140 FERC ¶ 61,219
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;
Philip D. Moeller, John R. Norris,
Cheryl A. LaFleur, and Tony T. Clark.

Idaho Wind Partners 1, LLC Docket No. EL12-74-000

ORDER GRANTING PETITION FOR DECLARATORY ORDER

(Issued September 20, 2012)

1. On June 15, 2012, Idaho Wind Partners 1, LLC (Idaho Wind) filed a petition for declaratory order. Idaho Wind's petition concerns Idaho Power Company's (Idaho Power's) new proposed Schedule 74 curtailment policy for purchases from qualifying facilities (QF) filed in an Idaho Public Utilities Commission (Idaho Commission) proceeding. Idaho Wind requests that the Commission declare that Schedule 74, if approved by the Idaho Commission, would violate section 210 of the Public Utility Regulatory Policies Act of 1978 (PURPA)[1] and the Commission's regulations. In this order, we grant Idaho Wind's petition, as discussed below, and find that Idaho Power's proposed Schedule 74 curtailment policy would be inconsistent with section 210 of PURPA and the Commission's regulations.

I. Background

A. Idaho Commission Proceeding and Schedule 74

2. Idaho Wind represents that its wholly-owned subsidiaries and Idaho Power have executed several QF power purchase agreements (PPA) that were approved by the Idaho Commission. The Idaho Commission has since initiated a proceeding on September 1, 2011, to review the terms of the QFs' PPA.[2] The Idaho Commission proceeding, in addition to addressing the Schedule 74 curtailment policy, is considering

[1] 16 U.S.C. § 824a-3 (2006).

[2] *See In the Matter of the Commission's Review of PURPA QF Contract Provisions Including the Surrogate Avoided Resource (SAR) and Integrated Resource Planning (IRP) Methodologies for Calculating Published Avoided Cost Rates*, Case No. GNR-E-11-03, Order No. 32352 (Idaho Public Utilities Commission Sept. 1, 2011).

changes to methodologies used for calculating avoided-cost rates. Idaho Wind states that, as a part of the Idaho Commission proceeding, Idaho Power proposed a new tariff on January 31, 2012, which included Schedule 74, for approval by the Idaho Commission.[3]

3. Proposed Schedule 74 would govern the operational dispatch of those QFs interconnected with Idaho Power that have 10 MW or more of nameplate capacity and that have generator output limiting controls installed.[4] Schedule 74 would allow Idaho Power to curtail generation from such QFs "if, due to operational circumstances, purchases from the Applicable QF would require [Idaho Power] to dispatch higher cost, less efficient resources to serve system load or to make Base Load Resources unavailable for serving the next anticipated load."[5] Per Schedule 74, such curtailment of QF output would "only [be] for the time period necessary during Must Run Periods wherein [Idaho Power] is not forced to make Base Load Resources unavailable for serving the next anticipated load, nor dispatch less efficient, higher cost resources to serve system load."[6]

4. Both Idaho Power and the Idaho Commission staff witnesses have testified in the Idaho Commission proceeding that curtailment during certain periods of light load, as proposed in Schedule 74, is authorized by section 292.304(f)(1) of the Commission's regulations[7] and by Commission precedent.

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[3] Idaho Wind has attached a copy of Idaho Power's proposed Schedule 74 to its petition. *See* Petition, Ex. A, "Idaho Power Company Proposed Schedule 74" (Schedule 74).

[4] According to Idaho Wind, generator output limiting controls enable Idaho Power to curtail delivery from the generators automatically in designated transmission constraint periods. *See* Petition at 4 & n.9.

[5] Schedule 74 at 1.

[6] *Id.* at 2.

[7] 18 C.F.R. § 292.304(f)(1) (2012).

B. Idaho Wind's Petition

5. Idaho Wind filed its petition on behalf of its eleven wholly-owned subsidiary project companies, each of which owns self-certified QFs and has a twenty-year fixed avoided-cost rate PPA with Idaho Power approved by the Idaho Commission.[8]

6. Idaho Wind seeks a ruling that proposed Schedule 74 would violate PURPA if Idaho Power curtails purchases from QFs with fixed avoided-cost rate contracts, "whether Idaho Power acts unilaterally or acts pursuant to a schedule or policy approved by the Idaho Commission."[9] Idaho Wind adds that curtailments associated with Schedule 74 would expose Idaho Wind's QFs and similarly situated QFs to immediate financial harm.

