



1 It is critical to the resolution of this case that the Commission not lose sight of the TWO  
2 issues in contention in this docket. One issue is the ownership of renewable energy credits  
3 (“RECs”) and the other issue is Grand View’s entitlement to a power purchase agreement (PPA)  
4 beginning on March 10, 2011. In its order denying Grand View’s Motion for Summary  
5 Judgment the Commission addressed just the issue of REC ownership and failed to address the  
6 issue of Grand View’s LEO.<sup>2</sup> However, the Commission recited the uncontested facts in this  
7 case at length:

8 Unless otherwise indicated, the following facts do not appear in dispute:  
9

10 Grand View’s initial complaint alleges that it has been in contact “with Idaho  
11 Power for several months discussing contract terms and conditions.” Complaint at ¶ 7.  
12 Pursuant to these discussions, Idaho Power sent Grand View a draft power purchase  
13 agreement (PPA) on March 10, 2011 (*hereinafter* the “March 2011 draft PPA” or the  
14 “March draft”). The March draft PPA contained avoided cost rates for the 20 MW solar  
15 plant based upon the Integrated Resource Planning (IRP) methodology for QFs greater  
16 than 100 kW. Motion for Summary Judgment at 1, 5. Grand View maintains that it  
17 agreed to all material terms in the March draft except the provision addressing the  
18 ownership of RECs. *Id.* at 4. Section 8.1 of the draft PPA provides:

19  
20 Under this Agreement, ownership of Green Tags and Renewable Energy  
21 Certificate (RECs), or the equivalent Environmental Attributes, directly  
22 associated with the production of energy from the Seller’s Facility sold to Idaho  
23 Power will be governed by any and all applicable Federal or State laws and/or any  
24 regulatory body or agency deemed to have authority to regulate these  
25 Environmental Attributes or to implement Federal and/or State laws regarding the  
26 same.  
27

28 March 2011 draft PPA (Paul Aff., Exh. 2).  
29

30 After the parties were unable to resolve their dispute regarding § 8.1, the parties  
31 discussed two alternatives proposed by Idaho Power. First, Idaho Power suggested that  
32 the parties split REC ownership on a 50-50 percent basis. Second, Idaho Power proposed  
33 dividing the RECs with Grand View receiving the RECs for the first ten years of the  
34 contract and Idaho Power receiving the RECs for the last 10 years of the Agreement.  
35 Complaint at ¶¶ 11, 12; Idaho Power Answer at ¶¶ 11, 12. After Grand View rejected the  
36 two alternatives, Idaho Power states that it agreed to Grand View’s request to submit a  
37 signed PPA to the Commission for its review including the language of § 8.1 of the PPA  
38 quoted above. This would allow Idaho Power to argue to the Commission that § 8.1 of

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<sup>2</sup> Order No. 32580, June 21, 2012.

1 the PPA should be retained, and conversely, Grand View could argue that § 8.1 should be  
2 deleted. Idaho Power Answer at 14. After Idaho Power agreed to Grand View's  
3 proposal to have the Commission decide the disputed issue, "Grand View instead filed  
4 [its] complaint on August 2, 2011. *Id.*<sup>3</sup>  
5

6 The Commission's factual narrative is compelling in the resolution of the question of Grand  
7 View's entitlement to the March 10, 2011 'draft' PPA. That PPA is attached as Exhibit 1 to Mr.  
8 Paul's affidavit in support of Grand View's Motion for Summary Judgment. Grand View had  
9 agreed to all terms but the single issue that Idaho Power and Grand view had initially agreed to  
10 submit to the Commission for resolution. The only outstanding issue at the time was who owned  
11 the RECs. The question of Idaho Power's obligation to purchase the output from this QF was  
12 not at issue. As discussed more fully below, Grand View had, at that time, created a Legally  
13 Enforceable Obligation on Idaho Power's part to purchase its PURPA power.

