

BEFORE THE IDAHO PUBLIC UTILITIES COMMISSION

GRAND VIEW PV SOLAR TWO, LLC,)	
)	CASE NO. IPC-E-11-15
COMPLAINANT,)	
)	
v.)	
)	ORDER NO. 32861
IDAHO POWER COMPANY,)	
)	
RESPONDENT.)	

On August 2, 2011, Grand View PV Solar Two filed a formal complaint against Idaho Power Company regarding the parties’ negotiation of a Power Purchase Agreement (PPA or Agreement) under the Public Utility Regulatory Policies Act of 1978 (PURPA). Grand View is the developer of a proposed 20 megawatt photovoltaic (PV) solar generating project to be located in Elmore County. In its initial complaint and subsequent Motion for Summary Judgment filed November 29, 2011, Grand View alleged that the sole dispute between the parties concerned the ownership of renewable energy credits (RECs) in the draft PPA dated March 10, 2011. RECs (also known as green tags, environmental attributes, or renewable trading certificates) typically represent the environmental attributes associated with 1 megawatt-hour (MWh) of electricity generated from an eligible renewable energy resource. Order Nos. 32580 at 4; 32802 at 8. Grand View requested the Commission order Idaho Power to expressly disclaim ownership of all RECs in the Agreement. Idaho Power and Avista Corporation (an intervenor) each filed answers to the summary judgment motion arguing that Grand View’s Motion should be denied in its entirety.

In June 2012, the Commission issued Order No. 32580 denying Grand View’s Motion for Summary Judgment. The parties agreed and the Commission found that no Idaho law specifically addresses the ownership of RECs. Order No. 32580 at 10. The Commission stated that it “cannot find as a matter of law that ownership of RECs vests solely in Grand View.” *Id.* at 13.

After the Commission issued its Order denying summary judgment Grand View filed two pleadings. First, in July 2012, Grand View filed a Petition for Clarification requesting the Commission clarify four points in its Summary Judgment Order No. 32580. Second, on March

19, 2013, Grand View filed a Motion for Declaratory Order. Notwithstanding the parties' dispute regarding REC ownership, Grand View argues in its Motion for Declaratory Order that a legally enforceable obligation was created between the parties on March 10, 2011 (the date of the draft PPA). Motion at 1. Idaho Power filed a timely Cross-Petition for Clarification and an answer opposing the Motion for Declaratory Order.

In this Order, the Commission grants in part and denies in part Grand View's Petition for Clarification and rules on the Motion for Declaratory Order.

BACKGROUND

A. Parties

Grand View Solar is an Idaho limited liability company formed for the purpose of developing its solar project. Order No. 32580 at 2. Grand View plans to sell the output from its solar project to Idaho Power pursuant to a PURPA contract, i.e., the PPA. Grand View's managing member for the project is Robert Paul of Alternative Power Development, Northwest, LLC. *Id. citing* Paul Aff. at ¶ 6. On July 15, 2011, Grand View filed a self-executing Notice of Certification as a "qualifying facility" (QF) with the Federal Energy Regulatory Commission (FERC). *Id. citing* FERC Docket No. QF11-405.

In September 2011, Avista Corporation filed a Petition to Intervene and the Commission subsequently granted intervention to Avista.¹ Order No. 32362. Avista and Idaho Power are both electric public utilities subject to the jurisdiction and regulation of this Commission. *Idaho Code* §§ 61-119 and 61-129.

B. Procedural History

The underlying facts and procedural history of this case are set out in Order No. 32580. Briefly, Grand View and Idaho Power engaged in negotiations and discussions regarding Grand View's desire to enter into a Power Purchase Agreement (PPA) under PURPA. The parties tentatively agreed that the PPA would include avoided cost rates for the 20 MW solar plant based upon Idaho Power's Integrated Resource Plan (IRP) methodology for PURPA qualifying projects greater than 100 kW. Order No. 32176 at 9. Pursuant to these discussions, Idaho Power sent Grand View a draft PPA on March 11, 2011 (the "March 2011 draft").

¹ Avista only participated in the summary judgment phase of this proceeding. Avista did not file any responsive pleadings to Grand View's Petition for Clarification or the Motion for Declaratory Order.

1. The Initial Complaint. Grand View maintained in its initial complaint (and again in its Motion for Summary Judgment) that it agreed to all material terms in the March 2011 draft Agreement except the provision addressing the ownership of RECs. Order No. 32580 at 5; Complaint at 2. Grand View requested the Commission order Idaho Power to delete § 8.1 of the PPA (addressing RECs) and instead insert “a clause in which Idaho Power explicitly disclaims ownership of the [RECs].” Complaint at 2, 6. Grand View asserted that it “is ready and willing to enter into the standard PURPA PPA with IRP calculated rates that disclaim REC ownership by Idaho Power.” *Id.* at ¶ 8; *see also* ¶¶ 9, 13. The REC provision in § 8.1 of the draft PPA states:

Under this Agreement, ownership of . . . 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; Order No. 32580 at 6.

2. Summary Judgment. In November 2011, Grand View filed a Motion for Summary Judgment reiterating its request that the Commission order that “Idaho Power disclaims ownership of all [RECs] of Grand View’s solar project. . . .” Motion at 2, 36. Grand View maintained that it “clearly owns the RECs for which Idaho Power will not pay and which no law transfers to Idaho Power.” *Id.* at 22. In its initial complaint and again on summary judgment, Grand View acknowledged Idaho Power offered to divide REC ownership equally (50/50) between the parties for the term of the Agreement, or one party taking RECs for the first 10 years and the other party taking RECs for the last 10 years of the Agreement. Complaint at ¶¶ 11-12; Paul Aff. at ¶ 27. Grand View rebuffed these offers arguing that it is entitled to a PURPA contract “in which REC ownership is disclaimed by Idaho Power.” Complaint at ¶ 13; Motion at 36.

Grand View’s manager, Robert Paul, acknowledges that § 8.1 of the draft PPA “states that REC ownership will be determined by applicable state or federal laws” (Aff. at ¶ 22), but maintains this provision makes the ownership of RECs dependent upon subsequent changes in state or federal law. Aff. at ¶ 23. He stated that owning “only one half of the RECs from the

project compromises the financial viability of the project” and compromises Grand View’s “ability to raise the capital necessary to build and operate the project.” *Id.* at ¶¶ 28, 29.²

Idaho Power and Avista each filed answers to the Motion opposing Grand View’s request for summary judgment. The utilities argued that the Motion be denied in its entirety.

