**ORAL ARGUMENT SCHEDULED FOR MAY 6, 2005**

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**IN THE UNITED STATES COURT OF APPEALS**
**FOR THE DISTRICT OF COLUMBIA CIRCUIT**

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**No. 04-1182**

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**XCEL ENERGY SERVICES, INC.,**
**Petitioner,**
**v.**
**FEDERAL ENERGY REGULATORY COMMISSION,**
**Respondent.**

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**ON PETITION FOR REVIEW OF ORDERS OF THE**
**FEDERAL ENERGY REGULATORY COMMISSION**

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# BRIEF FOR RESPONDENT
# FEDERAL ENERGY REGULATORY COMMISSION

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**CYNTHIA A. MARLETTE**
**GENERAL COUNSEL**

**DENNIS LANE**
**SOLICITOR**

**ROBERT H. SOLOMON**
**DEPUTY SOLICITOR**

**FOR RESPONDENT**
**FEDERAL ENERGY REGULATORY**
**COMMISSION**
**WASHINGTON, D.C. 20426**



**FEBRUARY 11, 2005**
**FINAL BRIEF: MARCH 28, 2005**

## CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1), Respondent Federal Energy Regulatory Commission hereby certifies as follows:

### A. Parties and Amici

All parties and intervenors appearing before the Commission and this Court are listed in Petitioner's brief. There are no *amici*.

### B. Rulings Under Review

The following orders of the Federal Energy Regulatory Commission are under review here:

1. *American Ref-Fuel Co., et al.*, 105 FERC ¶ 61,004 (2003), R. 61, J.A. 284; and

2. *American Ref-Fuel Co., et al.*, 107 FERC ¶ 61,016 (2004), R. 72, J.A. 333.

### C. Related Cases

This case has not previously been before this Court or any other Court. Counsel is not aware of any other related cases pending before this or any other Court.

Robert H. Solomon
Deputy Solicitor

March 28, 2005

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## GLOSSARY

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|---|---|
| Commission or FERC | Federal Energy Regulatory Commission |
| FPA | Federal Power Act |
| Initial Order | *American Ref-Fuel Co., et al.*, 105 FERC ¶ 61,004 (2003), R. 61, J.A. 284 |
| Int. Br. | Intervenors' brief in support of Petitioner |
| J.A. | joint appendix page |
| P | paragraph number |
| Pet. Br. | Petitioner's opening brief |
| PURPA | Public Utility Regulatory Policies Act of 1978 |
| PURPA § 210 | 16 U.S.C. § 824a-3 |
| QF | qualifying facility; i.e., qualifying cogeneration or qualifying small power production facility entitled to regulatory benefits under PURPA |
| R. | record page |
| RECs | renewable energy credits or similar tradable certificates, created under state law |
| Rehearing Order | *American Ref-Fuel Co., et al.*, 107 FERC ¶ 61,016 (2004), R. 72, J.A. 333 |
| Xcel | Petitioner Xcel Energy Services, Inc. |

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## STATEMENT OF THE ISSUES

1. Does this Court, under the specific statutory enforcement and review scheme found in section 210(h) of the Public Utility Regulatory Policies Act of 1978 ("PURPA"), 16 U.S.C. § 824a-3(h), lack jurisdiction to review a declaratory order of the Federal Energy Regulatory Commission ("Commission" or "FERC") interpreting the provisions of PURPA section 210 and the Commission's implementing regulations?

2. Assuming jurisdiction, did the Commission reasonably interpret

PURPA section 210 and the Commission's implementing regulations, in concluding that state law, rather than federal law, governs the creation and transfer of renewable energy credits?

## STATUTES AND REGULATIONS

Pertinent sections of PURPA, the Federal Power Act ("FPA"), and the Commission's implementing regulations, *see* 18 C.F.R. Part 292, are set out in the Addendum to this brief.

