

136 FERC ¶ 61,174  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;  
Marc Spitzer, Philip D. Moeller,  
John R. Norris, and Cheryl A. LaFleur.

Idaho Wind Partners 1, LLC

Docket No. EL11-12-002

ORDER DISMISSING REHEARING

(Issued September 15, 2011)

1. On June 20, 2011, Avista Corporation (Avista) filed a request for clarification or, in the alternative, rehearing of the Commission's May 19, 2011 order.<sup>1</sup> As discussed below, we dismiss Avista's request for rehearing as an untimely request for rehearing of the earlier March 17, 2011 Order.

**I. Background**

2. On December 15, 2010, Idaho Wind Partners 1, LLC (Idaho Wind) petitioned for Commission approval of a proposed transaction to make an "inside-the-fence" sale of qualifying facility (QF) output to and buy-back of QF output from a third party prior to a sale of that output to its local utility, Idaho Power Company, both without losing the ability to make the second sale pursuant to the Public Utility Regulatory Policies Act of 1978 (PURPA) mandatory purchase obligation, and without violating the Commission's anti-manipulation rules.<sup>2</sup> The purpose of the proposed transaction was to unbundle any associated renewable energy credits (RECs) from the energy prior to selling the energy a second time at the busbar interconnection between the QFs and Idaho Power Company pursuant to the PURPA mandatory purchase obligation at the avoided cost rate authorized by the Idaho Public Utilities Commission.<sup>3</sup> The petition requested, more specifically,

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<sup>1</sup> *Idaho Wind Partners 1, LLC*, 134 FERC ¶ 61,217 (2011) (March 17 Order), *order on reh'g*, 135 FERC ¶ 61,154 (2011) (May 19 Order).

<sup>2</sup> *Id.* P 2-3, 19, 22; *see* 16 U.S.C. § 824a-3 (2006). Idaho Wind filed the petition on behalf of its eleven wholly-owned subsidiary operating companies, which are wind-powered self-certified QFs located in Idaho.

<sup>3</sup> *Id.* P 4.

that the Commission find that the proposed transaction: (1) would not violate any of the Commission's anti-manipulation rules; (2) would not result in loss of QF status for any of Idaho Wind's wind generation facilities; and (3) would not disqualify the sale of electric energy from Idaho Wind's wind generation facilities to the local utility from being considered an avoided cost sale by a QF pursuant to PURPA.

3. In the March 17 Order, the Commission dismissed the petition without prejudice to Idaho Wind refiling as there was insufficient information about the third party to make a determination. The Commission, citing precedent allowing a QF to purchase and then re-sell pursuant to the PURPA mandatory purchase obligation and at PURPA avoided cost rates energy produced by another QF,<sup>4</sup> stated that if the simultaneous sale and buy-back is a sale to and buy-back from a third-party QF, and there is no commingling with non-QF energy, the energy would remain QF energy and thus may be sold to an electric utility pursuant to the PURPA mandatory purchase obligation at PURPA avoided cost rates.<sup>5</sup> But the record did not reveal whether, in this case, the third party is or is not a QF.

4. On April 18, 2011, Idaho Wind filed a request for clarification of the March 17 Order, asking the Commission to find that any QF, regardless of relative size or affiliation or physical location, may be the third party to the sale and buy-back proposed. In the May 19 Order, the Commission granted this clarification.

5. Subsequently, on June 20, 2011, Avista filed a request for clarification or, in the alternative, rehearing of the May 19 Order.

## **II. Request For Rehearing**

6. In its request, Avista states that the Commission erred in the May 19 Order in determining that "electric energy that Idaho Wind's facilities sell to a QF and then buy-back may subsequently be sold pursuant to PURPA's mandatory purchase obligation and at PURPA avoided cost rates."<sup>6</sup> Avista states that this determination appears to authorize a QF to sell electric energy it purchases in the market to a utility at the PURPA avoided

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<sup>4</sup> *Id.* P 20; *see id.* P 21.

<sup>5</sup> *Id.* P 21.

