(Decision No. C95-1209)

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

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IN THE MATTER OF THE INVESTIGATION OF THE MAINTENANCE COSTS AND OPERATIONAL EFFICIENCY OF PAWNEE I, UTILIZATION BY PUBLIC SERVICE COMPANY OF COLORADO OF QUALIFYING FACILITIES.	))))))	DOCKET NO. 94I-264E

DECISION ON QUALIFYING FACILITY JURISDICTIONAL ISSUES

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Mailed Date: December 5, 1995
Adopted Date: November 29, 1995
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T A B L E O F C O N T E N T S

I. BY THE COMMISSION:

A. Introduction

1. This matter comes before the Colorado Public Utilities Commission (the "Commission") as part of an investigation of the maintenance costs and operational efficiency of Pawnee I, the utilization by Public Service Company of Colorado ("PSCo") of qualifying facilities[1] ("QFs"), and related matters.

2. Briefs were filed by American Atlas No. 1, Ltd., Brush Cogeneration Partners, Colorado Power Partners, Thermo Power and Electric, Inc., Energy Investors Association of Colorado, the City of Boulder, the City and County of Denver acting by and through its Board of Water Commissioners, Bio-Energy Partners, and Thermo Cogeneration Partnership, L.P. (collectively "the QFs"); PSCo; the Colorado Office of the Consumer Counsel ("OCC"); and the Staff of the Public Utilities Commission ("Staff").

3. The primary issue in this portion of the case concerns the Commission's authority to modify existing power purchase con-

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[1] "Qualifying facilities" refers to both qualifying cogeneration facilities and qualifying small power production facilities. The cogeneration facilities produce both electric energy and steam or some other form of useful thermal energy, like heat, through the sequential use of energy, while a small power production facility produces electricity from biomass, waste, geothermal, or renewable resources and has a power production capacity less than or equal to 80 megawatts. *See* 16 U.S.C. §§ 796(18)(A) & 796(17)(A); Rule 2.000 of this Commission's Rules Implementing Sections 201 and 210, Public Utility Regulatory Policies Act, Small Power Production and Cogeneration Facilities, 4 *Code of Colorado Regulations* 723-19.

tracts between PSCo and the QFs. PSCo argues that the Commission has authority to modify QF contracts. Staff argues that the Commission can, so long as there is a waiver of federal protections by the QF, modify these contracts. All other parties argue that federal law, specifically the Public Utility Regulatory Policies Act ("PURPA") and its supporting regulations promulgated by the Federal Energy Regulatory Commission ("FERC") (the "FERC PURPA Rules"), preempts state law and prevents the Commission from modifying QF contracts.

4. On July 20, 1995, the Commission conducted a special open meeting to address the issues raised in the numerous briefs. Now being duly advised and having considered the record and legal principles relevant to this matter, the Commission will decide that the Commission cannot retroactively modify QF contracts;[2] that the Commission take no further action to investigate possible modification of existing QF contracts in this docket; and that this docket will remain open to investigate certain other issues enumerated below.

B. History of the Docket

1. This docket has its origins in a separate matter, the Qualifying Facilities Capacity Cost Adjustment case (the "QFCCA case"). *See* Docket No. 93S-151E. In the QFCCA case, PSCo filed

[2] This decision is based upon existing law, including PURPA. The Commission takes no position on its authority to retroactively modify QF contracts in the event of a change in controlling federal law.

Advice Letter No. 1197-Electric which sought authority to put into effect an adjustment clause to continue to recover the cost of capacity purchases from QFs. The QFCCA case went to hearing where Staff raised certain issues at the heart of the instant docket. Instead of ruling on these issues there, the Commission established this docket to examine the maintenance costs and operational efficiency of Pawnee I, the utilization by PSCo of QFs, and related matters.

2. By Notice dated August 18, 1994, the Commission outlined the issues to be addressed in this docket. These issues were further clarified at the September 26, 1994 Prehearing Conference.

3. Per Decision No. C94-1323, the Commission directed the parties to file briefs addressing the following two "threshold" jurisdictional issues:

> (1) The history of the development and use of qualifying facilities in the Public Service Company of Colorado system, including the mandates in federal and state law and regulation; litigation; the promulgation of avoided cost standards; the negotiation of contracts between qualifying facilities and Public Service; and the approval, if any, of those contracts by the commission.
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> (2) The Commission's regulatory authority concerning the relationship between qualifying facilities and Public Service Company of Colorado, including setting avoided costs, approving and modifying contracts between Public Service and qualifying facilities, and setting rates for Public Service based, in part, on costs set under such contracts.