7. More specifically, Idaho Wind contends that the Commission has clarified in Order No. 69[10] and in *Entergy Services, Inc.*[11] that section 292.304(f)(1) of the Commission's regulations does not authorize a utility to curtail QF purchases unilaterally. Idaho Wind points out that the Commission has stated that section 292.304(f)(1) of the Commission's regulations does not apply to fixed-rate PPAs. Idaho Wind asks the Commission to declare that section 292.304(f)(1) of the Commission's regulations does not override a utility's legally enforceable obligation to purchase from QFs pursuant to a contract with fixed avoided-cost rates established at the time the obligation is incurred;[12] Idaho Wind argues that such a declaration would be consistent with section 292.304(b)(5)

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[8] Idaho Wind identifies its eleven wholly-owned QFs as: Thousand Springs Wind Park, LLC; Tuana Gulch Wind Park, LLC; Oregon Trail Wind Park, LLC; Payne's Ferry Wind Park, LLC; Camp Reed Wind Park, LLC; Yahoo Creek Wind Park, LLC; Salmon Falls Wind Park, LLC; Pilgrim Stage Station Wind Park, LLC; Burley Butte Wind Park, LLC; Milner Dam Wind Park, LLC; and Golden Valley Wind Park, LLC.

[9] Petition at 8.

[10] *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, *order on reh'g sub nom.* Order No. 69-A, FERC Stats. & Regs. ¶ 30,160 (1980), *aff'd in part & vacated in part sub nom. Am. Elec. Power Serv. Corp. v. FERC*, 675 F.2d 1226 (D.C. Cir. 1982), *rev'd in part sub nom. Am. Paper Inst. v. Am. Elec. Power Serv. Corp.*, 461 U.S. 402 (1983).

[11] 137 FERC ¶ 61,199 (2011) (*Entergy*).

[12] Petition at 11-12, 16 (citing Order No. 69, FERC Stats. & Regs. ¶ 30,128 at 30,886; *Entergy*, 137 FERC ¶ 61,199 at PP 52-58).

of the Commission's regulations,[13] which, according to Idaho Wind, provides that rates fixed over the life of legally enforceable obligations are not unjust and unreasonable even if they differ from rates at the time of delivery.

8. Idaho Wind also argues that the fixed avoided-cost rate PPAs for each of its eleven QFs reflect Idaho Power's anticipated avoided costs over the entire twenty-year term of these PPAs because these rates were based on a table of Idaho Power's levelized and non-levelized avoided-cost rates, as adjusted for certain seasonal and other factors in accordance with Idaho Commission orders. Idaho Wind contends the PPAs accordingly already account for the variability and operational challenges that Idaho Power seeks to redress with Schedule 74 curtailments. Idaho Wind depicts the avoided costs incorporated into the PPAs as using the Idaho Commission's Surrogate Avoided Resource methodology that involves an "analysis of numerous variables, including fuel costs, capital costs, and fixed and variable operation and maintenance costs."[14] Further, Idaho Wind maintains that some of the QFs' PPAs "also include an adjustment from the published avoided cost rate to reflect variations in the time of day energy is delivered—heavy load hours versus light load hours—to more precisely value the energy being delivered," as well as a wind integration charge that includes in the calculation of the fixed avoided-cost rate the operational costs a utility incurs for integrating the variable nature of wind generation.[15] Idaho Wind concludes that neither the PPAs nor the QFs' generator interconnection agreements with Idaho Power permit Idaho Power to curtail the projects based merely on economic or operational circumstances as proposed in Schedule 74.

9. Idaho Wind adds that the proposed curtailments provided for in Schedule 74 would expose its QFs (and similarly situated QFs) to immediate financial harm through direct impacts on their revenues, given that these QFs "are only paid for the hours when energy is produced."[16] Moreover, Idaho Wind anticipates that Schedule 74 curtailment, if implemented, would hinder the ability of its QF project companies to comply with their PPA "firming up" commitment to deliver within a specified performance band of their monthly estimated production to Idaho Power. Idaho Wind further suggests that shutting down these QF units on the short notice provided by Schedule 74 would cause the QFs mechanical difficulties, which could lead to further downtime, lost revenue, and, ultimately, an inability for the QFs to fulfill their debt obligations.

