Office of the Secretary
Service Date
January 31, 2014

BEFORE THE IDAHO PUBLIC UTILITIES COMMISSION

GRAND VIEW PV SOLAR TWO, LLC,	)	
	)	**CASE NO. IPC-E-11-15**
COMPLAINANT,	)	
	)	
v.	)	
	)	**ORDER NO. 32974**
IDAHO POWER COMPANY,	)	
	)	
RESPONDENT.	)	

On August 2, 2011, Grand View PV Solar Two, LLC filed a formal complaint against Idaho Power Company regarding the parties' negotiation of a Power Purchase Agreement ("PPA" or "Agreement") under the Public Utility Regulatory Policies Act of 1978 (PURPA). Grand View is the developer of a proposed 20 megawatt (MW) solar generating project to be located in Elmore County. In its initial complaint, amended complaint, and subsequent Motion for Summary Judgment, Grand View alleged that the sole dispute between the parties concerned the ownership of renewable energy credits ("RECs")[1] in the draft PPA that Idaho Power forwarded to Grand View on March 10, 2011. In its complaint and on summary judgment, Grand View requested the Commission order Idaho Power to remove the REC provision (§ 8.1) of the draft PPA and instead insert a clause that requires Idaho Power to expressly disclaim ownership of all RECs in the Agreement. In June 2012, the Commission denied summary judgment.

In March 2013, Grand View raised a new argument claiming it had perfected a "legally enforceable obligation" (LEO) on the date Idaho Power had forwarded the draft PPA to Grand View (March 10, 2011), or no later than August 2, 2011 (the date it filed its formal complaint). A LEO may be established by a PURPA qualifying facility ("QF") when the QF makes a binding commitment to sell power to an electric utility. 18 C.F.R. § 292.304(d). Grand View also argued the REC provision in the draft PPA should be removed and the Agreement "otherwise remain silent as to REC ownership." Motion for Declaratory Order at 12. In July 2013, the Commission issued Order No. 32861 finding that Grand View had not perfected a

[1] A single REC represents the intangible environmental attributes associated with one megawatt-hour (MWh) of electricity generated from an eligible renewable energy facility.

LEO. The Commission gave Grand View one final opportunity to present evidence that it created a legally enforceable obligation. Grand View filed a response and Idaho Power filed an answer.

On October 29, 2013, the Commission issued final Order No. 32913 rejecting Grand View's REC and LEO arguments. Addressing the REC issue, the Commission found that absent an agreement to do otherwise, it was reasonable and consistent with Idaho common property law interests to apportion ownership of the RECs equally between Grand View and Idaho Power. Order No. 32913 at 16; Order No. 32861 at 9-10. Addressing the LEO issue, the Commission found Grand View's purported LEO was conditioned upon removal of the REC provision in § 8.1 and requiring Idaho Power to disclaim all REC ownership. The Commission declared 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." Order Nos. 32913 at 12, 20, 22; 32861 at 20 *quoting Armco Advanced Materials v. Pennsylvania PUC*, 579 A.2d 1337, 1347 (Pa. 1990), *aff'd per curiam* 634 A.2 207 (1993), *cert. denied*, 513 U.S. 925 (1994); *A.W. Brown v. Idaho Power Co.*, 121 Idaho 812, 827, 818 P.2d 841, 847 (1992). "Thus, we find Grand View did not make a binding and unconditional legally enforceable obligation to provide power to the utility." Order Nos. 32861 at 20; 32913 at 21-22.

GRAND VIEW'S PETITION FOR RECONSIDERATION

On November 18, 2013, Grand View filed a timely Petition for Reconsideration of final Order No. 32913 raising three primary issues. First, Grand View alleges the Commission failed to recognize that a LEO and a PURPA contract are not the same but are two distinct concepts. Petition at 2. Second, Grand View asserts the Commission has impermissibly tied the creation of a LEO to resolution of the REC ownership issue. *Id.* at 3. Finally, Grand View maintains the Commission's decision regarding RECs constitutes "retroactive ratemaking" by relying upon two Commission REC Orders issued in the concurrent generic PURPA investigation, Case No. GNR-E-11-03. Grand View argues it filed its complaint and created its LEO in August 2011 – before the Commission issued its final REC Order in its generic PURPA investigation in December 2012. Petition at 8.

On November 25, 2013, Idaho Power filed an answer to Grand View's Petition urging the Commission to deny the Petition in its entirety. On December 16, 2013, the Commission issued Order No. 32950 granting reconsideration so that it could consider Grand

View's arguments in greater detail. The Commission found that the record in this proceeding is sufficient and further briefing or evidentiary proceedings are unnecessary. *Idaho Code* § 61-626(2).

On January 10, 2014, Grand View advised the Commission's attorney that the parties were scheduled to meet on January 13, 2014, "to see if we can settle [the] Grand View [case]." On the same day, Idaho Power submitted two judicial opinions issued by the West Virginia Supreme Court of Appeals and the Federal District Court of West Virginia (S.D.) that address RECs.

On January 16, 2014, counsel for the Commission sent a letter to the parties inquiring about the status of their settlement discussions. The parties were instructed to report on the status of such discussions no later than January 21, 2014. Both parties separately replied that settlement discussions were unfruitful.

Having thoroughly reviewed the issues raised in Grand View's Petition for Reconsideration and the record in this case, the Commission issues this final Order on reconsideration granting in part and denying in part reconsideration. As set out in greater detail below, the Commission amends portions of its original final Order No. 32913 to conform to this Order. *Idaho Code* §§ 61-624 and 61-626(3).

BACKGROUND

A. The Parties' Negotiations

Commission Order Nos. 32861 and 32913 review the underlying facts and procedural history of this case. Briefly, Grand View and Idaho Power engaged in negotiations regarding the terms of a draft PURPA agreement. 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"). The parties agreed that the avoided cost rates contained in the draft Agreement be calculated using the Integrated Resource Plan (IRP) Methodology. Grand View alleged that it agreed to all material terms in the draft Agreement except the REC provision. Order No. 32580 at 5. However, the Commission later noted that several material terms in the draft Agreement contained in the record had not been reduced to writing including: the amount of energy to be delivered each month (§ 6.2); the date for performance under the contract (App. B-3); and the maximum capacity amount of the project (App. B-4). Order No. 32913 at 3.

Grand View maintained in its initial complaint, amended complaint and in its November 2011 Motion for Summary Judgment that the sole dispute between the parties was the inclusion of the REC[2] provision in § 8.1 of the draft Agreement. During their negotiations, Idaho Power suggested the parties split REC ownership on a 50%-50% basis. In the alternative, Idaho Power also proposed the parties equally divide the RECs with Grand View receiving the RECs for the first 10 years and Idaho Power receiving the RECs for the last 10 years of the Agreement. Order No. 32580 at 6 *citing* Complaint at ¶¶ 11, 12; Idaho Power Answer at ¶¶ 11, 12. Grand View refused both alternatives. *Id.*

The parties then discussed submitting the dispute to the Commission for resolution. Order No. 32580 at 6 *citing* Complaint at ¶ 14; Answer at ¶ 14. 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 [proposed] 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 Idaho Power] argue[s] for and one without and we accept the judgment of the Commission as the final outcome." Order Nos. 32913 at 3; 32861 at n.11; Idaho Power Answer to Amended Complaint, Atch. 1 at 2 (emphasis added). On July 10, 2011, counsel for Idaho Power responded that the utility

> 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 [and the] 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

[2] RECs are also known in various jurisdictions as environmental attributes, green tags, or renewable trading certificates. "RECs may be created at renewable generating facilities operated by utilities, exempt wholesale generators (EWGs), non-PURPA generators, or PURPA qualifying facilities (QFs)" such as Grand View. Order Nos. 32580 at 4; 32913 at 1 n.1.

