

134 FERC 61,217  
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. EL11-12-000

ORDER DISMISSING WITHOUT PREJUDICE PETITION FOR DECLARATORY  
ORDER

(Issued March 17, 2011)

1. On December 15, 2010, Idaho Wind Partners 1, LLC (Idaho Wind) filed a petition for declaratory order<sup>1</sup> seeking a ruling concerning an “inside the fence” bundled sale of energy and renewable energy credits (REC) from Idaho Wind-owned QFs to a third-party with an instantaneous buy-back of only the energy (so that the RECs can then be sold separately in California markets) and a subsequent sale of that energy to the local Idaho utility.
2. Idaho Wind asks the Commission to declare that this transaction: (1) will not adversely affect the QF status of the QFs; (2) does not preclude the subsequent sale of the energy produced by the QFs to the local Idaho utility at avoided cost rates pursuant to the Public Utility Regulatory Policies Act of 1978’s (PURPA)<sup>2</sup> mandatory purchase obligation; and (3) does not violate the Commission’s anti-manipulation rule.<sup>3</sup> For the reasons discussed below, we will dismiss without prejudice to refiling in a new proceeding Idaho Wind’s petition for declaratory order.

**Background**

3. In its petition Idaho Wind seeks Commission approval of a plan that would involve the sale of QF output to and buy-back of QF output from a third party prior to a

---

<sup>1</sup> Idaho Wind filed the petition on behalf of its eleven wholly-owned subsidiary operating companies, which are wind-powered self-certified qualifying facilities (QF) located in Idaho.

<sup>2</sup> Idaho Wind Petition at 1; *see* 16 U.S.C. § 824a-3 (2010).

<sup>3</sup> 18 C.F.R. § 1c.2 (2010).

sale of the QF output to its local utility, Idaho Power Company (Idaho Power). Idaho Wind's proposed transaction includes: (1) a bundled sale of energy and RECs from eleven wind QFs to a third party at market-based rates pursuant to the Federal Power Act (FPA);<sup>4</sup> (2) the QFs' instantaneous buy-back of only the energy (i.e., the same electric energy generated by the QFs but stripped of their RECs) pursuant to market-based rate authority at the same delivery point and same price and before (i.e., upstream of) the busbar interconnection with Idaho Power; and (3) the subsequent sale of the QF output to Idaho Power at the busbar interconnection between the QFs and the grid pursuant to the PURPA mandatory purchase obligation at the avoided cost rate authorized by the Idaho Public Utilities Commission (Idaho Commission). Idaho Wind states that the energy it buys back from the third party will be the same energy its QFs produced and sold to the third party, i.e., the third party will not sell back to Idaho Wind any energy other than the energy actually produced by the Idaho Wind QFs. Idaho Wind also states that the only energy it will sell to Idaho Power is energy actually produced by its QFs.

4. Idaho Wind states that a desire to comply with California's requirements for RECs is the underlying reason for the transaction. One of the requirements for a REC to be eligible for consideration under California's renewable portfolio standard (RPS) rules is for the initial sale of the REC to be bundled with the sale of the underlying energy. Although the QF's facilities are located outside California, California's rules allow for out-of-state RECs to be sold into California where the RECs are generated from facilities that are outside California but that are in the Western Interconnection. Idaho Wind states that the third party intends to sell Idaho Wind's RECs in California and so the transaction is structured to comply with California RPS requirements; according to Idaho Wind, once the RECs are initially sold as bundled with the QF energy, under the California RPS rules, the RECs can be unbundled by the third party from the QF energy and rebundled with other energy to be delivered to customers in California.

5. Idaho Wind argues that the transaction should not result in a loss of QF status by Idaho Wind's QFs. Idaho Wind also argues that it should be able to sell the energy produced by its QFs to Idaho Power pursuant to the PURPA mandatory purchase obligation following Idaho Wind's original sale and buy-back of the QF energy. Idaho Wind explains that its QFs will only sell their own net output to Idaho Power, and non-QF energy will not be commingled with their QF energy. Moreover, Idaho Wind states that the energy produced by these QFs never leaves the QF facilities because the sale and buy-back occur instantaneously "inside the fence." Idaho Wind maintains that there is thus no possibility that the energy to be sold to Idaho Power is anything but the output of the QFs. Idaho Wind also argues that its proposed transaction is consistent with

---

<sup>4</sup> Idaho Wind does not state whether the third party involved in this transaction is itself a QF or a non-QF.

Commission precedent concerning the sale of RECs. In this regard, Idaho Wind states that the Commission has disclaimed all jurisdiction over RECs or other environmental attributes under PURPA.<sup>5</sup> Idaho Wind points to the following statement in *American Ref-Fuel*:<sup>6</sup>

States, in creating RECs, have the power to determine who owns the RECs in the initial instance, and how they may be sold or traded; it is not an issue controlled by PURPA.

