Nos. 18-36061, 18-36095

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BEAR GULCH SOLAR, LLC; CANYON CREEK SOLAR, LLC; COUCH SOLAR, LLC; FOX FARM SOLAR, LLC; GLASS SOLAR, LLC; MALT SOLAR, LLC; MARTIN SOLAR, LLC; MIDDLE SOLAR, LLC; RIVER SOLAR, LLC; SAGE CREEK SOLAR, LLC; SYPES CANYON SOLAR, LLC; VALLEY VIEW SOLAR, LLC; ULM SOLAR, LLC; CYPRESS CREEK RENEWABLES DEVELOPMENT, LLC,

Plaintiffs-Appellants,

v.

MONTANA PUBLIC SERVICE COMMISSION; BOB LAKE; TRAVIS KAVULLA; BRAD JOHNSON; ROGER KOOPMAN; TONY O'DONNELL, in their official capacities as Commissioners,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR MONTANA, HELENA, IN CASE NO. 6:18-CV-00006-CCL
HONORABLE CHARLES C. LOVELL, SENIOR DISTRICT JUDGE

BRIEF OF AMICI CURIAE COMMUNITY RENEWABLE ENERGY ASSOCIATION, INSTITUTE FOR LOCAL SELF RESILIENCE, NORTHWEST AND INTERMOUNTAIN POWER PRODUCERS COALITION, RENEWABLE NORTHWEST, SOLAR ENERGY INDUSTRIES ASSOCIATION, AND VOTE SOLAR IN SUPPORT OF PLAINTIFFS-APPELLANTS FOR AFFIRMANCE ON CROSS-APPEAL

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CORPORATE DISCLOSURE STATEMENT

Amicus curiae Community Renewable Energy Association is an Oregon-based intergovernmental association, formed under Oregon Revised Statutes Sections 190.003 to 190.120, that has no parent corporation and issues no stock.

Amicus curiae Institute for Local Self Resilience is organized as a nonprofit District of Columbia corporation, formed under the District of Columbia Non-Profit Corporation Act. Institute for Local Self-Reliance is a not-for-profit that has no parent corporation and issues no stock.

Amicus curiae Northwest and Intermountain Power Producers Coalition is organized as a nonprofit Washington corporation, formed under the Washington Nonprofit Miscellaneous and Mutual Corporations Act, Revised Code of Washington Chapter 24.06. NIPPC is a not-for-profit trade association that has no parent corporation and issues no stock.

Amicus curiae Renewable Northwest is organized as a nonprofit corporation, formed under the laws of the state of Oregon, and operates under § 501(c)(3) of the Internal Revenue Code. Renewable Northwest has no parent corporation and issues no stock.

Amicus curiae Solar Energy Industries Association is organized as a nonprofit corporation, formed under the laws of the District of Columbia, and

operates under § 501(c)(6) of the Internal Revenue Code. SEIA has no parent corporation and issues no stock.

Amicus curiae Vote Solar is organized as a nonprofit California public benefit corporation formed under the laws of the State of California and operates under § 501(c)(3) of the Internal Revenue Code and has no parent corporation and issues no stock.

Dated: April 15, 2019

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STATEMENT OF INTEREST[1]

This appeal concerns the implementation of Section 210 of the Public Utility Regulatory Policies Act of 1978 (PURPA) and the Federal Energy Regulatory Commission's (FERC) rules and policies by a state regulatory authority. PURPA is critically important to independent (i.e., non-utility) power producers who develop and operate cogeneration and renewable energy facilities, and for customers to enjoy the benefits associated with reliance of the type of facilities that PURPA fosters, on whose behalf Amici Curiae advocate for lawful PURPA implementation.

Amicus Curiae Community Renewable Energy Association (CREA) is an Oregon-based intergovernmental association of local governments working with member organizations, which include irrigation districts, businesses, individuals and non-profit organizations. CREA advocates for policies encouraging development of community-scale renewable energy facilities.

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[1] All parties consented to the filing of this brief and agree that it is acceptable for the Defendants to address this amicus submission, if they chooses to do so, in their April 29, 2019 Reply Brief. Pursuant to Fed. R. App. P. 29(a)(4)(E), Amici state that this brief was not authored in whole or in part by counsel for any party, and no party, counsel for any party, or person other than Amici, their members, or counsel made a financial contribution to the preparation or submission of this brief.