> Agreement, and hereby agree to submit the issue of whether to include the 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. 32913 at 3-4 *quoting* Idaho Power Answer to Amended Complaint, Atch. 1 at 1 (emphasis added). On July 20, 2011, Grand View's counsel replied to Idaho Power's counsel in an 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 un-financeable. 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.

Order No. 32913 at 4 *quoting* Idaho Power Response to Grand View Submission, Atch. 1 at pp. 1-2 (Aug. 12, 2013) (emphasis added); *see also* Order No. 32861 at n.11.

B. The Concurrent PURPA Investigation

Shortly after Grand View filed its formal complaint in this case, the Commission initiated the third phase of its generic PURPA investigation, Case No. GNR-E-11-03. On September 1, 2011, the Commission opened its concurrent PURPA investigation to review various PURPA issues including REC ownership. Order No. 32352 at 4. Both Idaho Power and

Grand View were parties in that case. Order No. 32697 at 5-6. Legal briefs addressing the ownership of RECs were filed in July 2012, and the Commission conducted its technical hearing in August 2012. *Id.* at 1. After the technical hearing, the Commission directed the parties to engage in settlement discussions. *Id.* at 6. A partial settlement was reached and the Commission took additional comments on the settlement in October 2012. *Id.*

On December 18, 2012, the Commission issued its final Order in the generic PURPA investigation. Among other things, the Commission found that absent an agreement between the parties to do otherwise, the QF and the utility should equally share ownership of RECs when the avoided cost rates are calculated using the IRP Methodology. Order No. 32697 at 45-47. On reconsideration, the Commission affirmed its decision in Order No. 32697 that it was reasonable and consistent with common law property interests to apportion REC ownership equally between the QF and the utility, absent an agreement by the parties to do otherwise. Order No. 32802 at 19-20. No party, including Grand View, sought judicial review of that decision. Order No. 32913 at 16.

THE COMMISSION'S PRIOR ORDERS

A. The REC Decision

1. Jurisdiction. The Commission observed in its prior Orders that "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. 32913 at 15 *quoting* Order No. 32861 at 9; *Empire Lumber Co. v. Washington Water Power Co.*, 114 Idaho 191, 192, 755 P.2d 1229, 1230 (1988) (the Commission "is the appropriate forum to resolve" PURPA contract disputes). "Our Supreme Court has declared that 'the Commission has jurisdiction to examine common law contract issues between QFs and utilities.'" Order No. 32913 at 15 *quoting A.W. Brown*, 121 Idaho at 819, 828 P.2d at 848 (emphasis added); Order No. 32580 at 7. In resolving the ownership of RECs in Idaho, "the Commission relied upon Idaho common law to determine the property interest[s] associated with RECs." Order No. 32913 at 15, 16.

In its Summary Judgment Order No. 32580 and in its final Order No. 32913, the Commission quoted approvingly from the Second Circuit's opinion in *Wheelabrator Lisbon v. Connecticut Dept. Pub. Util. Control*, 531 F.3d 183, 186 (2nd Cir. 2008). The Court and the Commission explained 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.[3] Generally speaking, RECs are inventions of state property law whereby the renewable 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 Nos. 32580 at 4; 32913 at 7 (emphasis added). "[I]nsofar as RECs are state-created, different states can treat RECs differently." Order Nos. 32580 at 5; 32913 at 7 *quoting American Ref-Fuel*, 107 FERC ¶ 61,016 at n.4; *Idaho Wind Partners*, 136 FERC ¶ 61,174 at P.10 (2011) (the sale and trading of RECs are for the States to determine, and it is not an issue that PURPA controls."). In other words, PURPA "does not address the ownership of RECs. . . . . States, in creating RECs, have the power to determine who owns the RECs in the first instance, and how they may be sold or traded; it is not an issue controlled by PURPA." Order Nos. 32580 at 5, 8; 32913 at 8 (emphasis original) *quoting American Ref-Fuel*, 105 FERC ¶ 61,004 at P.23; *Wheelabrator Lisbon*, 531 F.3d at 189; *City of Martinsville v. Public Service Comm'n of W. Virginia*, 729 S.E.2d 188, 194 (W.Va. 2012); *Morgantown Energy Assoc. v. Public Service Comm'n of W. Virginia*, slip op. at *3,8, 2013 WL 5462386 (S.D.W.Va.) (Sept. 30, 2013).

2. REC Ownership. Turning to the issue of REC ownership, the Commission found and the parties agreed that no Idaho statute specifically addresses the ownership of RECs. Order Nos. 32580 at 9; 32913 at 7. The Commission found and Grand View has not challenged that RECs are 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; 32913 at 7 *citing* Black's Law Dictionary, 808 (6th ed. 1990); *City of Martinsville*, 729 S.E.2d at 197 (RECs "are an intangible creation. . ."). "RECs are not tangible and do not 'exist' until the renewable project produces power." Order No. 32913 at 15. The Commission noted in this case that there are no RECs without the generation of renewable power. Order Nos. 32697 at 45-46 (footnote omitted); 32802 at 12; 32913 at 15.

In final Order No. 32913, the Commission cited two primary reasons why it was appropriate to equally apportion RECs in this instance between Grand View and Idaho Power

[3] *American Ref-Fuel Co.*, 105 FERC ¶ 61,004 (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).

(absent their agreement to do otherwise). First, the Commission relied upon the property interest factors developed in the concurrent generic PURPA investigation (GNR-E-11-03) to support its decision to equally apportion the RECs. Order No. 32913 at 15. In the PURPA investigation, the Commission stated that the "question of REC ownership hinges upon which party has a property interest in RECs. Whether a party has a compensable property interest in RECs presents 'a question of law based upon factual underpinnings.'" Order No. 32802 at 18 *quoting Mohlen v. United States*, 74 F.Cl. 656, 660 (2006) *quoting Walchek v. United States*, 303 F.3d 1349, 1354 (Fed.Cir. 2002) *citing Wyatt v. United States*, 271 F.3d 1090, 1096 (Fed.Cir. 2001), *cert. denied sub nom. E. Minerals Int'l v. United States*, 535 U.S. 1077, 122 S.Ct. 1960 (2002).

3. Property Interest Factors. The Commission found the Supreme Court of Connecticut's opinion in *Wheelabrator Lisbon v. Dept. of Pub. Util. Control*, 931 A.2d 159 (Conn. 2007), was instructive in analyzing the factors pertaining to the property interests of REC ownership. In that opinion, the Connecticut Court listed several property interest factors. First and foremost, PURPA's "must purchase" provision compels utilities to purchase power that they would not otherwise be obligated to purchase but for PURPA. *Wheelabrator*, 931 A.2d at 174; Order No. 32913 at 7, 15. As the Commission explained in its final Order No. 32913, "[b]ut 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 No. 32913 at 15 *citing* Order Nos. 32580 at 10; 32802 at 12.

The second factor relied upon by the Commission is that RECs are "inexplicably tied to the [QF's] production of electricity." Order No. 32802 at 18 *quoting Wheelabrator*, 931 A.2d at 174; Order No. 32913 at 15. When a QF utilizes PURPA to compel a utility to purchase its renewable power, RECs would not be created but for PURPA's must purchase provision. Order No. 32802 at 15. The Commission noted that the disposition of RECs has now become a standard provision in Idaho PURPA contracts. Order Nos. 32697 at 44, 46; 32802 at 15.

