Office of the Secretary
Service Date
June 21, 2012

BEFORE THE IDAHO PUBLIC UTILITIES COMMISSION

GRAND VIEW PV SOLAR TWO, LLC,	)	
	)	**CASE NO. IPC-E-11-15**
COMPLAINANT,	)	
	)	
v.	)	
	)	**ORDER NO. 32580**
IDAHO POWER COMPANY,	)	
	)	
RESPONDENT.	)	

On August 2, 2011, Grand View PV Solar Two, LLC filed a formal complaint against Idaho Power Company regarding the parties' negotiation of a Power Purchase Agreement (PPA) under the Public Utility Regulatory Policies Act of 1978 (PURPA). Grand View is the developer of a proposed 20 megawatt (MW) solar generating project to be located in Elmore County. Grand View alleged in its initial complaint that the sole dispute between the parties concerns the disposition of renewable energy credits (RECs) in the draft PPA. In particular, Grand View wanted Idaho Power to disclaim ownership of all RECs in the PPA. Idaho Power filed a timely answer as did intervenor, Avista Corporation.

On November 29, 2011, Grand View filed a Motion for Summary Judgment requesting that the Commission order Idaho Power to enter into the draft PPA dated March 10, 2011, with a condition that "Idaho Power disclaims ownership of all [RECs attributable to] Grand View's solar project. . . ." Motion at 36. Idaho Power and Avista each filed answers to the Motion and asserted that Grand View's Motion should be denied in its entirety.

While Grand View's Motion for Summary Judgment was pending, Grand View "amended" its complaint on December 20, 2011. Grand View alleged that Idaho Power submitted a new draft PPA on December 2, 2011 that "contains rates and terms and conditions not in the originally tendered contract." First Amended Complaint at ¶ 34. Grand View requested that the Commission order Idaho Power to execute the March 2011 draft PPA and reiterated its request that the Commission compel the utility to add language that Idaho Power "disclaim . . . ownership of the RECs generated by the operation of Grand View Two's solar project." First Amended Complaint at 3. On January 25, 2012, Idaho Power filed an answer to

Grand View's First Amended Complaint requesting that the Commission deny the requested relief and dismiss the complaint.[1]

Based upon our review of the pleadings and record in this case, the Commission denies Grand View's Motion for Summary Judgment as set out in greater detail below.

BACKGROUND

A. Parties

Grand View Solar is an Idaho limited liability company formed for the purpose of developing a 20 MW nameplate facility that will use photovoltaic (PV) solar panels to convert solar energy into electric energy. Complaint at ¶ 2; Motion at 4. Grand View desires to build its PV facility near Grandview, Idaho and to sell the output from the plant to Idaho Power pursuant to a PURPA contract (i.e., the PPA). Motion at 4. Grand View's managing member for the project is Alternative Power Development, Northwest, LLC.[2] Paul Aff. at ¶ 6. On July 15, 2011, Grand View filed its Notice of Certification as a "qualifying facility" (QF) with the Federal Energy Regulatory Commission (FERC).[3]

Idaho Power is an Idaho corporation and Avista is a Washington corporation. Both are electric public utilities subject to the jurisdiction and regulation of this Commission. *Idaho Code* §§ 61-119 and 61-129.

The following parties and counsel participated in this docket:

Grand View Solar	Peter J. Richardson Gregory M. Adams Richardson & O'Leary
Idaho Power Company	Donovan E. Walker Jason B. Williams
Avista Corporation	Michael G. Andrea

[1] After completing deliberations in this matter, Grand View filed a "Notice of Settlement Discussions" on June 1, 2012. Grand View asked the Commission to refrain from taking formal action in this case while discussions are underway and that the parties will report on the progress of those discussions by June 15, 2012. The parties have not filed any report and consequently, the Commission issues this Order.

[2] Also an Idaho limited liability company.

[3] FERC Docket No. QF11-405.

B. PURPA

Congress passed PURPA in 1978 in response to a national energy crisis. Its purpose was to lessen the country's dependence on foreign oil and to encourage the promotion and development of renewable energy technologies as alternatives to fossil fuels.[4] To encourage the development of renewable generating facilities, Section 210 of PURPA requires that electric utilities (such as Idaho Power) purchase power produced by co-generators or small power producers that obtain QF status under PURPA. 16 U.S.C. § 824a-3(b); 18 C.F.R. § 292.303(a). This mandatory purchase requirement is often referred as the "must purchase" provision of PURPA and its implementing regulations promulgated by FERC.