Amicus Curiae Institute for Local Self Resilience (ILSR) is a not-for-profit corporation that promotes local power by contesting concentrated corporate power. The Institute for Local Self-Reliance provides economic and policy analysis of the electricity sector, identifying opportunities to more distribute the economic benefits of a renewable energy system by dispersing ownership of power generation.

Amicus Curiae Northwest and Intermountain Power Producers Coalition (NIPPC) is a not-for-profit trade association that advocates for competition in the power sector. NIPPC's members include independent power producers who develop and operate power plants, power marketers, and independent transmission companies. NIPPC members have collectively invested billions of dollars in existing generation resources in the United States and have substantial operating assets in the Northwest along with renewable and thermal projects in advanced development.

Amicus Curiae Renewable Northwest (RNW) is a nonprofit advocacy organization that works to facilitate the expansion of responsibly developed renewable resources in the Northwest. Renewable Northwest's members include renewable energy developers and manufacturers, as well as consumer advocates, environmental groups, academic institutions, and other industry advisers. The common goal of Renewable Northwest's members is to promote the development

of a cost-effective, reliable, and clean energy system for the betterment of the Northwest economy and environment.

Amicus Curiae Solar Energy Industries Association (SEIA) is the national trade association of the solar energy industry. As the voice of the industry, SEIA works to make solar a mainstream and significant energy source by expanding markets, reducing costs and increasing reliability, removing market barriers, and providing education on the benefits of solar energy. SEIA represents solar companies that own and operate a wide variety of projects throughout the country, including solar installations at the transmission and distribution levels, as well as behind-the-meter solar at commercial, industrial, and residential host sites. Solar power is the fastest growing source of energy worldwide, and SEIA's members include many companies that develop Qualified Facilities in Montana and elsewhere in the country.

Amicus Curiae Vote Solar is an independent 501(c)3 nonprofit corporation working to repower the U.S. with clean energy by making solar power more accessible and affordable through effective policy advocacy. Vote Solar seeks to promote the development of solar at every scale, from distributed rooftop solar to large utility-scale plants. Vote Solar has over 80,000 members nationally, including 86 members in Montana. Vote Solar is not a trade group and does not have corporate members.

The Amici Curiae collectively advocate for the lawful implementation of PURPA in Montana and elsewhere in the 9th Circuit and the U.S. PURPA requires that state commissions implement PURPA and FERC regulations, as interpreted by FERC and the federal courts. In the absence of lawful implementation of PURPA, many independent power producers do not have any viable mechanism to develop and sell the output of renewable energy projects. Accordingly, the Court's interpretation of PURPA and FERC's regulations affects Amici Curiae's interests.

INTRODUCTION AND BACKGROUND

I. PURPA'S REQUIREMENTS

Section 210 of PURPA seeks to "encourage the development of cogeneration and small power production facilities." *FERC v. Mississippi*, 456 U.S. 742, 750 (1982). Congress found that "traditional electricity utilities were reluctant to purchase power from, and to sell power to, the nontraditional facilities," and this reluctance was a barrier to the development of cogeneration and small power production facilities. *Id.* PURPA removes this barrier by directing FERC to "promulgate 'such rules as it determines necessary to encourage cogeneration and small power production,'" including rules that require utilities to offer to sell electricity to, and purchase electricity from, such facilities. *Id.* at 751 (quoting PURPA § 210(a); 16 U.S.C. 824a-3(a)).

FERC promulgated rules that, among other things, require that "[e]ach electric utility shall purchase . . . any energy and capacity which is made available from a qualifying facility." 18 C.F.R. § 292.303; *Small Power Prod. And Cogeneration Facilities; Regulations Implementing Sec. 210 of the Pub. Util. Reg. Pol. Act of 1978*, FERC Order No. 69, 45 Fed. Reg. 12,214 (Feb. 25, 1980). The rate for such purchases must be no more than the "avoided costs" or, in other words, "the incremental costs to an electric utility of electric energy or capacity or both which, but for the purchase from the qualifying facility or qualifying facilities, such utility would generate itself or purchase from another source." 18 C.F.R. § 292.304(a); 18 C.F.R. § 292.101(b)(6). Further, the qualifying facility (QF) has the option to either provide energy "as available" or pursuant to a legally enforceable obligation (LEO). 18 C.F.R. § 292.304(d). If the energy is provided pursuant to a LEO, the QF has the option to have the price based on either "the avoided costs calculated at the time of delivery" or "the avoided costs calculated at the time the obligation is incurred." *Id.* at § 292.304(d)(2).