3. The Amended Complaint. While the Motion for Summary Judgment was pending, Grand View filed an Amended Complaint on December 20, 2011. Grand View alleged in its amended complaint 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 ¶ 34.³ Grand View renewed its request that the Commission order Idaho Power to execute the March 2011 draft PPA and 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.” *Id.* at 3. On January 25, 2012, Idaho Power filed an answer to the first amended complaint requesting the Commission deny all relief and dismiss the complaint.

4. The Order Denying Summary Judgment. On June 21, 2012, the Commission issued Order No. 32580 denying Grand View’s Motion for Summary Judgment. The Commission’s Order traced the history of RECs and their relationship to renewable portfolio standards (RPSs)⁴ adopted in about 25 states. Order No. 32580 at 4 *citing Steven Ferrey, et al.* “Fire and Ice: World Renewable Energy and Carbon Control Mechanisms Confront Constitutional Barriers,” 20 *Duke Envtl.L. & Policy F.* 125 at 146 (Winter 2010). The Commission noted that approximately 15 states that have adopted RPS programs allow utilities to use RECs to meet their state-imposed RPS requirements. *Id. citing Ferrey* at 145. The Commission also noted the issue of REC ownership was an issue to be addressed in Phase III of its PURPA investigation, Case No. GNR-E-11-03. *Id.* at n.9.

The Commission also observed that “RECs exist outside the confines of PURPA. PURPA thus does not address the ownership of RECs. . . . States, in creating RECs, have the

² Equally dividing RECs with Idaho Power “would undermine Grand View’s entire going concern business by removing RECs to be produced by the solar QF as a future revenue stream.” Motion for Summary Judgment at 25 *citing* Paul Affidavit at ¶¶ 25-29.

³ Grand View did not submit the December 2011 PPA into the record.

⁴ 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. Order No. 32580 at 3; *Alliance to Protect Nantucket Sound v. Dept. of Public Utilities*, 959 N.E.2d 413, n.7 (Mass. 2011).

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.” Order No. 32580 at 5 (emphasis original) quoting *American Ref-Fuel Company*, 105 FERC 61,004 at ¶ 23 (2003), *rehrg denied* 107 FERC 61,016 (2004) *dismissed sub nom.* for lack of jurisdiction, *Xcel Energy Services v. FERC*, 407 F.3d 1242 (D.C.Cir. 2005). The Commission also quoted approvingly from a Second Circuit opinion in *Wheelabrator Lisbon v. Connecticut Dept. Pub. Utility Control* that:

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.

Order No. 32580 at 4 (emphasis original) quoting *Wheelabrator Lisbon*, 531 F.3d 183, 186 (2d Cir. 2008). “[I]nsofar as RECs are state-created, different states can treat RECs differently.” Order No. 32580 at 5 quoting *American Ref-Fuel*, 107 FERC ¶ 61,016 at n.4; see *Idaho Wind Partners*, 136 FERC ¶ 61,174 at P.10 (Sept. 15, 2011) (“the sale and trading of RECs are for the states to determine, and that this is not an issue that PURPA controls.”).

The Commission found that RECs were intangible assets or “non-physical assets which exist only in connection with something else, i.e., the purchase of renewable power under PURPA.” Order No. 32580 at 10 citing 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.” *Id.* (footnote omitted); see Order No. 32802 at 12 (“RECs are not tangible and do not ‘exist’ until the renewable QF project produces a MW of power.”).⁵

The parties acknowledged and the Commission found that no Idaho law implements an RPS program or addresses the ownership of RECs. Order No. 32580 at 9. After reviewing Grand View’s arguments, the Commission stated that it “cannot find as a matter of law that ownership of RECs vest solely in Grand View.” *Id.* at 13. The Commission found that the language in § 8.1 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.” *Id.* at 14.

⁵ RECs can also arise in non-PURPA renewable projects. Order Nos. 32580 at n.5; 32697 at n.9; 32802 at 8.

5. Settlement Discussions. In June 2012, Grand View filed a “Notice of Settlement Discussions.” The developer indicated in its notice that the parties will report on the progress of those discussions by June 15, 2012. No such report was filed. Order No. 32580 at 2, n.1. On February 5, 2013, Grand View formally notified the Commission that settlement discussions “have been fruitless.” The Notice did not disclose the settlement topics or the respective positions of the parties.

C. The Commission’s PURPA Investigation

On September 1, 2011, shortly after Grand View filed its initial complaint, the Commission initiated the third phase (Phase III) of its generic investigation into PURPA issues. Order No. 32352, Case No. GNR-E-11-03. In its initial Order opening Phase III, the Commission stated its intent to address the issues of RECs and REC ownership. *Id.* at 4. As a party in the first two phases of the Commission’s PURPA investigation, Grand View was also designated as a party in the Phase III proceeding. Order Nos. 32131 at 3; 32195 at 4; 32352 at 4; Notice of Parties in Case No. GNR-E-11-03 (Sept. 21, 2011).⁶

On December 18, 2012, the Commission issued final Order No. 32697 addressing REC ownership. “[A]bsent an agreement between the parties to do otherwise,” the Commission found it was “reasonable to equally apportion RECs between the utility and QF” when the PURPA contract is based upon avoided cost rates derived through the IRP methodology. Order No. 32697 at 46. “Because both the utility and QF are contractually and inextricably joined in the production, sale and purchase of QF power, we find that it is reasonable to apportion the unbundled RECs by splitting RECs either 50%-50% each year over the life of the PPA, or equally in terms of years over the length of the contract.” *Id.*; *see also* Order No. 32802 at 12, 19-20.

On reconsideration, the Commission affirmed its findings in Order No. 32697 that “RECs under the IRP Methodology should be equally shared by the parties while still allowing for some contractual flexibility.” Order No. 32802 at 20. The Commission specifically found that Idaho common law does not vest RECs exclusively in either the QF or the utility. The

⁶ On March 12, 2012, Idaho Power filed a Motion to Stay its PURPA obligations until such time as the Commission completed its Phase III PURPA investigation. In Order No. 32498, the Commission denied the temporary stay but found that Idaho Power’s current methodologies for calculating avoided cost rates “do not currently produce rates that reflect Idaho Power’s avoided costs and are not just and reasonable, nor in the public interest.” Order No. 32498 at 2. Effective March 21, 2012, the Commission ordered that all QF contracts or projects over 100 kW “will be individually evaluated with regard to all terms contained therein.” *Id.* The Commission said it would conduct a case-by-case review to ensure QF purchase agreements satisfy PURPA requirements. *Id.* at 3.