See Corrected Notice, ¶ 3(e) and 3(f), August 22, 1994.

C. PURPA, FERC, and Colorado Rules

1. PURPA

a. QFs are the creation of Congress through PURPA, and the FERC PURPA Rules govern their existence.[3] *See also* Colorado PURPA Rules, 4 *Code of Colorado Regulations* ("CCR") 723-19. PURPA is one of five "acts" contained within the National Energy Act of 1978. The declared policy objective behind PURPA was to improve conservation by electric utilities of oil and natural gas by encouraging the use of alternate technologies to generate electricity, specifically the development of cogeneration and small power production facilities (or QFs). *See* 16 U.S.C. § 2611; 15 U.S.C. § 3201; 16 U.S.C. § 824a-3.[4]

b. Pursuant to Section 210 of PURPA, FERC was required to promulgate regulations requiring electric utilities to purchase energy from and sell energy to QFs within certain parameters or standards. *See* 16 U.S.C. § 824a-3(a). With respect to purchases by electric utilities from QFs, the rates for such purpose are not to exceed the "incremental cost to the electric utility of alternative electric energy."[5] *See* 16 U.S.C. § 824a-3(b). In addition, both purchases from and sales to QFs of energy by utilities must be at rates "just and reasonable" to the consumer, and non-

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[3] 18 C.F.R. § 292 *et seq.*

[4] 16 U.S.C.S. 824a-3 is the present codification of Section 210 of PURPA.

[5] "Incremental cost of alternative electric energy" means, "with respect to electric energy purchased from a qualifying cogenerator or a qualifying small power producer, the cost to the electric utility of the electric energy which, but for the purchase from such cogenerator or small power producer, such utility would generate or purchase from another source." 16 U.S.C.S. § 824a-3(d). The FERC rules describe this cost as the "avoided cost" *See* 18 C.F.R. §§ 292.101(6), 292.304.

discriminatory against QFs. *See* 16 U.S.C. §§ 824a-3(b), 824a-3(c). Moreover, FERC was directed, if necessary, to prescribe rules which exempted QFs, in whole or in part, from the Federal Power Act, the Public Utility Holding Company Act, and "State laws and regulations respecting the rates, or respecting the financial or organizational regulation, of electric utilities, or from any combination of the foregoing . . ." 16 U.S.C. § 824a-3(e). Each state's regulatory authority was required to implement FERC's rules for each electric utility over which it has ratemaking authority. *See* 16 U.S.C. § 824a-3(f). The resulting state regulations were also required to nsure that the rates for the purchase of power from and sale of power to QFs are just and reasonable to consumers and non-discriminatory against QFs. Finally, Congress intended that QFs not be subjected to the same regulatory requirements as utilities. *See generally*, Joint Explanatory Statement of the Committee of Conference, Conference Report No. 1750, 95th Cong., 2d Sess., reprinted in 1978 U.S.C.C.A.N. 7831-32; *Federal Energy Regulatory Comm'n v. Mississippi*, 456 U.S. 742 (1982).

2. FERC PURPA Rules

a. Pursuant to the mandate in PURPA, FERC promulgated rules implementing Section 210. *See* 18 C.F.R. § 292.101 *et seq.* The rules provide that QFs shall be exempt from State law or regulation respecting: (1) the rates of electric utilities; and

(2) the financial and organizational regulation of electric utilities. *See* 18 C.F.R. § 292.602. These rules, because they do nothing more than preempt conflicting state enactments, are not violative of the United States Constitution. *Federal Energy Regulatory Comm'n v. Mississippi*, 456 U.S. at 759.

b. Additionally, these rules establish the "avoided cost" standard, *see supra*. note 4, to insure that ratepayers do not pay more than they would have paid had the utility acquired power from a non-QF source. *See* 18 C.F.R. § 292.304. If the rate paid to the QF by the utility "equals the avoided cost," the requirements of Section 210(b) are met. *See* 5 Fed. Reg. 12,214, 12,222 (1980). This methodology of rate setting was approved by the United States Supreme Court in *American Paper Institute, supra.*

c. With respect to avoided costs, the FERC PURPA Rules prescribe that, pursuant to a legally enforceable obligation for the delivery of energy or capacity over a specified term, "avoided cost" can be determined either at the time of delivery or at the time the obligation is incurred. *See* 18 C.F.R. § 292.304(d). If the avoided cost is based upon estimates over the specific term of the legally enforceable obligation, the arrangement between the QF and the utility will still be valid under PURPA even if the rates for such purchases differ from the avoided cost at the time of delivery. *See* 18 C.F.R. § 292.304(b)(5). In short, the FERC PURPA Rules entitle a QF to a reliance interest on a known avoided cost for the duration of a power sales contract with an electric utility.