<sup>6</sup> May 19 Order at P 5.

costs rate in violation of Order No. 671.<sup>7</sup> Avista argues that Order No. 671 held that electric energy purchased by a QF was not “electric energy from such facilities” and, therefore, was not subject to the PURPA mandatory purchase obligation. Moreover, Avista argues that Order No. 671 did not contemplate that a QF could or would sell QF electric energy pursuant to its market-based rate authority; rather, Order No. 671 only contemplated that a QF could and would sell non-QF electric energy pursuant to its market-based rate authority.<sup>8</sup> In sum, Avista believes that the Commission erred in the May 19 Order when it characterized energy purchased by a QF as “energy produced by the QF” which, after buy-back, may subsequently be sold pursuant to the PURPA mandatory purchase obligation at PURPA avoided cost rates. Avista argues that a third-party’s status as a QF is irrelevant when the energy sold by the third party QF is sold pursuant to market-based rates under sections 205 and 206 of the Federal Power Act (FPA) and not the mandatory purchase obligation in section 210 of PURPA.

7. Additionally, Avista asks the Commission to clarify that the May 19 Order does not preempt the power of the states to determine “who owns the RECs in the initial instance and how they may be sold or traded.”<sup>9</sup> Specifically, Avista requests the Commission to clarify that the May 19 Order only authorizes QFs to engage in simultaneous buy-sell transactions to strip RECs if (i) the applicable State has expressly determined that RECs generated by or associated with a QF are owned by the QF, or (ii) the QF has entered into a contract with the utility that is required under PURPA to purchase electric energy from the QF that expressly provides that the QF shall own the RECs generated by or associated with such QF.

### **III. Determination**

8. We explained in the May 19 Order, and we reaffirm here, that as long as the third party in the proposed transaction is a QF, regardless of its relative size, affiliation or physical location, the energy that is sold to and bought back from a QF will not affect the QF status of Idaho Wind’s facilities that sell and buy-back the energy, and that the electric energy thus may subsequently be sold pursuant to the PURPA mandatory

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<sup>7</sup> *Revised Regulations Governing Small Power Production and Cogeneration Facilities*, Order No. 671, FERC Stats. & Regs. ¶ 31,203, *clarified*, 114 FERC ¶ 61,128 (2006), *order on reh’g*, Order No. 671-A, FERC Stats. & Regs. ¶ 31,219 (2006).

<sup>8</sup> *Id.* P 101.

<sup>9</sup> *American Ref-Fuel Company*, 105 FERC ¶ 61,004, at P 23 (2003) (*American Ref-Fuel*), *reh’g denied*, 107 FERC ¶ 61,016 (2004).

purchase obligation and at PURPA avoided cost rates. What we clarified in the May 19 Order went to the relative size, affiliation, and physical location of the third-party QF. What we otherwise said was merely repeating what we had earlier said in the March 17 Order.<sup>10</sup>

9. We thus find that Avista's request for rehearing effectively questions not the May 19 Order but rather the Commission's March 17 Order holding that:

once a QF sells its energy to a third party, and then re-purchases that energy uncommingled with any non-QF energy from that third party, whether the energy may subsequently be resold by the QF to an electric utility as a mandatory PURPA sale at an avoided cost rate may depend on whether the third-party purchaser is a QF. If the simultaneous sale of QF energy and buy-back is a sale to and buy-back from a third-party QF, and there is no commingling with non-QF energy, the QF energy would remain QF energy after the simultaneous sale to and buy-back from the third-party QF and thus may be sold to an electric utility pursuant to the PURPA mandatory purchase obligation at PURPA avoided cost rates.<sup>11</sup>

Avista's request violates the Commission's procedural rules, because it seeks rehearing more than 30 days after the order has issued.<sup>12</sup> For this reason, we see no reason to address Avista's arguments for rehearing of the May 19 Order, and therefore will dismiss this request.

10. We also reiterate our holding in *American Ref-Fuel*, specifically, that under PURPA the sale and trading of RECs are for the states to determine, and that this is not an issue that PURPA controls. We see no need to otherwise comment on state regulation of RECs, and so we will not grant the further clarification that Avista seeks.

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<sup>10</sup> Compare May 19 Order at P 5 with March 17 Order at P 20-21.

<sup>11</sup> March 17 Order at P 21.

<sup>12</sup> 18 CFR § 385.713(b) (2011).

The Commission orders:

Avista's request for rehearing is hereby dismissed.

By the Commission.

( S E A L )

Kimberly D. Bose,  
Secretary.