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[13] 18 C.F.R. § 292.304(b)(5) (2012).

[14] Petition at 6.

[15] *Id*. (internal quotations removed).

[16] *Id*. at 14.

10. Idaho Wind clarifies that it is seeking neither a finding of economic harm nor a finding that the QFs' PPAs would be breached if Schedule 74 takes effect and power deliveries under the QFs' PPAs are curtailed. Rather, Idaho Wind states that it is reserving its right to seek redress in the event the QFs' PPAs are breached and, more importantly, seeks a declaratory order from the Commission in order to forestall an Idaho Commission order that would be inconsistent with PURPA.

II. Notice of Filing, Intervention, and Responsive Pleadings

11. Notice of Idaho Wind's filing was published in the *Federal Register*, 77 Fed. Reg. 38,049-50 (2012), with interventions and protests due on or before July 16, 2012.

12. Idaho Power and PacifiCorp filed timely motions to intervene and protests. The Idaho Commission filed a notice of intervention and protest. The American Wind Energy Association (AWEA), the Northwest and Intermountain Power Producers Coalition (NIPPC), Exergy Development Group of Idaho, LLC (Exergy), and Mountain Air Projects, LLC (Mountain Air) filed timely motions to intervene and comments in support of Idaho Wind's petition. First Wind Holdings, LLC and Exelon Corporation filed timely motions to intervene without taking any position on the merits of Idaho Wind's petition.

13. On July 17, 2012, Ridgeline Energy LLC (Ridgeline) and NorthWestern Corporation (NorthWestern) filed out-of-time motions to intervene.

14. On July 24, 2012, Idaho Power and the Idaho Commission filed answers to the motions to intervene and comments filed by Mountain Air and NorthWestern. On July 31, 2012, Idaho Wind filed a motion for leave to file an answer and an answer to the motions to intervene and protests by the Idaho Commission and Idaho Power. That same day, Ridgeline also filed an answer to Idaho Power's motion to intervene and answer. On August 1, 2012, Mountain Air moved for leave to file an answer and an answer to Idaho Power's motion to intervene and protest.

15. The Idaho Commission, Idaho Power, and PacifiCorp argue that Idaho Wind's petition should be dismissed as premature given the ongoing Idaho Commission hearing regarding Idaho Power's proposed Schedule 74. The Idaho Commission and Idaho Power state that, pursuant to Commission regulations implementing PURPA, determinations regarding Schedule 74 should be made by the Idaho Commission in the first instance. The Idaho Commission adds that only its staff has offered an opinion on the validity of Schedule 74, which is not binding upon the Idaho Commission itself and upon which the Idaho Commission has not yet acted. Therefore, the Idaho Commission reasons that, if the Commission rules on Idaho Wind's petition now, it would serve to

"neither 'terminate a controversy' nor 'remove uncertainty,'" which renders it deficient under Rule 207(a)(2) of the Commission's Rules of Practice and Procedure.[17]

16. Idaho Power contends that, by intervening and participating in the Idaho Commission proceeding concerning Schedule 74, Idaho Wind has conceded that the proper venue for determining the applicability and legality of Schedule 74 is the Idaho Commission, not this Commission. Idaho Power and PacifiCorp state that in the event the Idaho Commission approves proposed Schedule 74, then Idaho Wind may seek Commission enforcement against the Idaho Commission itself under section 210(h) of PURPA.[18] Because Idaho Wind has the potential remedy of bringing a PURPA enforcement petition against the Idaho Commission at the end of the Idaho Commission proceeding, Idaho Power argues that Idaho Wind's instant petition is an attempt to circumvent PURPA's statutory framework.

17. Even if the Commission finds Idaho Wind's petition ripe, Idaho Power argues that its interpretation of section 292.304(f)(1), as set forth in proposed Schedule 74, is consistent with the language of the regulation as well as the Commission's stated purpose in developing the regulation, and also the Commission's recent *Entergy* decision. Idaho Power argues that section 292.304(f)(1) of the Commission's regulations contains no explicit or implicit conditions as to its applicability. For instance, Idaho Power argues that section 292.304(f)(1) of the Commission's regulations applies to all purchases from QFs, not only to "as available" purchases.[19] In addition, Idaho Power contests Idaho Wind's assertion that the fixed avoided-cost rate PPAs already account for light loading conditions. According to Idaho Power, this is a dispute that is pending currently before the Idaho Commission and should be addressed by the Idaho Commission first, before bringing the dispute to this Commission.