3. Colorado PURPA Rules

a. In 1982, pursuant to 16 U.S.C. 824a-3(f) and 18 C.F.R. § 292.401 *et seq.*, Colorado implemented its own PURPA rules. *See* Colorado PURPA Rules, 4 CCR 723-19. These rules essentially track the FERC PURPA Rules.

b. The Colorado PURPA Rules acknowledge the affect of PURPA on the Commission's authority. Colorado PURPA Rule 5.300 provides:

> The exemptions [from utility-type[6] regulation and from organizational regulation of electric utilities] provided for by this rule shall not divest this Commission of its authority to review contracts for purchases and sales of power and energy, as long as such review is consistent with Sections 201 and 210 of PURPA.

FERC's interpretative materials further explain that if a conflict between §§ 201 and 210 of PURPA or the FERC PURPA Rules and the exercise of power by a state regulatory agency arises, "the State must yield to the Federal Requirements." *See* 45 Fed. Reg. at 12,233.

c. Furthermore, under the Colorado PURPA Rules, the Commission determined "avoided costs" for the contracting parties under a standardized methodology based on the projected future capacity and energy costs of PSCo's next avoidable non-QF power source. Decision No. C84-273 in Investigation & Suspension Docket No. 1603. These costs are now established by bid or auction or a combination procedure. Colorado PURPA Rule 3.5021, 4 CCR 723-19. The Commission also adopted the FERC PURPA Rules regarding when--whether at the time of delivery or whether estimated over the term

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[6] *E.g.*, traditional rate of return regulation.

of a contract--avoided cost could be calculated. Colorado PURPA Rule 3.594, 4 CCR 723-19.

d. Additionally, the Commission required that certain QF contracts be submitted to it for a determination as to whether the rates reflected the utility's full avoided costs and whether the rates were just and reasonable and non-discriminatory. *See* Case No. 5970, Decision No. C82-73 (January 12, 1982). The Commission either allowed contracts to become effective by operation of law if the basic criteria were met or, if they were not met, suspended the contract and commenced an investigation. *Id.*

D. Position of PSCo

1. PSCo submitted an opening brief on March 20, 1995 and a reply brief on April 10, 1995. In these briefs, PSCo argues that the Commission has broad authority to regulate utility rates in Colorado through Article XXV of the Colorado Constitution and Title 40 of the Colorado Revised Statutes. PSCo argues that the Commission has authority over rates paid by regulated utilities to QFs. Despite the broad grant of power to the Commission in the area of rate regulation, PSCo concedes that the Commission's authority is not exclusive and that PURPA affects the Commission's rate regulation powers.

2. PSCo states that it entered into negotiations with various QFs pursuant to the requirements set forth in the FERC and Colorado PURPA Rules. PSCo then argues that because the resulting contracts were standard--the Commission established the avoided cost term and required the contracts to be submitted to it for

approval--the Commission's jurisdiction did not end with its approval of a QF contract. PSCo also states that these contracts were subject to the continuing jurisdiction of the Commission because a Commission decision was necessary to give the contract force and effect. This act of rendering a decision is important, according to PSCo, because Commission decisions are always subject to revision and refinement per § 40-6-112(1), C.R.S. As a result, PSCo claims that amendments to QF contracts can be authorized or required by the Commission.

3. Additionally, PSCo states that the Commission's reserved police power also permits it to modify QF contracts. In this regard, PSCo relies on *Zelinger v. Public Serv. Co. of Colo.*, 435 P.2d 412 (Colo. 1967), where the Court held that the Commission could modify rates fixed by contract where the contract at issue contemplated that a change in rates might be made "as provided by law." PSCo argues that through the exercise of its police power, the Commission has a general authority to regulate utility contracts, including QF contracts even though QF contracts do not concern ratemaking.

