

BEFORE THE IDAHO PUBLIC UTILITIES COMMISSION

GRAND VIEW PV SOLAR TWO, LLC,)	
)	CASE NO. IPC-E-11-15
COMPLAINANT,)	
)	
v.)	
)	ORDER NO. 32913
IDAHO POWER COMPANY,)	
)	
RESPONDENT.)	

INTRODUCTION

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 proposes to develop a 20 megawatt photovoltaic (PV) solar generating project to be located in Elmore County. In its initial complaint, amended 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)¹ in the draft PPA forwarded to Grand View on March 10, 2011. 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 Commission found that no Idaho statute specifically addresses the ownership of RECs. Order No. 32580 at 10. The Commission concluded 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, in July 2012, a Petition for Clarification requesting the Commission clarify four points in its Summary Judgment Order No. 32580. Idaho Power filed a Cross-Petition for Clarification. On March 19, 2013, Grand View filed a Motion for Declaratory Order. Notwithstanding the

¹ 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.

parties' dispute regarding REC ownership, Grand View argued for the first time in its Motion for Declaratory Order that a "legally enforceable obligation" (LEO) was created between the parties on March 10, 2011 (the date Idaho Power forwarded the draft PPA to Grand View). Motion at 1. Idaho Power filed an answer opposing the Motion for Declaratory Order.

On July 29, 2013, the Commission issued Order No. 32861 in response to the separate Petitions for Clarification and Grand View's subsequent Motion for Declaratory Order. In Order No. 32861 the Commission granted in part and denied in part the two Petitions for Clarification and denied Grand View's Motion for Declaratory Order. In denying Grand View's Motion, the Commission found that "Grand View had not perfected a [legally enforceable obligation] on March 10, 2011 [(the date Idaho Power forwarded the draft PPA to Grand View)], August 2, 2011 [(the date Grand View filed its initial complaint against Idaho Power regarding RECs)], November 29, 2011 [(the date Grand View moved for summary judgment on the REC issue)], or December 20, 2011 [(the date it filed an amended REC complaint against Idaho Power)]" Order No. 32861 at 22.

The Commission specifically found 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 the § 8.1 REC provision] and [replacement with] the utility disclaiming all REC ownership." Order No. 32861 at 20 (emphasis added). Grand View's continued argument that receiving anything less than all the RECs made its offer to sell conditional, and therefore did not perfect the LEO. "Consequently, we find Grand View has not sufficiently demonstrated that it created a legally enforceable obligation . . . [and] Grand View's Motion for a Declaratory Order is denied." Order No. 32861 at 22.

Nevertheless, the Commission allowed Grand View an opportunity to present "evidence that it created a legally enforceable obligation without conditions." On August 5, 2013, Grand View submitted a response to the Commission's invitation. On August 12, 2013, Idaho Power filed a response to which Grand View filed a reply on August 27, 2013.

In this final Order, the Commission affirms its prior Order No. 32861 and finds that Grand View failed to present persuasive evidence that it is entitled to ownership of all the RECs or that it perfected a legally enforceable obligation with Idaho Power.

BACKGROUND

A. Initial Negotiations Between the Parties

The Commission's Order No. 32861 briefly reviewed the underlying facts and procedural history of this case. The parties engaged in negotiations regarding the terms of the draft PPA including agreed upon IRP-based avoided cost rates. Pursuant to these discussions, Idaho Power sent Grand View a draft PPA on March 10, 2011 (hereinafter the "March 2011 draft PPA" or "draft Agreement") containing IRP-derived seasonal rates (§ 7.1).²

According to Grand View's complaints, the sole dispute between the parties was the REC provision in § 8.1 of the March 2011 draft PPA. In an e-mail dated June 8, 2011, Grand View's counsel stated to Idaho Power's counsel that Grand View is "willing to sign the contract with the REC language you have if we make it contingent upon whether the Commission specifically requires that language." In other words we sign and submit two versions of the contract; one with the language [that] you argue for and one without and we accept the judgment of the Commission as the final outcome." Order No. 32861 at n.11; Idaho Power Reply at Atch. 1 (emphasis added). On July 10, 2011, counsel for Idaho Power responded that

[Idaho Power] would agree to submit a signed contract for the Commission's review containing the current [REC] language in the draft – to which we would include language requesting the Commission to approve or reject the Article 8 [REC] language – and the parties will accept that Commission determination. To clarify: the parties will sign the last tendered draft contract, to which you indicate the project was in complete agreement with – except for a change in the project name, and the [REC] language in Article 8. A contract would contain the current Article 8 language:

Under this Agreement, ownership of [RECs] . . . 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 [RECs] or to implement federal and/or state laws regarding the same.

To which we will add:

As of the date of this Agreement, Idaho Power seeks inclusion of the above [REC] language in Article 8. [Grand View] 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

² Although the parties have generally indicated that they agreed to all the terms save the REC provision, the draft 2011 Agreement contained in the record does not indicate the amount of energy to be deliverable each month (§ 6.2), the date to begin commercial operation (App. B-3), and the maximum capacity amount (App. B-4). Motion for Summary Judgment, Exh. 1; Idaho Power Reply to Grand View Response, Atch. 3.

above [REC] language in Article 8 or 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 this Article 8 [REC] language will be included and become an integral part of this Agreement, which the parties agree to support and uphold.

Please let me know how your client wishes to proceed.

Order No. 32861 at n.11; Idaho Power Reply, Atch. 1 (emphasis added). On July 20, 2011, Grand View Solar's counsel replied to Idaho Power's e-mail of July 10, 2011. In his e-mail, Grand View's counsel stated:

You are correct in your assumption that Grand View Solar's position remains that either (1) the contract is silent on REC ownership or (2) the contract disavows any ownership on Idaho Power's part. The language you propose is contrary to federal law on a QFs [sic] entitlement to a fixed obligation at the time of signing a contract. . . .

Your proposed language also effectively destroys any ability to market RECs on anything other than a year to year contract. It therefore puts us in the untenable position of signing a contract, the terms of which are wholly unacceptable to my client, and if approved would likely make the project unfinanceable. We run the risk of being a party to a contract that we cannot perform on. That exposes my client to significant liability for failure to perform and liquidated damages if it turns out to be un-financeable.

I have therefore recommended to my client that it lodge a complaint against Idaho Power at the PUC if you continue to insist on this provision. Probably the sooner the better. [Unless you] respond that you will accept our final offer to have the contract remain silent, or that Idaho Power still insists on the offending language by this time next week, we will proceed accordingly.

Id. (emphasis added). Grand View filed its complaint against Idaho Power on August 2, 2011.