## COUNTER-STATEMENT OF JURISDICTION

Contrary to the argument of Petitioner (Pet. Br. 1-2) and Intervenors (Int. Br. 3 n.1), this Court lacks jurisdiction to consider the instant appeal. PURPA § 210 provides a detailed and comprehensive scheme for judicial review of FERC and state actions implementing the mandates of the statute. As this Court has determined on several occasions, venue to review the Commission's interpretation and enforcement of PURPA is placed exclusively in the federal district courts, not the courts of appeals. *See Connecticut Valley Electric Co. v. FERC*, 208 F.3d 1037, 1042-43 (D.C. Cir. 2000); *Niagara Mohawk Power Corp. v. FERC*, 117 F.3d 1485, 1487-89 (D.C. Cir. 1997); *New York State Electric & Gas Corp. v. FERC*, 117 F.3d 1473, 1475-77 (D.C. Cir. 1997); *Industrial Cogenerators v. FERC*, 47 F.3d 1231, 1234-36 (D.C. Cir. 1995).

## STATEMENT OF THE CASE

### I. NATURE OF THE CASE, COURSE OF PROCEEDINGS, AND DISPOSITION BELOW

In recent years, some states have required retail sellers of electricity to include in their resource portfolios a certain amount of electricity from renewable resources. Some of these sellers have entered into wholesale power supply contracts with small power production facilities that qualify for preferential regulatory status under PURPA.

The question before the Commission was whether PURPA contracts with "qualifying facilities" convey to the utility purchaser renewable energy credits or similar tradable certificates ("RECs"). In response to a petition for a declaratory order, the Commission found that RECs do not automatically convey to the purchasing utility under the PURPA avoided cost scheme. *American Ref-Fuel Co., et al.*, 105 FERC ¶ 61,004 (Oct. 1, 2003) ("Initial Order"), R. 61, J.A. 284, *reh'g denied*, 107 FERC ¶ 61,016 (Apr. 15, 2004) ("Rehearing Order"), R. 72, J.A. 333. The Commission explained that neither PURPA nor the implementing regulations address the creation or transfer of RECs, thus leaving the question for the states and the contracting parties in the first instance to decide.

### II. STATEMENT OF FACTS

#### A. Statutory and Regulatory Framework

Congress enacted PURPA – one of five statutes enacted in 1978 as part of

the National Energy Act in response to increasing energy shortages and rising energy costs -- to promote the development of new types of generating facilities and to conserve the use of fossil fuels. *E.g.*, *FERC v. Mississippi*, 456 U.S. 742, 745-46 (1982). Because traditional utilities controlled the transmission lines and were reluctant to purchase power from non-traditional facilities, PURPA directed the Commission to promulgate rules requiring utilities to purchase power from "qualifying" cogeneration and small power production facilities. *E.g.*, *FERC v. Mississippi*, 456 U.S. at 750-51; *American Paper Institute, Inc. v. American Electric Power Service Corp.*, 461 U.S. 402, 405 (1983).

Under PURPA, the Commission has two principal tasks. First, under PURPA § 201, which amended FPA sections 3(17)-(18), 16 U.S.C. §§ 796(17)-(18), the Commission determines which "cogeneration facilities" and "small power production facilities" are "qualifying facilities" ("QFs") entitled to various regulatory benefits under PURPA. *See also* 18 C.F.R. §§ 292.201-.207 (2004) (setting out standards and procedures for determining eligibility as PURPA QFs). [1]

Second, under PURPA § 210, 16 U.S.C. § 824a-3, which did not amend the

[1] In short, a cogeneration facility produces both electricity and steam or some other form of usable energy. 16 U.S.C. § 796(18)(A); *see, e.g., Brazos Electric Power Cooperative v. FERC*, 205 F.3d 235 (5th Cir. 2000). A small power production facility produces less than 80 megawatts of electricity using biomass, waste, renewable resources, or geothermal resources as its primary energy source. 16 U.S.C. § 796(17)(A); *see, e.g., New Charleston Power I, L.P. v. FERC*, 56 F.3d 1430 (D.C. Cir. 1995).

