61,215, *order on reconsideration*, 71 FERC ¶ 61,269 (1995).

³² *See* 5 U.S.C. § 554(e) (2012); 18 C.F.R. § 385.207(a)(2) (2016).

behalf of petitioners, can provide assistance to a court on the Commission's thinking in the event that the petitioners decide to bring enforcement cases.

20. In this order, we give notice that we do not intend to go to court to enforce PURPA on behalf of FLS; FLS thus may bring its own enforcement action against the Montana Commission in the appropriate United States district court. Notwithstanding our decision not to go to court to enforce PURPA on behalf of FLS, however, we elect to also issue a declaratory order regarding legally enforceable obligations, finding that a requirement for a facilities study or an interconnection agreement, given that the utility can delay the facilities study or delay tendering an executable interconnection agreement, as a predicate for a legally enforceable obligation is inconsistent with PURPA and the Commission's regulations under PURPA.³³

21. The Commission's regulations require that a utility purchase any energy and capacity made available by a QF.³⁴ Under section 292.304(d) of the Commission's regulations, a QF also has the unconditional right to choose whether to sell its power "as available" or pursuant to a legally enforceable obligation at a forecasted avoided cost rate determined, at the QF's option, either at the time of delivery or at the time that the obligation is incurred.³⁵

22. In its June 16, 2016 Decision and in its Order 7500, the Montana Commission determined that solar QFs that met Montana's legally enforceable obligation standard by June 16, 2016 would be grandfathered and allowed to contract at the QF-1 Tariff Option 1(a) Standard Rate, while for all other solar QFs over 100 kW the standard rate would be suspended. In doing so, the Montana Commission reaffirmed the legally enforceable obligation standard it originally established in *Whitehall Wind*. There, the Montana Commission found that, to establish a legally enforceable obligation, a QF must

³³ When a state commission believes that a previously-determined avoided cost rate is no longer an accurate measure of a utility's avoided costs, the appropriate response is not to establish a standard for a legally enforceable obligation that is inconsistent with PURPA and the Commission's regulations under PURPA, but instead to determine a new avoided cost rate that better reflects the utility's avoided costs consistent with the requirements and procedures identified in the Commission's regulations under PURPA. *See* 18 C.F.R. § 292.304(b), (e) (2016); *Windham Solar LLC*, 157 FERC ¶ 61,134, at PP 5-6 (2016).

³⁴ 18 C.F.R. § 292.303(a) (2016).

³⁵ 18 C.F.R. § 292.304(d) (2016).

tender to the utility both an executed power purchase agreement³⁶ and an executed interconnection agreement.³⁷ NorthWestern's Attachment N of its OATT requires that NorthWestern provide an interconnecting generator with an executable interconnection agreement only after the completion of a facilities study.³⁸

23. We find that, just as requiring a QF to have a utility-executed contract, such as a PPA, in order to have a legally enforceable obligation is inconsistent with PURPA and our regulations, requiring a QF to tender an executed interconnection agreement is equally inconsistent with PURPA and our regulations. Such a requirement allows the utility to control whether and when a legally enforceable obligation exists – e.g., by delaying the facilities study or by delaying the tendering by the utility to the QF of an executable interconnection agreement. Thus, the Montana Commission's legally enforceable obligation standard is inconsistent with PURPA and our regulations under PURPA.

24. The Commission has explained that the term 'legally enforceable obligation' is broader than simply a contract between an electric utility and a QF,³⁹ and that a state may not limit the methods through which a legally enforceable obligation may be created to only a fully-executed contract.⁴⁰ In Order No. 69, the Commission stated that the "[u]se of the term 'legally enforceable obligation' is intended to prevent a utility from circumventing the requirement that provides capacity credit for an eligible qualifying facility merely by refusing to enter into a contract with the qualifying facility."⁴¹ The Commission explained in *JD Wind 1, LLC* that the establishment of a legally enforceable obligation turns on the QF's commitment, and *not* the utility's actions:

³⁶ Order 7500 specifies that the PPA only needs to be signed by the QF and submitted to the utility. Order 7500 at P 63.

³⁷ *Whitehall Wind* at P 47.

³⁸ NorthWestern OATT, Attachment N, Section 3.5.7.

³⁹ *Cedar Creek Wind, LLC*, 137 FERC ¶ 61,006, at P 36 (2011) (*Cedar Creek*).

⁴⁰ *Id.* P 35.

⁴¹ *Final Rule Regarding the Implementation of 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 & vacated in part sub nom. Am. Elec. Power Serv. Corp. v. FERC*, 675 F.2d 1226 (D.C. Cir. 1982), *rev'd in part sub nom. Am. Paper Inst. v. Am. Elec. Power Serv. Corp.*, 461 U.S. 402 (1983).

[A] QF has the option to commit itself to sell all or part of its electric output to an electric utility . . . 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.”⁴²

25. We find our order in *Cedar Creek* particularly instructive. There, the Idaho Commission had issued an order requiring a firm energy sales agreement/power purchase agreement to be executed by both parties to the agreement to be eligible for certain published avoided cost rates.⁴³ In response, the Commission found that this requirement made a fully-executed contract a condition precedent to the creation of a legally enforceable obligation, which the Commission found to be inconsistent with PURPA. The Commission further explained that the use of the term “legally enforceable obligation” is intended to prevent the utility from delaying the signing of a contract, so that a later and lower avoided cost is applicable.⁴⁴

26. Here, because the utility can, for example, delay the facilities study and the tendering to the QF of an executable interconnection agreement, the requirement of an executed interconnection agreement imposed by the Montana Commission is no different than requiring a utility-signed contract before the QF can establish a legally enforceable obligation, which, as noted, the Commission has previously found is inconsistent with PURPA and our regulations. In sum, as the Commission has stated: “when a state limits the methods through which a legally enforceable obligation may be created to only a fully-executed contract, the state’s limitation is inconsistent with PURPA, and our regulations implementing PURPA.”⁴⁵ The Montana Commission’s requiring a signed interconnection agreement is no different than requiring a utility-signed contract, and equally impermissible.

⁴² *JD Wind 1, LLC*, 129 FERC ¶ 61,148, at P 25 (2009), *reh’g denied*, 130 FERC ¶ 61,127 (2010).

⁴³ *Cedar Creek*, 137 FERC ¶ 61,006 at P 5.

⁴⁴ *Id.* PP 35-36.

⁴⁵ *Id.* P 35.

27. Finally, we add that the alleged non-compliance with the OATT's interconnection procedures and agreements, as FPA matters, are beyond the scope of this PURPA section 210(h)(2)(a) enforcement proceeding.

The Commission orders:

(A) Notice is hereby given that the Commission declines to initiate an enforcement action under section 210(h)(2)(A) of PURPA.

(B) The Commission hereby finds that the Montana Commission's legally enforceable obligation standard is inconsistent with PURPA and the Commission's PURPA regulations, as discussed in the body of this order.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.