

146 FERC ¶ 61,192
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Cheryl A. LaFleur, Acting Chairman;
Philip D. Moeller, John R. Norris,
and Tony Clark.

Otter Creek Solar LLC

Docket Nos. EL13-60-001
QF13-402-002

ORDER DENYING RECONSIDERATION

(Issued March 20, 2014)

1. On July 24, 2013, Otter Creek Solar LLC (Otter Creek) filed a pleading styled as a request for reconsideration or clarification of the Commission's Notice of Intent Not to Act issued in this proceeding on June 27, 2013.¹ In the June 27 Order, we declined to initiate an enforcement action under section 210(h)(2)(A) of the Public Utility Regulatory Policies Act of 1978 (PURPA)² against the Vermont Public Service Board (Vermont Commission). For the reasons discussed below, we decline to reconsider our previous ruling.

I. Background

2. In the June 27 Order, the Commission declined to initiate an enforcement action under section 210(h)(2)(A) of PURPA against the Vermont Commission.³ Otter Creek had argued that the avoided cost rate pricing determination and mechanism in the Vermont Commission's feed-in tariff program, referred to as the Sustainably Priced Energy Enterprise Development (SPEED) program, violates PURPA because, among other things, it fixes the wholesale price for the purchase of power from a qualifying facility (QF) at a price that has not been determined to be the utility's avoided costs.⁴ In the June 27 Order, the Commission noted that QF participation in the SPEED program is optional, and that QFs may still choose to participate in the Vermont Commission's

¹ *Otter Creek Solar LLC*, 143 FERC ¶ 61,282 (2013) (June 27 Order).

² 16 U.S.C. § 824a-3(h)(2)(A) (2012).

³ June 27 Order, 143 FERC ¶ 61,282 at P 2.

⁴ *Id.* P 3.

longstanding Rule 4.100 - Small Power Production and Cogeneration (Rule 4.100) program, which has been found by the Commission to be consistent with PURPA.⁵

II. Request for Reconsideration

3. In its request for reconsideration, Otter Creek makes two arguments. First, although Otter Creek is not an electric utility but rather is a 2 MW solar farm that has filed a Form 556 self-certification, Otter Creek argues that the June 27 Order “reverses the Commission’s position. . . that a State cannot mandate a price in excess of avoided costs or that have not been determined to be avoided costs.”⁶ Otter Creek contends, in this regard, that the June 27 Order results in utilities in Vermont being compelled to participate in a program that requires them to pay an above avoided-cost rate.

4. Otter Creek views the June 27 Order as finding that the SPEED 1 program complies with PURPA because it is a voluntary program. Otter Creek contends, however, that while feed-in tariffs are voluntary from the generator’s perspective it would not be seen as voluntary from the utility’s perspective. Otter Creek argues that the result is that utilities in Vermont must participate in a program that requires them to pay an above avoided-cost rate.⁷

5. Second, Otter Creek argues that the June 27 Order could be read as sanctioning the use of two sets of avoided costs, one under a state preferred program and one under a non-preferred program, and Otter Creek maintains that there cannot be two different calculations of avoided costs for facilities of the same type, size and location, such as two 1 MW facilities that sit side-by-side.⁸ Otter Creek asserts that, if PURPA mandates a purchase at a utility’s long-run avoided cost, then there can only be one such answer for the two facilities. It argues that there “should be no ‘optional’ avoided costs that can be ignored simply because the Vermont Commission or the Vermont utilities want to discourage the interconnection of solar QFs outside of certain preferred programs.”⁹

⁵ *Id.* P 4.

⁶ Otter Creek Request for Reconsideration at 2. Otter Creek states that the Commission most recently set forth this position in *California Pub. Utils. Comm’n*, 132 FERC ¶ 61,047 (2010).

⁷ *Id.* at 3-4.

⁸ *Id.* at 4-5.

⁹ *Id.* at 5-6.

III. Commission Determination

6. We deny Otter Creek's request for reconsideration. Under the statute, Otter Creek, as a QF, has the right to petition the Commission to enforce the requirements of section 210(f) of PURPA.¹⁰ However, as the Commission has long recognized, its enforcement authority is discretionary.¹¹ In this case, where on reconsideration Otter Creek identifies no concrete harm to Otter Creek tied to the Commission's June 27 Order, it is appropriate for the Commission to exercise its discretion and continue to decline to initiate an enforcement action.¹²

7. Separately, as we noted in the June 27 Order, as a QF in the State of Vermont, Otter Creek may avail itself of its rights under the Rule 4.100 program, which requires the calculation of rates based on "the avoided capacity and energy costs of the Vermont composite electric utility system."¹³ As we also noted in the June 27 Order, the Vermont Commission's Rule 4.100 program is the Vermont Commission's implementation of PURPA and has been found by the Commission to be consistent with PURPA.¹⁴

8. Vermont's SPEED program, in contrast, is a voluntary program that Otter Creek and other QFs may choose to avail themselves of if they wish to do so, but it in no way replaces or supersedes the Rule 4.100 program. Instead, the SPEED program is simply an option offered by Vermont to QFs like Otter Creek in addition to, but not as a replacement for, the Rule 4.100 program. And while Otter Creek suggests that there cannot be two rates for QFs, Otter Creek is incorrect; as we recognized in the June 27 Order, the Commission's regulations, in fact, have long allowed QFs to agree to

¹⁰ 16 U.S.C. § 824a-3(f), (h)(2)(A) (2012).

¹¹ See *Morgantown Energy Assoc.*, 139 FERC ¶ 61,066, at P 44, *order denying reconsideration*, 140 FERC ¶ 61,223 (2012) (citing *Policy Statement Regarding the Commission's Enforcement Role under Section 210 of the Public Utilities Act of 1978*, 23 FERC ¶ 61,304, at 61,645 (1983)).

¹² 16 U.S.C. § 824a-3(h)(2)(A), (B) (2012) (subsection (h)(2)(A) provides that the Commission "may" enforce the requirements of subsection (f), and subsection (h)(2)(B) provides that, "[i]f the Commission does not initiate an enforcement action under subparagraph (A)," the petitioner may then bring its own action in court).

¹³ Vermont Commission Rule 4.104(E).

¹⁴ June 27 Order, 143 FERC ¶ 61,282 at P 4.

rates that they find acceptable – even rates that “differ from the rate. . . which would otherwise be required.”¹⁵

The Commission orders:

The request for reconsideration is hereby denied, as discussed in the body of this order.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.

¹⁵ 18 C.F.R. § 292.301(b)(1) (2013); *see* June 27 Order, 143 FERC ¶ 61,282 at P 4.