FPA, the Commission, the states, and the courts each have defined, complementary roles in implementing and enforcing Congress' directives. *See, e.g., Connecticut Valley Electric Co.*, 208 F.3d at 1043 (respective roles are "specifically delineated" in PURPA's "elaborate enforcement scheme").

**1. Role of the Commission Under PURPA Section 210**

The Commission's role under PURPA § 210(a), 16 U.S.C. § 824a-3(a), is to implement regulations necessary to encourage the development of cogeneration and small power production facilities, including, in relevant respect, rules requiring utilities to purchase electricity from qualifying facilities. Under PURPA § 210(b), 16 U.S.C. § 824a-3(b), the rates for such utility purchases must be: (1) just and reasonable to electric customers and in the public interest; (2) not discriminatory against QFs; and (3) not in excess of the incremental cost to the electric utility of alternative electric energy. PURPA § 210(d), 16 U.S.C. § 824a-3(d), in turn, defines the "incremental cost of alternative electric energy" as "the cost to the electric utility of the electric energy which, but for the purchase from [the QF,] such utility would generate or purchase from another source."

FERC regulations implementing the PURPA purchase obligation do not set the precise rates for utility purchases from QFs or the terms of their contractual relationship. Rather, specific rates and specific contractual terms are left for the states (or unregulated utilities) to determine, limited by the FERC requirement,

implementing PURPA § 210(d), that electric utilities pay no more than the "avoided costs" of their purchases. 18 C.F.R. § 292.304(a)(2). The regulations define "avoided costs" as "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. § 292.101(b)(6). The regulations also enumerate various factors for the states to consider in determining avoided cost rates. 18 C.F.R. § 292.304(e). [2] *See American Paper Institute*, 461 U.S. at 412-17 (upholding FERC's full avoided cost rules).

**2. Role of the States Under PURPA Section 210**

Each state, in turn, implementing FERC regulations under PURPA § 210, establishes the specific rates and terms of sales by QFs to purchasing utilities in that state. Specifically, PURPA § 210(f), 16 U.S.C. § 824a-3(f), requires each "state regulatory authority" and "nonregulated electric utility" to implement the Commission's rules. There is no single uniform manner of implementation; a state commission, exercising its broad latitude, "may comply with the statutory requirements by issuing regulations, by resolving disputes on a case-by-case basis,

[2] Those factors include: (1) the purchasing utility's system cost data; (2) the availability of capacity or energy from a QF during system daily and peak periods;(3) the relationship of the availability of energy or capacity from the QF to the ability of the electric utility to avoid costs; and (4) the costs or savings resulting from variations in line losses from those that would have existed in the absence of purchases from the QF.

or by taking any other action reasonably designed to give effect to FERC's rules." *FERC v. Mississippi*, 456 U.S. at 751.

### 3. Role of the Courts Under PURPA Section 210

If a state authority fails to implement its PURPA responsibilities, then, under PURPA § 210(h), 16 U.S.C. § 824a-3(h)(2)(A), the Commission may bring an enforcement action in federal district court. Alternatively, an electric utility or QF may petition the Commission to bring such an action; if the Commission declines, then the utility or QF may itself file an enforcement action in district court. 16 U.S.C. § 824a-3(h)(2)(B). Under this enforcement scheme, the courts of appeals are precluded from reviewing, in the first instance, any position the Commission may take concerning the implementation of PURPA. *See, e.g., New York State Electric & Gas*, 117 F.3d at 1476 (citing cases).

## B. Dispute Over Renewable Energy Credits

Within this context, a group of PURPA QFs, operating waste-to-energy power plants throughout the United States, filed with the Commission, on June 13, 2003, a petition for a declaratory order. *See* R. 1, J.A. 11. The QFs asked the Commission to interpret PURPA § 210 and its implementing regulations to determine whether a PURPA power sales contract necessarily conveys to the purchasing utility any renewable energy credits or similar tradable certificates ("RECs").

