REPORT OF THE FINANCE & TRANSACTIONS COMMITTEE

The period covered by this report is January 1, 2012, through December 31, 2012.*

I. OVERVIEW OF RECENT DEVELOPMENTS IN THE IMPLEMENTATION OF DODD-FRANK TITLE VII

The Finance and Transactions Committee Report published in the 2012 Energy Law Journal (2012 Report)[1] examined how Dodd-Frank[2] would impact

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1. *Report of the Finance & Transactions Committee*, 33 ENERGY L.J. 273 (2012) [hereinafter *2012 Report*].

the way energy companies conduct their hedging transactions. As of the end of the period covered by this report, the Commodity Futures Trading Commission (CFTC) now has published forty-one final rules and eight final orders.[3] The CFTC also has issued sixty-four proposed rules, four advanced notices of proposed rulemaking, and six proposed exemptive orders.[4] The Securities and Exchange Commission (SEC) has proposed or adopted rules for more than three-quarters of the mandatory rulemaking provisions.[5]

This report brings current the 2012 Report with updates examining the rules that have been finalized thus far and estimating the timing for establishing the key rules that remain. The report also provides an update on Federal Power Act (FPA) section 203 filings at the Federal Energy Regulatory Commission (FERC).

II. KEY FEATURES OF DODD-FRANK TITLE VII AFFECTING ENERGY COMPANIES

A. End-User Exception from Clearing and Exchange-Trading Requirements

The 2012 Report discussed the end-user exception from the mandatory clearing and exchange trading requirements under Dodd-Frank pursuant to section 2(h)(7) of the Commodity Exchange Act (CEA).[6] On July 10, 2012, the CFTC issued its final rules related to the end-user exception.[7] The final rule set forth the same criteria as appeared in the CFTC's proposed rule.[8] A party may use this exception if it:

> (i) is not a financial entity; (ii) is using swaps to hedge or mitigate commercial risk; and (iii) notifies the [CFTC] . . . how it generally meets its financial obligations associated with entering into non-cleared swaps.[9]

The CFTC adopted the same definition of "financial entity" as set forth in section 2(h)(7)(C)(i) of the CEA, which includes, among other things, swap dealers, major swap participants, and entities predominantly engaged in banking or financial activities.[10]

A party makes the election on a swap-by-swap basis.[11] The regulations set forth two options for reporting a party's election. The party claiming the exception may either have the reporting party, at the time of swap execution,

2. Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank), Pub. L. No. 111-203, 124 Stat. 1376 (2010).

3. *Dodd-Frank Final Rules and Orders*, CFTC, http://www.cftc.gov/LawRegulation/DoddFrankAct/Dodd-FrankFinalRules/index.htm (last visited Mar. 10, 2013).

4. *Dodd-Frank Proposed Rules and Advanced Notices*, CFTC, http://www.cftc.gov/LawRegulation/DoddFrankAct/Dodd-FrankProposedRules/index.htm (last visited Mar. 10, 2013).

5. *Implementing the Dodd-Frank Wall Street Reform and Consumer Protection Act*, SEC, http://www.sec.gov/spotlight/dodd-frank.shtml (last modified Feb. 14, 2013).

6. *2012 Report*, *supra* note 1, at 4; Dodd-Frank § 124, 7 U.S.C. § 2(h)(7)(2012).

7. Final Rule, End-User Exception to the Clearing Requirement for Swaps, 77 Fed. Reg. 42,560 (July 19, 2012) (to be codified at 17 C.F.R. pt. 39).

8. *See generally id.*; Proposed Rule, End-User Exception to the Clearing Requirement for Swaps, 75 Fed. Reg. 80,747 (Dec. 23, 2010).

9. 77 Fed. Reg. 42,560, at 42,581.

10. 7 U.S.C. § 2(h)(7)(C)(i) (2012).

11. 77 Fed. Reg. 42,560, at 42,590.

indicate its election, or make such election itself in an annual filing with the CFTC or swap data repository, as applicable.[12]

On November 29, 2012, the CFTC issued the first swaps clearing order, which is applicable to credit default and interest rate swaps.[13] Category 3 entities will be required to clear such swaps or make an election for the end-user exception no later than September 9, 2013, with respect to such swaps entered into on or after that date.[14] The CFTC has yet to issue clearing orders with respect to other categories of swaps, and to set the end-user exception election deadlines with respect to each category of swap.