B. The Initial Complaint

Grand View maintained in its initial complaint, amended 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; Motion for Summary Judgment at 4. 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 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 disputed REC provision in § 8.1 of the draft PPA stated:

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. A summons was issued on August 15, 2011, directing Idaho Power to answer the complaint.³ On September 6, 2011, Idaho Power filed a timely answer urging the Commission to dismiss the complaint.

C. Summary Judgment

1. Grand View’s Motion. 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 stated that its complaint “involves a dispute over the ownership of valuable [RECs] of renewable electric energy generation.” *Id.* at 2. The QF 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. 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; Motion at 25; 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, acknowledged that § 8.1 of the draft PPA “states that REC ownership will be determined by applicable state or federal laws” (Aff. at ¶ 22), but maintained 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. Equally

³ Avista subsequently petitioned to intervene and its request was granted in Order No. 32362.

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.

Idaho Power and Avista each filed answers opposing Grand View’s Motion for Summary Judgment. The utilities argued that the Motion should be denied in its entirety.⁴

2. 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) now adopted in about 29 states. 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); 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 Env’tl. & Policy F.* 125, 146 (Winter 2010) (*hereinafter Ferrey*).⁵ Thirteen states (including Idaho) have no RPS programs and eight states have set RPS “goals.” The Commission observed that the adoption of RPS programs “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.” Order No. 32580 at 4 *quoting* *American Ref-Fuel Co.*, 105 FERC ¶ 61,004 at P.4 (2003), *reh’g 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).

⁴ 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 at ¶ 34 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.” 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 p. 3. On January 25, 2012, Idaho Power filed an answer to the amended complaint requesting the Commission deny all relief and dismiss the complaint.

⁵ For example, California’s RPS is 33% renewable energy by 2020, Oregon’s RPS for large electric utilities is 25% by 2025; and Washington’s RPS is 15% by 2020. www.dsireusa.org/documents/summarymaps/RPS_map.pdf (last visited Oct. 15, 2013).

The Commission stated that approximately 15 states have adopted RPS programs that allow utilities to use unbundled RECs to meet their state-imposed RPS requirements. *Id. citing Ferrey* at 146. The creation of state RPS programs occurred well after PURPA was enacted in 1978; RPS programs have generally been adopted since about 1995. Order No. 32580 at 3 *citing Ferrey* at 146. There is no federal RPS. The Commission also declared that the issue of REC ownership was an issue to be addressed in Phase III of its generic PURPA investigation, Case No. GNR-E-11-03. Order No. 32580 n.9.

In explaining RECs, the Commission quoted approvingly from a Second Circuit opinion in *Wheelabrator Lisbon v. Connecticut Dept. Pub. Utility Control*, 531 F.3d 183, 186 (2d Cir. 2008)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). “[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 (2011) (“the sale and trading of RECs are for the states to determine, and that this is not an issue that PURPA controls.”).

Turning to the issue of REC ownership, the parties agreed and the Commission found that no Idaho statute specifically implements an RPS program or addresses the ownership of RECs. *Id.* at 9. The Commission further 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 PURPA⁶, there might be no PPA and RECs would not exist or be created.” *Id.* (footnote added); *see* Order No. 32802 at 12

⁶ 16 U.S.C. § 824a-3(a)(2); 18 C.F.R. § 292.303(a).

(“RECs are not tangible and do not ‘exist’ until the renewable QF project produces a MW of power.”).⁷

The parties also acknowledged and the Commission found that PURPA does not control RECs – they are state-issued rights. Order No. 32580 at 8. Relying on FERC’s *American Ref-Fuel* case, the Commission found that “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.” Order No. 32580 at 5, 8 (emphasis original) *quoting American Ref-Fuel*, 105 FERC ¶ 61,004 at P.23 (2003).⁸

After reviewing the parties’ arguments, the Commission concluded that it “cannot find as a matter of law that ownership of RECs vest solely in Grand View.” *Id.* at 13. The Commission determined 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. Consequently, Grand View’s Motion for Summary Judgment was denied.

C. Petitions for Clarification

On July 9, 2012, Grand View filed a Petition for Clarification requesting that the Commission “clarify” four points in its Summary Judgment Order No. 32580. Idaho Power filed an answer urging the Commission to deny clarification and a Cross-Petition of its own. Grand View’s Petition for Clarification was followed up by a Motion for Declaratory Order on March 19, 2013. The Commission responded to both Petitions and Grand View’s Motion by issuing Order No. 32861.

1. Timing of REC Ownership and § 8.1. Grand View requested that the Commission clarify its Order and the REC provision in § 8.1 of the draft Agreement by adding a final sentence that provides REC “ownership will be determined by applicable law in effect at the time when the legally enforceable obligation is incurred.” Petition at 8. After reviewing the

⁷ The Commission found that RECs can also arise in non-PURPA renewable projects. Order Nos. 32580 at n.5; 32697 at n.9; 32802 at 8. Such non-PURPA projects might include: utility renewable projects; projects that are not PURPA eligible (e.g., too large); or projects by exempt wholesale generators (EWG).

⁸ In its Motion, Grand View quoted a passage from another FERC order: “. . . the sale and trading of RECs are for the states to determine, and that this is not an issue that PURPA controls.” Motion at 9 *quoting Idaho Wind Partners*, 136 ¶ FERC 61,174 at P.10 (2011).

arguments of both parties, the Commission found that it was appropriate to clarify its prior Order to eliminate confusion. Order No. 32861 at 9.

The Commission first noted that when a QF and the utility are unable to agree to a term or terms contained in a PPA, the Commission has a responsibility to resolve the dispute consistent with PURPA. However, the REC dispute in this case “concerns an issue that PURPA does not control – the ownership of RECs.” *Id.* The Commission recognized in its Summary Judgment Order there was no Idaho statute addressing REC ownership. “However, the parties were on notice that REC ownership would be addressed in our parallel generic [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.” *Id.*

In the PURPA investigation, the Commission found that absent an agreement by the parties to do otherwise, it is reasonable that REC ownership be equally divided between the QF and the utilities for solar projects larger than 100 kW. No party, including Grand View, sought judicial review of that decision. Having found in the PURPA investigation “that the ownership of RECs should be equally divided between the QF and the utility, we find [that] result should apply in this case.” Order No. 32861 at 10. Consequently, the Commission denied Grand View’s request to add a sentence and instead amended its prior Order to reflect that ownership of RECs will be split 50/50 between Idaho Power and Grand View consistent with Order Nos. 32697 and 32802. *Id.* at 10-11. “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.” *Id.* at 10.