The QFs explained that a growing number of states are adopting programs to promote increased reliance on renewable energy resources. *See* R. 1 at 2-5, J.A. 13-16 (describing programs). These state programs are premised on policy goals such as improving air and water quality, reducing greenhouse gas emissions, increasing fuel diversity, enhancing energy security, and hedging against the volatility of fossil fuel prices. Electric utilities in those states must procure a certain amount of renewable energy resources, an obligation that can be satisfied by: (1) owning renewable energy facilities; (2) purchasing power from such facilities; or (3) purchasing tradable certificates, such as RECs, that correspond to a certain amount of renewable energy generated by a third party.

The QF petitioners and supporting intervenors argued that, under PURPA and implementing regulations, the avoided cost rate paid by purchasing utilities compensates the selling QF only for the capacity and energy it generates. They argued that the environmental attributes associated with QF generation represent an unbundled commodity that can be sold separately as an incentive for QF development, consistent with the design of PURPA and implementing regulations.

Opposing intervenors, representing primarily electric utilities, including Petitioner Xcel Energy Services, Inc. ("Xcel"), *see* R. 35, J.A. 206, argued in response that only one bundled commodity is sold under PURPA contracts. They argued that electric utilities contract to purchase all attributes of QF generation,

including environmental attributes, not simply capacity and energy. Alternatively, some intervenors, primarily state commissions, argued that the Commission should refrain from acting on the petition, and should leave all implementation and interpretation matters to the states.

### C. The Commission's Orders

In an order issued October 1, 2003, the Commission granted the petition for a declaratory order – but only to the limited extent it found that PURPA avoided cost contracts do not inherently convey RECs to the purchasing utility. *American Ref-Fuel Co., et al.*, 105 FERC ¶ 61,004 (2003) ("Initial Order"), R. 61, J.A. 284. Neither PURPA § 210 nor its implementing regulations contemplate the environmental attributes of the selling QF in the calculation of the avoided cost rate. *Id*. at PP 19-22, J.A. 286. The rate has nothing to do with whether the selling QF generates renewable energy. *Id*. at PP 22-23, J.A. 286. As RECs are outside the scope of PURPA and entirely the creation of the states, it is state law, rather than federal law, that determines whether RECs are conveyed as part of the QF sale. *Id*. at PP 23-24, J.A. 286.

Xcel and other parties filed petitions for rehearing, which were denied on April 15, 2004. *American Ref-Fuel Co., et al.*, 107 FERC ¶ 61,016 (2004) ("Rehearing Order"), R. 72, J.A. 333. The Commission reiterated that PURPA § 210 and its implementing regulations do not contemplate RECs or their

conveyance in PURPA avoided cost purchase contracts, and, again, found that this issue is controlled by state, not federal, law. *Id*. at PP 13-15, J.A. 335. Just as states create RECs, they also determine whether RECs are bundled or unbundled with the QF sale of capacity and energy. *Id*. at P 16 & n.9, J.A. 336.

## SUMMARY OF ARGUMENT

This Court lacks jurisdiction to review, in the first instance, the Commission's declaratory order. A series of court decisions establishes that the Commission's interpretation of PURPA § 210 and its implementing regulations is, effectively, a non-binding memorandum of law that has persuasive force only should an enforcement action, based on specific facts, be filed in federal district court. Contrary to Xcel's arguments, the Commission's limited declaration did not arise under any provision of the FPA; therefore, the judicial review provision of the FPA is inapplicable.

If this Court proceeds to the merits, it should defer to the Commission's reasonable interpretation of PURPA § 210 and its implementing regulations. Neither the statute nor the regulations deal with the topic of RECs, a recent creation of the states. It was entirely reasonable for the Commission to conclude that RECs (and other types of renewable attributes) do not automatically convey as part of the avoided cost rate paid by the utility, and that the matter is properly one for the states to decide under state law and addressing specific facts.