Under the must purchase provision, the rate a QF is to receive for the sale of its power to a utility is generally referred to as the "avoided cost" rate. The avoided cost rate represents the "incremental cost" to the purchasing utility of power which, but for the purchase of power from the QF, such utility would either generate itself or purchase from another source. *Rosebud Enterprises v. Idaho PUC ("Rosebud I")*, 128 Idaho 624, 917 P.2d 781 (1996); 18 C.F.R. § 292.101(b)(6). The PURPA avoided cost rates are intended to compensate the QF only for the purchased power – avoided cost rates "are not intended to compensate the QF for [RECs]." *Morgantown Energy Associates*, 139 FERC 61,066 at ¶ 47 (April 24, 2012); *American Ref-Fuel Company*, 105 FERC 61,004 (Oct. 1, 2003), *reh'g denied*, 107 FERC 61,016 (April 15, 2004), *dismissed sub nom. for lack of jurisdiction, Xcel Energy Services v. FERC*, 407 F.3d 1242 (D.C. Cir. 2005). "PURPA . . . does not address the ownership of RECs." *American Ref-Fuel*, 105 FERC at ¶ 23.

C. Portfolio Standards and RECs

A Renewable Portfolio Standard (RPS) typically requires utilities to generate or purchase a certain percentage of their annual electric generation (their "portfolio") from designated renewable energy sources, or alternatively, meet their RPS obligation by the purchase of unbundled RECs from renewable generators. *Alliance to Protect Nantucket Sound v. Dept. of Public Utilities*, 959 N.E.2d 413, N.7 (Mass. 2011). The creation of RPS programs by the states occurred well after PURPA was enacted in 1978; RPS programs have generally been adopted since about 1995. *Steven Ferrey, et al.* "Fire and Ice: World Renewable Energy and Carbon Control Mechanisms Confront Constitutional Barriers," 20 Duke Envtl.L. & Pol'y F. 125 at 146

[4] See *FERC v. Mississippi*, 456 U.S. 742, 745-46, 102 S.Ct. 2126, 2130 (1982).

(Winter 2010)(hereinafter "*Ferrey*"). As FERC noted in its *American Ref-Fuel Order*, the adoption of RPSs "are premised on promoting policy goals such as improved air and water quality, reduction of greenhouse gas emissions, broader fuel diversity, enhanced energy security, and hedging against the price volatility of fossil fuels." 105 FERC at ¶ 4.

About 25 states and the District of Columbia have created mandatory RPS programs and 4 states have issued less stringent policy guidelines. *Ferrey* at 146. The RPS programs differ from state to state. In particular, states have adopted different RPS criteria to address a variety of factors including: (1) the percentage of renewable energy required; (2) what technologies qualify as "renewable"; (3) limiting eligible renewable resources by date; (4) whether the resource is located in-state or out-of-state; and (5) whether the utility may simply purchase RECs without actually generating or purchasing the energy. *Id.* at 146-50; *see also In Re Provision of Basic Generation Service*, 984 A.2d 437 (N.J. App. Div. 2009); *New Mexico Industrial Energy Consumers v. New Mexico PRC*, 168 P.3d 105, 108 (N.M. 2007). For example, Oregon adopted its RPS requirements in 2007 (O.R.S. § 469A). Under Oregon's RPS, certain electric utilities must generate a sliding percentage of their retail sales from "renewable" generating facilities: 5% by 2011, 15% by 2015, and 25% by 2025. Oregon § 469A.050. Washington has similar RPS requirements that were enacted in 2009.

About half of the states that have adopted RPS programs allow utilities to use renewable energy credits (RECs) to meet their RPS requirements. *Ferrey* at 145. RECs (also known as green tags, environmental attributes, or renewable trading certificates) typically represent the environmental attribute associated with 1 MWh of electricity generated from an eligible renewable energy resource. Order Nos. 29480; 32002. As the Second Circuit explained in *Wheelabrator Lisbon v. Connecticut Dept. Public Utility Control*,

> RECs are "tradable certificates . . . that correspond to a certain amount of renewable energy generated by a third party." *American Ref-Fuel*, 105 FERC at ¶ 61,005. Generally speaking, RECs are inventions of state property law whereby the renewable energy attributes are "unbundled" from the energy itself and sold separately. The credits can be purchased by companies and individuals to offset use of energy generated from traditional fossil fuel resources or . . . to satisfy certain requirements that [utilities] purchase a certain percentage of their energy from renewable resources.