B. Key Definitions: Swap Dealer and Major Swap Participant

1. Swap Dealer

On April 27, 2012, the CFTC and the SEC issued the final definitions of "swap dealer"[15] and "major swap participant."[16] The definition of swap dealer closely follows the statutory definition.[17] A swap dealer is a person that:

> (a) Holds itself out as a dealer in swaps;
> (b) Makes a market in swaps;
> (c) Regularly enters into swaps with counterparties as an ordinary course of business for its own account; or
> (d) Engages in any activity causing itself to be commonly known in the trade as a dealer or market maker in swaps.[18]

Under the interpretive guidance provided by the CFTC and the SEC, the swap dealer determination should include all relevant facts and circumstances, and focus on the typical activities in the person's business.[19] Examples of swap dealing activities include: (i) entering into swaps to satisfy "the business or risk management needs of a counterparty" or customer; (ii) "maintaining a separate profit and loss statement for swap activity"; and (iii) allocating staff and resources to "dealer-type activities."[20]

Several types of swap activities may be disregarded for the swap dealer determinations. Such exclusions include swaps between majority-owned affiliates or cooperatives and their members,[21] swaps entered into to hedge a person's physical positions,[22] and swap activities under the *de minimis* threshold.[23]

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12. *Id.*

13. Final Rule, Clearing Requirement Determination Under Section 2(h) of the CEA, 77 Fed. Reg. 74,284 (Dec. 13, 2012) (to be codified at 17 C.F.R. pts. 39, 50).

14. *Id.* at 74,320.

15. Final Rule, Further Definition of "Swap Dealer," "Security-Based Swap Dealer," "Major Swap Participant," "Major Security-Based Swap Participant" and "Eligible Contract Participant," 77 Fed. Reg. 30,596, 30,744 (May 23, 2012) (to be codified at 17 C.F.R. pts. 1, 240).

16. *Id*. at 30,746-47.

17. 7 U.S.C. § 1a(49)(A) (2012).

18. 77 Fed. Reg. 30,596, at 30,744.

19. *Id.* at 30,606.

20. *Id*. at 30,610.

21. *Id.* at 30,624-26.

22. *Id*. at 30,610-12.

23. *Id*. at 30,632-35.

The CFTC increased the *de minimis* threshold for swap dealing from a mere \$100 million in its proposed rule[24] to \$8 billion in the final rule.[25] With the exception of inter-affiliate swaps, hedging swaps, and certain other excepted swaps, a person that engages in some level of swap dealing activity may not be considered a swap dealer if its level of dealing activity is less than the *de minimis* threshold.[26] During the "phase-in period," which will last at least until late 2015, a person will not be considered a swap dealer if: (i) the aggregate notional value of swaps entered in its role as a dealer over the preceding twelve months does not exceed \$8 billion; and (ii) the aggregate notional value of swaps entered with "special entities," such as municipalities, political subdivisions, and employee benefit plans, does not exceed \$25 million.[27] The CFTC may adjust the \$8 billion threshold after conducting a study on the threshold and seeking public comment on such study.[28] If no action is taken by the CFTC, the phase-in period will terminate five years after swap data repositories begin receiving swap transaction information and the *de minimis* threshold for swap dealing activity will automatically drop to \$3 billion.[29]

2. Major Swap Participant

The final definition of "major swap participant" also follows the statutory definition closely.[30] A major swap participant is a person that does not meet the definition of swap dealer and:

(a) maintains a "substantial position" in any of the major swap categories, excluding positions held for hedging or mitigating commercial risk;

(b) has outstanding swaps that create "substantial counterparty exposure" that could have serious adverse effects on the U.S. banking system or financial markets generally; or

(c) is a "financial entity" that is highly leveraged, is not subject to capital requirements established by a banking agency, and maintains a "substantial position" in any of the major swaps categories.[31]

The CFTC offers two alternative tests for determining whether an entity's position is a "substantial position." One test examines the daily average net uncollateralized exposure and the other test examines this exposure *plus* the future potential of this type of exposure.[32] An entity creates "substantial counterparty exposure" if it has current uncollateralized exposure of \$5 billion or

24. Joint Proposed Rulemaking, Further Definition of "Swap Dealer," "Security-Based Swap Dealer," "Major Swap Participant," "Major Security-Based Swap Participant" and "Eligible Contract Participant", 75 Fed. Reg. 80,174, 81,080-81 (Dec. 21, 2010) (to be codified at 17 C.F.R. pts. 1, 240).