## ARGUMENT

### I. THIS COURT LACKS JURISDICTION TO REVIEW IN THE FIRST INSTANCE FERC'S INTERPRETATION OF PURPA SECTION 210

The Commission acted in response to a petition for a declaratory order seeking an interpretation of PURPA section 210 and its implementing regulations. In its limited ruling, the Commission found that neither PURPA nor its regulations address the specific question presented. Rather, it is state law, which creates RECs, that determines whether RECs are conveyed as part of the PURPA power sale. *See* Initial Order at PP 3, 24 ("While a state may decide that a sale of power at wholesale automatically transfers ownership of the state-created RECs, that requirement must find its authority in state law, not PURPA."), J.A. 284, 286; Rehearing Order at P 12 n.4 (noting that "insofar as RECs are State-created, different States can treat RECs differently"), J.A. 335.

In these circumstances, the appropriate venue for reviewing the Commission' interpretation of the statute is federal district court. The applicable judicial review provision, PURPA § 210(h)(2), *see supra* page 7, is "complete and independent," contemplating the filing of actions in federal district court only. *Industrial Cogenerators*, 47 F.3d at 1235-36. Contrary to Xcel's jurisdictional argument (Pet. Br. 1), the appellate review provision of FPA § 313(b), 16 U.S.C. § 825*l*(b), is not applicable here as the instant orders arise entirely under PURPA § 210 which, unlike PURPA § 201, did not amend the FPA. *See Industrial*

*Cogenerators*, 47 F.3d at 1234. Moreover, Xcel mistakenly claims (Pet. Br. 2) that the Commission considered QF eligibility issues arising under PURPA § 201; neither the petition for a declaratory order nor responsive pleadings questioned the status of the petitioning QFs or their general eligibility for PURPA benefits. [3] *See also New York State Electric & Gas Corp.*, 117 F.3d at 1477 (fact that petition for a declaratory order, seeking interpretation of PURPA § 210, was filed under the complaint provision of the FPA does not trigger appellate review provision of the FPA).

In all relevant respects, the instant appeal is similar to other appeals of Commission interpretations of PURPA § 210 that were dismissed for lack of jurisdiction. *See Connecticut Valley Electric Co.*, 208 F.3d at 1042-43; *Niagara Mohawk Power Corp.*, 117 F.3d at 1487-89; *New York State Electric & Gas Corp.*, 117 F.3d at 1475-77; *Industrial Cogenerators*, 47 F.3d at 1234-36; *see also Niagara Mohawk Power Corp. v. FERC*, 306 F.3d 1264, 1268 (2d Cir. 2002) (finding that no statute – not PURPA, the FPA or the Administrative Procedure Act – provides for judicial review of FERC decisions interpreting PURPA).

Like Xcel here (*see* Pet. Br. 10-11, 18-24), the petitioners in those cases alleged that the Commission, in interpreting PURPA § 210, permitted states to

[3] The QFs' petition to the Commission presumed their eligibility for PURPA benefits, including forced sales at avoided cost rates, and no party took exception to their status as QFs. *See* Petition for Declaratory Order, R. 1 at 1, J.A. 12 (noting that applicants previously had been certified as QFs).

allow QFs to charge electric utilities rates that exceed their avoided costs. The court found in each case that the Commission's interpretation amounted to no more than a non-binding, pre-enforcement memorandum of law that a district court, if later presented with a PURPA enforcement action and specific facts could choose, in its discretion, to adopt or to ignore. *E.g.*, *Industrial Cogenerators*, 47 F.3d at 1235 (noting that "the Declaratory Order is legally ineffectual apart from its ability to persuade (or to command the deference of) a court that might later have been called upon to interpret the Act and the agency's regulations in an private enforcement action"). [4]

Particularly instructive is this Court's opinion in *Niagara Mohawk*. Addressing an issue left open in *Industrial Cogenerators*, the Court found that it lacks jurisdiction to review Commission interpretations of PURPA § 210 that announce "a rule of general application, not tied to a particular set of facts." *Niagara Mohawk*, 117 F.3d at 1488. Here, too, the Commission's interpretation of PURPA § 210 did not rest on particular facts or individual contracts. Rather, its interpretation was based on its review of the statute and implementing regulations and was informed primarily by the absence of any reference to renewable or environmental attributes in the PURPA compliance scheme. Here, as in *Niagara*

[4] In other words, it would be left to later proceedings, resting on specific facts, to determine the persuasiveness or effectiveness of the Commission's generalized declaration. It is thus inaccurate to state categorically, as do Intervenors (Int. Br. 3 n.1), that the declaration here "was of no force or effect."