14 In construing the disputed § 8.1 in its order denying Grand View's Motion for Summary  
15 Judgment, the Commission modified the meaning of that disputed section by adding the  
16 requirement that "REC ownership will be governed by applicable state law at the time the  
17 contract is executed and approved." Of course, the phrase "at the time the contract is executed  
18 and approved" does not appear in the March 10, 2011, PPA and it does not appear in § 8.1 of that  
19 agreement. Grand View lodged a petition for clarification of the Commission's order on July 9,  
20 2012, pointing out that:

21 QFs can create a legally enforceable obligation without a fully executed and approved  
22 agreement. *See* 18 C.F.R. § 292.304(d)(2); *Cedar Creek Wind*, 137 FERC ¶ 61,006  
23 (2011). The Commission had determined that QFs can create a legally enforceable  
24 obligation without obtaining a fully executed agreement. *See In Re Cedar Creek Wind*,  
25 IPUC Order No. 32419 at 8-9, Case Nos. PAC-E-11-01, -02, -03, -04, -05 (2011). Grand  
26 View submits that the date at which all rates and terms of the contract – including REC  
27 ownership – should be determined is the date that the QF creates a legally enforceable  
28 obligation, whether by fully executed agreement or otherwise.<sup>4</sup>

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<sup>3</sup> *Id.* at 5 – 6.

<sup>4</sup> Petition for Clarification p.7.



1 omitted] We found that the Idaho Commission's orders in those proceedings, by limiting  
2 the circumstances under which a legally enforceable obligation arose, made a fully-  
3 executed contract a condition precedent to a legally enforceable obligation. We held that  
4 such a condition precedent is inconsistent with PURPA and our regulations implementing  
5 PURPA, however, because state restrictions mandating that a legally enforceable  
6 obligation may be created only by a fully-executed contract are inconsistent with PURPA  
7 and the Commission's regulations implementing PURPA. [citation omitted] In addition,  
8 we found that the Idaho Commission's limitation on the conditions for legally  
9 enforceable obligation formation overlooked "the fact that a legally enforceable  
10 obligation may be incurred before the formal memorialization of a contract to writing."  
11 [citation omitted] Indeed we stressed that:

12  
13 [T]he phrase legally enforceable obligation is broader than simply a contract  
14 between an electric utility and a QF and that the phrase is used to prevent an  
15 electric utility from avoiding its PURPA obligations by refusing to sign a  
16 contract, or as here, delaying the signing of a contract, so that later and lower  
17 avoided cost is applicable.<sup>8</sup>

18  
19 It was on August 2, 2011, that Grand View took the extraordinary measure of actually lodging a  
20 complaint with the Commission requesting that Idaho Power execute its standard PURPA PPA  
21 using the 'IRP' methodology for calculating rates. In its pleading, Grand View, complained that,  
22 inter alia: "Idaho Power is in violation of PURPA, FERC's implementing regulations and this  
23 Commission's orders;" that "Idaho Power ... resume inserting language in standard PURPA  
24 PPAs to the effect that Idaho Power makes no claim to REC ownership;" and that "Idaho Power  
25 refuses to enter into the standard PURPA PPA that disclaims REC ownership". Standing alone,  
26 the fact that Grand View lodged a complaint back in August of 2011 is sufficient evidence that  
27 Grand View had unilaterally obligated itself and Idaho Power to a legally enforceable obligation.

28 Indeed Idaho Power presumes the existence of a legally enforceable obligation in the way  
29 it crafted its Answer to Grand View's Complaint. Idaho Power answered:

30 However, Idaho Power admits that it agreed to Grand View's request to submit a signed  
31 contract for the Commission's review containing the proposed language cited above [§  
32 8.1] – to which Idaho Power would seek Commission approval, and to which Grand  
33 View would seek rejection of, and Grand View would advocate that the contract remain

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<sup>8</sup> *Grouse Creek Wind Park, LLC, Grouse Creek Wind Park II, LLC* Docket Nos. EL13-39-000, at P. 15. 142 FERC ¶ 61,187. March 15, 2013.