25. 77 Fed. Reg. 30,596, at 30,632-35.

26. *Id.* at 30,631.

27. *Id*. at 30,633-34, subject to CFTC No Action Letter 12-18, 2012 WL 4919783 (Oct. 12, 2012), in which the CFTC's Division of Swap Dealer and Intermediary Oversight generally recommends no enforcement action against any non-financial entities that regularly transact in the physical energy markets for failure to register as swap dealers, if such entities limit their dealing activities with publicly-owned and government-owned utilities to no more than \$800 million annually.

28. 77 Fed. Reg. 30,596, at 30,634.

29. *Id*.

30. 7 U.S.C. § 1a(33)(A).

31. 77 Fed. Reg. 30,596, at 30,662-65, 30,746-47.

32. *Id.* at 30,671.

greater, or a sum of current uncollateralized exposure and potential future exposure of $8 billion or greater across all swap categories.[33] In contrast to this "substantial position" calculation, the substantial counterparty exposure calculation includes all swaps, no matter what category or whether such swaps are used to hedge or mitigate risk.[34]

The CFTC created a safe harbor to take a person out of the major swap participant definition. Under the safe harbor, a person is not a major swap participant if:

(a)(i) the terms of the swap arrangements with counterparties do not "permit the person to maintain total uncollateralized exposure [greater] than $100 million, . . . and (ii) the person does not maintain notional swap . . . positions of more than $2 billion in any major category of swaps . . . , or more than $4 billion in the aggregate;"[35]

(b)(i) the terms of the swap arrangements with counterparties do not "permit the person to maintain total uncollateralized exposure [greater] than $200 million" and (ii) the person performs the "substantial position" calculations provided above on a monthly basis and the person's swap positions are no more than 50% of the "current exposure plus potential future exposure that would [otherwise] cause the person to be a major [swap] participant;"[36] or

(c)(i) the person's current uncollateralized exposure in connection with a major category of swaps is less than $1.5 billion for interest rate swaps or $500 million in regard to the other major swap categories and (ii) the person performs the "substantial position" calculations provided above on a monthly basis and the person's swap positions in each major category of swaps is less than 50% of the substantial position threshold.[37]

3. Consequences of Being a Swap Dealer or Major Swap Participant

As discussed in the prior versions of this report, Swap Dealers and Major Swap Participants are required to register with the CFTC and are subject to business conduct rules[38] and increased monitoring, oversight, and reporting requirements, and must satisfy certain capital and margin requirements.[39]

33. *Id.* at 30,715.

34. *Id.* at 30,682-83.

35. *Id.* at 30,695.

36. 77 Fed. Reg. 30,596, at 30,695.

37. *Id*.

38. The CFTC finalized business conduct standards that establishes the standards that Swap Dealers and Major Swap Participants must follow in their dealings with counterparties. Business Conduct Standards for Swap Dealers and Major Swap Participants with Counterparties, 77 Fed. Reg. 9734 (Feb. 17, 2012) (to be codified at 17 C.F.R. pts. 4, 23).

39. *Report of the Finance & Transactions Committee*, 32 ENERGY L.J. 323, 329 (2011); *2012 Report*, *supra* note 1, at 276. The CFTC has yet to issue final capital and margin rules. Peter Madigan, *The CFTC's To-Do List: 14 Rules to Go, from Sefs to Volcker*, RISK MAG., Nov. 7, 2012, *available at* http://www.risk.net/risk-magazine/feature/2222167/the-cftcs-todo-list-14-rules-to-go-from-sefs-to-volcker.