18. Idaho Power concurs that Order No. 69 prohibited curtailment of purchases from QFs for economic reasons, but does not read that order as prohibiting use of section 292.304(f)(1) of the Commission's regulations in fixed-rate contracts. Idaho Power further finds fault in Idaho Wind's reliance on *Entergy* by distinguishing that

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[17] Idaho Commission Notice of Intervention and Protest at 7 (citing 18 C.F.R. § 385.207(a)(2) (2012)).

[18] 16 U.S.C. § 824a-3(h) (2006).

[19] Idaho Power maintains that it is not clear that "unscheduled QF energy" is the same as "as available QF sales" made pursuant to section 292.304(d). According to Idaho Power, any QF energy sold without a transmission service reservation, such as the QF energy sold by Idaho Wind and other QFs selling to Idaho Power under "fixed-rate contracts," is unscheduled QF energy regardless of when the avoided-cost rate is set.

proceeding from the current one; Idaho Power argues that, in *Entergy*, the Commission was evaluating a utility's transmission curtailment of unscheduled QF energy under an open access transmission tariff, whereas Schedule 74 relates to a refusal to make QF purchases during light loading periods.

19. AWEA, NIPPC, Exergy, Mountain Air, and Ridgeline urge the Commission to grant Idaho Wind's petition and to find that, if approved, Idaho Power's proposed Schedule 74 would violate PURPA. Specifically, these entities agree with Idaho Wind that section 292.304(f)(1) of the Commission's regulations does not permit a utility that is party to a fixed avoided-cost rate PPA with a QF, such as Idaho Power, to curtail its QF purchases unilaterally and/or to do so pursuant to state approval.

20. In addition, AWEA, NIPPC, Exergy, and Ridgeline argue that a prompt Commission ruling on Idaho Wind's petition would benefit the Idaho Commission by providing this Commission's guidance regarding PURPA implementation. AWEA emphasizes that, if Schedule 74 is approved by the Idaho Commission, then this Commission should find that the Idaho Commission's decision is preempted by Federal law.

21. AWEA and Mountain Air argue that Idaho Power mistakenly relies on section 292.304(f)(1) of the Commission's regulations, because this section does not apply to fixed-rate contracts where avoided costs are calculated at the time the obligation is incurred; rather, it only applies where such avoided costs are calculated at the time of delivery. AWEA states that renewable generation developers enter into fixed-rate PPAs in order to provide revenue certainty, and that, if utilities are permitted to avoid complying with their contractual obligations and the requirements of PURPA, then future development of renewable energy sources will be impeded. Similarly, NIPPC, Exergy, Mountain Air, and Ridgeline urge the Commission to act on an expedited schedule on Idaho Wind's petition in order to avoid severe adverse financial impacts to entities situated similarly to Idaho Wind. NIPPC and Exergy note, for example, that the uncertainty associated with the Idaho Commission proceeding regarding Schedule 74 will negatively impact financing of existing projects currently under construction and that such delay could harm these existing QFs' ability to qualify for tax credits that will expire by the end of 2012.

22. Mountain Air argues that section 292.304(f)(1) of the Commission's regulations only permits curtailment of purchases from QFs due to operational circumstances that occur in light loading conditions, but stresses that this curtailment is not allowed for economic or environmental reasons. Referencing Idaho Power's witness's testimony offered in the Idaho Commission proceeding, Mountain Air argues that Schedule 74 is inconsistent with section 292.304(f)(1) of the Commission's regulations because, in some circumstances, it would authorize Idaho Power to curtail QF output for impermissible

economic and environmental reasons that relate to backing down Idaho Power's hydroelectric facilities.[20]

23. Mountain Air states that it is concerned that proposed Schedule 74 would allow Idaho Power to modify retroactively the curtailment provisions of existing executed Idaho Commission-approved QF PPAs. Mountain Air argues that the Commission has held consistently that such existing QF PPAs may not be modified retroactively to change the fixed avoided-cost rate or other terms and conditions set forth in state commission-approved PPAs. Mountain Air points out that, because of wind integration charges embedded in existing QF PPAs, these QF PPAs already account for Idaho Power's additional incremental costs of integrating wind generation. Therefore, Mountain Air argues that approval of Schedule 74 would serve to condone Idaho Power's collection of additional payments not set forth in its existing QF PPAs, thereby reducing to an artificial level the forecasted avoided-cost rates in Idaho Power's already-approved QF PPAs.[21]