*Mohawk* and related cases, review of such an interpretation of general application at this time and in this Court would create "a quite unnecessary conflict" and "oust [the district court] from its role as the court of first instance in . . . the elaborate enforcement scheme that Congress created." 117 F.3d at 1488-89. [5]

## II. ASSUMING JURISDICTION, THE COMMISSION REASONABLY INTERPRETED PURPA AND IMPLEMENTING REGULATIONS TO CONCLUDE THAT THE TRANSFER OF RECS IS A MATTER OF STATE, RATHER THAN FEDERAL, LAW

### A. Standard of Review

Judicial review of FERC decisions falls under the arbitrary and capricious standard of 5 U.S.C. § 706(2)(A). The relevant inquiry for the reviewing court under that standard is whether the agency has "examine[d] the relevant data and articulate[d] a . . . rational connection between the facts found and the choice made." *Motor Vehicle Manufacturer's Ass'n v. State Farm Mutual Automobile Ins. Co.*, 463 U.S. 29, 43 (1983) (quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962)).

Where the Commission's decision rests on an interpretation of a statute it is entrusted to administer, the reviewing court "must give effect to the

[5] Moreover, here, as in the other PURPA interpretation appeals dismissed by the courts, the Commission considered petitions for rehearing of its declaratory orders. This procedural fact did not lead the courts to conclude, as Xcel does now (Pet. Br. 2), that the Commission "implicitly acknowledg[ed] the FPA aspect of" the proceedings and thus the availability of judicial review at the court of appeals level.

unambiguously expressed intent of Congress." *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984). The court must defer to the agency's interpretation of any ambiguous language so long as it is reasonable. Similarly, the Commission is entitled to deference in its interpretation of its own regulations so long as it is not "plainly erroneous or inconsistent with the regulation." *E.g., Entergy Services, Inc. v. FERC*, 375 F.3d 1204, 1209 (D.C. Cir. 2004) (quoting *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945)).

In the instant case, assuming the Court proceeds to the merits of Xcel's appeal, the Commission's interpretation of PURPA section 210 and its implementing regulations is reasonable and entitled to judicial respect.

### B. Neither the Statute Nor the Regulations Contemplate the Renewable or Environmental Attributes of the Selling QF in the Setting of Rates

The Commission found that the renewable or environmental attributes of a QF have no relevance to the setting of rates for QF sales under PURPA § 210. Asked by the parties to interpret PURPA § 210, the Commission responded that the statute, in relevant respect, only obligates the Commission to prescribe rules imposing an obligation on electric utilities (like Xcel) to purchase electricity from QFs. *See* Initial Order at P 19, J.A. 286; Rehearing Order at P 12, J.A. 335; *see also supra* pages 5-7 (respective roles under statutory framework). The statute

only outlines the broad parameters for QF sales and QF rates, leaving the determination of specific rates and contractual terms to the states. As states are creators of RECs, it is hardly surprising, then, that PURPA § 210 is utterly silent on the topic of RECs or, more generally, the environmental or renewable attributes of the selling QF. *See* Initial Order at P 23, J.A. 286 (RECs "are created by the States" and "exist outside the confines of PURPA;" thus, the statute "does not address the ownership of RECs").

Similarly, the Commission's implementing regulations do not address the specific question presented. They specify the factors for the states to consider in determining avoided cost rates for QF sales. *See* Initial Order at PP 20-21, J.A. 286; Rehearing Order at PP 13-14, J.A. 335; *see also supra* pages 5-6 (regulatory framework). The Commission found significant that "what factor is *not* mentioned in the Commission's regulations is the environmental attributes of the QF selling to the utility." Initial Order at P 22, J.A. 286. It follows from this silence that "the avoided cost that a utility pays a QF does not depend on the type of QF, *i.e.*, whether it is a fossil-fuel-cogeneration facility or a renewable-energy small power production facility." *Id*. Accordingly, "[t]he avoided cost rates, in short, are not intended to compensate the QF for more than capacity and energy." *Id*.