C. Position Limits

1. The CFTC's Final Rule on Position Limits for Futures and Swaps

As discussed in the 2012 Report, the CFTC's final rule on position limits was issued in October 2011.[40] The Final Position Limits Rule was challenged jointly on December 2, 2011, by the International Swaps and Derivatives Association (ISDA) and the Securities Industry and Financial Markets Association (SIFMA) in the U.S. District Court for the District of Columbia, and the D.C. Circuit Court of Appeals.[41] Less than a month before the Final Position Limits Rule would become effective with respect to certain derivatives contracts, on September 28, 2012, the D.C. District Court issued its memorandum opinion vacating the Final Position Limits Rule and remanding it back to the CFTC.[42]

Early in its opinion, the Court indicated its grounds for its decision, stating:

> This case largely turns on whether the CFTC, in promulgating the Position Limits Rule, correctly interpreted Section 6a as amended by Dodd-Frank. Although both sides forcefully argue that the statute is clear and unambiguous, their respective interpretations lead to two very different results: one which mandates the Commission to set position limits without regard to whether they are necessary or appropriate, and one which requires the Commission to find such limits are necessary and appropriate before imposing them.[43]

The CFTC approved moving forward with an appeal of the ruling on November 15, 2012.[44] Because the Court vacated the Final Position Limits Rule, until the appeal is resolved, no compliance is necessary.[45]

III. KEY FEATURES OF TITLE IX AFFECTING ENERGY COMPANIES

A. Shareholder Votes on Executive Compensation and Golden Parachutes

The SEC adopted its proposed rules requiring the listing standards of various national securities exchanges to apply to any committee that oversees executive compensation without change, except for the proposed rules relating to compensation advisors and independent directors acting outside of a formal committee structure.[46] In addition, the final rule adopts the proposed rules regarding the independence requirements for compensation committee members contained in section 952 of Dodd-Frank without change.[47] The final rule "does

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40. Final Rule, Position Limits for Futures and Swaps, 76 Fed. Reg. 71,626 (Nov. 18, 2011) (to be codified at 17 C.F.R. pts. 1, 150, 151); *2012 Report*, *supra* note 1, at 279.

41. Complaint, Int'l Swaps and Derivatives Ass'n v. U.S. Commodity Futures Trading Comm'n, No. 1:11-cv-02146 (D.D.C. Dec. 2, 2011). The same action was filed on the same day with the U.S. Court of Appeals for the District of Columbia. Petition for Review, Int'l Swaps and Derivatives Ass'n v. U.S. Commodity Futures Trading Comm'n, No. 11-1469 (Dec. 2, 2011).

42. Int'l Swaps and Derivatives Ass'n v. U.S. Commodity Futures Trading Comm'n, 887 F. Supp. 2d 259 (D.D.C. 2012).

43. *Id.* at 266.

44. Press Release, U.S. Commodity Futures Trading Comm'n, CFTC Approves Position Limit Appeal (Nov. 15, 2012), http://www.cftc.gov/PressRoom/PressReleases/pr6413-12.

45. Alexander Osipovich, *Position Limits Rejection Lifts Compliance Burden*, RISK.NET (Oct. 4, 2012), http://www.risk.net/energy-risk/news/2214518/position-limits-rejection-lifts-compliance-burden.

46. Listing Standards for Compensation Committees, 77 Fed. Reg. 38,422, 38,429, 38,431-32 (June 27, 2012) (to be codified at 17 C.F.R. pts. 229, 240).

47. *Id.* at 38,426-28, 38,454.

not require that exchanges establish a uniform definition of independence" and adopts Rule 10C-1(b)(2) and (3) substantially as proposed.[48]

The SEC adopted a modified version of its proposed amendments to the disclosure requirements of Item 407 of Regulation S-K.[49] The final rule amendments

> will require additional disclosure in proxy or information statements filed on Schedule 14A or Schedule 14C of whether the work of a compensation consultant that has played any role in determining or recommending the amount or form of executive and director compensation, with certain exceptions, has raised a conflict of interest, and if so, the nature of the conflict and how the conflict is being addressed.[50]