PURPA then requires that each state regulatory authority implement FERC's rules for each electric utility for which it has ratemaking authority and that each nonregulated electric utility implement FERC's rules on its own. 16 U.S.C. § 824a-3(f). FERC is authorized to enforce these requirements in federal court against any state authority or nonregulated utility and QFs can petition

FERC to initiate an enforcement action. 16 U.S.C. § 824a-3(h). If FERC declines to initiate an enforcement action, then the petitioner may bring an action in federal district court to require that the state regulatory authority comply with these requirements. *Id*. The district court "may issue injunctive or other relief as may be appropriate." *Id.*

Although PURPA provides states with "latitude in determining the *manner* in which [FERC's] regulations are to be implemented" – whether that "manner" be issuance of regulations, resolution of disputes on a case-by-case basis or some other manner – the state's chosen "manner" of implementing PURPA must be "reasonably designed to give effect to FERC's rules." *Mississippi*, 456 U.S. at 751 (emph. added). In other words, under Section 210(f)(1) of PURPA, the state's regulations, generally applicable orders, and resolution of case-by-case matters must not conflict with FERC's regulations. If they do conflict, the state has failed to lawfully implement PURPA.

II. PURPA'S CONTINUED IMPORTANCE

Although initially enacted in 1978, PURPA remains highly relevant today. In the Energy Policy Act of 2005, Congress considered repeal of PURPA but determined to only remove the mandatory purchase obligation for utilities that operate in organized wholesale markets that provide non-discriminatory access to QFs. Pub. L. No. 109-58, § 1253, 119 Stat. 594, 567-70 (2005); 16 U.S.C. §

824a-3(m). In the many states where Amici Curiae's members are active, no such organized market exists, and PURPA's purchase obligation remains in effect for all QFs, just as it did in 1978.[2] Even in such organized markets, PURPA's mandatory purchase obligation ordinarily remains in place for QFs up to 20 MW in capacity, due to the difficulties such small facilities face in participating in markets. 18 C.F.R. § 292.309(a), (d); *New PURPA Section 210(m) Regulations Applicable to Small Power Production and Cogeneration Facilities*, Order No. 688-A, 119 FERC ¶ 61,305, at PP 84-104 (June 22, 2007).

Additionally, PURPA is still the only federal law mandating that utilities purchase renewable energy. Many states now have laws mandating that utilities purchase renewable energy (known as "renewable portfolio standards"). Steven Ferrey et al., *Fire and Ice: World Renewable Energy and Carbon Control Mechanisms Confront Constitutional Barriers*, 20 DUKE ENVTL. L. & POL'Y F. 125, 144-158 (2010). But many states have no such laws or have only a minimal requirement. *See id.* at 145.

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[2] For a discussion of the location of organized markets, *see* FERC, *Electric Power Markets: National Overview*, https://www.ferc.gov/market-oversight/mkt-electric/overview.asp (last visited Apr. 14, 2019).

In effect, PURPA remains the nation's bare minimum renewable energy mandate. PURPA "was and remains a primary incentive for renewable power development." Ferrey et al., 20 DUKE ENVTL. L. & POL'Y F. at 140.

III. PROCEDURAL HISTORY

In Montana, the Montana Public Service Commission (MPSC) implements PURPA and FERC's regulations. This case involves the proper implementation of those federal laws and regulations by Defendants, who are or were members of the MPSC (herein referred to as the Montana Commissioners). The U.S. District Court for the District of Montana found that the Montana Commissioners unlawfully implemented the requirement under PURPA to give QFs the option to sell their net output pursuant to a LEO. ER 22. On Cross-Appeal, the Montana Commissioners assert:

> First, the District Court erred in failing to determine that the retroactive relief sought by QF-Plaintiffs also constituted impermissible as-applied relief, beyond the subject matter jurisdiction of the Court. Second, the District Court incorrectly determined that the *Whitehall Wind* LEO standard did not comply with PURPA.