4. PSCo then argues that federal law does not preempt the Commission from modifying existing QF contracts. PSco relies on the fact that the FERC PURPA Rules do not limit the authority of the electric utility and QF from agreeing to a rate different than that otherwise required by PURPA rules. *See* 18 C.F.R. § 292.301(b)(1); Colorado PURPA Rule 3.200. Here, PSCo claims that the QFs that have entered into power sales agreements with PSCo have consented to continuing Commission jurisdiction over the

agreements, including jurisdiction to modify the contract. Moreover, PSCo states that the QFs, by entering into contracts with a continuing jurisdiction provision, have waived their right to be free from state regulation or law as prescribed by PURPA. The Commission would, therefore, be able to modify a QF contract if the rates are contrary to public interest and are no longer just and reasonable.

5. Finally, PSCo does not advocate that the Commission intercede and modify its QF contracts at this time. Instead, PSCo requests that the Commission not make a policy determination in this docket which precludes its power to modify QF contracts in the future.

E. Position of the QFs

1. On February 6, 1995, briefs were filed by American Atlas No. 1, Ltd., Brush Cogeneration Partners, Colorado Power Partners, Thermo Power and Electric, Inc., the City and County of Denver acting by and through its Board of Water Commissioners, the City of Boulder, and Energy Investors Association of Colorado. On February 16, 1995, Bio-Energy Partners filed its brief.

2. Energy Investors Association of Colorado filed a reply brief on April 7, 1995. On April 14, 1995, reply briefs were filed by the City of Boulder, the City and County of Denver acting by and through its Board of Water Commissioners, American Atlas No. 1, Ltd., Brush Cogeneration Partners, Colorado Power Partners, Thermo Power and Electric, Inc., Thermo Cogeneration Partnership, L.P., and Bio-Energy Partners.

3. Essentially, the QFs argue that the Commission does not have jurisdiction to modify existing QF contracts. They rely heavily on *Freehold Cogeneration Associates v. Board of Regulatory Commissioners of N.J.*, 44 F.3d 1178 (3rd Cir. 1995), *Independent Energy Producers Assoc. v. California Pub. Utilities Comm'n*, 36 F.3d 848 (9th Cir. 1994), and *Smith Cogeneration Management, Inc. v. Corporation Comm'n*, 863 P.2d 1227 (Okla. 1993). Each of these cases is discussed more fully in Section VIII, *infra*.

4. The QFs state that PURPA and the FERC PURPA Rules preempt state law and exempt them from utility-type regulation by the states. The QFs state that the grant of authority in PURPA and the FERC PURPA Rules to state regulatory commissions is limited to implementation of PURPA consistent with that law and those rules. Thus, the QFs argue that the Commission no longer has any jurisdiction over the QF or the contract once the Commission has approved the contract.

5. Additionally, the QFs state that the Commission is preempted from modifying QF contracts when the alleged harm to the electric utility involves paying contractually determined avoided costs which are higher than present avoided costs. The QFs state that federal law and federal regulations anticipated a potential economic loss by the electric utility due to a change in circumstances during the term of the QF contract. As such, the QFs state

that modification of a QF contract would be inconsistent with PURPA's requirements that full avoided cost is the rate to be paid to QFs and that the development of QFs is to be encouraged.

6. The QFs further argue, in response to PSCo's argument, that they did not waive any of their PURPA protections by executing the contracts. The QFs state that in order for a waiver to be given effect it must be clear and unequivocal and that PSCo's QF contracts do not contain such a waiver. In addition, some of the QFs state that their specific QF contract stated that the price PSCo paid to the QF would not be affected by revisions to PSCo's tariff.

7. The QFs also state that their investors relied on the contractually determined avoided cost figure and QF contract duration which provided for a readily determinable revenue stream. The QFs state that these investors fully expect the State to uphold the law by enforcing PSCo's contractual obligations. To do otherwise, they claim, would constitute an unconstitutional impairment of contracts in violation of Article II, § 11 of the Colorado Constitution and Article I, § 10, clause 1 of the U.S. Constitution. Finally, the QFs argue that QF power will not be promoted, per the intent of PURPA, if future project development is hampered by a Commission determination that it has authority to modify existing QF contracts. Thus, the QFs request the Commission to rule that it is preempted from modifying existing QF contracts.

F. Position of the OCC

On March 20, 1995, the OCC filed its brief in this docket. The OCC adopts the position that the Commission does not have legal authority or jurisdiction to modify the terms of PSCo's previously approved QF contracts. Like the QFs, the OCC finds support in *Freehold* and *Independent Energy Producers*. The OCC argues that these cases establish limits to state jurisdiction over QF contracts and limit the Commission's ability to modify the contracts between the QFs and PSCo. Moreover, the Colorado PURPA Rules, according to the OCC, are in accord with *Freehold* and *Independent Energy Producers* and that the Commission is required to follow its own rules.