2. Legally Enforceable Obligation. Grand View also requested that the text of the REC provision in § 8.1 be applicable to when a “legally enforceable obligation” (LEO) is incurred. Petition at 7, 12. The Commission denied clarification on this point because the focus of § 8.1 is the ownership of RECs, not when a LEO is formed. The Commission found that addressing LEO “would unnecessarily expand the scope of the clarification.” Order No. 32861 at 11. The Commission acknowledged “that a legally enforceable obligation may occur outside of a contract, [but] the focus of our prior Order was the dispute between the parties concerning RECs and the express[ed] language of § 8.1 in the Agreement.” *Id.*

3. Avoided Cost Rates do not include RECs. Grand View next requested the Commission state that avoided cost rates do not compensate the QF for more than the value of

the energy and capacity alone. Petition at 8. The Commission denied clarification on this point finding that its prior Order denying summary judgment is “clear and needs no clarification.” Order No. 32861 at 12. The Commission stated in its Summary Judgment Order that 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.’” *Id. citing* Order No. 32580 at 3, 8, *Morgantown Energy Associates*, 139 FERC ¶ 61,066 at P.47 (2012); *American Ref-Fuel*, 105 FERC ¶ 61,004 at P.22; 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].” *Id. quoting California PUC*, 133 FERC ¶ 61,059 at P.31 n.62 (2010); Order No. 32580 at 8.

4. No Idaho Law Transfer RECs. Finally, Grand View requested that the Commission clarify that no Idaho law transfers RECs to a purchasing utility without payment to the QF. The Commission denied clarification on this point for two reasons. First, the REC dispute in this case involved the “ownership of RECs” not the “transfer” of RECs. The Commission found that Grand View was seeking clarification of an issue that was not contained or addressed in the Commission’s previous Summary Judgment Order. Order No. 32861 at 13. Second, the Commission noted that it recently concluded in the generic PURPA investigation that ownership of RECs should vest equally with the QF and utilities for projects with IRP-based rates (absent an agreement to do otherwise). The Commission found that there was no “transfer” of RECs, instead RECs are equally owned by the QF and the utility. *Id.*; *Wheelabrator Lisbon v. Dept. of Public Util. Control*, 931 A.2d 159, 177 (Conn. 2007).

D. Motion for Declaratory Order

In its March 2013 Motion for Declaratory Order, Grand View made two new arguments. First, it argued that the Commission’s Orders determining REC ownership in the recently completed generic PURPA investigation (GNR-E-11-03) do not apply in this case because there was no controlling REC policy or law in Idaho when Idaho Power tendered the March 2011 draft PPA to Grand View. Thus, Grand View insisted the REC provision in § 8.1 should be removed and the PPA should “remain silent as to REC ownership in the contract pursuant to the Commission’s ruling in Order No. 32580.” Motion at 7. Second, Grand View argued it had perfected a “legally enforceable obligation” (LEO) under FERC’s PURPA

regulations⁹ on March 10, 2011 or no later than August 2, 2011 – before the Commission decided the REC ownership issue. *Id.* Thus, Grand View maintained that a LEO can be formed without deciding REC ownership. The Commission rejected both these arguments and denied Grand View’s Motion.

1. RECs. The Commission found Grand View’s REC argument unpersuasive for two reasons. First, the Commission observed that Grand View is now attempting to recast the facts in this case. The Commission specifically found that Grand View’s REC dispute was the gravamen of its initial complaint, amended complaint, and summary judgment motion. Grand View’s attempt to separate the REC issue from the newly introduced LEO issue is inconsistent with the facts and the positions of the parties. The Commission noted that Grand View had conceded several times throughout this proceeding that the only disputed issue in this case is the ownership of RECs. “The facts of this case demonstrate without a doubt there was a dispute about REC ownership and the Commission was asked [by Grand View] to resolve that disputed issue.” Order No. 32861 at 17.

Second, the Commission advised Grand View in the Summary Judgment Order that REC ownership would be addressed in the generic PURPA investigation. *Id.* at 17-18. Both Grand View and Idaho Power were parties in the concurrent generic investigation that decided the issue of REC ownership. Many parties in the generic investigation submitted legal briefs and extensive testimony on the issue of REC ownership; the REC issue was thoroughly examined. In its Orders, the Commission found that absent an agreement to do otherwise, “RECs in situations such as this should be equally divided between the QF and the utility.” Order No. 32861 at 18. Moreover, the Commission observed that its 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 to this case.” *Id.*

2. LEO. The Commission noted in its Order denying the Motion for Declaratory Order that Grand View is making its LEO argument for the first time. The Commission found that Grand View did not mention the term LEO in its initial complaint, in its amended complaint

⁹ 18 C.F.R. § 292.304(d).

and only once in passing in its Motion for Summary Judgment. Order No. 32861 at 19. Although Grand View asserted it was ready, willing and able to supply power to Idaho Power, the Commission found that “the record does not support that [Grand View] was willing and able to supply power for two reasons.” *Id.*

First, the Commission found that Grand View’s offer to supply power was not a binding offer but was conditioned upon two points: the removal of § 8.1 and Idaho Power disclaiming any ownership in RECs. In particular, the Commission noted that Grand View’s Motion for Summary Judgment requested that 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.” Order No. 32861 at 20 *citing* Motion at 2, 36.

Based upon these facts contained in Grand View’s pleadings, the Commission found “that Grand View failed to make a binding and unconditional offer to sell power to the utility, which the utility could accept.” *Id.* at 20. In other words, Grand View’s purported LEO was conditioned upon the removal of § 8.1 and the utility disclaiming all REC ownership.

The Commission stated that its findings were also supported by several judicial opinions. In *Idaho Power v. Cogeneration*, the Idaho Supreme Court found that a QF’s offer of a security payment was conditional “and therefore did not legally constitute a tender [offer].” 134 Idaho 738, 746, 9 P.3d 1204, 1212 (2000). Likewise, in *A.W. Brown v. Idaho Power*, our Supreme Court rejected a QF’s claim that it had perfected a LEO. 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 812, 817, 828 P.2d 841, 846 (1992) (emphasis added); Order No. 32861 at 20. “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.’” *Id. quoting Armco Advanced Materials v. Pennsylvania PUC*, 579 A.2d 1337, 1347 (Pa. 1990), *aff’d per curiam* 634 A.2d 207 (1993), *cert. denied* 513 U.S. 925 (1994). In other words, no contract or obligation could exist unless and until Idaho Power accepted Grand View’s two conditions (striking § 8.1 and disclaiming ownership of RECs).