Second Br. 5-6.[3] Through this brief, the Amici Curiae support the Plaintiffs' response to the Montana Commissioners' cross-appeal. Specifically, Amici

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[3] "Second Brief" refers to Defendant's Second Brief on Cross-Appeal (Dkt. 33).

Curiae urge the Court to reject the Montana Commissioners' arguments challenging the district court's ruling that the *Whitehall Wind* LEO test is unlawful and to find that the federal courts are fully empowered to provide a meaningful remedy under PURPA's cooperative federalism structure.[4] If adopted by this Court, the Montana Commissioners' arguments on these points would completely undermine FERC's LEO rule and the federal court's ability to enforce that federal law throughout the states in the Ninth Circuit. Accordingly, this Court should affirm the district court's ruling finding the Montana Commissioners' implementation to be unlawful and order appropriate relief.

SUMMARY OF ARGUMENT

The district court correctly held that the Montana Commissioners' *Whitehall Wind* test violated PURPA. The purpose and unambiguous language of FERC's LEO rule, 18 C.F.R. 202.304(d)(2)(ii), requires that a QF that has engaged in negotiations with the utility must have the power to determine the date for which a LEO is formed and that the applicable avoided costs are those that are in effect at the time the QF tenders an agreement that obligates it to provide power. A LEO is the QF's obligation to sell, and the utility's obligation to purchase, the QF's net electrical output to a utility, and it is necessarily broader

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[4] While Amici Curiae agree with the Plaintiff's arguments under the 11th Amendment, that is not something addressed by this amici brief.

than a written contract for the sale of the power (often called a "power purchase agreement," or "PPA"). A LEO is traditionally invoked outside the context of a power purchase agreement where a utility has refused to execute, or delayed executing, a power purchase agreement until a time when the utility knows that the avoided costs available to the QF will be lower than those calculated at the time the QF prefers to create a LEO.

Because the rates are critically important to the economic viability of the development effort of a renewable energy project, the utility's ability to delay the creation of a LEO may prevent development of such renewable energy projects under PURPA. The invoking of a LEO outside of a power purchase agreement thus appropriately recognizes that QFs, such as Plaintiffs here and the members of some of Amici Curiae's organizations, are attempting to negotiate with a reluctant monopoly purchaser of their power. In the case of a willing seller (the QF) and an unwilling buyer (the utility), the LEO rule ensures that PURPA's purpose may be accomplished by allowing the QF to unilaterally create a binding commitment by the utility to purchase the QF's power. Absent the LEO rule and other important elements of PURPA, such QFs would have no viable market in which to sell their power, and the renewable energy facilities envisioned by PURPA would not get developed.

Utilities often advocate for stringent requirements that make it practically impossible to obtain a LEO, and state commissions sometimes adopt such stringent tests. However, PURPA and its implementing federal regulations do not permit states to unreasonably frustrate the right of QFs to create a LEO. FERC created the LEO concept for the specific purpose of preventing the utility from circumventing its must-purchase obligation under PURPA. Therefore, a state's LEO standard may not require the QF to do more than fully negotiate with the utility and tender an executed power purchase agreement to the utility.

When a state commission is found to have implemented an unlawful LEO standard, PURPA allows the federal court to do more than merely declare the state commission's rule unlawful and leave it to the state commission to afford the affected QFs effective relief for the legal errors. Rather the federal courts are fully empowered to enforce PURPA's requirement that state commissions must implement FERC's rules through issuance of appropriate injunctive relief.

ARGUMENT

I. A LEO STANDARD CANNOT BE MORE ONEROUS THAN FULLY NEGOTIATING AND TENDERING AN EXECUTED POWER PURCHASE AGREEMENT

The district court correctly held that the *Whitehall Wind* test violated PURPA because it required the QF to tender a fully executed interconnection agreement, in addition to a power purchase agreement. Because the utility can

delay the interconnection process or refuse to provide an interconnection agreement, the *Whitehall Wind* test gives the utility unilateral control to prevent the QF from creating a LEO. Given that the purpose of a LEO is to prevent a utility from delaying the signing of a contract, any requirement that allows the utility to delay the creation of the LEO violates PURPA.