6. Finally, Idaho Wind asks the Commission to find that the proposed transaction does not result in a “wash trade” or any similar transaction prohibited by the Commission because there is no underlying intent to deceive or defraud. Idaho Wind states that the intent of the transaction is to comply with the California RPS requirements so that the RECs can be monetized and sold in the California market, i.e., the proposed transaction has a legitimate business purpose and the sale (and instantaneous buy-back) of the energy is necessary to enable a REC sale that satisfies California’s requirements. Idaho Wind states that the parties, in this transaction, are not defrauding or engaging in any act, practice or course of business that operates as a fraud or deceit upon an entity. Idaho Wind also asserts there is no intent to manipulate the wholesale electric markets, and there is no ability to impair or obstruct the operation of a well-functioning and competitive energy market or to adversely affect prices in the market. In the proposed transaction, all of the energy sold to, and purchased back from, the third party by the project companies, and the energy ultimately will be sold locally, to Idaho Power, under QF power purchase agreements (PPA), and will be priced at avoided cost rates authorized by the Idaho Commission.

7. Idaho Wind urges the Commission to expeditiously grant its petition, stating that the Commission’s ruling can impact the ability of the Idaho Wind QFs to participate in the energy and REC markets and can impact near-term contract execution and performance. Idaho Wind also states that “[b]ecause RECs were created to incentivize the development of renewable resources, the ability to actually monetize those RECs is an essential element of the [Idaho Wind QFs’] financial ability to operate.”<sup>7</sup>

---

<sup>5</sup> Idaho Wind Petition at 21.

<sup>6</sup> *American Ref-Fuel Company*, 105 FERC ¶ 61,004, at P 23 (2003) (*American Ref-Fuel*).

<sup>7</sup> Idaho Wind Petition at 20.

### **Notice of Filing and Responsive Pleadings**

8. Notice of Idaho Wind's filing was published in the *Federal Register*, 75 Fed. Reg. 81,265 (2010), with protests and interventions due on or before January 14, 2011. Pacific Gas and Electric Company, Iberdrola Renewables, Inc, NaturEner USA, LLC, and Southern California Edison Company each filed timely motions to intervene. The Idaho Commission and Idaho Power filed timely motions to intervene and protests. Avista Corporation (Avista) and PacifiCorp filed timely motions to intervene and comments. The Idaho Commission filed an erratum amending its protest on January 25, 2011. Idaho Wind filed an answer on January 27, 2011. A motion to intervene out of time and comments was filed by Ridgeline Energy LLC (Ridgeline) in support of Idaho Wind's filing.

9. The Idaho Commission urges the Commission to deny the petition. The Idaho Commission states that Idaho Wind may sell its RECs to any willing buyer without the need for the proposed third party transaction because numerous Western states (California, Nevada, Montana, Oregon, and Washington) accept "unbundled" RECs for compliance with their respective state renewable portfolio standards. The Idaho Commission highlights that the California Public Utilities Commission (CPUC), in a January 13, 2011 decision, changed the requirements for the sale of RECs and now allows California public utilities to acquire "unbundled" tradable RECs to meet California's RPS requirements; the Idaho Commission believes that the requested declaratory order is therefore unnecessary. The Idaho Commission also argues that the proposed transaction will result in the sale of the same QF energy more than once, which it argues is not permitted under PURPA.

10. Idaho Power argues that approval of the Idaho Wind petition would effectively prevent, or at least significantly hinder, the Idaho legislature, Idaho Commission, and Idaho judiciary from resolving issues related to the ownership and use of RECs in a manner consistent with Idaho's emerging energy policy. Idaho Power further argues that the Idaho Wind petition would force Idaho to enforce or facilitate the enforcement of California energy policy. Idaho Power avers that Idaho Wind's proposed transaction is a laundering scheme to monetize the value of the RECs for the California market while maintaining the benefit of above-market avoided cost rates for the energy it sells to Idaho Power, thereby violating the intent of the Commission's policy and precedent.

11. Idaho Power argues that the proposed transaction is inconsistent with Order No. 671.<sup>8</sup> Idaho Power states that, in Order No. 671, the Commission held that a QF may not

---

<sup>8</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).

sell non-QF energy under a contract approved under PURPA. Idaho Power asserts that the energy Idaho Wind will sell to Idaho Power is non-QF energy, and therefore is not subject to the PURPA mandatory purchase obligation. Idaho Power believes that Idaho Wind's sale of the energy generated by the QFs to a third party strips the energy of its QF character. Idaho Power thus argues that the energy being sold by Idaho Wind, after the sale and buy-back, may be sold only pursuant to sections 205 and 206 of the FPA.<sup>9</sup>

12. Idaho Power also claims the "inside the fence" transaction is not transparent and there is nothing to prevent abuse. Idaho Power states Idaho Wind's proposed transaction is similar to transactions that the Commission found to be inconsistent with well-functioning financial markets, i.e., to exploit price differentials or other differences in value between electric markets and thus game the electric markets in violation of market-based rate authority.