G. Position of Staff

1. On March 23, 1995, Staff filed its opening brief, which brief was also a response brief to the briefs filed by the QFs on February 6, 1995. Staff submitted an additional brief on April 7, 1995, in response to PSCo's opening brief.

2. Staff takes the position that the Commission cannot modify an existing QF contract which the Commission approved absent a specific provision which preserves the Commission's jurisdiction. Staff presents two issues to be examined in order to decide if the Commission can reopen a particular QF contract. They are: (1) does there exist a provision in an approved contract which constitutes a voluntary consent by the QF to continuing Commission jurisdiction; and (2) did the Commission specifically approve the QF contracts. Furthermore, Staff states that the question of

whether to reopen the decision approving the QF contract for purposes of modifying the contract is a policy question for the Commission.

3. As grounds for this potential authority to reopen and modify a QF contract, Staff relies on the proposition that the Commission is required to regulate utilities in the public interest. Staff states that modification of a QF contract can be accomplished through proper exercise of the reserved police power which it contends extends to contracts between QFs and PSCo. However, Staff concedes that use of the police power to modify a QF contract is curtailed by factors such as federal preemption.

4. With respect to federal preemption, Staff partially agrees with the argument of the QFs. Specifically, Staff asserts that the terms of a contract approved by this Commission are not subject to its subsequent review in the absence of an agreement to continuing Commission jurisdiction on the part of the QF. This would include review exercised through the Commission's police powers. However, Staff further points out that federal preemption neither affects the Commission's authority over state-regulated public utilities nor over QFs in areas other than those "respecting the rates, or respecting the financial or organizational regulation, of electric utilities[.]" *See* 16 U.S.C. § 824a-3(e)(1).

5. Staff takes this argument further and examines the issue of contract "approval." In particular, Staff suggests that in the absence of a Commission order, it is arguable that a QF con-

tract has not been approved.[7] Staff then states, citing *Freehold, supra.*, that if the Commission has specifically approved a QF contract, assuming the QF did not voluntarily waive its protection from state regulation, the Commission has concluded its implementation role and has no further role with that particular QF contract. The Commission would therefore be precluded from modifying that QF contract according to Staff.

6. Staff further states that QFs can agree to a regulatory out clause in their QF contract with a public utility. Such a clause would preserve jurisdiction with the state regulatory authority because the agreement is outside the PURPA umbrella. Staff states that such an agreement by a QF must be voluntary and intentional, which determination would require a contract by contract review.

7. Next, Staff points out that it would recommend against modifying existing QF contracts because it is an inefficient way to achieve the goals of increasing PSCo's power plant efficiency and use of available QF power. Moreover, Staff notes that there may be legal concerns if the Commission reconsiders terms it established, such as avoided cost, in conformance with its own rules. As a possible solution, Staff suggests that the Commission could reduce the ratepayers' burden of bearing the avoided cost term of the QF contracts at issue by denying PSCo the ability to pass-through all of

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[7] Staff contends that not all of PSCo's QF contracts have been approved by Commission order; however, the QFs contend that all PSCo QF contracts have been approved by this Commission either explicitly (*i.e.*, by order) or implicitly (*i.e.*, by the Commission's role in prescribing fundamental contractual terms).

the avoided cost expense associated with its QF contracts as part of a prudency review.

8. In addition to the specific issue addressed by the briefs, Staff takes the opportunity to argue that this docket should also examine ways to encourage PSCo to achieve both greater efficiency of its system and appropriate dispatch of QFs within that system.

H. Commission Findings And Conclusions

1. Preemption

a. The Commission must first determine whether it has the authority to modify existing contracts between QFs and PSCo. We conclude that the Commission is preempted from modifying these contracts.

b. Our authority is preempted by federal law pursuant to the Supremacy Clause of Article VI of the U.S. Constitution. Preemption occurs if any one of the following circumstances is present: (1) Congress expresses the intent to preempt state law; (2) Congress has indicated an intent to occupy a given field through pervasive regulation to the exclusion of state law; or (3) state law actually conflicts with federal law. *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 299-300.

c. The application of the preemption clause to QF contracts has been recently considered in *Freehold, supra, Independent Energy Producers, supra*, and *Smith Cogeneration, supra*. The Commission finds that the threshold issue presented in this docket can be resolved by examining these cases.