531 F.3d 183, 186 (2d Cir. 2008) (emphasis added). "One-third of sales of 'green' electricity are actually the purchase of . . . state-created RECs, rather than the energy itself." *Ferrey* at 157.

FERC has noted that RECs did not exist and were not contemplated when PURPA was enacted in 1978. *American Ref-Fuel*, 105 FERC at ¶ 4; Order No. 29480 at 3. Issues regarding RECs ownership have generally arisen since states began adopting RPS programs over the last 15 years. *American Ref-Fuel*, 105 FERC at ¶ 23; *Xcel Energy*, 407 F.3d at 1242; *In Re Ownership of Renewable Energy Certificates*, 913 A.2d 825 (N.J. App. Div. 2007). FERC observed in 2003 that "RECs have been created in recent years by State programs typically designed to promote increased reliance on renewable energy resources." *American Ref-Fuel*, 105 FERC at ¶ 23. RECs "exist outside the confines of PURPA. PURPA thus does not address the ownership of RECs. . . . States, in creating RECs, have the power to determine who owns the RECs in the initial instance, and how they may be sold or traded; it is not an issue controlled by PURPA." *Id.* at ¶ 23 (emphasis added); Order No. 29480; *Idaho Wind Partners*, 136 FERC 61,174 at n.10 (Sept. 15, 2011) ("the sale and trading of RECs are for the states to decide"). "[I]nsofar as RECs are state-created, different states can treat RECs differently." *American Ref-Fuel*, 107 FERC 61,016 at n.4.

Unlike many of our surrounding states, the Idaho Legislature has considered but not adopted an RPS. 2012 Idaho Energy Plan § 3.2.2 at p. 78 (Jan. 10, 2012). The parties here agree the State of Idaho has not adopted a RPS program for electric utilities and it has not created a REC program. Order Nos. 29577; 29480; 29577.

D. The Facts

The underlying facts in this case are taken from the pleadings and the affidavit of Grand View's manager, Robert Paul. Unless otherwise indicated, the following facts do not appear in dispute.

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

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

March 2011 draft PPA. § 8.1 (Paul Aff., Exh. 2).

After the parties were unable to resolve their dispute regarding § 8.1, the parties discussed two alternatives proposed by Idaho Power. First, Idaho Power suggested that the parties split REC ownership on a 50-50 percent basis. Second, Idaho Power proposed dividing the RECs with Grand View receiving the RECs for the first 10 years of the contract and Idaho Power receiving the RECs for the last 10 years of the Agreement. Complaint at ¶¶ 11, 12; Idaho Power Answer at ¶¶ 11, 12. After Grand View rejected the two alternatives, Idaho Power states that it agreed to Grand View's request to submit a signed PPA to the Commission for its review including the language of § 8.1 quoted above. This would allow Idaho Power to argue to the Commission that § 8.1 of the PPA should be retained, and conversely, Grand View could argue that § 8.1 should be deleted. Idaho Power Answer at 14. After Idaho Power agreed to Grand View's proposal to have the Commission decide the disputed issue, "Grand View instead filed [its] complaint" on August 2, 2011. *Id.*

MOTION FOR SUMMARY JUDGMENT

A. Standard of Review

The Commission's Rules of Procedure do not specifically address motions for summary judgment. However, in the past the Commission has adopted the standards for summary judgment as set out in the Idaho Rules of Civil Procedure (IRCP). Order No. 28888; 28832; 32246; 29687. Summary judgment may be granted only if "the pleadings, depositions, and admissions of file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." IRCP 56(c). "Where the evidentiary facts are undisputed and the [Commission] will be the trier of fact, 'summary judgment is appropriate, despite the possibility of conflicting inferences because the [Commission] alone will be responsible for resolving the conflict between those inferences.'" *McKoon v. Hathaway*, 146 Idaho 106, 109, 190 P.3d 925, 928 (2008) *quoting Drew v. Sorensen*, 133 Idaho 534, 537, 989 P.2d 276, 279 (1999); *Riverside Development Co. v. Ritchie*, 103 Idaho

515, 519, 650 P.2d 657, 661 (1982). A mere scintilla of evidence or only slight doubt as to the facts is not sufficient to create a genuine issue of material fact for purposes of summary judgment. *Samuel v. Hepworth Nungester & Lezamiz*, 134 Idaho 84, 996 P.2d 303 (2002). Summary judgment must be denied if a reasonable person could reach different conclusions or draw conflicting inferences from the evidence. *Smith v. Meridian Joint School District No. 2*, 128 Idaho 714, 918 P.2d 583 (1996). Where the Commission acts as the trier of fact, it is not constrained to draw inferences in favor of the party opposing a motion for summary judgment, but instead, can arrive at the most probable inferences to be drawn from uncontroverted evidentiary facts. *Riverside*, 103 Idaho 518-20, 650 P.2d at 661-62.