Commission found the Connecticut’s Supreme Court opinion in *Wheelabrator Lisbon v. Dept. of Pub. Util. Control*, 931 A.2d 159, 174-75 (Conn. 2007) instructive in analyzing REC ownership issues. *Id.* at 18-19. “We find especially important the fact that PURPA compels the purchase [of QF power] and that utilities must purchase QF power whether needed or not. These facts are balanced against the QF’s investment in the renewable facility and the Congressional goal of promoting renewables.” *Id.* at 19. No party, including Grand View, sought judicial review of the Commission’s decision that ownership of RECs should be vested equally in both the utility and the QF for IRP-based agreements. *Id.* at 20.

With this background we turn to the Petition for Clarification and Motion for Declaratory Order.

PETITIONS FOR CLARIFICATION

On July 9, 2012, Grand View filed a Petition for Clarification requesting that the Commission clarify four points in the Commission’s Summary Judgment Order No. 32580.⁷ On July 30, 2012, Idaho Power filed an Answer to Grand View’s Petition and a Cross-Petition for Clarification. Idaho Power urged the Commission to deny Grand View’s clarification request. The four points of clarification are discussed below.

1. The Timing of REC Ownership and § 8.1. Grand View requests the Commission clarify its Order by requiring Idaho Power to modify § 8.1 of the draft PPA. The request is based upon the Commission’s Order No. 32580 requiring that the ownership of RECs be “governed by applicable state law at the time the contract is executed and approved.” Petition at 1 *quoting* Order No. 32580 at 14 (emphasis added). Relying on the quoted language, Grand View asserts the Commission’s Order does not clearly indicate that REC ownership will be based upon applicable law at the time the contract becomes effective. Petition at 4-5. Grand View argues § 8.1 needs to be clarified so that the Order not be viewed as subjecting REC ownership to future changes based upon any changes in law throughout the 20-year term of the Agreement. *Id.* at 5.

Grand View maintains Idaho Power’s position is that § 8.1 “is merely a change in law provision stating that if applicable law determines REC ownership then that applicable law governs.” *Id. quoting* Idaho Power’s Answer at 5; *see also* 8-10. In other words, Grand View insists that both Idaho Power and Avista suggest that REC ownership is subject to future change under the PPA if state law changes the ownership of RECs during the term of the Agreement.

⁷ Commission Rule 325 allows any person to petition to clarify any Order. IDAPA 31.01.01.325.

Petition at 5. Grand View concludes that subjecting it to future changes regarding the ownership of RECs during the term of the PPA would violate Section 210(e) of PURPA. *Id.* at 6.

To clarify the Commission's intent regarding § 8.1, Grand View proposes the Commission order that an additional sentence be added to the REC provision. In particular, Grand View suggests the underlined sentence below be added to the REC provision in § 8.1 of the draft PPA:

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. Such ownership will be determined by applicable law in effect at the time when the legally enforceable obligation is incurred.

Petition at 8. Grand View insists that adding this sentence "will provide the clarity necessary to ensure that the PPA does not subject Grand View to changed circumstances after the time that it obligated itself to a legally enforceable obligation to deliver energy and capacity." *Id.*

For its part, Idaho Power recommends the Commission deny clarification and not modify the language of § 8.1. Answer/Cross-Petition at 5-6. The utility acknowledges the Commission's Order states in two places that REC ownership is to be determined under the contract by applicable law when the PPA is executed and approved (Order No. 32580 at 14). However, Idaho Power maintains that as a "change of law provision, Section 8.1 simply states that if a change of law related to [RECs] occurs [during the term of the contract], then that applicable law governs [REC ownership]." Answer at 6-7. In other words, Idaho Power argued § 8.1 is a "placeholder" which provides that at such time as the ownership of RECs is finally decided, then that decision will be applicable to the PPA. Idaho Power concludes there is nothing in PURPA, case law, or in Commission Order No. 32580 requiring that the ownership of RECs be determined at the time the QF and the utility execute a PPA or when the QF incurs a legally enforceable obligation. *Id.* at 7.

Commission Findings: Before turning to the language of our prior Order and § 8.1, it is helpful to review the positions of the parties concerning the REC issue. The parties had not entered into a PPA and Grand View instead filed a complaint regarding the REC provision contained in § 8.1 of the draft Agreement. On one side, Grand View maintained in its complaint,

amended complaint, and on summary judgment that it owns the RECs and wants the Commission to order Idaho Power to disclaim any REC ownership. Now on clarification, Grand View wants § 8.1 to be modified as set out above. On the other side, Idaho Power argues in its answer that the issue of REC ownership has not been determined⁸ and that § 8.1 does not assign REC ownership to either Grand View or Idaho Power. Order No. 32580 at 13-14. Idaho Power insisted that § 8.1 “is merely a change of law provision [which] simply states that if a change of law related to [RECs] occurs, then that applicable law governs.” Answer at 6-7. Thus, both Grand View and Idaho Power seek clarification to support their opposing positions. We grant clarification on this issue.

Grand View’s request for clarification focuses on the timing of REC ownership by suggesting that § 8.1 be amended to provide that REC ownership will be decided “at the time the contract becomes effective.” Petition at 4. It asserts “that once ownership is determined based upon applicable law at the time the contract becomes effective . . . REC ownership cannot change . . . when a new law, regulation, or order . . . is issued.” *Id.* Conversely, Idaho Power requests the Commission clarify that REC ownership under § 8.1 of the PPA can change as REC law changes during the term of the PPAs. Having considered the parties’ arguments, the language of § 8.1 and our prior Orders, we find it is appropriate to clarify our prior Order to eliminate confusion.

At the outset, we recognize when a QF and a utility are unable to agree to terms contained in a PPA, this Commission has a responsibility to resolve the dispute consistent with PURPA. Here the dispute concerned an issue that PURPA does not control – the ownership of RECs. The parties were unable to reach agreement on the disposition or ownership of RECs. As the parties agreed and the Commission found in its Summary Judgment Order, there was – at that time – no controlling Idaho law addressing REC ownership. Order No. 32580 at 9, 13-14. However, the parties were on notice that REC ownership would be addressed in our parallel PURPA investigation initiated shortly after Grand View filed its complaint in this case. Moreover, both Grand View and Idaho Power were parties in the GNR-E-11-03 case. In that case, the Commission found it was reasonable to equally apportion REC ownership between the QF and the utility for solar projects larger than 100 kW, like the Grand View project here. Order

⁸ At the time Grand View filed its Petition for Clarification (July 2012), the Commission had not decided the REC ownership issue in Case No. GNR-E-11-03. The issue of REC ownership was decided in Order No. 32697 issued December 18, 2012.