Second, the Commission was unconvinced that Grand View was “able” to perform its legal obligation. In particular, the Commission pointed to Grand View’s affidavit of its manager

Robert Paul who stated that the inability to sell all the RECs compromises the project's financial viability. Order No. 32861 at 22 *citing* Paul Aff. at ¶ 24. If Grand View was unable to sell all the RECs, his ability to raise the capital necessary to build and operate the project would be compromised.¹⁰ *Id. citing* ¶¶ 25, 26, 28. The Commission found these statements undermined Grand View's argument that it was willing and able to legally obligate itself to supply power to the utility. *Id.* at 22.

Despite the Commission's findings that no LEO had arisen between the date when the draft Agreement was submitted and Grand View's amended complaint (March 2011 to December 2011), the Commission gave Grand View one last opportunity to "provide any evidence that it made an unconditional offer that would give rise to a legally enforceable obligation." *Id.* at 22. It ordered Grand View to provide the necessary evidence within seven days and allowed Idaho Power the ability to file a response within 14 days.

With this extensive background on the proceedings to date, we now turn to Grand View's "Response" and Idaho Power's reply submitted August 5, 2013 and August 12, 2013, respectively.¹¹

RESPONSES TO ORDER NO. 32861

As noted above, the Commission's Order No. 32861 gave Grand View another opportunity to provide any evidence that it made an unconditional offer that would give rise to a LEO. More specifically, the Commission observed that the parties engaged in settlement negotiations between June 1, 2012, and February 5, 2013. G.V. Notice of Failure of Settlement Discussion at 2. Grand View submitted its response on August 5, 2013. Grand View's response consists of 17 pages and 18 exhibits totaling approximately 170 pages.

A. Separating the REC and LEO Issues

1. Grand View's Response. Grand View maintains that from the outset, this docket was not about RECs but the memorialization of a legally enforceable obligation. Response at 2. Grand View insists that the March 2011 draft PPA "was designed to memorialize the previously created LEO" and the issue of "REC ownership is a red herring and a mere distraction from the real issue at hand . . . did Grand View obligate itself to sell its electrical output to Idaho Power in

¹⁰ 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.

¹¹ Grand View also submitted comments to Idaho Power's reply on August 27, 2013.

the summer of 2011?” *Id.* at 3, 5. It states that “resolution of the REC ownership issue was not an essential element of the contract.” *Id.* at 3. Grand View claims all of the other terms of the contract were known and memorialized in the draft PPA. *Id.* at 5.

Grand View also argues that at the time it established its LEO in the summer of 2011, “neither the Commission nor the state Legislature had addressed the question of REC ownership.” *Id.* at 5. “In the absence of state law or policy in effect in August 2011, . . . Idaho Power’s insistence on REC ownership was completely outside the context of the creation of a LEO under PURPA.” *Id.* at 5. Grand View insists that because the Order in the Commission’s generic PURPA docket apportioning REC ownership 50/50 between the utility and the QF was issued after the LEO was created in the summer of 2011, it is not controlling in this instance. *Id.* at 4. Thus, Idaho Power had no right to insist on a REC provision in the contract between the parties.

2. Idaho Power’s Reply. Idaho Power asserts it was Grand View that filed a complaint and asked the Commission to resolve the REC issue “and now when the Commission has made a determination regarding RECs that Grand View views as unfavorable, it claims such decision is not applicable to it.” Reply at 8. Idaho Power notes that Grand View participated as a party in the Commission proceeding where the Commission decided the issue of REC ownership. *Id.* Having resolved the REC issue which is the basis of Grand View’s complaint and Motion for Summary Judgment, the Commission should not allow Grand View to introduce the new LEO issue. *Id.* at 10.

Commission Findings: Based upon our review of the record in this proceeding, we find that Grand View’s separation argument is unavailing for three reasons. First, as we noted in our prior Orders, Grand View has repeatedly alleged that the sole dispute between the parties concerned the ownership of RECs in the March 2011 draft PPA. Order Nos. 32580 at 1, 7; 32861 at 1; Grand View Motion at 2. We find Grand View’s argument that the REC ownership issue should be separated from the LEO issue ignores the fact that the REC issue “was the gravamen of the initial complaint and summary judgment.” Order No. 32861 at 17. It was Grand View that complained about the REC provision and subsequently moved for summary judgment. Motion for Summary Judgment at 2 (“This case involves a dispute over the ownership of [RECs].”). It sought a declaratory judgment that Idaho Power must disclaim ownership of all

RECs. *Id.* at 2, 36. To now suggest that we simply ignore the REC dispute is inconsistent with the facts of this case and the arguments advanced by Grand View.

As we noted in our prior Orders in this case, when a QF and a utility are unable to agree to terms contained in a PPA, the Commission “has a responsibility to resolve the dispute consistent with PURPA” and Idaho law. Order No. 32861 at 9. However, in this case, the ownership of RECs is an issue that PURPA does not control. *Id.* at 5, 9; Order No. 32580 at 8, 10. Although there is no Idaho statutory law specifically addressing the ownership of RECs in Idaho, the Commission relied upon Idaho common law to determine the property interest associated with RECs. Our Supreme Court has declared 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) (emphasis added); Order No. 32580 at 7.

We affirm our prior Orders finding that RECs are intangible assets. Intangible assets (i.e., RECs) are non-physical assets which exist only in connection with something else. Black’s Law Dictionary 808 (6th ed. 1990). Like in the draft PPA in this case, the allocation of RECs is now a term that is found in most, if not all, PURPA contracts. RECs are not tangible and do not “exist” until the renewable project produces power. “There is no REC without the generation of renewable power.” Order Nos. 32697 at 45-46 (footnote omitted); 32802 at 12.

But for the PURPA “must purchase” provision (16 U.S.C. § 824a-3(a)(2)), the utility would be free to not enter into a contract and RECs would therefore not exist or be created. Order Nos. 32580 at 45; 32802 at 12. In other words, the utility

is not wholly free to bargain because PURPA compels utilities to purchase the power output produced by QFs. PURPA compels the utility to purchase power whether it needs the power to serve load or not. Even if QF power replaces power the utility would otherwise generate, ratepayers are ultimately paying for both the capital assets of the utility’s base load generating plants in rates and the QF power.

Order No. 32802 at 18; *Wheelabrator Lisbon*, 931 A.2d at 174. Based on this reasoning, the Commission determined that:

Absent an agreement between the parties in a PURPA contract to do otherwise, the Commission found it was reasonable to equally apportion RECs between the utility and the QF when the contract is based upon rates derived through the IRP methodology. “Because both the utility and QF are contractually and inexplicably 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.”