24. NorthWestern contends that the applicability of QF curtailment pursuant to section 292.304(f)(1) of the Commission's regulations and Order No. 69 is appropriate for clarification, and argues that Order No. 69 is outdated and does not take into account challenges faced by utilities operating in today's power market structures. Specifically, NorthWestern seeks clarification that, as used in section 292.304(f)(1) of the Commission's regulations, the term "operational circumstances" includes light loading periods and the term "baseload" includes "liquidated damages PPAs, for which NorthWestern may not have access to generator-specific data such as ramp rates, restart times, or unit dispatch costs."[22]

25. The Idaho Commission urges the Commission to deny NorthWestern intervention. Because NorthWestern is an entity operating outside Idaho, the Idaho Commission views NorthWestern as having no interest in the instant proceeding beyond development of precedent, which, it argues, is insufficient to warrant intervenor status under Commission case law.

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[20] Mountain Air concedes that the non-hydroelectric QF curtailment scenario contemplated by Schedule 74, which relates to below-base load coal generation, would be permitted by section 292.304(f)(1). Therefore, Mountain Air does not object to this aspect of Schedule 74.

[21] Mountain Air acknowledges that Idaho Power may seek approval to increase its wind integration charge for future QF PPAs by asking for approval from the Idaho Commission. But Mountain Air views Idaho Power as prohibited from modifying such rates retroactively for its existing contracts.

[22] NorthWestern Comments at 4-5.

26. Idaho Power does not object to NorthWestern's motion to intervene out of time, but opposes NorthWestern's proposal to expand the scope of Idaho Wind's petition into a generic rulemaking; Idaho Power offers that resolution of the issues raised in Idaho Wind's petition is best addressed state-by-state. Regarding Mountain Air's comments, Idaho Power argues that any harm that Schedule 74 presents is at most projected harm, rather than imminent harm, and argues that Mountain Air's characterization of Schedule 74 as a retroactive modification of QF PPAs is erroneous in that Schedule 74 implements the right of utilities to refuse to purchase power from QFs, whether selling under long-term PPAs or at as available rates, during periods when certain operational, light loading conditions exist.

27. In its answer, Idaho Wind argues that its petition for declaratory order is ripe for Commission review and that the Commission is not barred from ruling on it under the Commission's PURPA enforcement regime. Relying on its insistence that PURPA contracts with fixed avoided-cost rates may never be curtailed pursuant to section 292.304(f)(1), Idaho Wind disagrees with Idaho Power and the Idaho Commission that a factual record must be developed by the Idaho Commission to determine whether light loading periods were explicitly considered when the QF PPAs were executed. Idaho Wind also insists that section 292.304(f)(1) should not be interpreted as a "stand alone" provision capable of being raised to displace freely negotiated terms in a long-term PPA.

28. Both Ridgeline's and Mountain Air's answers highlight their own long-term fixed avoided-cost rate PPAs with Idaho Power and the harm they face should Schedule 74 be approved by the Idaho Commission. They both echo Idaho Wind's concerns that section 292.304(f)(1) of the Commission's regulations should not be used to supersede the terms bargained for in their respective PPAs.

III. Discussion

A. Procedural Matters

29. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2012), the notice of intervention and the timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding.

30. Pursuant to Rule 214(d) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214(d) (2012), the Commission will grant Ridgeline's and NorthWestern's motions to intervene given their interests in the proceeding, the early stage of the proceeding, and the absence of any undue prejudice or delay.

31. Rule 213(a)(2) of the Commission's Rules of Practice, 18 C.F.R. § 385.213(a)(2) (2012), prohibits an answer to a protest or an answer unless otherwise ordered by the decisional authority. We will accept the answers of the Idaho Commission, Idaho Power,

Idaho Wind, Ridgeline, and Mountain Air because they have provided information that assisted us in our decision-making process.