Xcel agrees with the Commission's interpretation of the statute and the regulations. *See* Pet. Br. 15 (noting that "[u]nder the PURPA avoided cost

construct, [environmental or renewable] attributes are irrelevant for pricing purposes"). Xcel continues, however, that renewable characteristics give rise to the PURPA purchase obligation. *See* Pet. Br. 12-13, 16. This is not always true – under the statute a "renewable resources" small power production facility is only one type of qualifying small power production facility that can compel utility purchases. *See* 16 U.S.C. § 796(17)(A)(i) (a small power production facility uses, as a primary energy source, "biomass, waste, renewable resources, geothermal resources, or any combination thereof"). *See also* Rehearing Order at P 15 ("As those seeking rehearing recognize, only renewable energy small power production facilities have renewable attributes"), J.A. 335.

In any event, the Commission did not, as Xcel submits (Pet. Br. 12), "ignore" this argument, but found it beside the point. The renewable characteristics of the selling QF matter only for the purpose of determining its initial eligibility for QF status under PURPA § 201. But the QF applicants and utility and state commission intervenors did not seek an interpretation of that provision, but rather an interpretation of PURPA § 210. *See* Rehearing Order at P 11 n.3 (intervenors seeking rehearing asked the Commission to affirmatively rule that, under PURPA and PURPA avoided cost contracts, RECs are conveyed to the purchasing utilities), J.A. 335.

Limiting its interpretation to the avoided cost rate provisions of PURPA §

210 and implementing regulations, as requested, the Commission reasonably determined that the renewable or environmental characteristics of the selling QF play no role in the calculation of the avoided cost rate paid by the purchasing utility. As the utility is, under the avoided cost framework, indifferent as to the source of the electricity it is purchasing -- whether from a fossil-fueled cogeneration facility or from any of the various types of small power production facilities -- "the avoided cost that a utility pays a QF does not depend on the type of QF." Rehearing Order at P 15, J.A. 335.

### C. The Commission Did Not Require Purchases in Excess of the Utility's Avoided Costs or in Contravention of Precedent

The Commission also reasonably recognized its own limited role under PURPA § 210 and the complementary role of the states. Finding its own regulations silent on the topic of RECs, which the Commission recognized are the creation of state law, the Commission declared that a state under state law, rather than the Commission under federal law, "may decide that a sale of power at wholesale automatically transfers ownership of the state-created RECs." Initial Order at PP 3, 24, J.A. 284, 286; *see also id*. at P 23 ("States, in creating RECs, have the power to determine who owns the REC in the first instance, and they may be sold or traded; it is not an issue controlled by PURPA"), J.A. 286; Rehearing Order at P 12 n.4 ("insofar as RECs are State-created, different States can treat RECs differently"), J.A. 335.

For this reason, the Commission did not, as Xcel submits (Pet. Br. 2-3, 14), declare categorically that renewable attributes are unbundled commodities, always separate and distinct from the capacity and energy a QF generates. Rather, the Commission granted the petition for declaratory order only "to the extent" that RECs do not "automatically" or "inherently" convey as part of the avoided cost rate. Initial Order at PP 2-3, 18, 24, J.A. 284, 286; Rehearing Order at PP 5, 6 & n.1, 11 n.3, 16, J.A. 334-336. Whether a PURPA sales contract actually does convey ownership of a REC is entirely a matter to be decided under state law, not PURPA. Thus, some states could find that RECs are conveyed to the purchaser under those states' QF/renewable sales policies, while other states could find that RECs are not conveyed under the PURPA contract and may be separately sold.

Xcel responds (Pet. Br. 3, 18-19) that the Commission, through its limited declaratory order, has required utility purchasers to make a second payment to purchase RECs. The Commission has done no such thing; any obligation to purchase RECs arises entirely under state law and under the parties' contracts executed pursuant to state law. The Commission did not review any of the "over one hundred PURPA contracts" between Xcel and its QF suppliers, Pet. Br. 8-9, and thus had no reason to determine what specific contractual provisions require regarding the ownership or conveyance of RECs.