Order No. 32802 at 12 *quoting* Order No. 32697 at 46 (internal citations and footnote omitted).

Second, in our prior Order No. 32861 in this case, we stated that the parties were on notice that REC ownership would be addressed in our parallel PURPA investigation. Both Grand View and Idaho Power were parties and participated in the GNR-E-11-03 case. In that generic investigation, the Commission found it reasonable and consistent with common law property interests to apportion REC ownership equally between the QF and the utility for solar projects larger than 100 kW, like the Grand View project here. Order No. 32861 at 9-10 *citing* Order Nos. 32697 at 46; 32802 at 19-20.¹² “No party, including Grand View, sought judicial review of that decision. Having decided the disputed issue of REC ownership in the PURPA investigation [case],” the Commission found it appropriate to consistently apply the REC ownership decision in this case. *Id.* at 18. We affirm that decision in this Order.

Finally, we reject Grand View’s assertion that the March 2011 draft PPA “was designed to memorialize the . . . LEO.” Response at 3. As we have previously observed, Grand View’s initial complaint and amended complaint do not mention the term “legally enforceable obligation” and its Motion for Summary Judgment only mentions LEO in passing. Order No. 32861 at 19. In the months leading up to when Grand View filed its complaint in August 2011, the parties were negotiating the terms of the March 2011 draft PPA and particularly the REC provision in § 8.1. Indeed, the June 8, 2011 e-mail from Grand View’s counsel states “we are willing to sign the contract with the REC language you have if we make it contingent upon whether the Commission specifically requires that language.” Idaho Power Response, Atch. 1 at 2-3 (emphasis added). The March 10, 2011 draft PPA could not “memorialize” a previously established LEO because the parties were still negotiating the REC provision of the Agreement in June and July 2011.¹³ In addition, the draft Agreement is clearly marked as a “**Draft for Discussion Purposes Only**” on each page. Summary Judgment Exh. 1; Idaho Power Reply Atch. 3. Grand View did not advocate that it had perfected a LEO until it filed its Motion for Declaratory Order in March 2013. Motion at 7. Consequently, we conclude that the REC and

¹² See Order No. 32802 at 18-20 for our analysis of the property interests accompanying REC ownership related to the Supreme Court of Connecticut’s *Wheelabrator Lisbon* opinion.

¹³ Because the scope of Order No. 32861 was limited to providing evidence regarding the issue of unconditional LEO, we decline to address Grand View’s new retroactive argument about RECs.

LEO issues are not two separate and distinct issues. We further find that the evidence clearly shows that the REC issue preceded Grand View's introduction of the LEO issue.

B. The LEO Issue

Grand View asserts in its response to Order No. 32861 that the "existence of a LEO is assumed, and indeed, is the very foundation" of its complaint. *Id.* at 2. Grand View does not allege it created a LEO "without conditions" but simply said it "created a legally enforceable obligation no later than August 2, 2011." Grand View Response at 1, 17. Except for the question of REC ownership, Grand View maintains that the LEO was complete as to every essential term and condition. *Id.* at 3. Grand View advances several arguments supporting its LEO position and these arguments are discussed in greater detail below.

For its part, Idaho Power maintains that Grand View's response "does not demonstrate that it created a legally enforceable obligation without conditions as referenced in Commission Order No. 32861." Idaho Power Reply at 2. The utility asserts that Grand View's response actually supports the Commission's findings that Grand View had not established a LEO. Although Idaho Power was willing to enter into a contract with Grand View, Grand View "chose not to legally obligate itself to deliver power . . . at that time . . . and instead chose to pursue a complaint asking the Commission to compel Idaho Power to disclaim any ownership of RECs." *Id.*

1. LEO Predates the REC Dispute. Grand View first argues that its purported LEO predates the Commission's December 2012 Order No. 32697 where it decided the disputed issue of REC ownership. "Despite Grand View's acknowledgement that it and Idaho Power had not come to an agreement as to the ownership of RECs, REC ownership does not control the creation of a LEO under PURPA." Response at 5.

Commission Findings: As we found in the REC section above, Grand View's complaint was filed in August 2011 and declared the sole dispute between the parties involved RECs. Grand View's REC dispute predates its LEO argument. Seventeen months after it first filed its complaint in this matter disputing the ownership of RECs, Grand View requested the Commission issue a declaratory order finding that Grand View had perfected a LEO in this matter. Although Grand View alludes to the concept of a LEO in its July 2012 Petition for Clarification, it did not assert that it perfected a LEO (in March 2011) until its Motion for Declaratory Order filed in March 2013. The Commission issued its Order No. 32697 in

December 2012 resolving the REC ownership issue. We also find that the parties were still negotiating the REC provision of the March 2011 draft PPA in June-July 2011. *See supra* p. 3-4. Moreover, we found in our Summary Judgment Order that Grand View did not raise the LEO issue in its Motion for Summary Judgment filed in November 2011. Order No. 32861 at n.10. We held the “Commission need ‘not decide an issue not raised in the moving party’s Motion for Summary Judgment.’” *Id. citing Esser Electric v. Lost River Ballistics Technologies*, 145 Idaho 912, 919, 188 P.3d 845, 861 (2008). Because the LEO issue was not asserted in Grand View’s complaint, the date of the filing of the complaint is inapposite for a determination of whether or when a LEO was formed.

2. RECs not Essential. Grand View next maintains that the “REC ownership issue was not an essential element of the [March 2011 draft] contract.” *Id.* at 3. Grand View argues that the Commission acknowledged that RECs were not an essential element in its prior Order No. 32861 when we stated:

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 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 4 *quoting* Order No. 32861 at 4-5 *quoting* Order No. 32580 at 5 (emphasis original) *quoting American Ref-Fuel*, 105 FERC ¶ 61,004 at P.23 (2003).

Commission Findings: We find this argument unpersuasive for two reasons. First, Grand View’s own pleadings in this case refute the argument that REC ownership was not an essential element of its contract. As indicated at pages 3 and 4 of this Order, the ownership of RECs was a prominently disputed and negotiated issue between Grand View and Idaho Power. Indeed, it was Grand View that subsequently filed a complaint urging the Commission to delete the REC provision found in § 8.1 of the March 2011 draft PPA and instead insert a clause “in which Idaho Power explicitly disclaims ownership of the [RECs].” Complaint at 2, 6; Motion for Summary Judgment at 2, 36. To say that ownership of RECs was not an essential element of either the contract, the alleged LEO, or this case is contrary to the evidence, ignores the facts of this case, and disregards Grand View’s own pleadings. As Grand View acknowledged in its initial complaint, amended complaint, and Motion for Summary Judgment, the only reason it refused to sign the draft PPA was the dispute over REC ownership.