B. Commission Determination

32. Section 210(h)(2)(B) of PURPA[23] allows any electric utility, qualifying cogenerator, or qualifying small power producer to petition the Commission to act under section 210(h)(2)(A) of PURPA[24] to enforce the requirement that a state commission implement the Commission's regulations. Given the fact that the Idaho Commission proceeding concerning Schedule 74 is still ongoing, we agree with Idaho Power, the Idaho Commission, and PacifiCorp that it is premature at this time for the Commission to consider initiating an enforcement action against the Idaho Commission. If the Idaho Commission proceeding yields a result either that triggers an enforcement petition pursuant to section 210(h)(2)(B) of PURPA, or that potentially might call for our enforcement sua sponte pursuant to section 210(h)(2)(A), then we will address such questions at such time.

33. Nevertheless, Idaho Wind's petition is not a PURPA enforcement petition—it is a request for a declaratory order. We agree with the Idaho Commission that the final disposition by the Idaho Commission concerning Schedule 74 is uncertain. But section 554(e) of the Administrative Procedure Act and section 207(a)(2) of the Commission's Rules of Practice and Procedure provide us the authority and discretion to rule on a petition for declaratory order in order to "remove uncertainty."[25] Exercising that discretion to remove uncertainty, we find it appropriate at this juncture to address Idaho Wind's petition. Leaving resolution of this issue until after the conclusion of the Idaho Commission proceeding would result in more uncertainty and, as Idaho Wind's petition alleges, could lead to unnecessary and potentially significant financial consequences for Idaho Wind and similarly situated QFs.

34. Subject to certain exemptions not relevant here,[26] Commission regulations implementing PURPA compel an electric utility to purchase energy and capacity made

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[23] 16 U.S.C. § 824a-3(h)(2)(B) (2006).

[24] *Id*. § 824a-3(h)(2)(A).

[25] *See* 5 U.S.C. § 554(e) (2006); 18 C.F.R. § 385.207(a)(2) (2012); *accord USGen New England, Inc.*, 118 FERC ¶ 61,172, at P 18 (2007).

[26] *See* 18 C.F.R. §§ 292.309-10 (2012).

available by QFs to that utility.[27] In these purchases, a utility need not pay any price that is higher than the utility's avoided costs.[28]

35. A QF has two vehicles through which it may provide such energy or capacity to a utility: (1) the QF may sell the electric energy that it determines is available; or (2) the QF may sell pursuant to a legally enforceable obligation over a specified term.[29] If the QF sells energy or capacity pursuant to a legally enforceable obligation, then that sale may be priced at either the utility's "avoided costs calculated *at the time of delivery*" or the utility's "avoided costs calculated *at the time the obligation is incurred*."[30] Here, it is undisputed that the PPAs between Idaho Wind and Idaho Power, both the PPAs executed in 2005 and the PPAs executed in 2009, provide for an avoided-cost rate determined at the time the obligation was incurred, rather than a rate based on the avoided costs determined at the time of delivery.[31]

36. Section 292.304(f)(1) of the Commission's regulations permits a utility to curtail its purchase of energy or capacity from a QF when, "due to operational circumstances, purchases from [QFs] will result in costs greater than those which the utility would incur if it did not make such purchases, but instead generated an equivalent amount of energy

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[27] *Id*. § 292.303(a).

[28] *Id*. § 292.304(a)(2). The Commission defines 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." *Id*. § 292.101(b)(6).

[29] *Id*. § 292.304(d)(1)-(2).

[30] *Id*. § 292.304(d)(2)(i)-(ii) (emphasis added).

[31] *See* Petition, Ex. E, Thousand Springs PPA at 7-11 (Feb. 18, 2005) (PPA providing for sale of all of QF's net energy at "the non-levelized energy price in accordance with [Idaho] Commission Order 29646 with seasonalization factors applied"); *id*., Ex. F, Yahoo Creek PPA at 17-21 (July 9, 2009) (PPA providing for sale of all QF's net energy at "the levelized energy price for a Facility scheduled to come on-line during calendar year 2010, for a contract term of twenty (20) years in accordance with [Idaho] Commission Order 30744, 30738 and adjusted in accordance with [Idaho] Commission Order 30415 for Heavy Load Hour Energy deliveries, and adjusted in accordance with Commission Order 30488 for the wind integration charge and with seasonalization factors applied").

itself."[32] It is the proper interpretation of 18 C.F.R. § 292.304(f)(1) that is at the center of the dispute raised in the instant petition.