d. In *Freehold*, a case in which a QF sought a declaratory order that the state regulatory authority was preempted by PURPA from requiring the QF and the utility to renegotiate the purchase rate term of their agreement, the United States Court of Appeals for the Third Circuit held that through PURPA "Congress intended to exempt [QFs] from state and federal utility rate regulations." *Freehold*, 44 F.3d at 1192. The Court relied in great part on § 210(e)(1) of PURPA which exempts QFs from significant state regulation. *See id.* at 1190-94; 16 U.S.C. § 824a-3(e)(1).

e. The Court further states that the jurisdiction of the state regulatory authority ended with its approval of the QF contract and that an attempt to modify the contract is "exactly the type of regulation from which [the QF] is immune under § 210(e) [of PURPA]." *Id* at 1192. In this regard, the Court held:

> Once the [state regulatory authority] approved the power purchase agreement between [the QF] and [the utility] on the ground that the rates were consistent with avoided cost, any action or order by the [state regulatory authority] to reconsider its approval or to deny the passage of those rates to [the utility's] consumers under purported state authority was preempted by federal law.

Id. at 1194. Finally, the Court in *Freehold* also stated that any problems arising from the tension caused by permitting the parties to a QF contract to agree to a long term fixed price for power, is a matter for FERC. *Id.* at 1191, n. 11.

f. In *Independent Energy Producers*, the QFs were seeking a temporary restraining order to prevent the state regulatory authority from implementing an order vesting in utilities the authority to enforce PURPA's federal operating and efficiency requirements and, if necessary, to suspend payment of the rates

specified in the QF contract and substitute a lower, alternative rate. *See* 36 F.3d 848. The U.S. for the Ninth Circuit held that the state regulatory authority's proposed order was preempted by federal law because the authority to make QF status determinations resides exclusively with FERC. *See Id.* at 855.

g. In arguing its position, the state regulatory authority contended that it was not making a status determination, but rather was adjusting the avoided cost rate to more accurately reflect the utilities' present avoided cost and to ensure that the rate for the purchase of energy would be "just and reasonable" and in the "public interest" per the requirements of PURPA and the FERC PURPA Rules. *See* 16 U.S.C. § 824a-3(b); 18 C.F.R. § 292.304(a). The Court responded:

> [T]he fact that the prices for fuel, and therefore the [u]tilities' avoided costs, are lower than estimated, does not give the state and the [u]tilities the right unilaterally to modify the terms of the standard offer contract. Federal regulations provide that QFs are entitled to deliver energy to utilities at an avoided cost rate calculated at the time the contract is signed. 18 C.F.R. § 292.304(d)(2). [FERC] recognized that, at times, the avoided cost rate provided in the contract might be greater or less than the utility's current avoided costs but that certainty as to rate was important . . . . While the actual avoided cost might vary over time, under current law the QF remains entitled to receive the avoided cost rate specified in its contract.
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> Thus, although the avoided cost rates calculated in the [u]tilities' contracts are in fact higher than the [u]tilities' current short term avoided cost rates, the proper remedy for such a situation is to ensure that future standard offer contracts contain more flexible pricing mechanisms. (citation omitted).

Id. at 858-59. In so ruling, the Court refused to permit the state regulatory authority to modify the avoided cost term of existing QF contracts.

h. Finally, in *Smith Cogeneration*, a case in which the state regulatory authority attempted to impose a notice provision in QF contracts allowing it to reconsider the avoided cost term after the contract was agreed upon, the Oklahoma Supreme Court held that a state regulatory authority could not require the parties to a QF contract to agree to a provision permitting it to modify their contract. *Smith Cogeneration*, 863 P.2d at 1242. In determining that such a provision constitutes utility-type regulation, the Court wrote:

> Reconsideration of long term contracts with established estimated avoided costs imposes utility-type regulation over QFs. PURPA and FERC regulations seek to prevent reconsideration of such contracts. . . .
>
> Requiring QFs and electric utilities to include a notice provision allowing reconsideration of established avoided costs conflicts with PURPA and FERC regulations. Such a requirement makes it impossible to comply with PURPA and FERC regulations requiring established rate certainty for the duration of long term contracts for qualifying facilities that have incurred an obligation to deliver power. . . . Once avoided costs are set, the [state regulatory authority] cannot later review the contract to reconsider the avoided costs.