Second, Grand View's reliance on the quote from our prior Orders that "PURPA does not control the ownership of RECs" is misplaced. This off-repeated passage from the Commission's Orders denying summary judgment (No. 32580) and Motion for Declaratory Order (No. 32861) addresses whether REC ownership is a matter subject to federal PURPA law or state property law. As indicated in the Commission's prior Orders, both this Commission and FERC have declared that PURPA does not address the ownership of RECs, and States have the power to determine who owns the RECs. Order Nos. 32580 at 5, 32861 at 4-5, *American Ref-Fuel*, 105 FERC ¶ 61,004 at P.23 (other citations omitted). We quoted approvingly from the U.S. Court of Appeals for the Second Circuit where that Court observed that "RECs are inventions of state property law whereby the renewable energy attributes are 'unbundled' from the energy itself and sold separately." Order Nos. 32861 at 5, 32580 at 4 quoting *Wheelabrator Lisbon v. Connecticut Dept. of Pub. Utility Control*, 531 F.3d at 186. Because "RECs are state-created, different states can treat RECs differently." Order Nos. 32861 at 5, 32850 at 5 quoting *American Ref-Fuel*, 107 FERC ¶ 61,016 at n.4; see also *Idaho Wind Partners*, 136 FERC ¶ 61,174 at P.10 (2011) (the "sale and trading of RECs are for the states to determine, and that this is not an issue that PURPA controls."). Grand View made RECs an essential element of the draft contract when it conditioned performance on Idaho Power disclaiming REC ownership. Order No. 32861 at 17.

3. Proof of Unconditional LEO. As previously mentioned, the Commission provided Grand View with an opportunity to provide evidence that that it created a LEO without conditions. Order No. 32861 at 22. Although the Commission specifically found in its Order No. 32861 at 22 that Grand View had not perfected a LEO on March 10, 2011 (the date Idaho Power forwarded the draft PPA to Grand View); August 2, 2011 (the date of Grand View's initial complaint); November 29, 2011 (the date Grand View moved for summary judgment); or December 20, 2011 (the date it filed its amended REC complaint), it allowed Grand View a final opportunity to present contrary evidence. The Commission recognized that Grand View and Idaho Power had engaged in prolonged settlement negotiations between June 2012 and February 2013. Notice of Failed Settlement Discussion at 2. Thus, Grand View was provided an opportunity to present evidence of making an unconditional offer during the initial negotiation or as part of the later settlement process.

Idaho Power asserts in its reply that Grand View could have entered into a binding contract containing the avoided cost rates of the March 2011 draft PPA “yet Grand View chose not to obligate itself.” Reply at 9. “Grand View cannot escape the simple fact that it chose not to obligate itself, and thus did not obligate Idaho Power and its customers, to the previously effective rates.” *Id.* Idaho Power states it was willing to submit the March 2011 contract and the REC dispute to the Commission for resolution but Grand View expressly refused to obligate itself by insisting it was entitled to all of the RECs. Having failed in its attempt to compel Idaho Power to disclaim any ownership interest in the RECs, Grand View now attempts to go back and create a LEO at a time it affirmatively chose not to obligate itself. Simply put, “Grand View chose to gamble, and lost. It chose of its volition not to obligate itself to the transaction.” *Id.*

Commission Findings: In its initial complaint, Grand View stated that it was “willing to enter into the standard PURPA PPA with IRP calculated rates that disclaim REC ownership by Idaho Power.” Complaint at ¶ 8, p. 6. In its amended complaint filed in December 2011, Grand View renewed its request that the Commission order Idaho Power to tender the draft contract “with the addition of language disclaiming [Idaho Power’s ownership of RECs” Amended Complaint at p. 3.¹⁴ In Grand View’s November 2011 Motion for Summary Judgment it argued it is entitled “to a standard PURPA PPA wherein Idaho Power disclaims ownership of all [RECs].” Motion at 36. In its March 2013 Motion for Declaratory Order, Grand View argued that the REC provision of the draft PPA should be removed and the contract “should otherwise remain silent as to REC ownership. . . .” Motion at p. 7. We find these statements from Grand View’s pleadings are express conditions that demonstrate Grand View was not willing or able to bind or commit itself unless Idaho Power disclaimed ownership of RECs. “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.’” Order No. 32861 at 20 quoting *Armco Advanced Materials v. Pennsylvania PUC*, 579 A.2d 1337, 1347 (Pa. 1990); *In Re Mid Atlantic Cogen*, 1993 WL 561981*7 (New Jersey Board of Regulatory Control 1993).

Despite its initial proposal to sign and submit the dispute to the Commission, Grand View refused to obligate itself by insisting it was entitled to all the RECs. Indeed, it was Grand View’s counsel that made the initial offer to submit the dispute to the Commission for resolution.

¹⁴ The amended complaint also notes that Grand View’s complaint “was predicated upon [the draft] contract” – without mention of a LEO. Amended Complaint at ¶ 38.

He stated in his June 8, 2011 e-mail to Idaho Power’s counsel that Grand View is willing to sign the March 2011 draft PPA “if we make it contingent upon whether the Commission specifically requires that [REC] 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.” Order No. 32861 at n.11, Idaho Power Reply at Atch. 1 (emphasis added). However, after having suggested such a process, Grand View subsequently refused to obligate itself in an e-mail dated July 20, 2011. *Id.* We find this exchange is persuasive evidence that Grand View was not willing to unconditionally obligate itself to supply power and thus no LEO was perfected.

Having been unsuccessful in its REC arguments, Grand View now “attempts to go back and create a legally enforceable obligation to the prices in effect at that time it affirmatively chose not to obligate itself to the transaction.” Idaho Power Reply at 9. Moreover, Grand View’s counsel explained in his e-mail rejecting his own proposal that if Grand View committed itself to the obligation to supply power under the contract, it “would likely make the project unfinanceable. We run the risk of being a party to a contract that we cannot perform on.” Reply Exh. 1; *supra* p. 4. Taken at face value, Grand View’s statements regarding financial risk¹⁵ raise substantial doubts about its ability to proceed with the project if it receives anything less than ownership of all the RECs. Grand View also refused Idaho Power’s offer to split REC ownership. Instead, Grand View “seeks a contract in which REC ownership is disclaimed by Idaho Power.” *Id.* at ¶ 13; Motion for Summary Judgment at p. 36. Based upon this record we cannot find that Grand View made an unconditional binding offer or commitment to supply power to Idaho Power.