The Montana Commissioners argue that, because Montana's QF interconnection procedure follows the "established process" in FERC's Small Generator Interconnection Procedures, the interconnections process "does not permit utilities to delay." Second Br. 53. However, as responded to by Plaintiffs, the FERC interconnection rules do not prevent utilities from extending or not complying with deadlines or otherwise impermissibly interfering with a QF's ability to establish a LEO. Third Br. 15.[5] Therefore, this Court should reject the Montana Commissioners' argument.

The concept of a LEO is central to PURPA's statutory and regulatory scheme and critically important to realize PURPA's goal of encouraging the development of cogeneration and small power production facilities. A LEO ensures that a QF that has negotiated with the utility can commit to sell its net

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[5] "Third Brief" refers to Plaintiff's Third Brief on Cross-Appeal (Dkt. 41).

output to a utility and to lock in the fixed pricing at which it will sell on a day of its choosing—even when the utility resists.

The LEO concept is especially important because avoided costs tend to change over time and no QF can develop, finance, and construct its electric generating facility if its agreement to sell energy is subject to change. FERC's rules remedy this issue by providing that "each [QF]" shall have the "option" to provide energy or capacity pursuant to a contract or other LEO over a specified term at avoid costs that are calculated at the time the obligation is incurred. 18 C.F.R. § 292.304(d)(2).

FERC's intention in adopting its LEO concept was explicit: "[u]se of the term 'legally enforceable obligation' is intended to prevent a utility from circumventing the requirement that provides capacity credit for an eligible qualifying facility merely by refusing to enter into a contract with the qualifying facility," and in order to establish "a *fixed contract price* for . . . energy and capacity at the outset of [the] obligation." 45 Fed. Reg. at 12224 (emphasis added). Thus, while ideally a QF could execute a power purchase agreement with the utility, the LEO is necessary to obligate the utility to purchase the net output at fixed prices when the utility refuses to execute an agreement or delays executing the agreement.

The right to long-term contracts with pre-established terms and conditions is critically important to successful development of QFs. As Congress itself recognized, "'cogenerators and small power producers are different from electric utilities, not being guaranteed a rate of return on their activities generally or on the activities vis a vis the sale of power to the utility.'" *Am. Paper Inst., Inc. v. Am. Elec. Power Serv. Corp.*, 461 U.S. 402, 414 (1983) (quoting H R Conf Rep No 95-1750, at 97–98 (1978)). Unlike traditional utilities, which are legally entitled to charge end-use customers all prudently incurred costs of electric service, a QF's "'risk in proceeding forward in the cogeneration or small power production enterprise is not guaranteed to be recoverable.'" *Id.* As such, QFs must rely on long-term contracts containing fixed contractual rights and prices that are not subject to changes over time to obtain financing for such facilities operating in a market controlled by monopoly utilities. *See N.Y. State Elec. & Gas Corp.*, 71 FERC ¶ 61,027, at 61,117-18 (Apr. 12, 1995) (noting FERC has "recognized the importance of contractual reliance for this purpose").

This industry context for PURPA and its LEO rule is important. QFs are attempting to negotiate with an unwilling buyer that has long enjoyed a monopoly in the generation supply market. Indeed, PURPA was enacted because utilities were reluctant to purchase from such nontraditional facilities

owned by independent power producers willing to take on the risk of investing in new renewable energy technologies. Absent the right to create a LEO on the date of the QF's choosing, the utility could delay the creation of the LEO until the avoided costs were lower and the QF may no longer receive the revenue necessary to make its development efforts profitable. The practical effect of allowing the utility to delay creation of a LEO may be that the QF could not enter into a contract with avoided cost rates sufficient to justify the construction of the facility, and the facility may never be constructed.

To effectuate the need for long-term fixed price contracts, PURPA gives states the initial power to determine the specific parameters of when a LEO is formed. *West Penn Power Co.*, 71 FERC ¶ 61,153 at 61,495 (May 8, 1995). These state requirements, however, may not conflict with FERC's rules. *Cedar Creek Wind, LLC*, 137 FERC ¶ 61,006 at P.35 (Oct. 4, 2011). The Montana Commissioners assert that there is "no such thing as a FERC LEO standard." Second Br. 50. But that argument misses the point. Under PURPA's cooperative federalism model, state commissions implement the federal law and regulations, but they must operate within the parameters set by PURPA and FERC. So, while it is true that FERC has not mandated one single LEO rule to be applied universally in all states, FERC's LEO rule does not allow the state to enable its

regulated utilities to control the date of creation of the LEO. Instead, FERC's LEO rule requires the state to enable *the QF* to unilaterally create the LEO.