Id. at 1240-41.

i. Based on the holdings of the above cases, it is clear in factual circumstances such as those described in *Freehold*, *Independent Energy Producers*, and *Smith Cogeneration* that the Commission cannot reopen and modify the purchase price term of existing QF contracts because such action would constitute utility-type regulation prohibited by PURPA, the FERC PURPA Rules, and the Colorado PURPA Rules. Setting the purchase price for power at the avoided cost at the time the contractual obligation is incurred is a perfectly valid methodology which cannot now be modified by the

Commission as to existing QF contracts. As a result, other than the findings described below, all other arguments, including the approval issue raised by Staff, set forth by the parties to this matter, need not be considered at this time; however, in the event that federal law is changed and/or PURPA is amended, the Commission may reexamine its finding that it cannot modify any of PSCo's existing QF contracts.

2. Waiver of PURPA Rights

a. PURPA, the FERC PURPA Rules, and the Colorado PURPA Rules do permit a QF to waive the protections afforded it by PURPA. *See* 18 C.F.R. § 292.301(b)(1); Colorado PURPA Rule 3.200; *see also Freehold*, 44 F.3d at 1193. Waiver, however, can only be accomplished if it is a knowing and voluntary relinquishment of a known right made with the intent that the right is to be surrendered. *Vogel v. Carolina Int'l, Inc.*, 711 P.2d 708, 711-12 (Colo. App. 1985).

b. In its brief, PSCo does not quote any specific contractual language which proves that any QF with which it has contracted waived its right under PURPA to be exempt from state utility-type regulation. Staff did cite some specific language which it suggests might constitute a waiver of PURPA rights. The following is an example of language which Staff argues could create a waiver:

> This Agreement is subject to the jurisdiction and applicable regulations of the Commission and any other agencies having jurisdiction in the premises of this Agreement.

* * *

> Each Party agrees to use its best efforts to comply with all applicable rules and regulations of all governmental agencies having jurisdiction.

See Staff Opening Brief at 15-16. The Commission cannot conclude at this time that either clause constitutes a waiver of PURPA protections afforded QFs.

c. This language **in and of itself** is not sufficient to prove waiver of PURPA rights because it does not clearly reflect on its face the intent of the parties that the QF surrender the protections afforded it by PURPA. Waiver of the right to be exempt from state utility-type regulation cannot be construed from the quoted language, which could be construed as choice of forum language. *Freehold*, 44 F.3d at 1187. In short, this type of language does not on its face confer upon the Commission any jurisdiction it would not otherwise have. Thus, the Commission finds that PSCo, at this point in time, has not demonstrated that any QF with which it has entered into a contract for the provision of power has waived its regulatory exemption set forth in PURPA.

3. Recovery of QF Costs in Rates

a. PSCo correctly claims that it could reduce rates to its customers if it were permitted to make a downward modification in the purchase price it is presently obligated to pay per its QF contracts. Because of the federal preemption described above, such a modification is impermissible under present law.[8]

[8] The Commission takes no position on its authority to modify QF contracts in this manner in the event of a change in controlling federal law.

b. We also conclude, under federal preemption theories, that the Commission presently cannot prevent PSCo from passing through the full amount of PSCo's QF expenses to its customers in the form of rates. *See Freehold*, 44 F.3d at 1193-94 (absent a change in governing law, state regulatory authority could not modify its approval of flow-through to recover the rates specified in QF contracts and the costs resulting therefrom). Thus, the Commission rejects any argument which suggests that the Commission, under current law, can force PSCo to pass through less than 100 percent of its QF expenses to its ratepayers.

4. Remaining Issues

a. In their legal briefs addressing the jurisdictional issues discussed in this decision, both Staff and PSCo made specific recommendations that the Commission proceed into a full investigation of the so-called "technical or factual" matters associated with the utilization of QFs on the PSCo system and their impact on rates. The Commission concurs with this recommendation.

b. Numerous "technical" issues unrelated to the Commission's jurisdiction over existing QF contracts can and should be the subject of further investigation in this docket. Many of these issues were originally raised by Commission Staff in Docket No. 93S-151E. As taken verbatim from Notice for this docket dated August 18, 1995, they include:

> (a) The prices currently being paid to qualifying facilities, the legal standards under which the appropriateness of these prices should be evaluated, and how these prices compare with the prices Public Service pays for other forms of purchased power and with the costs of power it generates itself;

(b) The operation and dispatch of qualifying facilities providing power to Public Service and the legal and "system operations" rationale for such operation and dispatch;

(c) The operation and maintenance of Public Service's Pawnee power plant, including its production costs, the mechanical, economic and "systems operations" rationale for such operation, and relevant measures of cost and efficiency;