As we declared in our prior Order, it is up to the States, not FERC, to determine “the date at which a legally enforceable obligation is incurred under State law.” Order No. 32861 at 19; *Rosebud Enterprises v. Idaho PUC*, 128 Idaho 609, 623-24, 917 P.2d 766, 780-81 (1996); *Rosebud Enterprises v. Idaho PUC*, 131 Idaho 1, 6, 951 P.2d 521, 526 (1997); *Power Resources Group v. PUC of Texas*, 422 F.3d 231, 239 (5th Cir. 2005) (“FERC has given each state the authority to decide when a LEO arises in that state.”). Our Supreme Court has stated it is the Commission that has the authority to determine whether a LEO exists. *Rosebud*, 128 Idaho at 624, 917 P.2d at 781.

¹⁵ See also section 5 below.

Our finding is also supported by the Idaho Supreme Court’s opinion in *A.W. Brown v. Idaho Power Co.*, 121 Idaho 812, 828 P.2d 841 (1992) and other cases. See Order No. 32861 at 20-21. In discussing the necessary criteria for a LEO, the Court stated in *A.W. Brown* 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 827, 828 P.2d at 846 (emphasis added); Order No. 32861 at 20. The Commission further found that 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.’” *Id. quoting Armco*, 579 A.2d at 1347. It was Grand View that chose not to obligate itself when it declined to sign the March 2011 draft PPA and submit the dispute to the Commission for resolution.

Based upon our review of the record, we affirm our prior Order finding that Grand View failed to make a binding and unconditional legally enforceable obligation to provide its electric output to Idaho Power. Despite its arguments to the contrary, we continue to find that “Grand View’s purported LEO was conditioned upon the removal of § 8.1 [of the draft PPA] and the utility disclaiming all REC ownership.” Order No. 32861 at 20. Consequently, Grand View did not create a legally enforceable obligation.

4. Site Preparation and Interconnection. Grand View also insists that its actions regarding its interconnection activities and site preparation demonstrate that it is ready to perform under its purported legally enforceable obligation. In particular, Grand View argues that Idaho Power conceded that Grand View had created a LEO when as part of the interconnection process Idaho Power informed Grand View that it had “received all of the required materials” and that “this application is now considered complete.” Response at 16 *citing* Exh. 11. Grand View maintains that this statement is recognition that the QF perfected a LEO.

Idaho Power replies that Grand View’s submission of additional documents contained in Exhibits 10-18 do “not in any way provide evidence that it unconditionally obligated itself to sell to Idaho Power.” Reply at 3. Instead, Idaho Power maintains that Grand View was merely taking preliminary actions consistent with developing a project. This conduct and preliminary activities “do not refute Grand View’s express refusal to obligate itself to the [draft] contract.” *Id.* Idaho Power also argues that the creation of a WREGIS account and obtaining precertification for eligibility to California’s renewable portfolio standard (Grand View Exh. 1-3) do not evidence an obligation to sell power to Idaho Power. *Id.* at 3. The utility observed that

these precertification actions “do not guarantee that a facility will be eligible for [REC] certification in the future.” Exh. 3. In other words, these acts have no bearing on Grand View’s ultimate obligation to sell power. Site studies and permit extensions (Exh. 4-9) also do not obligate the QF to build the facility. *Id.*

Idaho Power also asserts that many of Grand View’s “exhibits” relating to interconnection (Exh. 10-18) are not relevant because those exhibits pertain to Grand View’s initial interconnection request (interconnection queue No. 369) that was subsequently withdrawn. Having withdrawn its interconnection request queue No. 369, Grand View re-applied for interconnection and has been issued a new queue No. 397 to coincide with the interconnection requests of Grand View’s other projects. Although Idaho Power acknowledges that Grand View has signed a new Generator Interconnection Agreement (GIA), it maintains the GIA does not commit Grand View nor prove that the QF obligated itself to sell power pursuant to the draft 2011 PPA. *Id.* at 5.

Commission Findings: Some procedural background is helpful in examining this issue. The typical PURPA transaction in Idaho contains two separate and independent parts. One part is the parties’ mutual obligations to sell and to purchase the electrical output from a QF project embodied either in a power purchase agreement (PPA) or perfected in a LEO. 16 U.S.C. § 824a-3(a)(2); 18 C.F.R. § 292.304(d). The other part is the “interconnection process” where the utility and the renewable project negotiate and contract for the construction of the necessary interconnection facilities to “connect” the renewable project with the purchasing utility’s system. 18 C.F.R. § 292.308; Order Nos. 32755 at 2; 32780 at 2. The culmination of the interconnection process is the execution of a Generator Interconnection Agreement (GIA) and the construction of the transmission or interconnection facilities. Either of these parts (the obligation or the interconnection) may be initiated first by the QF; sometimes the QF initiates the interconnection process first and other times it first works on completing the PPA. See, e.g., Case No. IPC-E-12-10 (PPA first) and Case Nos. IPC-E-12-25, IPC-E-12-26 (interconnection first).

We first find that Grand View’s interconnection and site preparation activities are not directly relevant to the question of whether Grand View’s alleged LEO was conditioned on Idaho Power disclaiming all REC ownership. As we previously explained, there are two separate and distinct parts. We are not persuaded that activities related to interconnection mitigate the lack of a firm and binding commitment by Grand View to sell power. Second, Grand View’s initial

interconnection activities as part of queue No. 369 (Exh. 10-18) were withdrawn. Grand View re-initiated the interconnection process and was assigned a later queue No. 397. Even though it signed a new GIA for interconnection queue No. 397, Grand View has until December 31, 2013 to pay the required construction funds. Idaho Power Reply at 5.

Third, while Grand View's site permitting/preparation activities may be viewed as indications of its desire to construct the project, these activities do not mitigate the evidence of Grand View's lack of binding or unconditional commitment under the PPA/LEO part; i.e., its obligation was conditional upon Idaho Power disclaiming all REC ownership. Likewise, the WREGIS and California registrations and permitting extension do not mitigate the lack of a firm commitment or obligation to supply power. As the trier of fact and based upon the totality of the evidence, we do not find these interconnection measures convince us that Grand View unconditionally committed to supply power to Idaho Power.