B. New Disclosure Rules for Oil and Gas Developers

Pursuant to section 1504 of Dodd-Frank, the SEC issued its final rule requiring resource extraction issuers[51] to disclose information on any payments to the United States or non-U.S. governments made by the issuer or its subsidiaries, or entities under the issuer's control for the purpose of commercial development of oil, natural gas, or minerals.[52] Consistent with the SEC's proposed rule, issued in 2010, the final rule defines "payment" to mean a payment that "is made to further the commercial development of oil, natural gas, or minerals, is 'not de minimis,' and includes taxes, royalties, fees (including license fees), production entitlements, and bonuses."[53] The final rule additionally requires disclosure of dividends and payments for infrastructure improvements, and defines "not de minimis" payments to mean "any payment . . . or series of related payments that equals or exceeds $100,000 during the most recent fiscal year."[54] While the proposed rule requires the resource extraction issuer to disclose such payments in the issuer's existing Exchange Act annual report, the final rule requires the issuer to provide the disclosures in a new annual report.[55] The final rule requires the disclosures to be submitted using an interactive data standard, or a standardized list of electronic tags that identify

> (i) [t]he total amounts of the payments, by category; (ii) [t]he currency used to make the payments; (iii) [t]he financial period in which the payments were made; (iv) [t]he business segment of the resource extraction issuer that made the payments; (v) [t]he government that received the payments and the country in which the

48. *Id.* at 38,428-29.

49. *Id.* at 38,439.

50. *Id.* at 38,445.

51. Disclosure of Payments by Resource Extraction Issuers, 77 Fed. Reg. 56,365, 56,416 (Sept. 12, 2012) (to be codified at 17 C.F.R. pts. 240, 249). The final rule defines the term "resource extraction issuer" as defined in section 13(q) of the Securities Exchange Act, which was added by section 1504 of Dodd-Frank: "A resource extraction issuer is an issuer that is required to file an annual report with the Commission and engages in the commercial development of oil, natural gas, or minerals." *Id.*

52. *Id.* at 56,379.

53. *Id.* at 56,368.

54. *Id.*

55. *Id.*

> government is located; and (vi) [t]he project of the resource extraction issuer to which the payments relate.[56]

IV. Update on Federal Power Act Section 203 Filings at the Federal Energy Regulatory Commission

During the 2012 Federal Energy Regulatory Commission (FERC or Commission) filing year period, which commenced October 1, 2011, the FERC received 151 applications seeking authorizations for mergers, acquisitions, and other change-of-control transactions subject to FPA section 203[57] authorization. Among these transactions, the FERC reviewed two major proposed mergers of traditional utilities: between Exelon Corporation (Exelon) and Constellation Energy Group (Constellation) (collectively, "Exelon-Constellation") and between Duke Energy Corporation (Duke) and Progress Energy, Inc. (Progress) (collectively, "Duke-Progress"), both as discussed below.[58]

A. Exelon-Constellation

In an application filed with the FERC on May 20, 2011, in Docket No. EC11-83, Exelon proposed to acquire all of the outstanding shares of Constellation.[59] As a result of the stock purchase and certain related internal corporate reorganization transactions, Exelon became the ultimate holding company of Constellation and Constellation's subsidiary, Baltimore Gas & Electric Company.[60]

In the application, Exelon-Constellation acknowledged that their generating assets overlapped within the PJM Interconnection, L.L.C. market, creating the appearance of potential market power.[61] The applicants proposed for study several new sub-markets for competition analysis purposes, and the FERC accepted their proposal for the purposes of their merger proceeding, without creating additional submarkets for the purposes of other competitive analyses.[62] As a condition to FERC authorization, the applicants entered into an agreement with the PJM Independent Market Monitor to provide for certain generation divestitures and certain "behavioral commitments" (including ongoing monitoring) related to generating unit commitment and wholesale power pricing for ten years following consummation.[63] In addition, the applicants agreed not to divest the generating units they had proposed to sell to any of eight specific generation owners already doing business in the PJM market.[64] On March 19, 2012, the applicants notified the FERC that they had consummated the merger,[65]

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56. *Id.*

57. 16 U.S.C. § 824b (2012).

58. The author of this subsection represented certain investors and their advisors in both the Exelon-Constellation and Duke-Progress mergers.

59. *Exelon Corp. & Constellation Energy Grp., Inc.*, 138 F.E.R.C. ¶ 61,167 at P 1 (2012).

60. *Id.* at PP 2, 17 & n.8.

61. *Id.* at PP 25-26.