1 silent as to REC ownership – and that the parties would accept the Commission’s  
2 determination approving or rejecting the language in the signed contract. Upon Idaho  
3 Power’s agreement to this proposal by Grand View to submit the issue to the  
4 Commission in a signed contract with the parties’ rights reserved to argue alternatively as  
5 described above, Grand View instead filed this complaint.<sup>9</sup>  
6

7 Idaho Power’s Admission presupposes the execution of a contract with the parties rights reserved  
8 on the REC issue. That can only mean the parties had a mutual agreement as to all other issues  
9 or else Idaho Power would not have admitted it was prepared to sign the PPA, albeit with REC  
10 reservations. That said, it is, according to FERC, irrelevant that Idaho Power may have been  
11 willing to sign the contract. Grand View has the unfettered right to unilaterally create a LEO  
12 without Idaho Power’s written consent. That is what it did, at a minimum, when it lodged its  
13 complaint seeking an order from the Commission on the question of execution of a standard  
14 PURPA agreement that disclaimed REC ownership.

15 Moreover, FERC’s *Grouse Creek* order made it clear that a QF need not have to even file  
16 a complaint in order to create legally enforceable obligation:

17 A contract serves to limit and/or define bilaterally the specifics of the relationship  
18 between the QF and the utility. A contract may also limit and/or define bilaterally the  
19 specifics of the legally enforceable obligation at the heart of the relationship. But the  
20 obligation can pre-date the signing of the contract. Moreover, the tool of “seek[ing] state  
21 regulatory authority assistance to enforce the PURPA-imposed obligation” does not mean  
22 that seeking such assistance is a necessary condition precedent to the existence of a  
23 legally enforceable obligation. The Idaho Commission’s requirement that a QF formally  
24 complain “meritorious[ly]” to the Idaho Commission before obtaining a legally  
25 enforceable obligation would both unreasonably interfere with a QFs right to a legally  
26 enforceable obligation [citation omitted] and also create practical disincentives to  
27 amicable contact formation. Such obstacles to QFs are at odds with the Commission’s  
28 regulations implementing PURPA. They are not reasonable conditions for a state  
29 PURPA process.<sup>10</sup>  
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31 It is clear, then, that Grand View has gone the ‘extra mile’ in terms of creating a legally  
32 enforceable obligation. Grand View actually took the, according to FERC, unnecessary step of

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<sup>9</sup> Idaho Power Company’s Answer p. 6. Emphasis provided.  
<sup>10</sup> *Grouse Creek, supra* at 17.

1 seeking state regulatory assistance through the filing a complaint seeking a Commission ordered  
2 PURPA agreement.

3 PRAYER FOR RELIEF

4 WHEREFORE Grand View Solar PV Two, LLC respectfully requests this Commission  
5 issue its order declaring that it created a legally enforceable obligation between it and Idaho  
6 Power as of March 10, 2011, and no later than August 2, 2011, and order Idaho Power to tender  
7 an executable contract to that effect containing rates and terms and conditions in effect as of the  
8 date of the Legally Enforceable Obligation. Furthermore, Idaho Power should not insert  
9 disputed Section 8.1 and should otherwise remain silent as to REC ownership in the contract  
10 pursuant to the Commission's ruling in Order No. 32580.

11

Respectfully submitted this 19th day of March 2013.

RICHARDSON AND O'LEARY, PLLC



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Gregory M. Adams (ISB No. 7454)

Attorneys for Complainant

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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on the 19th day of March, 2013, a true and correct copy of the within and foregoing **MOTION FOR DECLARATORY ORDER OF GRAND VIEW PV SOLAR TWO, LLC** was served in the manner shown to:

Ms. Jean Jewell  
Commission Secretary  
Idaho Public Utilities Commission  
472 W. Washington (83702)  
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