B. Jurisdiction

"State public utility commissions (PUCs) are responsible for implementing the FERC's [PURPA] rules. . . ." *Xcel*, 407 F.3d at 1243. As the Idaho Supreme Court has recognized, the Idaho Commission "has authority under PURPA and implementing regulation of the [FERC] to set avoided cost [rates], to order electric utilities to purchase power from small power producers, and to implement [FERC's PURPA] rules." *Rosebud I*, 128 Idaho at 613, 917 P.2d at 770 (internal punctuation and footnote omitted). "According to the FERC, '[i]t is up to the states, not [FERC], to determine the specific parameters of individual QF power purchase agreements." *Rosebud Enterprises v. Idaho PUC (Rosebud II)*, 128 Idaho 609, 623, 917 P.2d 766, 780 (1996). Our Supreme Court has also held that the Commission has jurisdiction to examine common law contract issues between QFs and utilities. *A.W. Brown v. Idaho Power Co.*, 121 Idaho 812, 819, 828 P.2d 841, 848 (1992). The Commission "has jurisdiction to hear complaints against utilities alleging violation of any provision of law . . . *and is the appropriate forum to . . . determine whether a regulated utility has an obligation under PURPA to purchase power from an applicant.*" *Id.* (emphasis original) *quoting Empire Lumber Co. v. Washington Water Power*, 114 Idaho 191, 192, 755 P.2d 1229 (1988).

DISCUSSION AND FINDINGS

In its Motion for Summary Judgment, Grand View contends that the sole issue in dispute is the § 8.1 REC language contained in the March 2011 PPA and that this dispute raises purely legal issues. Motion at 7. Grand View further maintains there are no facts in dispute. *Id.* As discussed in greater detail below, Grand View asserts that the proposed REC language violates PURPA, the dormant Commerce Clause of the U.S. Constitution, and the Taking

Clauses of both the U.S. and Idaho Constitutions. *Id.* at 1-2. Not only does Grand View request that the REC provision § 8.1 be removed but that Idaho Power disclaim ownership of all RECs associated with the solar project. Finally, Grand View requests that with these two changes, the Commission order Idaho Power to enter into a PPA with all the terms and conditions set out in the March 2011 draft PPA. *Id.*; Amended Complaint.

Both Idaho Power and Avista individually argue that REC language contained in § 8.1 of the March 2011 draft PPA does not assign REC ownership to either Grand View or Idaho Power. They assert that there is no Idaho law that confers ownership of the RECs to Grand View and this legal issue "is currently unsettled in Idaho." Avista Answer at 7; Idaho Power Answer at 7-8, 26.

A. Areas of Agreement – Federal and Idaho Law

At the outset, we note that there are several areas of common agreement among Grand View, Idaho Power and Avista that serve to narrow the issues in dispute. First, all the parties agree that PURPA does not control RECs – RECs are state-issued rights. Grand View Motion at 5, 8-9; Avista Answer at 3, 8; Idaho Power Answer at 5-6. In particular, Grand View quotes from FERC's decision in *American Ref-Fuel* that QF contracts "do not convey RECs to the purchasing utility (absent an express provision in a contract to the contrary)." Motion at 8 *quoting* 105 FERC at ¶ 24. In its Declaratory Order, FERC states: "RECs are created by the States. They exist outside the confines of PURPA. What is relevant here is that RECs are created by the States. PURPA thus does not address the ownership of RECs." 105 FERC at ¶ 23. We agree and note that the parties do not argue that any other federal law governs the ownership of RECs.

Second, Grand View and Avista agree that avoided cost rates do not convey ownership of RECs. Grand View Motion at 8-9; Avista Answer at 9. As noted above, PURPA avoided cost rates are intended to compensate the QF for the purchased power – avoided cost rates "are not intended to compensate the QF for [RECs]." *Morgantown Energy Associates*, 139 FERC 61,066 at ¶ 47 (April 24, 2012); *American Ref-Fuel*, 105 FERC 61,004; Order No. 29480. "RECs are separate commodities . . . and [are] not part of the avoided cost calculation. . . ." *California PUC*, 133 FERC 61,059 at ¶ 31 n.62 (Oct. 21, 2010). However, FERC regulations provide that avoided costs may "differentiate" among QFs "using various technologies on the basis of the supply characteristics of the different technologies." *Id.* at ¶ 23 *quoting* 18 C.F.R. §

292.304(c)(3)(ii). Moreover, avoided costs may take into account "real costs" that would be incurred by a utility if a state were to require the "utility to procure a certain percentage of energy from generators with certain characteristics, generators . . . that are relevant to the determination of the utility's avoided cost for that procurement requirement." *Id.* at ¶ 29.