62. *Id.* at PP 31-33.

63. *Id.* at PP 82-85.

64. *Id.* at P 83 & n.93.

65. Notice of Consummation, Exelon Corp. & Constellation Energy Grp., Inc., FERC Docket Nos. EC11-83-000, EC11-83-001 (Mar. 19, 2012).

and have filed several quarterly reports relating to their generator divestitures and behavioral commitments since then.[66]

B. Duke-Progress

On April 4, 2011, Duke and Progress filed a section 203 application with the FERC, in which the applicants sought authorization to consummate a stock-acquisition transaction in which Progress would become a subsidiary of Duke.[67] Both Duke and Progress own and operate vertically-integrated utilities, including adjacent service territory in North and South Carolina.[68] On September 30, 2011, the FERC issued an order finding that the merger would result "in significant screen failures in the horizontal market power analysis and will thereby have an adverse effect on competition."[69] The FERC granted a conditional authorization for the transaction, "subject to [FERC] approval of market power mitigation measures," which might include one or more of the following: "membership in a Regional Transmission Organization (RTO)" (no one RTO geographically controls or then controlled the Duke-Progress geographic area), "implementation of an independent coordinator of transmission (ICT) arrangement, generation divestiture, virtual divestiture, and/or transmission upgrades."[70] The applicants proposed to adopt a combination of virtual divestiture (in the form of conditions on generator pricing and offers), independent monitoring of compliance with merger conditions, and future transmission upgrades.[71]

The Duke-Progress proceeding involved nearly 200 filings, interventions, protests, amendments, and supplementary filings by the applicants, FERC notices, and orders.[72] The FERC initially found the applicants' proposed post-Duke-Progress order compliance steps to be insufficient, and required the applicants to propose further mitigation measures.[73] On June 8, 2012, the FERC accepted the applicants' expanded proposals to divest generation, build transmission, and offer wholesale power on protective terms and conditions,[74] and on July 11, 2012, the applicants notified the FERC of their July 2, 2012 consummation.[75] Since the filing of that notice of consummation, there have been over a dozen filings and notices of record in the proceeding, which is still

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66. *See, e.g.*, Quarterly Independent Monitoring Report, Exelon Corp. & Constellation Energy Grp., Inc., FERC Docket Nos. EC11-83-000, EC11-83-001 (July 10, 2012); Quarterly Independent Monitoring Report, Exelon Corp. & Constellation Energy Grp., Inc., FERC Docket Nos. EC11-83-000, EC11-83-001 (Oct. 10, 2012).

67. *Duke Energy Corp. & Progress Energy, Inc.*, 136 F.E.R.C. ¶ 61,245 at P 1 (2011).

68. *Id.* at PP 5, 16.

69. *Id.* at P 1.

70. *Id.*

71. Compliance Filing, Duke Energy Corp. & Progress Energy, Inc., FERC Docket Nos. EC11-60-000, EC11-60-001, at 2-3, 11-12 (Oct. 17, 2011).

72. *See generally* Duke Energy Corp & Progress Energy, Inc., FERC Docket Nos. EC11-60-000, EC11-60-005.

73. *Duke Energy Corp. & Progress Energy, Inc.*, 137 F.E.R.C. ¶ 61,210 at PP 91-92 (2011).

74. *Duke Energy Corp. & Progress Energy, Inc.*, 139 F.E.R.C. ¶ 61,194 (2012).

75. Notice of Consummation, Duke Energy Corp. & Progress Energy, Inc., FERC Docket No. EC11-60-000.

open before the FERC,[76] and there have been press reports of controversy concerning the post-consummation governance of the applicants and their adherence to state commission requirements.[77]

V. Petitions From Qualifying Facilities for Enforcement Action at the Federal Energy Regulatory Commission

During the 2012 Commission filing year, the Commission received several petitions from qualifying facilities (QFs) for enforcement actions pursuant to section 210(h) of the Public Utility Regulatory Policies Act of 1978 (PURPA).[78] The Commission took enforcement action in certain cases, while declining to do so in others. Below, this section details four different situations.