5. Financial Viability. Grand View also takes issue with the Commission's finding that Grand View may not have been "able" to perform under a legally enforceable obligation because the QF's inability to sell all of the RECs associated with the project compromised the financial viability of the project. Response at 6; Order No. 32861 at 22. In its prior Order denying a declaratory order, the Commission noted that Grand View's manager had stated the project's financial viability, its profitability, and its ability to raise the capital necessary to build and operate the project "could also be compromised" if Grand View could not sell all of the RECs. *Id. citing* Paul Affidavit at ¶¶ 25-29. The Commission found these statements "undermine Grand View's argument that it was willing and able to mutually obligate itself to supply power" to the utility. *Id.*

In its response, Grand View concedes that its inability to sell all of the RECs compromises the project but this loss of ancillary income "would not necessarily make the project non-viable." Response at 6. However, Grand View maintains that its subsequent actions (including site preparation, permitting, registering to sell RECs, etc.) refutes that it was not taking its obligation to *deliver power to Idaho Power* seriously. In particular, Grand View notes that it has extended its conditional use permit to construct the facility, extended its land lease, prepared the site for the construction of the PV panels, and initiated actions to enter into a generator interconnection agreement with Idaho Power. Response at 14-15; Exh. 6, 7. Grand

View insists that at “no time did Grand View assert that it would not fulfill its obligation to provide the power it had committed to provide under the agreed upon term[s].” *Id.*

Commission Findings: Although Grand View concedes that the REC dispute and the reduction of REC income make it more difficult for Grand View to secure financing, it asserts that at no time has it said it would not fulfill its obligation to provide power “under the agreed upon term[s].” Response at 6. Grand View argues that the loss of the REC income from not owning all the RECs “would not necessarily make the project non-viable.” *Id.* at 6. However, Grand View’s own counsel stated that anything less than disclaiming ownership to Idaho Power “would likely make the project un-financeable. We run the risk of being a party to a contract that we cannot perform on.” See *supra* p. 4. Grand View also declared that 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. Based upon our review of the record, we find that the Commission relied on Grand View’s own assertions of project viability in making a determination of whether Grand View obligated itself to provide power. The Commission has not, nor do we now, make an independent determination of Grand View’s viability.

6. Prior Orders. Next, Grand View again asserts that the Commission has previously ruled that Idaho Power may not condition a PURPA contract on the “right of first refusal” for RECs. Response at 3. In the early case referenced by Grand View, Idaho Power requested the Commission grant it a right of first refusal to purchase unbundled RECs in PPAs. Order No. 29480. Grand View asserts that the Commission’s prior Order expressly declared that Idaho utilities may not condition their mandatory obligation to purchase on a right of first refusal. *Id.* at 3.

Commission Findings: Grand View seemingly ignores that the Commission has already addressed this argument when it denied summary judgment. In Order No. 32580 at 9, the Commission found that Grand View’s characterization and “interpretation of this Order [No. 29480] is erroneous.” In particular, the Commission explained in its Order denying summary judgment that it did not reach the issue of REC ownership in Order No. 29480 because the Commission dismissed Idaho Power’s petition for lack of an actual or judicial controversy. Thus, we found and we again affirm that Order No. 29480 does not stand for the proposition

cited by Grand View. As we explained in the Summary Judgment Order, Idaho Power’s petition was not ripe for a declaratory judgment. Order No. 32580 at 9-10. Thus, we find this argument is not relevant and that the Commission has previously ruled against Grand View on this issue.

7. Yellowstone Case. Lastly, Grand View asserts that an earlier proceeding (Case No. IPC-E-10-22) involving Yellowstone Power (a cogeneration QF) and Idaho Power supports its argument that the Commission “grandfathered” a LEO in that case. Idaho Power insists that the Yellowstone case does not support Grand View’s argument. Unlike this case, Idaho Power says both parties in the Yellowstone case did sign a contract and submitted it to the Commission. Unlike Yellowstone, Grand View refused to obligate itself. Reply at 6.

Commission Findings: We find that Grand View’s reliance on Yellowstone is entirely misplaced. The parties in Yellowstone had agreed to all contract terms (including RECs).¹⁶ In this case, Grand View withheld consent for entering into a contract with Idaho Power unless and until Idaho Power disclaimed REC ownership. There was no mention in the prior case of creating a legally enforceable obligation. Indeed, the parties executed a contract. As we have previously mentioned, FERC developed the concept of a LEO in response to situations where the utility refused to enter into a contract. In Yellowstone and here, the utility did not refuse to enter into a contract. The LEO issue simply did not arise and Yellowstone has absolutely no bearing on this case.

CONCLUSIONS

The Commission has jurisdiction over electric utilities and the issues raised in this matter pursuant to the authority and power granted it under Title 61 of the Idaho Code and PURPA. The Commission has authority to resolve common law contract disputes between QFs and electric utilities. It is up to the States to determine the specific parameters of individual power purchase agreements, including the date at which a legally enforceable obligation is incurred under state law. We conclude that Grand View’s insistence that Idaho Power disclaim REC ownership left the QF unwilling to enter into a binding and unconditional PURPA contract with Idaho Power. Therefore, we conclude that Grand View did not create a legally enforceable obligation in this case.

¹⁶ In the Yellowstone PPA, the parties agreed that the QF would retain ownership of the RECs.

ORDER

IT IS HEREBY ORDERED that Grand View Solar Two's complaint requesting that the Commission order Idaho Power to delete § 8.1 of the March 10, 2011 draft PPA and disclaim all ownership of RECs is denied.

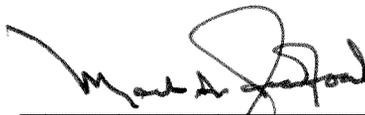
IT IS FURTHER ORDERED that Grand View's Motion for Declaratory Order that it perfected a legally enforceable obligation as of March 10, 2011, and no later than August 2, 2011, is denied.

THIS IS A FINAL ORDER. Any person interested in this Order (or in issues finally decided by this Order) or in interlocutory Orders previously issued in this Case No. IPC-E-11-15 may petition for reconsideration within twenty-one (21) days of the service date of this Order with regard to any matter decided in this Order or in interlocutory Orders previously issued in this case. Within seven (7) days after any person has petitioned for reconsideration, any other person may cross-petition for reconsideration. See *Idaho Code* § 61-626.

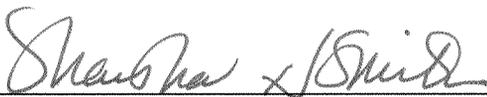
DONE by Order of the Idaho Public Utilities Commission at Boise, Idaho this 29th day of October 2013.



PAUL KJELLANDER, PRESIDENT



MACK A. REDFORD, COMMISSIONER



MARSHA H. SMITH, COMMISSIONER

ATTEST:



Jean D. Jewell
Commission Secretary

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