A leading LEO decision from another Northwest state demonstrates how to correctly apply FERC's LEO rule. *See Snow Mountain Pine Co. v. Maudlin*, 734 P.2d 1366, 1370-71 (Or. App. 1987), *rev den* 739 P.2d 571 (1987). In *Snow Mountain Pine*, an Oregon utility insisted that the LEO could be created "*only* when the utility and a qualifying facility execute a written contract for the purchase of power *or* when the commissioner[6] issues an order determining the contract terms for the parties in a case brought before him." *Id.* at 1370 (emphasis added). According to the utility, "an obligation is not incurred by a qualifying facility's unilateral presentation of a contract, the terms of which have not been agreed upon." *Id.* The Oregon Public Utility Commissioner's order endorsed this view and determined that rates would be calculated as of the date of the Commission's final order resolving the QF's complaint and not the earlier date on which the QF tendered an agreement to the utility. *Id.* The Oregon appellate court reversed the commissioner, holding that the QF created a LEO "by tendering an agreement that obligates it to provide power" – thus rejecting

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[6] Note that the Oregon "Commissioner" is the predecessor to the "Oregon Public Utility Commission."

the view that the QF cannot create a LEO until the state commission actually calculates the disputed rates. *Id.* at 1371.

The court reasoned that "the obligation to purchase power is imposed by law on a utility; it is not voluntarily assumed." *Id.* at 1370. "[A] qualifying facility's self-imposed obligation *to deliver energy* triggers a utility's obligation *to purchase energy*." *Id.* at 1371. Accordingly, "[t]he date on which the qualifying facility obligates itself to deliver energy fixes the date on which the 'avoided costs' are determined[,]" and "the fact that the price is not agreed upon when the qualifying facility obligates itself to provide power does not change the date on which the obligation is incurred or affect the date used for determining the price." *Id.* "To permit a utility to delay the date to be used to calculate the purchase price simply by refusing to purchase energy would expose qualifying facilities to risks that we believe Congress and the Oregon Legislature intended to prevent." *Id.* The court found FERC's preamble to its LEO rule particularly relevant, stating FERC "suggests that a utility cannot merely by refusing to enter into a contract, deprive a qualifying facility of its right to commit to sell power in the future at prices *which are determined at the time the qualifying facility makes its decision to provide power*." *Id.* at 600 (internal quotation omitted) (emphasis added). Indeed, a LEO had existed as of the QF's tender of a proposed agreement in July 6, 1983, even though that proposed

agreement contained the incorrect rates and the final rate was still unknown at the time of the appellate court's decision years later in 1987. *Id.* The court directed the Commissioner to recalculate the avoided costs as of the date the QF tendered the agreement, not the date of the Commissioner's final order establishing rates. *Id.* at 1371-72.

Further, in addition to the examples provided by Plaintiffs, FERC also found that it was inconsistent with PURPA and FERC's regulations for a state commission to require that a PPA be executed by one or both parties in order to form a LEO prior to a regulatory change. *Grouse Creek, LLC*, 142 FERC ¶ 61,187 at PP 37-38 (Mar. 15, 2013). In *Grouse Creek*, neither the QF nor the utility executed the PPA prior to a December 14 regulatory change; however, the QF provided final site-specific information by December 2, signed the agreement on December 20, and the utility signed on December 28. *Id*. at PP 6, 14. The state commission rejected the executed PPA because it was not executed by either or both parties prior to the rule change. *Id*. at PP 6. FERC compared this to four other similar cases before the same state commission and found that in all four instances the QFs:

> had engaged in formal negotiations to enter into power purchase agreements with electric utilities during November and December 2010, and all four QF petitioners had unequivocally committed themselves to sell to the utilities prior to the new rules concerning eligibility for published avoided cost rates went into effect, i.e., before December 14, 2010.

Id. at P 37.