A. Morgantown Energy Associates & City of New Martinsville, West Virginia

In an April 2012 order, in response to a petition for PURPA enforcement, the Commission found that the Public Service Commission of West Virginia had rendered a decision inconsistent with the PURPA.[79] Morgantown Energy Associates (Morgantown) owns and operates a QF and has a related power purchase agreement (PPA), approved by the West Virginia Commission, to provide electricity to Monongahela Power Company.[80] The PPA, entered into in 1989, is silent with respect to renewable energy credits (RECs).[81] "In a November 2011 decision, the [West Virginia Commission] held that an electric utility that purchases electric energy and capacity under a [PPA] with a [QF] formed in accordance" with the PURPA owns the RECs associated with that purchase, and not the owner of the QF.[82] Morgantown filed a PURPA section 210(h) petition for enforcement at the FERC.[83] The City of New Martinsville, West Virginia, which also owns and operates a QF and has a related PPA entered into with Monongahela in 1986, also filed a petition for enforcement and a request that the FERC consider its petition together with Morgantown Energy's due to the commonality of relevant facts and issues.[84]

In its April 2012 order, the FERC declined to initiate an enforcement action, but concluded that certain statements in the West Virginia Commission's decision were inconsistent with the PURPA.[85] Quoting *American Ref-Fuel*, the Commission stated, "'[w]hile a state may decide that a sale of power at wholesale automatically transfers the ownership of the state-created RECs, that requirement must find its authority in state law, not [the] PURPA.'"[86] Thus,

76. *See generally* Duke Energy Corp. & Progress Energy, Inc., FERC Docket Nos. EC11-60-000, EC11-60-005.

77. *See, e.g.*, Bruce Henderson, *Duke CEO Rogers Will Retire, Other Executives to Shuffle*, CHARLOTTE OBSERVER (Nov. 30, 2012), http://www.charlotteobserver.com/2012/11/30/3696161/duke-ceo-rogers-to-retire-under.html.

78. 16 U.S.C. § 824a-3 (2012).

79. *Morgantown Energy Assocs.*, 139 F.E.R.C. ¶ 61,066 (2012).

80. *Id.* at P 2.

81. *Id.*

82. *Id.* at P 1 (citation omitted).

83. *Id.* at P 13.

84. 139 F.E.R.C. ¶ 61,066, at PP 3, 22-23.

85. *Id.* at P 1.

86. *Id.* at P 44 (quoting *American Ref-Fuel*, 105 F.E.R.C. ¶ 61,004 at P 3 (2003)).

"[t]o the extent that the West Virginia Order finds that avoided-cost rates under [the] PURPA also compensate for RECs, the West Virginia Order is inconsistent with [the] PURPA."[87]

B. Exelon Wind

In an August 2012 order responding to a petition by Exelon Wind (formerly John Deere Renewables), the Commission declined to initiate an enforcement action against the Public Utility Commission of Texas, but concluded that one provision of the Southwestern Public Service Company (SPS, a subsidiary of Xcel) tariff which was approved by the Texas Commission, and concerned purchases from QFs, was inconsistent with the PURPA.[88] That provision concerned "setting SPS's avoided costs equal to the SPP Energy Imbalance Service market locational imbalance price at a QF's node."[89] The Commission explained that the methodology was inconsistent as it was

> based on the price that a QF would have been paid had it sold its energy directly in the EIS Market, instead of using a methodology of calculating what the costs to the utility would have been for self-supplied, or purchased, energy "but for" the presence of the QF or QFs in the markets, as required by the Commission's regulations.[90]

C. Cedar Creek Wind, Rainbow Ranch Wind & Murphy Flat Power

In the wake of three separate petitions filed by QFs for section 210(h) enforcement against the Idaho PUC, the Commission initiated an enforcement action in a November 20, 2012 order.[91] The Idaho PUC lowered the published avoided cost rate eligibility cap for a QF from 10 aMW to 100 kW and adopted a "bright line rule" in a June 2011 decision, stating that in order for projects in excess of the 100 kW eligibility cap to be eligible for published avoided cost rates, a PPA "must be executed, i.e., signed by both parties to the agreement, prior to" December 14, 2010.[92] QFs Cedar Creek, Rainbow Ranch, and Murphy Flat Power separately engaged in substantial PPA negotiations and/or signed a PPA prior to December 14, 2010, but the Idaho PUC found that none of those agreements qualified because none of them were signed by the utility prior to December 14.[93] Cedar Creek, Rainbow Ranch, and Murphy Flat Power petitioned in August 2011, March 2012, and September 2012, respectively, to contest the Idaho PUC's bright line rule that both parties must sign the PPAs for them to be in effect.[94]

In an October 2011 order responding to Cedar Creek's petition, the Commission, while declining to initiate an enforcement, declared that the Idaho

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87. *Id.* at P 47.