No. 32697 at 46; 32802 at 19-20. No party, including Grand View, sought judicial review of that decision. Having decided the disputed issue of REC ownership in the PURPA investigation in Order No. 32697 (Dec. 18, 2012), and affirmed in Order No. 32802 (May 6, 2013), this issue is now settled.

The language of § 8.1 generally provides that REC ownership will be governed by applicable laws or by those regulatory agencies with authority to regulate RECs. Consistent with our prior Order No. 32580, we find this section does not vest REC ownership in either party. Order No. 32580 at 14. Having determined that REC ownership should be equally divided (absent agreement of the parties to do otherwise), we find that Grand View's suggestion to add the new sentence to § 8.1 is unnecessary. Grand View is correct that the phrase "at the time the contract is executed and approved" does not appear in § 8.1 or anywhere in the Agreement. Petition at 3. On review, we find that this sentence should not be added.

Turning to Idaho Power's argument, we generally find that changing contract terms in a PPA (here REC ownership) should not occur. Order No. 32580 at 14. While we appreciate the distinction between an inappropriate "reopener" and a permissible "change in law" provision, the parties here disputed REC ownership. QFs (as stated by Grand View in this case) rely upon revenue from the sale of RECs to finance their PURPA projects. For example, Grand View's manager stated that receiving "only one half of the REC [revenue] from the project compromises the financial viability of the project." Paul Aff. at ¶ 28. From the QF's perspective, knowing all the terms and conditions of the PPA assists the developer in analyzing its projected cost and revenue stream. Thus, we find it is appropriate that the ownership of RECs – and the accompanying revenue from the sale of RECs – should not be subject to change during the contractual term absent a mutual agreement by the parties to do otherwise. This promotes the underlying purpose of PURPA by encouraging the development of renewable generation. *See* Order Nos. 32697 at 46-47; 32802 at 12. Here there is no agreement between the parties that the section is a "change in law" provision. Consequently, we reject Idaho Power's position that § 8.1 is an allowable change in law provision.

Having found in the PURPA investigation that the ownership of RECs should be equally divided between the QF and the utility, we find this result should apply to this case. Both Grand View and Idaho Power were parties in the PURPA investigation and were advised in this case that the REC issue would be addressed there. Order No. 32580 at 12, n.9; 32352 at 4;

32598; 32697. Consequently, we find that § 8.1 should be amended to reflect the ownership of RECs will be split 50/50 between the parties consistent with Order Nos. 32697 and 32802. We further find the phrase “at the time the contract is executed and approved” should be deleted from our prior Order No. 32580. *Idaho Code* § 61-624. We clarify that § 8.1 is to be amended to equally divide REC ownership between Grand View and Idaho Power.

2. Legally Enforceable Obligation. Grand View next requests the Commission clarify the terms “executed and approved” in Order No. 32580 also applies when a “legally enforceable obligation” is incurred. Petition at 7. Grand View expresses concern that the language “when the PPA is executed and approved” could be misconstrued as applying to only written Agreements. *Id.* Grand View noted that a QF can perfect a “legally enforceable obligation without a fully executed and approved agreement.” *Id.* Thus, this point further supports Grand View’s efforts at adding the new sentence to § 8.1 as shown *supra* page 8.

Idaho Power urges the Commission to refrain from expanding the scope of clarification. Answer/Cross-Petition at 5. Idaho Power states it “did not intend for ownership of RECs [to be determined] at the time the parties executed and the Commission approved a PPA let alone when a legally enforceable obligation occurs.” *Id.* at 6. “Instead, Idaho Power has consistently argued that the language of Section 8.1 is merely a change of law provision, which the Commission found neither violates nor is preempted by PURPA.” *Id.*

Idaho Power further argues that Grand View’s Petition is “a thinly veiled attempt” to have the Commission “grandfather” the rates contained in the draft March 2011 as the surrogate to the issue of whether Grand View incurred a legally enforceable obligation as of March 10, 2011 (the date of the March 2011 PPA). *Id.* at 8. The utility urges the Commission to deny Grand View’s request to make any findings related to a “legally enforceable obligation until such time as that issue is briefed by the parties in this case.” *Id.* at 9.

Commission Findings: We deny clarification on this point because Grand View’s request would unnecessarily expand the scope and change the focus of our prior Order. While we acknowledge that a legally enforceable obligation may occur outside of a contract, the focus of our prior Order was the dispute between the parties concerning RECs and the express language of § 8.1 in the Agreement. The issue of REC ownership is now settled.

3. Avoided Cost Rates do not Include RECs. Grand View next requests the Commission state that the avoided cost rates “will not compensate the [QF] for more than

estimated value of the energy and capacity alone.” Petition at 2. Grand View insists the Commission’s “Order is problematic because it could be construed [that] nobody owns the RECs that will be created by Grand View’s [solar project].” *Id.* at 8.

Idaho Power again urges the Commission to deny clarification of this issue. The utility notes in its answer the issue of REC ownership is “currently” scheduled to be addressed in the Commission’s Phase III PURPA investigation in Case No. GNR-E-11-03.⁹ Idaho Power maintains hundreds of pages of legal briefs were submitted in that case in July 2012. “Grand View is a party to that proceeding and may be attempting to generate findings from the Commission in this case to use in Case No. GNR-E-11-03.” Answer at 9.

Commission Findings: The Order denying summary judgment is clear and needs no clarification. In that Order we stated “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].” Order No. 32580 at 3, 8 *citing Morgantown Energy Associates*, 139 FERC ¶ 61,066 at P. 47 (April 24, 2012); *American Ref-Fuel*, 105 FERC ¶ 61,004; Order No. 29480. Compensation for “RECs is outside of PURPA, and is not part of the avoided cost calculation; RECs are separate commodities from the capacity and energy produced by QFs. If a state chooses to create these separate commodities, they are not compensation for [QF power].” *California PUC*, 133 FERC ¶ 61,059 at P. 31 n.62 (Oct. 21, 2010); Order No. 32580 at 8.