37. In Order No. 69,[33] discussing section 292.304(f) of the Commission's regulations, the Commission noted that net increased operating costs to a utility could occur in a specific situation, namely *operational circumstances* that can occur during light loading periods.[34] The Commission observed:

> If a utility operating *only* base load units . . . were forced to cut back output from the units in order to accommodate purchases from qualifying facilities, these base load units might not be able to increase their output level rapidly when the system demand later increased. As a result, the utility would be required to utilize less efficient, higher cost units with faster start-up to meet the demand that would have been supplied by the less expensive base load unit had it been permitted to operate at a constant output.[35]

It then observed that:

> The result of such a transaction would be that rather than avoiding costs as a result of the purchase from a qualifying facility, the purchasing electric utility would incur greater costs than it would have had it not purchased energy or capacity from the qualifying facility. A strict application of the avoided cost principle set forth in this section would assess these additional costs as negative avoided costs which must be reimbursed by the qualifying facility. In order to avoid the anomalous result of forcing a qualifying facility to pay an electric utility for purchasing its output, the Commission [in its Notice of Proposed Rulemaking] proposed that an electric utility be

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[32] 18 C.F.R. § 292.304(f)(1) (2012). A utility may also curtail purchases from a QF during a system emergency if such purchases would contribute to a system emergency, *id*. § 292.307(b); *accord Exelon Wind 1, LLC.*, 140 FERC ¶ 61,152, at P 48 (2012), but system emergencies are neither at issue in nor relevant to our ruling on Idaho Wind's petition.

[33] Order No. 69, FERC Stats. & Regs. ¶ 30,128 at 30,886 (emphasis added).

[34] We decline NorthWestern's request to reassess Order No. 69 or section 292.304(f)(1) of the Commission's regulations. That is beyond the scope of this proceeding.

[35] Order No. 69, FERC Stats. & Regs. ¶ 30,128 at 30,886.

> required to identify periods during which this situation would occur, so that the qualifying facility could cease delivery of electricity during those periods.[36]

38. The Commission was thus concerned that a QF, if compelled to deliver as-available energy during a low loading period, could be selling at negative avoided costs and thus would actually pay the utility to accept its energy. The Commission therefore provided in Order No. 69 that the utility must inform a QF of the possibility of negative avoided costs so that the QF could opt to not sell during those periods.[37]

39. The Commission went on to explain: "The Commission does *not* intend that this paragraph [describing the need to provide notice to the QF] override contractual or other legally enforceable obligations incurred by the electric utility to purchase from a qualifying facility."[38] Rather, the purpose behind section 292.304(f) is to preserve contractual or other legally enforceable obligations incurred by the electric utility to purchase from a qualifying facility. As a party to long-term PPAs employing avoided-cost rates determined at the time these obligations were incurred, Idaho Power may not curtail pursuant to section 292.304(f)(1).[39]

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[36] *Id*.

[37] *Id*.

[38] *Id*. (emphasis added).

[39] We agree with Idaho Wind and several of the intervenors that section 292.304(f)(1) does not exist in a vacuum, and we note that, when Order No. 69 addressed another provision of section 292.304, it sought to uphold the expectations of parties to long-term contracts similar to PPAs at issue in this proceeding. *See id*. at 30,880 ("The import of [section 292.304(b)(5)] is to ensure that a qualifying facility which has obtained the certainty of an arrangement is not deprived of the benefits of its commitment as a result of changed circumstances. This provision can also work to preserve the bargain entered into by the electric utility; should the actual avoided cost be higher than those contracted for, the electric utility is nevertheless entitled to retain the benefit of its contracted for, or otherwise legally enforceable, lower price for purchases from the qualifying facility.").

40. In sum, therefore, a utility may not curtail unilaterally where the QF electric energy is purchased, as here, pursuant to a long-term obligation.[40] Contrary to Idaho Power's view, even if Schedule 74 were not at issue, it would not have permission to curtail QF purchases unilaterally under its current QF PPAs. Because Idaho Power may not use curtailment under light loading periods to avoid its contractual obligations under its long-term fixed avoided-cost rate PPAs, we find that Schedule 74 is inconsistent with PURPA and that, if approved by the Idaho Commission or applied unilaterally, would violate PURPA and Commission regulations implementing PURPA.