88. *Exelon Wind, LLC*, 140 F.E.R.C. ¶ 61,152 at PP 1-3 (2012).

89. *Id.* at P 43.

90. *Id.* at P 52.

91. *Murphy Flat Power, LLC*, 141 F.E.R.C. ¶ 61,145 (2012).

92. *Id.* at PP 5-6.

93. *Id.* at PP 4, 6-8.

94. Petition for Enforcement, Cedar Creek Wind, LLC, FERC Docket No. EL11-59-000 (Aug. 5, 2011); Petition for Enforcement, Rainbow Ranch Wind, LLC, FERC Docket No. EL12-41-000 (Mar. 1, 2012); Petition for Enforcement, Murphy Flat Mesa, LLC, FERC Docket No. EL12-108-000 (Sept. 25, 2012).

PUC's requirement for both parties to have signed a PPA was inconsistent with the PURPA, stating that under its regulations, "a QF has the option to commit itself to sell all or part of its electric output to an electric utility."[95] In an April 2012 order responding to Rainbow Ranch's petition, the Commission, while again declining to initiate an enforcement, cited its Cedar Creek order and reiterated that the Idaho PUC's requirement for both parties to have signed a PPA was inconsistent with the PURPA.[96] Finally, in a November 2012 order responding to Murphy Flat Power's petition, the FERC stated: "we give notice that, given the Idaho Commission's continued reliance on its 'bright line rule' in its June 8, 2011 decision, despite the Commission's orders in *Cedar Creek* and *Rainbow Ranch*, we intend to go to court to enforce [the] PURPA."[97]

D. Idaho Wind Partners

In June 2012, Idaho Wind Partners, which has several QF PPAs with Idaho Power Company and approved by the Idaho PUC, filed a petition requesting that the FERC declare that Idaho Power's proposed Schedule 74 curtailment policy for purchases from QFs filed in an Idaho Commission proceeding, if approved, would violate the PURPA.[98] "Schedule 74 would govern the operational dispatch of those QFs interconnected with Idaho Power that have 10 MW or more of nameplate capacity and that have generator output limiting controls installed."[99] "Schedule 74 would allow Idaho Power to curtail generation from such QFs if, due to operational circumstances, purchases from the [a]pplicable QF would require Idaho Power to dispatch higher cost, less efficient resources to serve system load or to make Base Load Resources unavailable for serving the next anticipated load."[100]

The FERC granted the petition, finding that the proposed Schedule 74 curtailment policy would be inconsistent with section 210 of the PURPA and the regulations thereunder.[101] The FERC explained that "a utility may not curtail unilaterally where the QF electric energy is purchased, as here, pursuant to a long-term obligation."[102] The FERC concluded that, "[b]ecause Idaho Power may not use curtailment under light loading periods to avoid its contractual obligations under its long-term fixed avoided-cost rate PPAs, we find that Schedule 74 is inconsistent with [the] PURPA and that, if approved by the Idaho Commission or applied unilaterally, would violate [the] PURPA and Commission regulations implementing [the] PURPA."[103]

95. *Cedar Creek Wind, LLC*, 137 F.E.R.C. ¶ 61,006 at P 32 (2011).
96. *Rainbow Ranch Wind, LLC*, 139 F.E.R.C. ¶ 61,077 at P 23 (2012).
97. *Murphy Flat Power, LLC*, 141 F.E.R.C. ¶ 61,145 at P 23 (2012).
98. *Idaho Wind Partners 1, LLC*, 140 F.E.R.C. ¶ 61,219 (2012).
99. *Id.* at P 3 (citation omitted).
100. *Id.* (internal quotation omitted).
101. *Id.* at P 1.
102. *Id.* at P 40 (citation omitted).
103. *Id.*

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