The Commission recently confirmed that point in the PURPA investigation case. Order No. 32802 at 12, 24 (“we have been steadfast and clear in stating that avoided cost rates do not compensate QFs for RECs”). Our PURPA investigation Orders also addressed Grand View’s argument that Order No. 32588 “could be construed [that] nobody owns the RECs.” We find this argument unpersuasive. This issue has been settled by the Commission’s decision that RECs for solar projects greater than 100 kW shall be equally divided by the utility and the QF. Consequently, clarification of this point is unnecessary and the request is denied.

4. No Idaho Law Transfers RECs. Finally, Grand View requests the Commission “clarify” that no Idaho law transfers RECs to a purchasing utility without payment to the QF. Petition at 8. Although Grand View acknowledges it is the States and not FERC that “have the power to determine who owns the RECs in the initial instance and how they will be sold or

⁹ See *supra* n.8.

traded” (Petition at 9), the developer requests that the Commission “clarify” that no Idaho law conveys RECs to a utility without payment to the QF. *Id.* at 12. Idaho Power again urges the Commission to deny clarification of this issue because the issue of REC ownership was addressed in the Commission’s PURPA investigation, GNR-E-11-03. Answer at 9.

Commission Findings: We decline to clarify this issue for two reasons. First, Grand View seeks clarification regarding the “transfer” of RECs. In our prior Order denying summary judgment, the Commission observed the utilities and Grand View agreed that no Idaho law or case addresses the ownership of RECs. Order No. 32580 at 9 (record citations omitted); Order No. 32802 at 12. In other words, our prior Order addressed REC ownership and simply does not address the “transfer” of RECs. Without a determination of ownership, there can be no finding regarding transfer of such ownership. Thus, Grand View seeks clarification of an issue we did not address.

Second, our recent Orders concluding Phase III of the PURPA investigation held that ownership of RECs should vest equally with the QF and the utility for projects with IRP-based rates. There is no “transfer” of RECs – RECs are owned equally by both the QF and the utility. As the Commission observed in the Summary Judgment Order, Grand View is not “the defacto owner of all the RECs.” Order No. 32580 at 15. Thus, no REC property owned by the QF has been “transferred” to the utility. *Id. citing Wheelabrator Lisbon v. Dept. of Public Util. Control*, 283 Conn. 672, 700, 931 A.2d 159, 177 (2007). We find the relevant question to be the ownership of RECs, not the transfer of RECs. Consequently, we decline to address the transfer of RECs.

MOTION FOR DECLARATORY ORDER

A. Position of the Parties

1. Grand View. On March 19, 2013, Grand View filed a Motion for a Declaratory Order. In its Motion, Grand View makes two arguments that are intertwined. The first issue concerns the ownership of RECs. More specifically, Grand View argues the Commission’s December 2012 Order No. 32697 in the PURPA investigation holding that REC ownership be shared between the QF and the utility is not controlling in this case. Motion at 4. In essence, Grand View insists there was no controlling REC law or policy in Idaho “at the time” Idaho Power tendered the draft PPA in March 2011, and therefore Grand View must own the RECs. The Commission should “order Idaho Power to tender an executable [PPA] . . . containing the

terms and conditions in effect as of the date of the Legally Enforceable Obligation. Furthermore, Idaho Power should not insert disputed Section 8.1 and should otherwise remain silent as to REC ownership. . . .” *Id.* at 7.

Second, Grand View advances a new issue by arguing that a legally enforceable obligation (LEO) was created between Grand View and Idaho Power on “March 10, 2011 [(the date of the draft PPA)] . . . and no later than August 2, 2011” (the date of Grand View’s initial complaint). Motion at 1. Grand View argues that the Commission failed to address the legally enforceable obligation issue in its Summary Judgment Order. Grand View insists it “created a Legally Enforceable Obligation on Idaho Power’s part to purchase [Grand View’s] PURPA power.” *Id.* at 3. Grand View asserts a LEO can be formed without deciding the REC issue. The parties were in agreement to all terms in the March 2011 draft PPA except for the REC issue. Idaho Power’s obligation to purchase the output from the project “was not at issue.” Grand View maintains it “does not have to wait until Idaho Power executes the [PPA]” before the Commission finds a legally enforceable obligation was created.

Grand View insists that FERC has previously admonished the Commission that “a LEO may be created unilaterally by a QF independent of the utility’s or Commission’s actions.” *Id.* Grand View quotes from FERC’s *Grouse Creek Order* stating:

a QF, by committing itself to sell to an electric utility, also commits the electric utility to buy from the QF; these commitments result in either contracts or in non-contractual, but binding, legally enforceable obligations. We found that the Idaho Commission’s order in those proceedings, by limiting the circumstances under which a legally enforceable obligation arose, make a fully-executed contract a condition precedent to a legally enforceable obligation. We held that such a condition precedent is inconsistent with PURPA and our regulations implementing PURPA. . . .

. . . [A] legally enforceable obligation may be incurred before the formal memorialization of a contract to writing.

Motion at 4-5 *citing Grouse Creek Order*, 142 FERC ¶ 61,187 ¶ 15 (2013) (internal citations omitted).

Grand View maintains the fact it filed a complaint in August 2011 “is sufficient evidence that Grand View had unilaterally obligated itself and Idaho Power to a legally enforceable obligation.” *Id.* at 5. Grand View maintains it has the right to unilaterally create a LEO without having to resort to a PPA or obtain Idaho Power’s written consent. *Id.* at 6.

Grand View also notes that FERC has stated in its *Grouse Creek Order* “that a QF need not have to even file a complaint in order to create a legally enforceable obligation. . . .” *Id.* Grand View also observed in that same Order that FERC declared:

The Idaho Commission’s requirement that a QF formally complain “meritoriously” to the Idaho Commission before obtaining a legally enforceable obligation would both unreasonably interfere with a QF’s right to a legally enforceable obligation and also create practical disincentives to amicable contract formation. Such obstacles to QFs are at odds with the [FERC’s] regulations implementing PURPA.

Motion at 6 *quoting Grouse Creek Order* at [¶ 40]. Thus, the Commission should find that a legally enforceable obligation was created on March 11, 2011, and no later than August 2, 2011. *Id.* at 7.