Third, "PURPA compels the utility to purchase power whether it needs the power to serve load or not. Even if the 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 [as well as] the QF power." Order Nos. 32913 at 15; 32802 at 18. Fourth, ratepayers are ultimately paying for both the purchase of QF power and the assets of the utility's base load generating plants that are supposedly displaced by the QF power. Order No. 32913 at

15. Finally, the Commission noted that "providing all the RECs to the QF would result in a windfall to them." Order No. 32802 at 19; *Wheelabrator*, 931 A.2d at 174-75.[4]

After weighing these property interest factors, the Commission affirmed its decision that the RECs in this case should be equally divided between Grand View and Idaho Power. The Commission concluded 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. 32913 at 15-16 *quoting* Order Nos. 32802 at 12; 32697 at 46 (internal citations and footnote omitted).

The second primary reason supporting the Commission's REC decision in final Order No. 32913 was that Grand View and Idaho Power "were on notice that REC ownership would be addressed in [the] parallel PURPA investigation." Order No. 32913 at 16 *citing* Order No. 32861 at 9-10. The Commission observed that both "Grand View and Idaho Power were parties and participated in the GNR-E-11-03 case." *Id.* The Commission noted that no party in the generic PURPA investigation, including Grand View, sought judicial review of the Commission's decision to apportion REC ownership equally between the QF and the utility. Order No. 32913 at 16. "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.*; Order No. 32861 at 9-10.[5]

---

[4] The Commission also examined property interest factors that cut in favor of the QF. In particular, the Commission noted that "QFs must first generate the power before a REC is created. QFs must build their facilities and interconnect with the utility purchasing the generated power. . . . Second, providing all the RECs to the utility would result in a windfall to the utility. . . . [Providing the RECs to the QF constitutes a] secondary source of . . . income for QFs [that] further encourages the development of renewable resources consistent with the goals of PURPA and the intent of this Commission." Order No. 32802 at 19 *citing Wheelabrator*, 931 A.2d at 175 n.24.

[5] The Commission also noted in its Summary Judgment Order that early cases from other states without REC statutes held that RECs "are the property of the purchasing utility rather than the producer." Order No. 32580 at 13 *quoting In re Ownership of RECs*, 913 A.2d 825, 828 (N.J.App.Div. 2007) *citing* Holt, *Who Owns Renewable Energy Certificates*? at 14 (published by Ernest Orlando Lawrence Berkley National Laboratory, available at: eetd.lbl.gov/ea/emp/reports/599965.pdf).

B. The LEO Decision

Grand View asserted the draft PPA was designed to memorialize the LEO and that the "LEO issue was the very heart of its complaint." Petition at 6. The Commission dismissed this characterization of the case for several reasons. First, the Commission found "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 Nos. 32913 at 16; 32861 at 19. The Commission found that Grand View first advocated it had perfected a LEO in March 2013 – 19 months[6] after it had filed its complaint in this matter. Order No. 32913 at 16-17. Second, the Commission found the March 2011 draft PPA did not "memorialize" a LEO because the parties were still negotiating the REC provision of the draft Agreement in June and July of 2011. *Id.* at 16. In addition, the March 2011 draft PPA was clearly marked "**Draft for Discussion Purposes Only**" on each page. *Id.*

Third, the Commission found Grand View was not willing or able to unconditionally bind or commit itself to sell its output to Idaho Power "unless Idaho Power disclaimed ownership of RECs." Order No. 32913 at 20; Complaint at ¶ 8, p. 6. Grand View refused to obligate itself by insisting it was entitled to all the RECs. More specifically, Grand View's offer to supply power to the utility was based upon two conditions: (1) the removal of the REC provision in § 8.1; and (2) ordering Idaho Power to disclaim any and all ownership of RECs. Order Nos. 32861 at 19-20; 32913 at 18-22.

The Commission also relied on the conduct of the parties to find there was no LEO. During negotiations with Idaho Power, Grand View's counsel stated in the June 8, 2011 e-mail that the QF was "willing to sign the contract with the REC language you have if we make it contingent upon whether the Commission specifically requires that language." Order No. 32913 at 16. The Commission noted it was Grand View's counsel that made the initial offer to submit the REC dispute to the Commission for resolution. He suggested the parties sign and submit two versions of the PPA to the Commission: "one with the [REC] language of [§ 8.1] . . . and one without and we accept the judgment of the Commission as the final outcome." *Id.* at 3, 21 *quoting* Order No. 32861 at n.11. However, after having suggested its willingness to submit the

[6] Although the Commission's Order No. 32913 calculates that Grand View filed its Motion for Declaratory Order 17 months after it first filed its complaint in August 2011, the actual number of months is 19 (from August 2011 to March 2013).

dispute to the Commission, Grand View subsequently refused to obligate itself to supply power without receiving all of the RECs. Order No. 32913 at 4, 21.

Finally, the Commission declared that its findings were supported by several Idaho Supreme Court opinions. In discussing the necessary criteria for perfecting a LEO, the Court stated in *A.W. Brown v. Idaho Power Co.*, that a QF "must show 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); Order Nos. 32913 at 22; 32861 at 20. In *Rosebud Enterprises v. Idaho PUC*, 131 Idaho 1, 6, 951 P.2d 521, 526 (1997), our Court held that a QF was not entitled to an earlier rate because the QF's offer was expressly conditioned on it obtaining concessions. . . ." Order No. 32913 at 20 (emphasis original). The Commission concluded 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* Order No. 32861 at 20 *quoting Armco Advanced Materials v. Pennsylvania PUC*, 579 A.2d 1337, 1347 (Pa. 1990); *In re Mid Atlantic Cogen*, 193 WL 561981*7 (N.J. Bd. of Reg. Control 1993).

LEGAL STANDARDS

Reconsideration provides an opportunity for a party to bring to the Commission's attention any question previously determined and thereby affords the Commission with an opportunity to rectify any mistake or omission. *Washington Water Power Co. v. Kootenai Environmental Alliance*, 99 Idaho 875, 879, 591 P.2d 122, 126 (1979). The Commission may grant reconsideration by reviewing the existing record, by written briefs, or by evidentiary hearing. IDAPA 31.01.01.332. If reconsideration is granted, the Commission must complete its reconsideration within 13 weeks after the deadline for filing petitions for reconsideration. *Idaho Code* § 61-626(2). The Commission must then issue its Order on reconsideration.

If the Commission believes the original final Order "should be changed, the Commission may . . . change the same." *Idaho Code* § 61-626(3). An Order on reconsideration that changes "the original final order, shall have the same force and effect as the original order." *Id. see also Idaho Code* § 61-624. We now turn to Grand View's arguments raised in its Petition for Reconsideration. These arguments can be divided into two general disputed areas: whether Grand View perfected a legally enforceable obligation (LEO) and the ownership of RECs.

ISSUES ON RECONSIDERATION

A. A PURPA Contract and a LEO are not the Same

1. Grand View. Grand View first asserts the Commission has conflated two separate and distinct concepts into one. In particular, it points to two sentences in Order No. 32913 to support its argument. It argues the Commission's determination that Grand View did not create a legally enforceable obligation rests upon the Commission's finding that Grand View was "unwilling to enter into a binding . . . contract." Petition at 2 (emphasis added). In other words, Grand View maintains the Commission required Grand View to enter into a PURPA contract as a condition precedent for the formation of a LEO. *Id.* In support of its argument, Grand View points to two sentences in the "Conclusion" section of the Commission's final Order No. 32913 and insists that this passage constitute the Commission's "ultimate finding" (Petition at 2):

> 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.

Order No. 32913 at 26. Grand View alleges these two sentences demonstrate the Idaho Commission continues to require a fully executed contract before a QF can create a legally enforceable agreement. Petition at 2.