13. Avista requests that the Commission deny the petition to the extent that it seeks an order that allows a QF to sell its output pursuant to sections 205 and 206 of the FPA, purchase energy from a third party, and then resell that energy purchased from a third party to a utility as QF energy under PURPA. Alternatively, if the Commission grants the petition, Avista requests that the Commission expressly state that RECs may only be stripped from the energy generated by a QF if state law clearly establishes that the QF retains ownership of the RECs, or the utility that is required to purchase the energy under PURPA has expressly contractually disclaimed any ownership rights it otherwise may have to such RECs.

14. PacifiCorp opposes any effort by Idaho Wind to have the Commission find that a QF that sells energy and RECs and then repurchases the energy, even if done instantaneously, can then force a utility to subsequently purchase the energy under section 292.303(a) of the Commission's regulations.<sup>10</sup> PacifiCorp states that an electric utility does not have an obligation to purchase energy from a QF that has been deliberately stripped of its RECs; PacifiCorp claims that the stripping of the RECs from the QF energy makes such energy non-QF energy. Alternatively, PacifiCorp requests that the Commission decline to rule whether Idaho Wind's proposed transaction disqualifies Idaho Wind from making a sale under PURPA on the ground that the matter should be left to the states to determine if such energy, washed of RECs, continues to be subject to the PURPA mandatory purchase obligation.

15. In its answer to the protests, Idaho Wind states that notwithstanding the CPUC's recent decision it is still necessary to structure the proposed transaction as set forth in the

---

<sup>9</sup> 16 U.S.C. §§ 824d, e (2006).

<sup>10</sup> 18 C.F.R. § 292.303(a) (2010).

petition; Idaho Wind points out that to satisfy California RPS requirements the initial sale of the REC must still be bundled with the associated energy.

## **Discussion**

### **Procedural Matters**

16. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2010), the notice of intervention and the timely, unopposed motions to intervene serve to make those who filed them parties to this proceeding. Pursuant to Rule 214(d) of the Commission's Rules of Practice and Procedure, 18 C.F.R. 385.214(d) (2010), the Commission will grant Ridgeline's late-filed motion to intervene given its interest in the proceeding, the early stage of the proceeding, and the absence of undue prejudice or delay.

17. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2010), prohibits an answer to a protest or to an answer unless otherwise ordered by the decisional authority. We will accept Idaho Wind's answer because it has provided information that assisted us in our decision-making process.

### **Commission Determination**

18. We will dismiss without prejudice to refiling in a new proceeding the petition for declaratory order, as discussed below. As we explain further below, the petition does not identify who the third-party purchaser/seller is, particularly whether the third party is or is not itself a QF, and that information may be relevant in determining whether the energy that Idaho Wind proposes to sell subsequently to Idaho Power remains QF energy subject to the PURPA mandatory purchase obligation with a right to be sold at a PURPA avoided cost rate.

19. The principal issue raised by Idaho Wind's petition is whether a QF can sell its electric output along with associated RECs to a third-party, instantaneously buy back only the electric energy (in what Idaho Power describes as an inside the fence, before the busbar, transaction where the electric energy has not been commingled with any non-QF electric energy), and subsequently require Idaho Power to purchase the electric energy at PURPA avoided cost rates pursuant to the PURPA mandatory purchase obligation. Section 210(a) of PURPA<sup>11</sup> provides that the Commission shall prescribe rules requiring electric utilities to purchase electric energy from QFs, which the Commission interpreted,

---

<sup>11</sup> 16 U.S.C. § 824a-3(a) (2006).

in its original implementation of PURPA,<sup>12</sup> as imposing an obligation on electric utilities to purchase all electric energy and capacity made available from the QFs with which the electric utility is, directly or indirectly, interconnected.<sup>13</sup> The Commission codified this mandatory purchase obligation in section 292.303(a) of its regulations,<sup>14</sup> which provides that “[e]ach electric utility shall purchase . . . any energy and capacity which is made available from a qualifying facility.” The issue presented by Idaho Wind’s petition is thus whether, following the sale and simultaneous buy-back of the electric energy produced by the Idaho Wind QFs, that electric energy still constitutes “any energy and capacity made available from a qualifying facility.”