Third, we note that the parties also agree that no Idaho law implements a RPS program or addresses the ownership of RECs. Grand View at 5, 15-16; Avista at 7; Idaho Power at 6-7, 9. As the Commission has noted on several occasions, the "State of Idaho has not created a [REC] program, has not established a trading market for [RECs] nor does it require a renewable resource portfolio standard." Order No. 29480 at 16; 29577 at 2; 29630 at 5. Moreover, Grand View has not pointed to any Idaho law or judicial opinion that addresses the ownership of RECs. Finding no specific federal or state laws governing the ownership of RECs, we turn next to Grand View's argument that other facts support its assertion.

B. Grand View's Material Facts

In its Summary Judgment Motion, Grand View argues that "under any reasonable interpretation of the current QF rate mechanism and existing Idaho Commission orders implementing PURPA, Idaho QFs are the default owners [of] the environmental attributes." Motion at 16. To support its argument, Grand View relies on two prior Commission Orders, REC requirements from surrounding states, and Idaho Power's prior waiver of REC ownership. We first examine the two Commission Orders.

1. Prior Orders. Shortly after FERC issued its Declaratory Order in *American Ref-Fuel*, Idaho Power filed a petition with this Commission asking the Commission to determine the ownership of RECs. Case No. IPC-E-04-02. In its petition, Idaho Power requested that it be afforded a "right of first refusal" to purchase RECs from QF developers. After receiving comments from utilities, QF developers and other interested persons, the Commission dismissed the petition because it did not "present an actual or judiciable controversy in Idaho and is not ripe for a declaratory judgment by this Commission." Order No. 29480.

Grand View suggests that our dismissal of Idaho Power's petition demonstrates that Idaho law does not convey RECs to the utility. Motion at 13. We find that Grand View's interpretation of this Order is erroneous. As noted above, the Commission dismissed the petition because it did not present an actual or judiciable controversy and was not ripe for a declaratory judgment by the Commission. Order No. 29480 at 16. The Commission did not reach the issue

of REC ownership. Although the Commission denied the petition, we offered guidance to PURPA contracting parties. More specifically, the Commission recognized that parties were free to "voluntarily negotiate[e] the sale and purchase of such [unbundled RECs] should [they] be perceived to have value." *Id.*; *see also* Order No. 29577 at 2. But this statement does not address the question of who owns RECs in the first instance.

Unlike the must purchase provision of PURPA, we have held that the parties to a QF contract or PPA are free to contract for the ownership of RECs. Our Supreme Court has declared that "Freedom of contract is a fundamental concept underlying the law of contract and is an essential element of the free enterprise system." *Morrison v. Northwest Nazarene University*, 152 Idaho 660, 661, 273 P.2d 1253, 1254 (2012) *quoting Rawlings v. Layne & Boles Pump Co.*, 93 Idaho 496, 499, 465 P.2d 107, 110 (1970). In many ways, RECs are similar to other intangible assets. Intangible assets (RECs) are non-physical assets which exist only in connection with something else, i.e., the purchase of renewable power under PURPA. Black's Law Dictionary 808 (6th Ed. 1990). In other words, but for the "must purchase" provision of PURPA, there might be no PPA and RECs would not exist or be created.[5]

In Order No. 29480, the Commission quoted extensively from *American Ref-Fuel*. In particular, the Commission noted that

> RECs are relative[ly] recent creations of the states. Seven states have adopted renewable portfolio standards that use unbundled RECs. What is relevant here is that the RECs are created by the states. They exist outside the confines of PURPA. PURPA thus does not address the ownership of RECs. The contracts for sale of QF [power], entered into pursuant to PURPA, likewise do not control the ownership of the RECs (absent an express provision in the contract). States, in creating RECs, have the power to determine who owns the RECs in the initial instance, and how they may be sold and traded; it is not an issue controlled by PURPA.