2. Idaho Power. In its answer, Idaho Power maintains this argument is without merit. In particular, Idaho Power notes the Commission states in its prior Order No. 32861 that QFs may obligate electric utilities to buy QF power by entering into PURPA contracts or by perfecting a legally enforceable obligation. Answer at 6 (emphasis added). Idaho Power states that a fully executed and approved contract is always a legally enforceable obligation but a LEO "may not always be represented by fully executed and approved contract." *Id.*

Commission Finding: After reviewing Grand View's Petition, Idaho Power's answer and our prior Orders, we do not agree with Grand View's interpretation of the quoted passage set out above for two reasons. First, we find the two sentences are taken out of context. Contrary to Grand View's assertion, this passage does not constitute the Commission's "ultimate findings." The two sentences quoted by Grand View are included in a section entitled "CONCLUSIONS" and are located at the end of our prior final Order No. 32913 at page 26. The Commission's actual findings regarding the disputed issues presented in this case are clearly denoted in Order No. 32913 in Order sections entitled "***Commission Findings***." (Emphasis original.)

Second, we reject Grand View's argument that the Commission failed to find Grand View had not created a LEO based upon a "conclusion that the QF was 'unwilling to enter into a binding . . . contract.'" Petition at 2 (emphasis added). As explained in greater detail in Section C (*infra* p. 15), we found that Grand View's purported LEO "was not a binding offer but was conditioned upon two points: the removal of [the REC provision in] § 8.1 and Idaho Power disclaiming any ownership in RECs." Order No. 32913 at 12, 18-22. Our LEO findings did not rest upon whether Grand View executed a contract. More importantly, the Commission has acknowledged in this case "that a legally enforceable obligation may occur outside of a contract. . . ." Order Nos. 32913 at 9; 32861 at 11.

The Commission has indicated on many occasions that a LEO and a PURPA contract are not one and the same. As we said in our prior Order in this case denying Grand View's Motion for Declaratory Order, 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)." Order No. 32861 at 18 (emphasis added) *citing* 18 C.F.R. § 292.304(d); *Power Resource Group v. PUC of Texas*, 422 F.3d 231, 237 (5th Cir. 2005). *See also Idaho Power Co. v. Idaho PUC* (hereinafter "*Grouse Creek*"), ___ Idaho ___, No. 135, slip op. at 10-11 (Dec. 18, 2013); Order No. 25528, 152 P.U.R. 4th 495 (1994). As we previously stated in this case, "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. Order No. 32861 at 18 *quoting Power Resource*, 422 F.3d at 238 *quoting* 45 Fed.Reg. 12,214, 12,224 (Feb. 25, 1980); *Grouse Creek*, slip op. at 10. The Commission "has never made a determination that the creation of a legally enforceable obligation only occurs when a QF and utility enter into a written and signed agreement." Order No. 32635 at 10, 11 (2012), *aff'd*, *Grouse Creek*, slip op. at 10; *see also Rosebud Enterprises v. Idaho PUC*, 131 Idaho at 6, 951 P.2d at 526 *citing A.W. Brown*, 121 Idaho at 815, 828 P.2d at 844; Order No. 25638.

Having rejected Grand View's argument, we nevertheless believe it is appropriate to remove any doubt about the meaning of the quoted passage from Order No. 32913 at page 26. Consistent with our authority to amend the prior final Order pursuant to *Idaho Code* § 61-626(3), we amend Order No. 32913 to clarify its meaning. Consequently, the quoted passage in our prior final Order No. 32913 is amended as set out below.

> 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. We also conclude that Grand View was not willing to unconditionally obligate and bind itself to supply power to the utility. Therefore, we conclude that Grand View did not create a legally enforceable obligation in this case.

B. RECs and LEOs are Separate and Distinct Concepts

Grand View next takes issue with a statement in the Commission's final Order No. 32913 where we said: "we conclude that the REC and LEO issues are not two separate and distinct issues." Petition at 4 *quoting* Order No. 32913 at 16-17. Grand View maintains that statement is erroneous because RECs and a LEO are in fact separate issues.

Commission Findings: Again, Grand View cherry-picks a sentence in an attempt to obfuscate the issues. In this part of the Order, the Commission was responding to Grand View's argument that this case had nothing to do with RECs but rather the only disputed issue was whether the draft Agreement was a memorialization of a legally enforceable obligation (LEO). To the contrary, we found that this case was not solely about the LEO issue as Grand View argued in its March 2013 Motion for Declaratory Order. We noted in our final Order "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. 32913 at 14 *citing* 32580 at 1, 7; 32861 at 1; Grand View Summary Judgment Motion at 2. The Commission found that Grand View's argument that the REC issue should be entirely separate and distinct from the LEO issue ignored the facts and pleadings of this case that "the REC issue 'was the gravamen of the initial complaint and summary judgment.'" Order No. 32913 at 14 *citing* Order No. 32861 at 17. It was Grand View that stated on summary judgment that this "case involves a dispute over the ownership of [RECs]." Motion for Summary Judgment at 2. In other words, we recognized that Grand View presented both REC and LEO issues.

Upon reconsideration in an abundance of caution, we find it is appropriate to clarify this sentence and its meaning. We recognize that REC issues and LEO issues may be separate and distinct. However, in this case, the two issues are intertwined. In particular, the Commission found that Grand View's purported LEO was conditioned upon Grand View receiving ownership of all the RECs. So in that sense, the two distinct issues are interwoven in this particular case. Consistent with our authority in *Idaho Code* § 61-626(3), we amend Order

No. 32913 at pages 16-17 to clarify this sentence to read: "Consequently, we conclude that although the REC and LEO issues are ~~not~~ two separate and distinct issues, they are intertwined in this particular case."

C. Grand View did not Perfect a Legally Enforceable Obligation

1. Grand View's Arguments. Grand View asserts it had perfected a legally enforceable obligation (LEO) when it purportedly obligated itself to sell power to Idaho Power as of August 2011.[7] Petition at 13. Grand View asserts the Commission's Orders in this case impermissibly tied creation of a LEO to resolution of the REC ownership issue. *Id.* at 3. Grand View advances two primary arguments. First, Grand View again asserts the "LEO issue was the very heart of its complaint." Petition at 6. It insists that its initial complaint in this case made "it abundantly clear that [Grand View] had created a LEO. . . ." *Id.* Second, Grand View argues the Commission erred when it found that Grand View's offer to sell power to the utility was conditional and non-binding.

2. Idaho Power's Answer. In its answer, Idaho Power maintains the Commission properly found that Grand View had not created a LEO "because Grand View, not Idaho Power, was the party that refused to obligate itself to the previously effective rates, and did not obligate itself to deliver power to Idaho Power." Answer at 3. The utility insists the Commission properly found that Grand View did not create a legally enforceable obligation. It states the Order clearly lays out the reasons for its finding that Grand View's offer to supply power to the utility was conditioned upon the QF receiving all of the RECs. *Id.* at 4. Even when the Commission allowed Grand View another opportunity to "present evidence that it created a legally enforceable obligation without conditions," Grand View failed to provide persuasive evidence that it had perfected a LEO. *Id.* at 3.

Idaho Power insists the Commission's findings that Grand View's offer was expressly conditioned and non-binding are consistent with Idaho Supreme Court precedent. *Id.* at 4 citing *A.W. Brown*, 121 Idaho at 817, 828 P.2d at 846. Quoting from *A.W. Brown*, Idaho Power asserts 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. . . ." (Emphasis added.) *See also Rosebud Enterprises*, 131 Idaho at 6, 951 P.2d at 526 (the QF

[7] During this case Grand View has argued that it perfected a LEO at several different times: on March 10, 2011 (the date of the draft PPA) (Motion for Declaratory Order at 1); between March 10 and August 2, 2011 (*Id.* at 7); prior to August 2, 2011 (Response to Order No. 32861 at 17); and "in August 2011" (Petition for Reconsideration at 13).