20. Prior to the Energy Policy Act of 2005 (EPAAct 2005),<sup>15</sup> a QF could not sell non-QF energy and still maintain QF status.<sup>16</sup> A QF could only sell its net output; an exception to the rule that a QF could only sell its net output and not purchased energy, however, was when the purchased energy had been purchased from another QF.<sup>17</sup> EPAAct 2005 changed the ownership requirements for QF status so that a QF may now sell both QF energy and non-QF energy.<sup>18</sup> But the Commission has also explained that a QF may sell only QF energy pursuant to the PURPA mandatory purchase obligation and at the PURPA avoided cost rate, and that non-QF energy is not eligible for a mandatory

---

<sup>12</sup> *Small Power Production and Cogeneration Facilities; Regulations Implementing Section 210 of the Public Utility Regulatory Policies Act of 1978*, Order No. 69, FERC Stats. & Regs. ¶ 30,128 (1980), *order on reh’g*, Order No. 69-A, FERC Stats. & Regs. ¶ 30,160, *aff’d in part and vacated in part*, *American Electric Power Service Corp. v. FERC*, 675 F.2d 1226 (D.C. Cir 1982), *rev’d in part*, *American Paper Institute, Inc. v. American Electric Power Service Corp.*, 461 U.S. 402 (1983).

<sup>13</sup> Order No. 69, FERC Stats. & Regs. ¶ 30,128 at 30,870.

<sup>14</sup> 18 C.F.R. § 292.303(a) (2010).

<sup>15</sup> *See* Pub. L. No. 109-58, 119 Stat. 594 (2005).

<sup>16</sup> *See, e.g., Turners Falls Limited Partnership*, 55 FERC ¶ 61,487, at 62,668 & n.24 (1991); *Connecticut Valley Electric Company, Inc. v. Wheelabrator Claremont Company, L.P.*, 82 FERC ¶ 61,116 at 61,418 & n.17, *reh’g denied*, 83 FERC ¶ 61,136 (1998) (*Connecticut Valley*), *aff’d*, 208 F. 3d 1039 (D.C. Cir. 2000); *Ormesa, LLC*, 107 FERC ¶ 61,043 at P 22, n.10, *reh’g denied*, 108 FERC ¶ 61,299 at P 9-10 (2004), *appeal denied*, 443 F.3d 94, 97 (D.C. Cir. 2006).

<sup>17</sup> *Connecticut Valley*, 82 FERC at 61,418.

<sup>18</sup> Order No. 671, FERC Stats. & Regs. ¶ 31,203 at P 101.

PURPA sale at a PURPA avoided cost rate.<sup>19</sup> The Commission stated that the PURPA mandatory purchase obligation was applicable to “electric energy produced by the QF and *not non-QF electric energy which the QF has purchased* or has produced itself through a process that does not satisfy the technical requirements for QF status.”<sup>20</sup>

21. Our precedent thus suggests 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. We do not know if the third party may, in fact, not be a QF, however, and thus we need not and do not rule here whether our conclusion as to the sale to the electric utility would be the same or different if the third-party purchaser/seller is not a QF.

22. Regarding Idaho Wind’s request that the Commission find that its proposed transaction would not violate 18 C.F.R. § 1c.2 (2010), we agree that, under the facts presented in the petition, entering into the transaction would not violate the regulation.

23. As discussed in Order No. 670,<sup>21</sup> the anti-manipulation rule prohibits any entity from: (1) using a fraudulent device, scheme or artifice, or making a material misrepresentation or a material omission as to which there is a duty to speak under a Commission-filed tariff, Commission order, rule or regulation, or engaging in any act, practice, or course of business that operates or would operate as a fraud or deceit upon any entity; (2) with the requisite scienter; (3) in connection with a transaction subject to the jurisdiction of the Commission.

24. Under the circumstances presented, there is no evidence of a fraudulent scheme or artifice, misrepresentation, or deceit. Idaho Wind has described its proposed transaction and requested our approval prior to its undertaking. Making its intention to engage in this transaction publicly known and requesting Commission approval suggest that there is neither a fraudulent scheme nor scienter.

---

<sup>19</sup> *Id.*

<sup>20</sup> *Id.* (emphasis added).

<sup>21</sup> *Prohibition of Energy Market Manipulation*, Order No. 670, FERC Stats. & Regs. ¶ 31,202 (2006).

25. Whether a violation of the anti-manipulation rule occurs is a determination to be made on the basis of all of the facts of a case.<sup>22</sup> The Commission's conclusion is based upon the facts presented and representations by Idaho Wind in its petition regarding the sale, purchase, and resale of the energy. Any different or additional facts might lead us to a different determination.

26. In conclusion, as explained above, because it is unclear to us whether the transaction that Idaho Wind has described in fact includes a third-party QF, or whether the third party is instead a non-QF, we cannot give the declaration Idaho Wind has asked for in its petition and we will accordingly dismiss it without prejudice to refiling in another proceeding.

The Commission orders:

The Commission hereby dismisses without prejudice to refiling in another proceeding Idaho Wind's petition for declaratory order, as discussed in the body of this order.

By the Commission.

( S E A L )

Kimberly D. Bose,  
Secretary.

---

<sup>22</sup> *Id.* P 50.