2. Idaho Power’s Answer. On April 2, 2013, Idaho Power filed its answer opposing Grand View’s Motion for Declaratory Order for several reasons. First, Idaho Power takes issue with Grand View’s characterization of events in this case. More specifically, Idaho Power asserts this is the first instance where Grand View argued it had perfected a legally enforceable obligation in March or August 2011. Answer at 5, 12. The disputed issue in the initial complaint, the amended complaint and summary judgment concerned RECs. *Id.* at 12. The utility states it was willing to enter into a contract with Grand View but Grand View chose not to obligate itself to deliver power to Idaho Power without Idaho Power disclaiming all the RECs. *Id.* at 5. The utility asserts a “legally enforceable obligation cannot be created when a QF refuses to contract with a utility.” *Id.* Idaho Power maintains that Grand View repeatedly refused to obligate itself to sell power to Idaho Power between March 10, 2011 (the date of draft PPA) and before August 2, 2011 (the date Grand View filed its complaint). *Id.* at 6. “[Grand View’s] refusal to contract or obligate itself . . ., especially in the context of a utility willing and ready to enter into a PURPA [PPA], cannot be used to create a legally enforceable obligation.” *Id.* at 13-14.

Second, Idaho Power argues a legally enforceable obligation (LEO) only arises in the context of what avoided cost rates can be assessed. Answer at 7 *citing* 18 C.F.R. § 292.304. The utility insists that the LEO concept “was intended as a mechanism to determine the time for a calculation of the rate.” *Id.* The Company also notes a LEO is the mechanism used to prevent utilities from avoiding its PURPA obligations by refusing to sign a contract. *Id. citing Grouse*

Creek Order, 142 FERC 61,187 at ¶ 36 (2013). The Company maintains a LEO is intended to remedy a situation where the utility has acted in bad faith or delayed/refused to contract. *Id.* at 8. In this case, Idaho Power asserts it has not acted in bad faith or caused delay, and Grand View is the party which refused to contract.

Third, Idaho Power maintains a legally enforceable obligation reflects the creation of “mutual obligations” to ensure that a party cannot unilaterally force or bind another party against its will. *Id.* at 9. The utility takes issue with Grand View’s assertion that it has an “unfettered right to unilaterally create” a LEO. *Id.* citing Motion at 6. Idaho Power argues that this is “a gross overstatement and undermines ‘the carefully constructed concepts of mutual obligations under state contract law. . . .’” *Id.* at 10. “FERC intended that . . . a legally enforceable obligation should be reciprocal.” *Id.* at 8. Idaho Power argues that if avoided cost rates had increased since March 2011, Grand View would not be arguing that a LEO was perfected in 2011. The concept was “not intended to be used in a situation where a QF refuses to contract with a utility.” *Id.* at 9.

Finally, Idaho Power relies upon several Idaho Supreme Court cases to support its argument that a LEO was not formed. In particular, the Company stated that the Idaho Supreme Court in *A.W. Brown v. Idaho Power Co.*, 121 Idaho 812, 828 P.2d 841 (1992), upheld the Commission’s decision that there was no PURPA contract and that the QF was not entitled to earlier (and higher) avoided cost rates when it did not make a reciprocal commitment or obligated itself to provide power to the utility. Answer at 10-11.

3. Grand View’s Reply. On April 8, 2013, Grand View filed a reply to Idaho Power’s answer. Grand View reiterates that it created a legally enforceable obligation (LEO) unilaterally. Reply at 2. Relying on FERC’s *Grouse Creek Order*, Grand View states that:

once a QF makes itself available to sell to a utility, a legally enforceable obligation may exist prior to the formation of a contract. A contract serves to limit and/or define bilaterally the specifics of the relationship between the QF and the utility. A contract may also limit and/or define bilaterally the specifics of the legally enforceable obligation at the heart of the relationship.

Id. (emphasis original) citing 142 FERC ¶ 61,187 at PP 16-17. Grand View reiterates that the parties had agreed to all the terms in the PPA with the exception of the REC provision. Thus, the question for the Commission is “not whether the contract was signed, but whether and when a legally enforceable obligation was created.” *Id.* at 3.

Grand View insists that if Idaho Power is allowed to avoid a legally enforceable obligation to purchase QF power, then any utility could avoid a LEO by “including in the PPA itself a provision it knew would be unacceptable to the QF.” *Id.* at 5. Grand View also maintains that the Idaho Supreme Court cases relied upon by Idaho Power do not support the utility’s position. More specifically, Grand View distinguishes the *Rosebud* case from this case by noting that *Rosebud* rejected Idaho Power’s entire offer. “Grand View, unlike *Rosebud*, unconditionally committed to sell its electric output for a specific term and for a specific price. Grand View, unlike *Rosebud*, was ready[,] willing and able to perform. Its performance was not conditioned upon vendor, supplier or financial approval. Grand View was obligated.” *Id.* at 7. Grand View restates from its initial complaint that it is “ready and willing to enter into the standard PURPA PPA with IRP calculated rates that disclaim REC ownership by Idaho Power.” *Id.* at 8 *citing* Complaint at 3.

B. Commission Findings

1. The REC Issue. We first turn to Grand View’s argument that because REC ownership was not decided when the PPA was drafted in March 2011, there should be no REC provision in the Agreement. The Commission’s PURPA investigation Orders resolving the REC dispute “should not be controlling on Grand View’s REC ownership because Grand View had created its LEO in March 2011.” Motion at 4. We find this argument unpersuasive for two reasons. First, Grand View’s REC argument ignores the fact that the REC dispute was the gravamen of the initial complaint and summary judgment. It now suggests that we simply ignore the REC dispute – the very heart of Grand View’s complaint, amended complaint and Motion for Summary Judgment. Grand View’s argument to simply separate the REC dispute from the legally enforceable obligation issue is inconsistent with the facts and the positions of the parties. Grand View concedes that when it filed its complaint, the “only outstanding issue at the time was who owned the RECs.” Motion at 2. The facts of this case demonstrate without a doubt there was a dispute about REC ownership and the Commission was asked to resolve that disputed issue.

Second, both Grand View and Idaho Power were parties to the PURPA investigation that decided the REC issues. Both parties were aware that the issue of REC ownership was to be decided in that case. We noted in our Summary Judgment Order in this case that parties in the PURPA investigation were addressing REC ownership. Order No. 32580 at 12, n.9. The

Commission found in its Summary Judgment Order that Idaho Power has not permanently “waived its rights to RECs or that . . . REC ownership vests entirely with QFs.” *Id.* at 12. We found in our PURPA investigation Orders that RECs in situations such as this case should be equally divided between the QF and the utility. Grand View was a party to the PURPA investigation and neither raised the applicability argument in that case or petitioned for judicial review. Moreover, the Commission’s REC decision in Order No. 32697 was made in December 2012, well in advance of Grand View’s current Motion for Declaratory Order filed in April 2013. Having found that REC ownership should be equally divided in our PURPA investigation between the utility and the QF (especially where both Idaho Power and Grand View were parties), it is appropriate to consistently apply the REC determination in this case.