"made its willingness to commit to a 'definitive agreement' expressly conditioned on its obtaining concession. . . ."). Idaho Power also observed 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.* at 5 *quoting Armco Advanced Materials*, 579 A.2d at 1347; *see also* Order Nos. 32913 at 12, 20, 22; 32861 at 20.

Commission Findings: We do not agree with Grand View's assertion that from the time of its opening complaint "Grand View made it abundantly clear that it had created a LEO." Petition at 6. To the contrary, the facts and Grand View's pleadings in this case do not support this characterization. "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 Nos. 32913 at 16; 32861 at 19. It was Grand View that declared in its complaint and on summary judgment that the sole dispute was the REC provision in the draft PPA. Order No. 32913 at 14 *citing* Grand View's Motion for Summary Judgment at 2 ("this case involves a dispute over the ownership of [RECs]."); Order Nos. 32580 at 1, 7; 32861 at 1; 32913 at 14. The Commission previously found the REC dispute "was the gravamen of the initial complaint and summary judgment." Order No. 32913 at 14 *quoting* Order No. 32861 at 17.

Moreover, the Commission found Grand View did not advocate it had perfected a LEO until it filed its Motion for Declaratory Order in March 2013. Order No. 32913 at 16 *citing* Motion at 7. Thus, the Commission found that Grand View waited 19 months after its complaint before first asserting it perfected a LEO. *Id.* at 17. The Commission also found the March 2011 draft PPA could not "memorialize a LEO" because the parties were still negotiating the REC issue in June and July 2011. *Id.* at 16. Consequently, we find the evidence clearly does not support Grand View's position that the LEO issue was the only issue in this case.

Grand View also points to the second sentence in its Motion for Summary Judgment (November 2011) to support its assertion that the "LEO was the very heart of its complaint." Petition at 6. As set out in its Petition for Reconsideration, the second sentence of Grand View's Motion states:

> Grand View has requested a standard Public Utility Regulatory Policies Act of 1978 ("PURPA") power purchase agreement ("PPA") with Idaho Power Company containing Integrated Resource Plan Methodology ("IRP

> Methodology") rates valuing only the energy and capacity to be sold from Grand View's solar power generating facility.

Petition at 6 *quoting* Motion for Summary Judgment at 1. However, a review of this passage above does not reveal any mention of the terms "legally enforceable obligation" or "LEO." Consequently, we find this argument is without merit.[8]

After reviewing the record in this case, we affirm our prior Order Nos. 32861 and 32913 that found Grand View did not perfect a LEO. Grand View's offer to supply power to Idaho Power was an offer with two conditions: (1) the removal of the REC provision in § 8.1; and (2) directing Idaho Power to disclaim any ownership of RECs. Grand View's initial complaint states that it is willing to enter into a PURPA contract "with IRP calculated rates that disclaim REC ownership by Idaho Power." Order Nos. 32913 at 20; 32861 at 19 *quoting* Complaint at ¶ 8, p. 6. Grand View repeats in its amended complaint and again in its Motion for Summary Judgment that its offer is contingent upon "Idaho Power disclaim[ing] ownership of all [RECs]." Motion at 36; Amended Complaint at p. 3.

We find these statements demonstrate that Grand View was not willing to bind or commit itself to either a contract or a LEO unless Idaho Power disclaimed ownership of RECs. Because Grand View's REC conditions have not been satisfied, there is no LEO. "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 Nos. 32913 at 20; 32861 at 20 *quoting Armco Advanced Materials*, 579 A.2d at 1347; *In re Mid Atlantic Cogen*, 1993 WL 56198*7 (N.J. Bd of Reg. Control 1993). Moreover, in the parties' negotiations, Grand View's counsel stated in his June 8, 2011 e-mail to Idaho Power that Grand View is willing to sign the draft PPA "if we make it contingent upon whether the Commission specifically requires that [REC] language." Order No. 32913 at 21. We found this declaration "persuasive evidence that Grand View was not willing to unconditionally obligate itself to supply power and thus no LEO was perfected." *Id.*

Our findings are also consistent with PURPA opinions issued by the Idaho Supreme Court. This Commission has authority to determine whether a LEO has been perfected under

[8] Grand View also cites to nine paragraphs in its initial complaint to further support its argument that the LEO issue is the heart of its complaint. Petition at 6-7. However, but for the one mention of the word "obligation," the terms "legally enforceable obligation" or "LEO" do not appear anywhere in these nine paragraphs. Simply put, we find that the complaint and the Motion for Summary Judgment were about the REC issue.

state law. *Power Resource*, 422 F.3d 238-39; *Rosebud Enterprises v. Idaho PUC*, 128 Idaho 609, 624, 917 P.2d 766, 781 (1996); *Grouse Creek*, slip op. at 9-10. In *A.W. Brown*, our Court held that for a LEO to be created, a QF "must show but for the actions of the utility it was otherwise entitled to a contract. In most cases this will entail making a comprehensive binding offer. . . ." 121 Idaho at 817, 828 P.2d at 846 (emphasis added); Order Nos. 32861 at 20; 32913 at 22. In *Rosebud Enterprise v. Idaho PUC*, 131 Idaho at 6, 951 P.2d at 526, the Court held that a 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 definitive agreement' expressly conditioned on its obtaining concessions from vendors, financers, and suppliers.'" Order No. 32861 at 20; *see generally Grouse Creek*, slip op. at 9-11; *Idaho Power Co. v. Cogeneration*, 134 Idaho 738, 746, 9 P.3d 1204, 1212 (2000) (a QF's offer of a security payment was conditional "and therefore did not legally constitute a tender."). Based upon the foregoing, we again conclude that Grand View did not perfect a LEO in this case.

D. Idaho Power's Conduct did not Prevent the Formation of a Contract

1. Grand View. Grand View next argues Idaho Power "was actively preventing the parties from executing the [PURPA] contract . . . [b]y insisting on [the REC] terms that it knew was objectionable. . . ." Petition at 13. In other words, Grand View argues that it was Idaho Power's conduct that prevented Grand View from executing the PURPA contract.

2. Idaho Power. Idaho Power vigorously disputes this contention. Idaho Power insists it was Grand View that maintained it was entitled to all the RECs and that Idaho Power should disclaim any ownership interest in RECs. The utility maintains the initial language of the REC provision in § 8.1 simply stated that "REC ownership would be determined by the proper authority to make such determination." Answer at 6.

Idaho Power also states it accepted Grand View's proposal to sign the contract and submit the dispute with its two separate REC alternatives to the Commission for resolution. *Id.* at 6-7. After proposing the REC dispute be submitted to the Commission for resolution, Grand View later opposed its own proposal. "If Grand View wanted to obligate itself, it had the opportunity to do so, but refused. Idaho Power, to the contrary, was willing to enter into the contractual obligation at that time, but Grand View refused. There was no legally enforceable obligation created because Grand View refused to obligate itself." *Id.*

Commission Findings: We reject Grand View's assertion that Idaho Power was actively preventing the parties from executing the contract. Petition at 13. We noted in Order No. 32861 "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." Order No. 32861 at 18 *quoting Power Resource*, 422 F.3d at 238 *quoting* 45 Fed.Reg. 12,214, 12,224 (Feb. 23, 1980); *see also Grouse Creek*, ___ Idaho ___ slip op. at 10. When examining whether a LEO has been created, the Idaho Supreme Court recently held "that a finding of a legally enforceable obligation requires a showing that there would have been a contract but for the actions of the utility." *Grouse Creek*, slip op. at 10.