Order No. 29480 at 3 (emphasis added) *quoting American Ref-Fuel*, 105 FERC 61,004 at ¶ 23 (Oct. 1, 2003) *rehr'g denied*, 107 FERC ¶ 61,016 (April 15, 2004).[6] The Commission expressly denied "any and all other relief requested by the commenting parties as may be related to the 'Environmental Attributes' associated with QF renewable energy." Order No. 29480 at 17. The Commission is in the best position to construe its own Orders and we did not hold that QFs are

[5] We recognize that RECs exist in non-PURPA renewable projects. *See* Order Nos. 30259; 30485.

[6] The Commission also noted that "the State of Idaho has not created a [REC] program, has not established a trading market for [RECs], nor does it require a renewable resource portfolio standard." Order No. 29480 at 16.

the default owners of RECs. What is clear from our review of Order No. 29480 is that the Commission did not decide the ownership of RECs. Any inference to the contrary is in error.

Grand View also relies on another 2004 case approving a PPA between Idaho Power and Simplot, Case No. IPC-E-04-16. Motion at 13. In this case, Simplot was operating a cogeneration facility with a PPA that would renew year-to-year unless terminated. In the PPA, Idaho Power waived any claim to ownership of the environmental attributes associated with the PPA. In approving the PPA, the Commission noted that "[t]he regulatory landscape has not changed" since the Commission issued its earlier Order No. 29480 less than five months earlier. Order No. 29577 at 5. Given the agreement between the parties, the Commission did not address the REC ownership issue. The Commission again observed that the state "has still not created a [REC] program, has not established a trading market for [RECs], nor does it require renewable resource portfolio standards." *Id.* at 2, 5-6. The Order reiterates that "utilities and QFs are free to voluntarily contract and negotiate the sale and purchases of such [RECs] should environmental attributes be perceived by the contracting parties to have value." *Id.* at 6.

We find Idaho Power's waiver of its ownership of RECs in this 2004 PPA case is not controlling in all subsequent cases for several reasons. First, in its application to approve the Simplot PPA, Idaho Power states that it "waives any claim to ownership of the Environmental Attributes." Application at 5; PPA at § 8.1 (emphasis added). As our Supreme Court has stated a "waiver is a voluntary, intentional relinquishment of a known right. . . ." *Knipe Land Co. v. Robertson*, 151 Idaho 449, 457, 259 P.3d 595, 604 (2011) (emphasis added). In Mr. Paul's affidavit for Grand View he states that he "understood Idaho Power affirmatively waived ownership of [RECs] . . . [i]n past PURPA contracts." Aff. at ¶ 10; *see also* ¶ 11. Because a waiver is voluntary, we find that there is no bar to Idaho Power later deciding to not waive its claim to REC ownership.

Second, the application declares that it is an "open question" whether Environmental Attributes (EAs) have any value (at the time) given the lack of either a RPS or REC program in Idaho. *Id.* Thus, Idaho Power waived any legal right to the RECs because Idaho had no REC program and RECs lacked value at that time. *Id.* at 6.[7] Third, more recently, this Commission has approved PPAs between Idaho Power and QFs where REC ownership is split either 50%-50% over the life of the PPA, or to the QF in the first 10 years and to Idaho Power in the last 10

[7] We do not decide whether the cogeneration energy in the Simplot case qualifies as RECs, i.e., renewable energy.

years. See Order Nos. 32125 (Rockland), 32294 (Clark Canyon), 32384 (Interconnect Solar), and 32451 (Riverside).[8] These recent cases demonstrate that Idaho Power has not permanently waived its right to RECs.

What is clear in our review of these two Orders is the Commission did not squarely decide the ownership of RECs, nor did we implicitly indicate that RECs are the sole property of QFs. As the finder of fact, we do not infer from these Orders that Idaho Power has permanently waived its rights to RECs, or that a utility does not have a right to RECs, or that this Commission has determined that RECs ownership vests entirely with QFs. These two Orders do not support Grand View's Motion for Summary Judgment as a matter of law.[9]

2. Other States. Likewise unavailing is Grand View's reliance on the rules or orders of neighboring states such as Oregon and Montana that have RPS programs and sometime confer REC ownership on QFs. Motion at 14-15. In Oregon, the QF retains the ownership of RECs "[u]nless otherwise agreed to by separate contract." Or. Admin. Rules, 860-022-0075. Thus, there is flexibility in REC ownership. In addition, the Oregon rule only applies to PPAs "executed on or after the effective date of this rule." *Id.* Thus, the Oregon rule does not apply to Oregon PPAs executed before the November 2005 rule.