(d) The manner in which Public Service currently dispatches the output of its own plants, power purchased from other utilities, and power purchased from qualifying facilities, including the operation and logic of the "economic dispatch" system.

c. The Commission will leave this docket open for several reasons. First, in order to insure that the Commission fulfills its responsibility to efficiently monitor purchase power contracts between QFs and the electric utilities subject to our jurisdiction, this docket shall serve as a repository for collecting a wide variety of data related to existing QF contracts on the PSCo system. The Commission recognizes that much of the information concerning PSCo's existing QF contracts is currently provided in various forms by the Company. For example, a significant amount of such information is provided by PSCo in order to comply with the Commission's own QF Rules or as part of its annual QFCCA filing. Likewise, the Commission also recognizes that much of this information may be included in the original Commission decisions approving PSCo's existing QF contracts or in the possession of the Commission's own Staff. Nonetheless, the need to gather information concerning QFs on the PSCo system into one centralized data repository convenient to all interested parties is a necessity.

d. Therefore, the Commission seeks the following information:

1. Copies of the purchase power contracts for each QF operating, or scheduled to operate, on the PSCo system.

2. Copies of the Commission decision, if one exists, specifically approving the purchase power contract for each QF operating, or scheduled to operate, on the PSCo system. If the Commission approved a QF purchase power contract by operation of law, a complete copy of the advice letter or application submitted by PSCo for each QF purchase power contract so approved should be provided.

3. A description of the capacity and energy payment rates associated with each QF operating, or scheduled to operate, on the PSCo system. This description should reference the specific Commission decision, if one exists, and corresponding PSCo tariffs which authorize the capacity and energy payment rates contained in the purchase power contract for each QF.

4. The most recent copies of all formal PSCo filings related to QFs made with this Commission. This includes, but is not limited to, filings made in order to comply with: the Commission's own QF Rules, the requirements of the QFCCA, previous Commission decisions associated with specific QF purchase power contracts, and previous Commission decisions associated with avoided cost calculation methodologies.

5. Information demonstrating continuing compliance, on the part of every existing QF on the PSCo system, with PURPA operating and efficiency standards as provided in 18 C.F.R. §§ 292.204 and § 292.205 concerning the qualifying criteria for small power production and cogeneration facilities, respectively.

6. For various capacity factors, comprehensive information concerning how the cost of capacity and energy provided by each QF operating, or scheduled to operate, on the PSCo system compares to the cost of capacity and energy provided by non-QF sources and the cost of capacity and energy provided by PSCo's own power plants.

7. Information concerning how QFs affect the operational reliability and safety of PSCo's system.

e. In addition to keeping this docket open in order to gather the aforementioned information, the Commission also seeks to proceed with a formal investigation concerning two broad areas of concern. The first area of concern is the operations and maintenance of PSCo's Pawnee power plant which serves as the operational proxy from which energy payment rates for QFs on the PSCo system are derived. This investigation should address Pawnee's production costs, the mechanical, economic and "systems operations" rationale underlying Pawnee's operations and maintenance, and the relevant measures of cost and efficiency by which Pawnee's production costs and operations should be judged. The second area of formal investigation is the manner in which PSCo currently dispatches the output of its own power plants, power purchased from non-QF sources, and power purchased from QFs, including the operation and logic of PSCo's "economic dispatch" system.

f. A prehearing conference will be held to establish a procedural schedule for gathering this information and to conduct the investigation into the two areas of concern.

II. ORDER

A. The Commission Orders That:

1. Based upon the legal principles discussed above, the Commission will perform no further investigation in this docket regarding potential modification of existing power sales contracts between Public Service Company of Colorado and qualifying facilities under the Public Utilities Regulatory Policy Act.

2. The Commission shall keep this docket open to investigate the following issues: the operation and maintenance of Public Service Company of Colorado's Pawnee power plant and the dispatch of resources on the Public Service Company of Colorado system. In addition, this docket shall also be used to collect information concerning qualifying facilities on the Public Service Company of Colorado system as described in the body of this Decision.

3. The Commission shall issue a subsequent order in this docket setting a date for a prehearing conference concerning the establishment of a procedural schedule with respect to the items set forth in paragraph 2 of this Order.

4. This Order is effective on its Mailed Date.

B. ADOPTED IN OPEN MEETING November 29, 1995.

(SEAL)

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

ROBERT J. HIX

CHRISTINE E. M. ALVAREZ

VINCENT MAJKOWSKI

Commissioners

ATTEST: A TRUE COPY

Bruce N. Smith
Director

DAB:srs