Despite Grand View's protest to the contrary, we find that Idaho Power did not prevent or delay Grand View from signing a contract. During the parties' negotiations in June and July 2011, Grand View indicated it was willing to sign the PURPA contract "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. 32913 at 3, 21; Order No. 32861 at 21 n.11. Idaho Power's counsel agreed to submitting the matter to the Commission for resolution. *Id.* at 3-4. However, counsel for Grand View ultimately rejected his own proposal.

In the negotiations regarding the REC provision, Idaho Power offered to divide REC ownership equally (50%-50%) between the parties, or one party taking RECs for the first 10 years and the other party taking the RECs for the last 10 years of the Agreement. Order No. 32913 at 5 *citing* Complaint at ¶¶ 11-12; Motion for Summary Judgment 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." Order No. 32913 at 5 *citing* Complaint at ¶ 13; Motion for Summary Judgment at 36. It was Grand View that insisted it was entitled to own all the RECs.

In rejecting the proposal to submit the matter to the Commission for resolution, Grand View's counsel noted that agreeing to such a contract "runs the risk of being a party to a contract that we cannot perform on . . . [Unless] you respond that you will accept our final offer to have the contract remain silent, or that Idaho Power still insist on the [REC] language remaining in § 8.1, we will proceed [by filing a complaint against Idaho Power at the PUC]." Order No. 32913

at 4. Based upon the conduct of the parties, we do not find that Idaho Power delayed or impeded the signing of the contract. Indeed, it was Grand View that rejected the offer that it initially proposed to submit the dispute to the Commission for resolution. *Id.* Thus, we find it was Grand View's conduct that caused there to be no written contract, as well as no LEO.

E. Prior Orders

Grand View next asserts the Commission's Orders in this case are inconsistent with prior Orders in two respects. These arguments are discussed below.

1. Right-of-first-refusal. Grand View renews a prior argument that it made on summary judgment that the Commission acted inconsistently with an Order the Commission issued 10 years earlier in Case No. IPC-E-04-2. Petition at 4-5. In that Order, the Commission dismissed Idaho Power's Petition for a Declaratory Order that it be granted a "right-of-first-refusal" to purchase unbundled RECs in PURPA contracts. Order No. 29480. Grand View maintains the Commission's prior Order expressly declared that Idaho utilities may not condition their mandatory purchase of QF power on a right-of-first-refusal. Petition at 5. Grand View insists the holding in that Order should be equated to prohibiting utilities from being allocated REC ownership. Thus, Grand View argues the Commission acted arbitrarily by failing to follow the holding of prior Order No. 29480.

Commission Findings: Consistent with our previous decisions in Order Nos. 32580 and 32913, we again find Grand View's interpretation of Order No. 29480 is erroneous. In that earlier case, the Commission dismissed Idaho Power's Petition for a Declaratory Order "because it did not present an actual or judiciable controversy and was not ripe for a declaratory judgment by the Commission." Order No. 32580 at 9 *citing* Order No. 29480 at 16; Order No. 32913 at 25. Thus, the Commission never reached the merits of that case and certainly did not address the issue of REC ownership.

The earlier case and this case simply address two different issues. A right-of-first-refusal is the right to have first opportunity to purchase the intangible asset of a REC when it becomes available, or the right to meet any other offer. Black's Law Dictionary, 1191 (5th ed. 1979). In contrast, this case addresses and resolves a different issue – the ownership of RECs in the first instance. Thus, the Commission did not address the issue of REC ownership in that earlier case because "Idaho Power's petition was not ripe for a declaratory judgment." Order No. 32580 at 9-10; 32913 at 26.

We also find the Commission is not bound to decide future cases in the same way as past cases. The Commission is a regulatory agency that performs both judicial and legislative functions and it is not bound by *stare decisis*. *Grouse Creek*, slip op. at 12; *Building Contractors Ass'n of Southwestern Idaho v. Idaho PUC*, 151 Idaho 10, 15, 253 P.3d 684, 689 (2011). Even if we rejected the right-of-first-refusal for RECs in Order No. 29480 – which we did not because there was no judiciable controversy – we are not bound to adhere to a policy decision made almost 10 years ago.

2. Negotiating RECs. Grand View also maintains it is impossible "to reconcile the Commission's declaration that QFs and utilities may voluntarily negotiate RECs, with the conclusion in its final Order that Grand View's failure to negotiate RECs with Idaho Power was fatal to its creation of a LEO." Petition at 4 *quoting* Order No. 32580 at 12. Grand View points to a statement made in our earlier Order No. 32580 in this case that declared "QFs and utilities may voluntarily negotiate RECs." *Citing* Order Nos. 29480 and 29577.

Commission Findings: In Order No. 32580, we were discussing the historical development of the REC issues. On summary judgment, Grand View was arguing it is the default owner of RECs and relied on the "rules or orders of neighboring states," such as Oregon and Montana to support its position. Order No. 32580 at 12. The prior Order noted there was no specific federal or state law governing the ownership of RECs in Idaho at that time. *Id.* at 9.

The Commission was not persuaded by Grand View's reliance on the REC programs of Oregon and Montana. The Commission held that "Oregon and Montana . . . have RPS programs and sometime confers REC ownership on QFs." Given the differences between RECs in these States and Idaho, the Commission found "rules or decisions from other states are not controlling [in Idaho]. . . . What this Commission has said [in the past] is that QFs and utilities may voluntarily negotiate RECs." *Id.* at 12.

It is possible to reconcile our statement that QFs and utilities may voluntarily negotiate RECs with our particular findings in this case. The sentence that Grand View maintains is incongruent was discussing the REC policies of other states. In that earlier Order we were simply acknowledging the flexibility that parties have to negotiate REC ownership. However, in this adjudication the parties were unable to settle their REC dispute so the Commission resolved the dispute by equally dividing REC ownership. We find that Grand View's argument is not persuasive.

F. Retroactive Ratemaking and Contract Impairment

Grand View next argues the Commission erred in its final Order No. 32913 by the "retroactive application of the Commission's REC ownership order" from the concurrent, generic PURPA investigation, Case No. GNR-E-11-03. Petition at 7. In essence, Grand View asserts it was inappropriate for the Commission to resolve the disputed issue of REC ownership in this case by applying the REC decision from our PURPA investigation Order No. 32697 issued in December 2013. Grand View raises three arguments why the application of the prior REC decision from the generic PURPA investigation is inappropriate to resolve the REC dispute in this case.

Idaho Power insists in its answer the Commission did not engage in retroactive ratemaking or rulemaking. Idaho Power points out that this case and the Commission's generic PURPA investigation were both ongoing at the same time. Answer at 7. Idaho Power maintains that "although a determination as to REC ownership had not been made at the time Grand View initially filed its complaint, that determination was made in parallel proceedings, to which both Grand View and Idaho Power were parties[. The generic REC] determination was made while Grand View's complaint and LEO issues were still pending with the Commission." *Id.* Idaho Power maintains that "Grand View's claim of retroactivity simply does not lie." *Id.*

In our final Order No. 32950 the Commission granted Grand View's Petition for Reconsideration so the Commission could consider Grand View's three retroactive arguments in greater detail. These arguments are discussed below.

1. Retroactive Ratemaking. Grand View first argues the Commission's decision to equally divide REC ownership under the IRP methodology (absent an agreement by the parties to do otherwise) is "retroactive ratemaking." Petition at 7-8.