FERC reasoned that, because the purpose of a LEO was to prevent utilities from refusing to sign contracts or delaying signing until a lower rate was in effect, the state commission's requirement that the contract be executed to form a LEO was inconsistent with PURPA and FERC's regulations implementing PURPA. *Id.* at P 36. Therefore, at a minimum, where a contract has not been executed prior to a rule change, a LEO is created where negotiations took place, the material terms were finalized, and the QF unequivocally committed to sell to the utility prior to the rule change.

In this case, FERC reasoned that a state rule that requires, per se, that certain procedural steps be completed prior to LEO formation is inconsistent with PURPA and FERC regulations. *FLS Energy, Inc.*, 157 FERC ¶ 61,211 at P 23 (Dec. 15, 2016). This is especially true when those steps are under the control of or provide discretion to the utility regarding when a contract is entered into. FERC found that it was inconsistent with PURPA and FERC's regulations for the Montana Commissioners to require that the QF have a fully executed interconnection agreement in order to form a LEO prior to a regulatory change. *Id.* Plaintiffs in this case tendered executed PPAs to the utility prior to a June 16, 2016 suspension of standard rates but had not tendered its interconnection agreement because the same utility had not provided an executable copy of the

interconnection agreement. *Id*. at PP 3-4. FERC reasoned that, because "the establishment of a [LEO] turns on the QF's commitment, and *not* the utility's actions," the Montana Commissioners' requirement that an interconnection agreement be tendered was inconsistent with PURPA and FERC's regulations. *Id*. at PP 23-26. This requirement would inappropriately allow a utility to "control whether and when a [LEO] exists—e.g. by delaying the facilities study or by delaying the tendering by the utility to the QF of an executable interconnection agreement." Id. at P 23. Therefore, a state commission rule requiring certain procedural steps that are within the utility's control, and over which the utility has the power to delay, is inconsistent with PURPA.

FERC's reasoning, which was correctly adopted by the district court, is persuasive in light of the importance and purpose of the LEO. The purpose of the LEO is to avoid the situation where the utility can circumvent its must-purchase obligation by simply refusing to execute a power purchase agreement. It necessarily follows, then, that any LEO standard that allows the utility to circumvent, or unreasonably delay, its must-purchase obligation is inconsistent with PURPA. At a minimum, because the LEO is broader-than and encompasses a power purchase agreement, the requirement to form a LEO cannot require the QF to do anything more onerous than fully negotiate and execute a final power

purchase agreement with terms and conditions to which both parties agree, [7] as occurred in this case. *See, e.g.,* ER 9 (¶17), 10 (¶ 26).

Therefore, while less could be sufficient for a QF to form a LEO, as Plaintiffs argue, it would be inconsistent with PURPA to require a QF to do more than execute a fully negotiated power purchase agreement in order to form a LEO. This Court should affirm the ruling of the district court on that point. For all the foregoing reasons, the district court correctly ruled that Defendants violated PURPA by requiring an executed interconnection agreement as a condition of LEO formation. At a minimum, the tender to the utility by a QF of an executed, fully negotiated power purchase agreement must, as a matter of federal law be sufficient to establish a LEO.

II. FEDERAL COURTS SHOULD PROVIDE DIRECTION TO THE MONTANA COMMISSIONERS AS TO WHAT PURPA REQUIRES

Where a state commission adopts an unlawful LEO standard, federal courts are fully empowered to provide a meaningful remedy to the QF plaintiff. The Montana Commissioners assert that (as an alternative to the argument that the 11th Amendment bars relief) relief cannot be provided because the relief sought

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[7] While this fact is not disputed, Plaintiffs have not asked the federal courts to make any finding of fact with regard to the actions they took to establish LEOs or any conclusion of law specific to them.

by QF-Plaintiffs constituted impermissible "as-applied" relief, beyond the subject matter jurisdiction of the Court under PURPA's "cooperative federalism" scheme.

The Montana Commissioners' proposed rule of law would make it nearly impossible to ever remedy a state's unlawful implementation of PURPA, and it would functionally turn PURPA into a dead letter in federal courts. In enacting PURPA, Congress specifically intended to address the fact that both electric utilities and state regulatory agencies were a barrier to non-utility owned cogenerators and renewable energy generators selling their net output to utilities. *See Mississippi*, 456 U.S. at 750. Federal judicial review will be hamstrung if a federal court can only inform an agency that its implementation was improper, but cannot provide specific direction to how it must correct the error.