2. The LEO Issue. We next turn to Grand View’s assertion that it created a legally enforceable obligation in March 2011 (when Idaho Power tendered the draft PPA) or no later than August 2, 2011 (when Grand View filed its initial complaint against Idaho Power in this matter). PURPA generally requires electric utilities such as Idaho Power to purchase the output from “qualifying facilities (QFs)” at rates set by State regulatory commissions. 16 U.S.C. § 824a-3(a)(2). This mandatory purchase requirement is often referred to as the “must purchase” provision of PURPA. *FERC v. Mississippi*, 456 U.S. 472, 451 (1982).

There are two general methods by which a QF can provide power to utilities: (1) by entering into a signed contract with the utility; or (2) pursuant to a legally enforceable obligation (LEO). 18 C.F.R. § 292.304(d); *Power Resource Group v. PUC of Texas*, 422 F.3d 231, 237 (5th Cir. 2005). FERC specifically adopted the concept of a legally enforceable obligation to prevent utilities from circumventing the “must purchase” PURPA provision “merely by refusing to enter into a contract with the” QF. *Power Resource*, 422 F.3d at 238 quoting *Regulations Implementing Section 210 of the Public Utility Policies Act of 1978*, 45 Fed.Reg 12,214, 12,224 (Feb. 25, 1980); *Cedar Creek Order*, 137 FERC ¶ 61,006 at P. 32 (2011). Under either a contract or LEO there are reciprocal obligations: a QF unconditionally commits itself to sell power to the utility and the utility commits to buy that power from the QF. “These commitments thus result either in contracts or in non-contractual, but binding, legally enforceable obligations.” *Cedar Creek Order* at ¶ 32.

In addition, each QF has the option to provide power to the utility under avoided cost rates calculated at either: (1) the time of delivery; or (2) at the time a legally enforceable

obligation (LEO) is incurred. *Afton Energy v. Idaho Power Co.*, 107 Idaho 781, 787, 693 P.2d 427, 433 (1984) *citing* 18 C.F.R. § 292.304(d).

When examining claims that a LEO has been created it is up to the States to determine the specific parameters of individual QF power purchase agreements, including the date at which a legally enforceable obligation is incurred under State law. Similarly, whether the particular facts applicable to an individual QF necessitate modifications or other terms and conditions of the QF's contract with the purchasing utility is a matter for the States to determine.

Order No. 32635 at 9 *citing West Penn Power Co.*, 71 FERC ¶ 61,153 at 61,495 (1995); *Power Resource*, 422 F.3d at 239 (“FERC has given each State the authority to decide when a LEO arises in that State.”).

Returning to the facts of this case, we note that Grand View and Idaho Power have not entered into a PPA. Grand View now asserts that it perfected a LEO on the date that Idaho Power tendered the draft PPA (March 11, 2011), or no later than August 2, 2011 (the date Grand View filed its initial complaint). Our review of the record reveals that Grand View did not mention the term “legally enforceable obligation” in its initial complaint, in its amended complaint from December 2011, and only mentioned LEO once in passing in its November 2011 Motion for Summary Judgment.¹⁰

Grand View generally asserts it was ready, willing and able to supply power to Idaho Power. While Grand View may have been ready, we find the record does not support that it was willing and able to supply power. More specifically, Grand View's offer to supply power to Idaho Power was an offer with two conditions: (1) the removal of § 8.1; and (2) Idaho Power disclaiming any ownership of RECs. In its formal complaint, Grand View says it is “ready and willing to enter into the standard PURPA PPA with IRP calculated rates that disclaim REC ownership by Idaho Power.” Initial Complaint at ¶ 8. In its initial complaint's prayer for relief, Grand View asks the Commission to order “Idaho Power to resume inserting language in standard PPAs to the effect that Idaho Power makes no claim to REC ownership.” *Id.* at 6. Again, in its amended complaint, Grand View restates the requested relief from its initial complaint. Amended Complaint at 1-2. The prayer for relief in its amended complaint requests

¹⁰ Grand View asserts in its Motion that the Commission failed to address the LEO issue on summary judgment. Motion at 3. However, Grand View did not raise this issue in its summary judgment motion. Indeed, the issues raised in its Motion concerned RECs. The Commission need “not decide an issue not raised in the moving party's motion for summary judgment.” *Esser Electric v. Lost River Ballistics Technologies*, 145 Idaho 912, 919, 188 P.3d 854, 861 (2008).

the Commission order Idaho Power to execute the March 10, 2011 draft contract “with the addition of language disclaiming ownership of the RECs. . . .” *Id.* at 3. Also, in its Motion for Summary Judgment, Grand View requested the Commission order Idaho Power to disclaim “ownership of all [RECs], and order that Idaho Power enter into such a PPA with rates calculated under the methodology in effect on the date of the filing of Grand View’s complaint.” Motion at 2, 36.

Based upon these facts contained in the pleadings, we find that Grand View failed to make a binding and unconditional offer to sell power to the utility, which the utility could accept. In other words, Grand View’s purported LEO was conditioned upon the removal of § 8.1 and the utility disclaiming all REC ownership. Thus, we find Grand View did not make a binding and unconditional legally enforceable obligation to provide power to the utility.

Our finding that the offer was conditional and not a binding offer is supported by several Idaho Supreme Court cases. In *A.W. Brown v. Idaho Power Company*, our Supreme Court examined a claim made by a QF that it had perfected a LEO and was entitled to prior avoided cost rates. 121 Idaho 812, 828 P.2d 841 (1992). In discussing, the necessary criteria for a LEO, the Court stated that the QF “must show that but for the actions of the utility it was otherwise entitled to a contract [or LEO]. In most cases this will entail making a comprehensive binding offer. . . .” 121 Idaho at 817, 828 P.2d at 846 (emphasis added). In *Rosebud Enterprises v. Idaho PUC*, 131 Idaho 1, 951 P.2d 521 (1997), *rehrg denied* (1998), the Court held that the QF was not entitled to an earlier avoided cost rate because it had not legally obligated itself to deliver power to the utility. In affirming this Commission’s decision, the Court observed that “Rosebud made its willingness to commit to ‘a definite agreement’ expressly conditioned on its obtaining concessions from vendors, financiers, and suppliers.” *Id.* at 6, 951 P.2d at 526. While most of the PPA terms in this case were not in dispute, we nevertheless find that Grand View’s LEO offer was conditional and not binding. A legally enforceable obligation is a binding commitment to deliver power to the utility. A LEO does not exist when the QF has not unconditionally obligated itself to provide power “and remains free to walk away from the transaction without liability.” *Armco Advanced Materials v. Pennsylvania PUC*, 579 A.2d1337, 1347 (Pa. 1990). Failure to satisfy the two conditions here would allow Grand View to walk away from its conditional offer. *Id.*; *see also In re Midatlantic Cogen*, 1993 WL 561981*7 N.J.B.R.C. (N.J. 1993).