Commission Findings: The Commission is a regulatory agency that performs both judicial and legislative functions. *Grouse Creek*, slip op. at 12; *Building Contractors,* 151 Idaho at 15, 253 P.3d at 689. "The function of ratemaking is legislative and not judicial." *Industrial Customers of Idaho Power Co. v. Idaho PUC*, 134 Idaho 285, 289, 1 P.3d 786, 790 (2000). After reviewing Grand View's argument regarding retroactive ratemaking, we find this argument is misplaced for two reasons. First, its characterization that the Commission's Order No. 32913 constitutes "ratemaking" concerning the issue of RECs is simply mistaken. Contrary to Grand View's argument, the Commission is not and has not "made or set any rates" for RECs. In

neither the Orders issued in the generic PURPA investigation nor this case, has the Commission established any "rates" to be paid for RECs. Our Orders allow the QF and the utility to market their respective RECs to obtain whatever price they can obtain in the marketplace.

Second, even Grand View acknowledges that "the Commission is not setting rates" in this case. Petition at 11. With this admission, Grand View's ratemaking argument must fall.

2. Retroactive Rulemaking. Grand View next argues the Commission engaged in "retroactive rulemaking" by applying the REC ownership decision from the concurrent PURPA investigation to the disputed REC issue in this case. Petition at 9. Grand View seemingly suggests the Commission simply applied our determination regarding REC ownership from the then concurrent PURPA investigation (Order Nos. 32697 and 32802), to the facts of this case. It supports its argument with two United States Supreme Court opinions. In essence, Grand View maintains the PURPA investigation was a "rulemaking" and that case began after Grand View filed its complaint in this case. Thus, the REC decision in the PURPA Orders should not control the disposition of REC ownership in this complaint. Grand View asserts the two opinions stand for the proposition that the Commission is "prohibited from engaging in retroactive rulemaking unless that authority is expressly authorized by statute." *Id.* at 9 *citing Bowen v. Georgetown University Hospital*, 488 U.S. 204, 208, 109 S.Ct. 469 (1988); *Landgraf v. USI Film Products*, 511 U.S. 244, 265, 114 S.Ct. 1483 (1994).

Commission Findings: Before we examine the retroactive rulemaking argument, it is helpful to review the interplay between the Commission's generic investigation of RECs in the then concurrent PURPA investigation, and the resolution of the REC dispute in this complaint case. On August 2, 2011, Grand View filed its formal complaint in this case alleging the sole dispute between the parties concerned the ownership of REC ownership. Shortly thereafter on September 1, 2011, the Commission initiated the third phase of its generic PURPA investigation to examine several PURPA-related issues including RECs. Order No. 32352 at 4 (September 1, 2011). Grand View and Idaho Power were both parties in the concurrent PURPA investigation. In final Order No. 32697 (December 2012) in the generic investigation, the Commission found it reasonable and consistent with common law property interest 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. 32913 at 16 *quoting* Order No. 32861 at 9-10 *citing* Order Nos. 32697 at 46; 32802 at 19-20.

Several parties requested the Commission reconsider its REC decision. In Order No. 32802 issued May 6, 2013, the Commission affirmed its decision in final Order No. 32697 that REC ownership in cases such as this should be shared equally by the utility and the QF. Order No. 32802.

In final Order No. 32913 in this case, we observed that "no party, including Grand View, sought judicial review of" the Commission's decision that REC ownership should be equally divided. Order No. 32913 at 16. "'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.* With this background, we now turn to Grand View's retroactive rulemaking argument.

Grand View maintains the PURPA investigation was a "rulemaking" and that the Commission cannot retroactively apply the REC determination in that case (that was initiated a month after Grand View's complaint) to resolve the REC dispute in this complaint proceeding. However, what Grand View ignores is that our final Order No. 32913 in this case contained two primary reasons for dividing REC ownership equally between the parties. Grand View ignores the first reason and focuses its retroactive rulemaking argument on the second reason. After reviewing the arguments and the record, we find there are two reasons for denying the retroactive rulemaking claim.

First, in final Order No. 32913, the Commission's first reason for dividing REC ownership equally was simply not based on the holding of final Orders in the PURPA investigation (i.e., to divide REC ownership) but actually on the property interest factors set out by the Connecticut Supreme Court in *Wheelabrator Lisbon v. Dept. of Pub. Util. Control*, 931 A.2d 159, 174-75 (Conn. 2007) and adopted in Order No. 32802 at 18-21. In particular, the Commission found in its final Order that 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. 32913 at 15; 32580 at 45; 32802 at 12. We continued by noting three of the property interests relating to Idaho Power. We declared that Idaho Power is:

> [1.] is not wholly free to bargain because PURPA compels utilities to purchase the power output produced by QFs. [2.] PURPA compels the utility to purchase power whether it needs the power to serve load or not. [3.] 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. 32913 at 15; Order No. 32802 at 18; *Wheelabrator Lisbon*, 931 A.2d at 174. The Commission's final Order in this complaint case specifically referred to the property interest factors analyzed in the PURPA REC Order No. 32802. Order No. 32913 at 16, n.12 *citing* Order No. 32802 at 18-20. Thus, the Commission's first reason to equally divide REC ownership in this case was expressly based upon the property interest factors set out in *Wheelabrator Lisbon.* We further find that our first reason set out in Order No. 32913 at 15 clearly supports our decision to equally divide REC ownership in this case. Moreover, Grand View has not challenged the first reason.

Second, we find Grand View's reliance and application of the two U.S. Supreme Court cases to support its retroactive rulemaking argument is misplaced. In *Bowen*, the U.S. Department of Health & Human Services adopted a rule in November 1984 "requiring private hospitals to refund Medicare payments for services rendered before promulgation of the rule." *Landgraf*, 511 U.S. at 265, 114 S.Ct. at 1496-97. "In effect, the Secretary promulgated a rule retroactively. . . ." *Bowen*, 488 U.S. at 207, 109 S.Ct. at 471. As framed by the Court in *Bowen*, "the threshold question is whether the Medicare Act authorized retroactive rulemaking." *Id.* at 208, 109 S.Ct. at 471. The Court found that the cost-limit rule was invalid because the retroactive provision in the statute applies "only to case-by-case adjudications, not rulemaking." *Id.* at 209, 109 S.Ct. at 472. However, we find that using the property interest factors from the PURPA investigation to resolve the REC dispute in this case is not retroactive rulemaking.

As Justice Scalia discussed in his concurring opinion in *Bowen*, there is difference between rulemaking (the PURPA investigation) and adjudication (this complaint case). He explained:

> Rule making [(i.e., the PURPA investigation)] is agency action which regulates the future conduct of either groups of persons or a single person; it is essentially legislative in nature, not only because it operates in the future but also because it is primarily concerned with policy considerations. . . . Conversely, adjudication [(resolving the REC dispute in this complaint case)] is concerned with the determination of past and present rights and liabilities.

Bowen, 488 U.S. at 218-19, 109 S.Ct. at 477 (emphasis added), *quoting* 1947 Attorney General's Manual on the Administrative Procedures Act at 13-14. Based upon this distinction, we find that

the generic PURPA investigation was a "legislative" case, while this complaint case is an "adjudication" case that resolves the REC dispute relating to the past and present rights of REC ownership from the date of Grand View's complaint on August 2, 2011. In other words, our REC ownership decision contained in the Orders from the PURPA investigation were applicable to new PURPA contracts on a prospective basis, while our REC ownership decision in this adjudication relates to the past and present (retroactive) rights of the parties. Consequently, our determination regarding the REC dispute between Grand View and Idaho Power was an adjudication of the parties' rights and, therefore, cannot be a violation of the rule against retroactive rulemaking. *Bowen*, 488 U.S. at 218-19, 109 S.Ct. at 477 (J. Scalia concurring).