Rather, the Commission simply noted that "states in creating RECs that are

unbundled and tradable have recognized" that environmental attributes "associated with the facilities are separate from, and may be sold separately from, the capacity and energy" sold by the QFs. Rehearing Order at P 16, J.A. 335-336. In other words, state law, not the Commission under PURPA, determines whether renewable attributes of generation are unbundled and must be purchased separately. The Commission neither required RECs or other environmental attributes to be purchased separately, nor found they "inherently" convey to the purchasing utility, *id.*, but, rather, left those questions open to particular facts.

Xcel also assumes (Pet. Br. 15, 18-24) that the forced purchase of both QF electricity and QF-related renewable attributes will result in a total purchase price above the utility's avoided costs. This is entirely speculative. Just as a state determines whether the REC it creates conveys with the PURPA sales contract as part of the avoided cost rate, so, too, the state determines the price of the REC if it conveys separately. For this reason, the state determines whether the purchase of QF capacity and energy and QF renewable attributes, whether bundled as one sale or unbundled as separate sales, in the aggregate exceeds the utility's avoided costs.

Equally unfounded is Xcel's claim (Pet. Br. 22-24) that the Commission's declaration diverges, without explanation, from FERC precedent. The declaration is entirely consistent with precedent, cited by Xcel, that a purchasing utility pay no more than its avoided cost for QF capacity and energy. There is no Commission

precedent governing the ownership or conveyance of RECs, which are recent phenomena that post-date the FERC orders Xcel cites. In the first instance, states must decide REC rate treatment.

Should, however, the Commission determine, based on specific facts and specific contracts, that a state in fact is imposing an environmental adder that results in a price for QF capacity and energy in excess of the purchasing utility's avoided costs, the Commission may then, consistent with cases cited by Xcel, choose to pursue an enforcement action under PURPA § 210(h)(2). *See supra* page 7 (enforcement scheme). [6] At this time, however, the Commission has not been presented with such facts, but was asked only to provide a general declaration as to its interpretation of the statute. What weight that declaration would be given in a specific case will have to await another day.

[6] The principal case upon which Xcel relies, *Southern California Edison Co*., 70 FERC ¶ 61,215, *order on reh'g*, 71 FERC ¶ 61,269 (1995), arose from such an enforcement action filed with the Commission. In that case, the Commission, presented with the specific facts of a California Public Utilities Commission supply auction restricted only to renewable QF bidders, found that a state may not set avoided cost rates for QF purchases "by imposing environmental adders or subtractors that are not based on real costs that would be incurred by utilities." 71 FERC at 62,081. In contrast, the instant case, based on no specific facts, concerns generally only environmental benefits associated with renewable QFs, not environmental costs that otherwise would be borne by utilities. *See id*. at 62,080-81 (noting many ways states, acting either within or outside PURPA, can lawfully pursue renewable resource policies).

## CONCLUSION

For the foregoing reasons, Xcel's petition should be dismissed for lack of jurisdiction or, alternatively, denied on the merits.

Respectfully submitted,

Cynthia A. Marlette
General Counsel

Dennis Lane
Solicitor

Robert H. Solomon
Deputy Solicitor

Federal Energy Regulatory Commission
Washington, D.C. 20426
TEL: (202) 502-8257
FAX: (202) 273-0901
robert.solomon@ferc.gov

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**FERC Docket No. EL03-133**
**D.C. Cir. No. 04-1182**

## CERTIFICATE OF COMPLIANCE

In accordance with Circuit Rule 28(d)(1), I hereby certify that this brief contains 4545 words, not including the tables of contents and authorities, the certificate of counsel, this certificate and the addendum.

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Robert H. Solomon
Deputy Solicitor

Federal Energy Regulatory
Commission
Washington, DC 20426
TEL: (202) 502-8257
FAX: (202) 273-0901

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