These two cases are consistent with a third PURPA case, *Idaho Power Co. v. Cogeneration*, 134 Idaho 738, 9 P.3d 1204 (2000). In *Cogeneration*, the Idaho Supreme Court was examining a PURPA case involving Idaho Power and another QF. In that case, the QF tendered payment of a security deposit “conditioned on Idaho Power’s recognizing that an event of *force majeure* had occurred.” 134 Idaho at 746, 9 P.3d at 1212. The Court affirmed the trial court’s finding that the QF’s offer of the security payment was conditional “and therefore did not legally constitute a tender.” *Id.* The Court went on to observe that the district court correctly reasoned that the QF’s offer did not constitute a tender because it was not unconditional. *Id.*

In this case, Grand View has not indicated that receiving anything less than all REC revenue would be satisfactory. Grand View acknowledges that Idaho Power offered “to split REC ownership between Idaho Power and Grand View Solar Two on a fifty/fifty percent basis” . . . or the first 10 years and last 10 years of the PPA. Initial Complaint at ¶ 11-12. Grand View specifically rejected that offer and stated that it “seeks a contract in which REC ownership is disclaimed by Idaho Power.” *Id.* at ¶ 13.¹¹ In its prayer for relief in its initial complaint, Grand View asked the Commission to “Requir[e] Idaho Power to resume inserting language in standard PURPA PPAs to the effect that Idaho Power makes no claim to REC ownership.” *Id.* at 6; Amended Complaint at 3. Thus, we cannot find that Grand View would have accepted anything less than all the RECs.

¹¹ During the parties 2011 negotiations, Grand View’s counsel suggested in an e-mail dated June 8, 2011, the QF is “willing to sign the [Agreement] with the REC language you have [in § 8.1] if we make it contingent upon whether the Commission specifically requires that language. In other words, we sign and submit two versions of the [Agreement]: one with the language [of § 8.1] . . . and one without and we accept the judgment of the Commission as the final outcome.” Idaho Power Answer to Amended Complaint, Atch. 1. In response to this suggestion by Grand View, Idaho Power’s counsel in a July 10, 2011 e-mail offered to submit the disputed § 8.1 to the Commission for resolution. The utility suggested to Grand View that it add language to § 8.1 clearly pointing out that the REC provision was in dispute. The text proposed to be added to § 8.1 was contained in a July 10, 2011 e-mail from Idaho Power’s counsel to Grand View’s counsel. The proposed addition read:

As of the date of this Agreement, Idaho Power seeks inclusion of the above language in Article 8. Seller seeks to have Article 8 remain blank. The parties have agreed to all other terms and conditions of this Agreement, and hereby agree to submit the issue of whether to include the above language in Article 8 or to leave Article 8 blank in this Agreement to the Commission for its determination. The parties intend to submit comments to the Commission supporting their respective positions, and hereby agree to abide by the Commission’s determination of this issue in this Agreement. The final Order of the Commission in response to the inclusion of Article 8 language will be included and become an integral part of this Agreement, which the parties agree to support and uphold.

Id. Grand View rejected Idaho Power’s offer and instead filed its initial complaint on August 2, 2011.

The affidavit of Grand View’s manager also calls into question whether Grand View is able to perform under a legally enforceable obligation. Grand View’s manager, Robert Paul, stated in his supporting affidavit, that Grand View’s business plan is based upon selling all the RECs associated with this project. Aff. at ¶ 24. He stated that without the ability to sell all the RECs, the “project’s financial viability will be compromised.” Aff. at ¶ 25, 28. He also declared that the project’s profitability, his ability to raise the capital necessary to build and operate the project would also be compromised” if Grand View could not sell all of the RECs. *Id.* at ¶¶ 26, 29. He “had no objections to Idaho Power’s draft contract other than the clause clouding ownership of the RECs. But for that clause, I would have signed the Power Purchase Agreement on behalf of Grand View PV Solar Two.” Aff. at ¶ 12. We find these statements undermine Grand View’s argument that it was willing and able to mutually obligate itself to supply power. We find its offer to supply power was contingent upon removal of § 8.1 and the inclusion of language ordering Idaho Power to disclaim RECs in their entirety.

Although we find based on the record before us that Grand View had not perfected a LEO on March 11, 2011, August 2, 2011, November 29, 2011, or December 20, 2011, we note the parties did engage in settlement negotiations. However, Grand View has not asserted nor has it provided any evidence that it made an unconditional offer that would give rise to a legally enforceable obligation. Consequently, we find Grand View has not sufficiently demonstrated that it created a legally enforceable obligation. Thus, Grand View’s Motion for a Declaratory Order is denied.

ORDER

IT IS HEREBY ORDERED that Grand View’s Petition for Clarification and Idaho Power’s Cross-Petition for Clarification are granted in part and denied in part as set out above.

IT IS FURTHER ORDERED that Grand View’s Motion for Declaratory Order is denied.

IT IS FURTHER ORDERED that if Grand View has evidence that it created a legally enforceable obligation without conditions, then it may present such evidence to the Commission within seven days of the date of this Order. If Grand View makes such a filing, then Idaho Power may file a response within 14 days of the service date of this Order.

DONE by Order of the Idaho Public Utilities Commission at Boise, Idaho this 29th
day of July 2013.



PAUL KJELLANDER, PRESIDENT

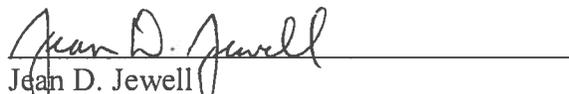


MACK A. REDFORD, COMMISSIONER



MARSHA H. SMITH, COMMISSIONER

ATTEST:



Jean D. Jewell
Commission Secretary

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