Our adjudication of the REC dispute in this complaint "involves that form of administrative action where retroactivity is not only permissible but standard. Adjudication *deals* with what the law was; rulemaking deals with what the law will be." *Bowen*, 488 U.S. at 221, 109 S.Ct. at 478 (J. Scalia, concurring) (emphasis original) (construing the federal Administrative Procedures Act); *compare Idaho Code* § 67-520(12) ("Order") *with* (19) ("Rule") (defining terms in the Idaho Administrative Procedures Act). Justice Scalia goes on to say "it is important to note that the retroactivity limitation applies *only* to rulemaking. Thus, where legal consequences hinge upon the interpretation [of property interests], and where no pre-existing interpretative [order] construing those requirements is in effect, nothing prevents the agency from acting retroactively through adjudication." *Bowen*, 488 U.S. at 224, 109 S.Ct. at 480 (emphasis original). Thus, we find there is no prohibition to resolving the REC ownership dispute in this adjudication. Here the Commission is acting in our quasi-judicial capacity to adjudicate this dispute.

Finally, we reconsider the second reason supporting our REC ownership decision. In our final Order we stated that both Grand View and Idaho Power "were on notice that REC ownership would be addressed in our parallel PURPA investigation." Order No. 32913 at 16. The Commission further explained it was "reasonable and consistent with common law property law interest to apportion REC ownership equally between the QF and the utility for solar projects larger than 100 kW, like the Grand View project here." The Commission stated that 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. We affirm that decision in this Order." Order No. 32913 at 16.

After reviewing this second finding (above) and Grand View's retroactive rulemaking argument, we find it is reasonable to clarify the second reason in Order No. 32913 at page 16 supporting our decision to divide REC ownership equally. Rather than applying the result of our PURPA investigation to equally dividing REC ownership, we should have stated that we are applying the analysis of the property interest factors[9] from our concurrent rulemaking investigation to the dispute about RECs in this adjudication. Using the property interest factors from the generic case (as we did in our first finding) would change the reasoning but not the result of our REC decision in this adjudicatory proceeding. [10] Consequently, we amend Order No. 32913 to reflect this clarification to the second reason at page 16 of the Order. *Idaho Code* § 61-626(3). Order No. 32913 at 16 shall be changed as follows: "Having decided the disputed issue of REC ownership in the PURPA investigation [case]," the Commission finds it appropriate to consistently apply the property interest factors regarding REC ownership ~~decision~~ set out in Order Nos. 32697 and 32802 to the REC dispute in this case. ~~*Id.* at 18.~~ Order Nos. 32697 at 45-47; 32802 at 18-21. Applying those property interest factors to the dispute in this case, leads us to find that REC ownership should be equally divided between the parties in this adjudication. ~~We affirm that decision in this Order.~~

3. Impairment of Contract. Grand View also argues the Commission's REC decision in this case violates the Contracts Clause provisions of the Idaho and United States Constitutions. Article I, § 16 of the Idaho Constitution provides "No bill of attainder expost facto law, or law impairing the obligation of contracts shall ever be passed."[11] Grand View argues its LEO was created in August 2011, and the Commission's subsequent REC decision impairs its LEO. Petition at 9-10. Grand View asserts the Commission's retroactive application of its REC decision reaches "back to the time Grand View created its LEO to take one half of its RECs and give them to Idaho Power without compensation. . . ." Petition at 11.

Commission Findings: In evaluating claims of contract impairment, our Supreme Court has held that Idaho courts "should apply federal analytical principles when deciding challenges under Article I, § 16 of the Idaho Constitution. . . ." *CDA Dairy Queen v. State Ins.*

[9] *See supra* pp. 8-9, n.4.

[10] *See* the property interest facts contained in Order Nos. 32802 at 18-20; 32913 at 15, n.12; *supra* pp. 8-9, n.4.

[11] Article I § 10 of the United States Constitution provides, in part, "no state . . . shall pass any Bill of attainder, expost facto Law, or Law impairing the Obligation of Contracts."

Fund, 154 Idaho 379, 383, 299 P.3d 186, 190 (2013). The Court in *Dairy Queen* sets out a threshold three-part analysis for determining when "a legislative act violates the contracts clause." *Id.* at 387, 299 P.3d at 194. [12] The Commission's Order does not "violate the contract clause unless there is a contractual relationship between the parties regarding the specific terms at issue, the challenge act compares an obligation under that contract, and the impairment is substantial." *Id.* Applying this threshold inquiry to the facts of this case results in no constitutional violation.

Turning to the first part of the three-part test, we find there is no contractual relationship existing between Idaho Power and Grand View. As set out above, it is undisputed that the parties did not enter into a contract. In addition, we found there was no legally enforceable obligation (e.g. "a contractual relationship") that was perfected by Grand View. Having found no contract or LEO, there is no violation of a contractual relationship and no violation of the contracts clause.

In conclusion, we find Grand View did not perfect a LEO in this case. We further find there is substantial evidence supporting the Commission's decision in this adjudicatory proceeding to equally divide REC ownership under the IRP Methodology between Grand View and Idaho Power. As set out in the body of this Order, we conclude it is reasonable and appropriate to amend parts of the prior final Order No. 32913. Consequently, Grand View's Petition for Reconsideration is granted in part and denied in part as set out in greater detail above.

ORDER

IT IS HEREBY ORDERED that Grand View's Petition for Reconsideration is granted in part and denied in part. As set out in the body of this Order, the Commission amends parts of its original final Order No. 32913 pursuant to *Idaho Code* § 61-626(3). The Commission Secretary shall issue a correction sheet to Order No. 32913 reflecting the changes set out above.

---

[12] The Court in *Dairy Queen* also observed an exception to the constitutional protections of contracts. "For almost 100 years, this Court has recognized the police power exception to the contracts clause in the context of regulating . . . public utilities." 154 Idaho at 385, 299 P.3d at 192. In *Agricultural Products Corp. v. Utah Power & Light Co.*, 98 Idaho 23, 29, 557 P.2d 617, 623 (1976), the Court held that "the state's regulation of utility rates pursuant to its police power, including statutorily alteration of rates set by private contracts, was 'not a violation of constitutional prohibition against impairment of contractual obligations.'" *See also Afton Energy v. Idaho Power Co.*, 107 Idaho 781, 792-94, 693 P.2d 427, 438-440 (1984) (discussing the authority of the Commission to adjust PURPA contract rates. "In a matter not inconsistent with federal law to the extent that it may be applicable."). Here, however, we do not need to address the police power exception since there was neither a contract nor LEO.

IT IS FURTHER ORDERED that Grand View's Petition for Reconsideration asserting it created a legally enforceable obligation is denied. Grand View's Petition that it is entitled to ownership of all the RECs is also denied.

IT IS FURTHER ORDERED that Grand View's underlying complaint against Idaho Power is dismissed.

THIS IS A FINAL ORDER ON RECONSIDERATION. Any party aggrieved by this Order or other final or interlocutory Orders previously issued in this Case No. IPC-E-11-15 may appeal to the Supreme Court of Idaho pursuant to the Public Utilities Law and the Idaho Appellate Rules. See *Idaho Code* § 61-627.

DONE by Order of the Idaho Public Utilities Commission at Boise, Idaho this 31st day of January 2014.

PAUL KJELLANDER, PRESIDENT

MACK A. REDFORD, COMMISSIONER

MARSHA H. SMITH, COMMISSIONER

ATTEST:

Jean D. Jewell
Commission Secretary

bls/O:IPC-E-11-15_dh5_Reconsideration