In Montana, QFs may choose among four different rate options. Under two rate options the QF may convey all RECs to the utility and receive one rate, or the QF may choose to keep the RECs and receive a different rate. QFs and utilities may also separately negotiate for RECs. Order No. 6973d at ¶¶ 137, 140, 143 (Case No. D2008.12.146, April 13, 2010). Under a third rate option, the RECs must be conveyed to the utility and the purchase rate is reduced in the first 10 years of the PPA by the federal production tax credit. *Id.* at ¶ 147.

As the Commission has consistently observed, Idaho has no renewable portfolio standard, nor does it have a REC program. Order Nos. 29480 and 29577. We find rules or decisions from other states are not controlling here. Moreover, Montana seems to adjust the QF rate for items such as reserves, federal production tax credits, and whether the RECs are transferred to the utility. What this Commission has said is that QFs and utilities may voluntarily negotiate RECs. *Id.* Moreover, early cases from other states regarding the ownership of RECs

[8] The recent PacifiCorp-Cedar Creek PPA split RECs 10 years and 10 years. Order No. 32419.

[9] We note that parties in the generic PURPA investigation (GNR-E-11-03) have addressed the issue of REC ownership. Testimony in that case will be heard in August 2012.

in pre-2000 power purchase agreements have held that the RECs "are the property of the purchasing utility rather than the producer." *In Re Ownership RECs*, 913 A.2d at 828, *citing* Holt, *Who Owns Renewable Energy Certificates?* at p. 14. In that case, the New Jersey Appellate Court noted that at least nine other states ruled that RECs belonged to the purchaser of the renewable energy. *Id.*; *see also Wheelabrator*, 532 F.3d at 186-90. Consequently, we do not find the rules and orders of other states to be controlling in Idaho – where Idaho has no RPS or REC programs.

Based upon our review of Grand View's arguments and the facts as presented, we cannot find as a matter of law that ownership of RECs vests solely in Grand View. In addition, we find the inferences suggested by Grand View from our prior Orders do not support its Motion for Summary Judgment. Consequently, Grand View's Motion for Summary Judgment is denied.

C. PURPA Preemption

Grand View next argues that the proposed REC language in § 8.1 of the draft PPA is preempted by PURPA. More specifically, Grand View maintains that if the Commission allows such language to remain in the PPA, this provision would constitute a "reopener provision" that would subject Grand View to "ongoing changes in regulatory conditions regarding REC ownership" and would be preempted under PURPA. Motion at 17. Grand View maintains that Section 210(e) of PURPA preempts a state commission from approving a PPA with a "contract reopener" provision. 16 U.S.C. § 824a-3(e); 18 C.F.R. 292.602. Instead, Grand View urges the Commission to order Idaho Power to delete § 8.1 and direct Idaho Power to expressly disclaim any ownership rights it may have in RECs. Again, Section 8.1 of the March 2011 draft PPA provides in pertinent part

> Under this Agreement, ownership of Green Tags and Renewable Energy Certificate (RECs) . . . from [Grand View's] Facility sold to Idaho Power will be governed by any and all applicable Federal or State laws and/or any regulatory body or agency deemed to have authority to regulate these Environmental Attributes or to implement Federal and/or State laws regarding the same.

In their respective answers, both Idaho Power and Avista insist that Grand View has misconstrued this provision on two counts. First, Avista asserts that this provision "does not assign ownership to either Grand View or Idaho Power; rather, it merely states, in effect, the unremarkable proposition that ownership of RECs will be determined in accordance with

applicable law." Avista Answer at 7. For its part, Idaho Power also maintains that the provision does not allocate ownership to either the QF or the utility. Idaho Power asserts that § 8.1 "merely states that ownership will be determined by the applicable law." Idaho Power Answer at 5. Second, Avista and Idaho Power both argue that the language of § 8.1 is not a contract reopener, is not preempted by PURPA, and does not subject the QF to utility type regulation. Avista Answer at 7; Idaho Power Answer at 15-16.

We first find that Grand View has misconstrued the language in § 8.1. This language does not definitively confer REC ownership on either Grand View or Idaho Power. It merely states that REC ownership will be governed by applicable state law at the time the contract is executed and approved. As indicated above, RECs are inventions of state property law. *American Ref-Fuel*, 105 FERC 61,004 at ¶¶ 23-24; *Wheelabrator*, 531 F.3d at 186. FERC has consistently held that PURPA does not control the ownership of RECs. More to the point, RECs are created by the states and exist outside the confines of PURPA (with the exception of express provisions in a PPA). *American Ref-Fuel*, 105 FERC at ¶ 23; *Idaho Wind Partners*, 134 FERC 61,217 (March 17, 2011); *rehr'g dismissed*, 136 FERC 61,174 at ¶ 10 (Sept. 15, 2011). Consequently, we find that § 8.1 of the draft contract does not confer REC ownership.