The district court appropriately recognized that the relief allowed by the PURPA statute itself in federal court is broad. *See* ER 24; 16 U.S.C. § 824a-3(h)(2)(B) (the district court "may issue such injunctive or other relief as may be appropriate."). These points are well-argued in the Plaintiffs' briefing and need not be repeated here.

In addition to incorrectly interpreting the statutory language, the Montana Commissioners' arguments overlook the practical realities of the difficulties of enforcing a QF's right to sell under PURPA – which are well illustrated by the

facts of this case. The QFs here sought to develop solar powered facilities, not to engage in endless administrative and judicial litigation. *See* ER 7 (¶6). After spending thousands of dollars in development efforts, they sought to obtain long-term power purchase agreements. ER 8 (¶¶9-10). However, after receiving notice that the utility requested emergency suspension of the rate, the QFs intervened in the proceeding, finalized their power purchase agreements and sought to have them executed by the utility. ER 9 (¶¶15-20). The Montana Commissioners then refused to authorize the utility to execute the agreements, relying on an unlawful LEO test. *See* ER 9-10 (¶21). The QFs next had to file a petition for enforcement with FERC, which agreed with the QFs that the Montana Commissioners had acted unlawfully. ER 11 (¶¶28-30). Then, the QFs successfully brought an action against the Montana Commissioners in the district court, which also agreed that the utility and the Montana Commissioners acted unlawfully. ER 22.

During this years-long process, the QFs have not had the long-term contractual commitment they would normally need to secure investment in the construction of the underlying facilities. That is the lengthy and costly litigation path that faces each QF that is harmed by a reluctant utility purchaser or a state commission that adopts a LEO rule inconsistent with FERC. Pursuing such litigation to vindicate the rights of QFs and to effectuate the purpose of PURPA

in the courts is a major undertaking for a business that set out to simply develop a renewable energy facility.

Yet the Montana Commissioners argue that PURPA somehow bars the district court from doing anything other than declaring the unlawfulness of the Montana Commissioners' actions. Instead, the Montana Commissioners argue that the district court and the QFs are left only to hope the MPSC will itself afford effective relief from its own legal errors. The practical impact of the Montana Commissioners' theory of PURPA is that harmed QFs may be left never able to obtain effective relief from a state commission's failure to lawfully implement PURPA. In turn, QFs could be deterred from ever challenging a state commission's unlawful implementation of PURPA in the first place because there would be no effective relief to justify engaging in such lengthy and expensive litigation.

The Court should reject the illogical and unsound result for which the Montana Commissioners advocate. When a district court concludes that a state commission has not lawfully implemented FERC's rules, the district court logically should also be able to issue declaratory relief and injunctive relief directing the state commission to lawfully implement the rules. The state commission should not be left free to, for example, implement another unlawful rule, which would require the court to retain jurisdiction to oversee the proper

implementation or—even worse—otherwise require the QF to again seek FERC enforcement of the new rule and further litigation in federal court.

Rather than waste administrative and judicial resources on perpetual enforcement actions, PURPA expressly allows the federal court to offer clear direction, and even injunctive relief, to remedy the state commission's violations of PURPA. That includes a clear declaration as to what PURPA and FERC's rules require, at a minimum, with respect to LEO formation, as the Plaintiffs here sought.

In sum, the relief sought here was not only appropriate, but it was also necessary to effectuate the purpose of PURPA and FERC's rules. This Court should therefore not only conclude that the Montana Commissioners violated PURPA, but should also instruct the Montana Commissioners that any QF that tendered a fully-negotiated, executed PPA to NorthWestern on or before June 16, 2016 formed a LEO and is therefore entitled to a power purchase agreement with NorthWestern under the prior QF-1 Tariff.

CONCLUSION

For the reasons explained above, the Court should affirm the district's court's judgment on the merits and provide the relief requested by Plaintiffs.

Dated this 15th day of April 2019.

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C) and Circuit Rule 32-1, I certify that:

This brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5), Fed. R. App. P. 32(a)(7)(B), and Circuit Rule 32-1 because it contains 5572 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionately spaced typeface using Microsoft Word 2018, Times New Roman, 14-point font.

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CERTIFICATE OF SERVICE

I hereby certify that on April 15, 2019, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. I further certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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