We next examine whether the language of § 8.1 is a "reopener." While we generally agree in principle with Grand View that a contract provision that would require future changes in the rates or terms of PPAs would be impermissible under PURPA, we find that § 8.1 is not a reopener. We further find Grand View's reliance on *Freehold Cogeneration Association v. Board of Regulatory Comm'rs of New Jersey*, 44 F.3d 178 (3rd Cir. 1995) is misplaced. *Freehold* involved an attempt by the New Jersey Board to reopen a PPA previously entered into between Freehold and the utility, and approved by the Board. We recognize that "Congress did not intend to impose traditional ratemaking concepts" on the sale of QF power to utilities. *American Paper Institute v. American Electric Power Service Corp.*, 461 U.S. 402, 414, 103 S.Ct. 1921, 1928-29 (1983). Once a PPA has been executed and approved by the Commission – once the contract terms are set – they are generally not subject to future change absent the express language of the PPA, or the agreement of the parties. *See Rosebud I*, 128 Idaho at 622-23, 719 P.2d at 779-80; *Afton Energy v. Idaho Power Co.*, 107 Idaho 781, 786-87, 693 P.2d 427, 432-33 (1984).

As indicated above, § 8.1 of the March 2011 draft PPA merely reflects that REC ownership will be determined by applicable law when the PPA is executed and approved. It

does not subject Grand View to future changes in the ownership of RECs. Moreover, we note that the parties here have not entered into a contractual agreement and the Commission has not approved the PPA. Grand View attempts to create ambiguity where none exists and has misconstrued this clause. The plain language of § 8.1 would not subject the PPA to changing conditions. Consequently, we find that § 8.1 is not preempted by PURPA.

D. Taking and Commerce Clause Claims

Grand View next asserts that if the Commission were to approve the proposed language of § 8.1, the section would constitute a taking of Grand View's REC property under the Fifth Amendment of the United States Constitution and under Article 1 § 14 of the Idaho Constitution. Motion at 20. Grand View also argues that the language § 8.1 will violate the dormant Commerce Clause of the U.S. Constitution. *Id.* at 27.

Idaho Power and Avista argue there is no taking or Commerce Clause violation. Both utilities argue that the language of § 8.1 performs no "taking" of property. Consequently, the "takings clause of the U.S. and Idaho Constitutions does not apply. Grand View is not entitled to judgment as a matter of law." Idaho Power Answer at 17. Avista also notes that the Commission has not yet approved the PPA. Thus, any takings or Commerce Clause arguments are premature and speculative.

Based upon our review of the language in § 8.1 of the March 2011 draft PPA, we find that this language does not constitute a taking under either the Idaho or U.S. Constitutions. As set out above, ownership of RECs is a matter to be determined by state law. The language of § 8.1 does not assign ownership but merely states that "ownership of [RECs] will be governed by any and all applicable Federal or State laws. . . ." § 8.1. This does not constitute a taking. There is no unconstitutional taking because § 8.1 does not purport to assign REC ownership and Grand View has failed to adequately demonstrate that it is the de facto owner of all the RECs. As the Connecticut Supreme Court found in a similar case: "We agree with the Trial Court that the [PUC's] decision [to award RECs to the utility] could not constitute an unconstitutional taking under the State's Constitution because no property owned by the [QF] has been taken." *Wheelabrator Lisbon v. Dept. of Public Util. Control*, 283 Conn. 672, 700, 931 A.2d 159, 177 (2007); *Wheelabrator Lisbon v. Conn. Dept. of Public Util. Control*, 526 F.Supp.2d 295, 307 (D.Conn. 2006).

We also find that Grand View's argument regarding the Commerce Clause is without merit. Section 8.1 does not assign ownership of the RECs to either Idaho Power or Grand View, but merely states that REC ownership will be based upon applicable law. Grand View cannot assert a Commerce Clause violation when the ownership of RECs has not been decided. Consequently, this issue is premature and speculative.

ORDER

IT IS HEREBY ORDERED that Grand View's Motion for Summary Judgment is denied.

DONE by Order of the Idaho Public Utilities Commission at Boise, Idaho this 21st day of June 2012.

PAUL KJELLANDER, PRESIDENT

MACK A. REDFORD, COMMISSIONER

MARSHA H. SMITH, COMMISSIONER

ATTEST:

Jean D. Jewell
Commission Secretary

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