41. Moreover, and in addition, we emphasize that in the case before us we are addressing sales pursuant to long-term PPAs, i.e., sales pursuant to "contractual or other legally enforceable obligations."[41] In *Entergy*, as we similarly and earlier noted in Order No. 69, we observed that avoided-cost rates can reflect average or composite costs and thus already account for fluctuations in the value of the electric energy in the contractually-set price.[42] We therefore reject Idaho Power's contention in this case that

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[40] This is consistent with what we expressed in *Entergy*:

> Many avoided cost rates are calculated on an average or composite basis, and already reflect the variations in the value of the purchase in the lower overall rate. In such circumstances, the utility is already compensated, through the lower rate it generally pays for unscheduled QF energy, for any periods during which it purchases unscheduled QF energy even though that energy's value is lower than the true avoided cost. On the other hand, for avoided cost rates that are determined in real-time, such avoided costs adjust to reflect the low (or zero or negative) value of the unscheduled QF energy, allowing the QF to make its own curtailment decisions. *In neither case is the utility authorized to curtail the QF purchase unilaterally*.

Entergy, 137 FERC ¶ 61,199 at P 56 (emphasis added).

[41] Order No. 69, FERC Stats. & Regs. ¶ 30,128 at 30,886.

[42] *See Entergy*, 137 FERC ¶ 61,199 at P 56; *accord* Order No. 69, FERC Stats. & Regs. ¶ 30,128 at 30,886. Similarly, in order to preserve the expectations of parties to long-term PPAs, we have expressed repeatedly our unwillingness to permit the modification of such contracts in the event that a party claims the economic assumptions made by parties entering into these contracts have changed. *See, e.g., Conn. Valley Elec. Co., Inc. v. Wheelabrator Claremont Co., L.P.*, 82 FERC ¶ 61,116, at 61,419-20 (1998), *denying reconsideration and reh'g and granting clarification*, 83 FERC ¶ 61,136, *aff'd sub nom. Conn. Valley Elec. Co. v. FERC*, 208 F.3d 1037 (2000); *West Penn Power Co.*, 71 FERC ¶ 61,153, at 61,494-96 (1995); *N.Y. State Elec. & Gas Corp.*, 71 FERC

(continued…)

there is a factual dispute over the degree to which light loading was taken into account in its PPAs with Idaho Wind's subsidiaries. Instead, the rates set in the PPAs for such bilateral transactions—which reflect avoided costs calculated at the time the obligations were incurred—already represent each party's taking into consideration various changes in circumstances over time such as light loading when deciding to be bound by the PPAs' terms.[43]

The Commission orders:

Idaho Power's petition for declaratory order is hereby granted, as discussed in the body of this order.

By the Commission. Commissioner Clark is dissenting with a separate statement.

(S E A L)

Kimberly D. Bose,
Secretary.

¶ 61,027, at 61,117-18, *reconsideration denied*, 72 FERC ¶ 61,067 (1995), *appeal dismissed sub nom. N.Y. State Elec. & Gas Corp. v. FERC*, 117 F.3d 1473 (D.C. Cir. 1997); *Conn. Light & Power Co.*, 70 FERC ¶ 61,012, at 61,029, *reconsideration denied*, 71 FERC ¶ 61,035, at 61,154 (1995), *appeal denied sub nom. Niagara Mohawk Power Corp. v. FERC*, 117 F.3d 1485 (D.C. Cir. 1997); *Southern Cal. Edison Co. and San Diego Gas & Elec. Co.*, 70 FERC ¶ 61,215, at 61,677-78, *reconsideration denied in part*, 71 FERC ¶ 61,269, at 62,079 (1995).

[43] *Cf. Fla. Power & Light Co.*, 67 FERC ¶ 61,141, at 61,396 (1994) (citing cases suggesting "that the Commission has every right to expect contracting parties to express clearly their intentions and not require the Commission to read into their agreements what is not spelled out there").

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Idaho Wind Partners, 1 Docket No. EL12-74-000

(Issued September 20, 2012)

CLARK, Commissioner, *dissenting*:

I dissent from the Order because I find the issue is unripe for Commission review. The Commission should discourage parties from seeking FERC intervention in pending state proceedings in all but the most extraordinary circumstances. By this order, the Commission is allowing one party in a state proceeding to cherry-pick a single issue in a larger, ongoing case. By putting its thumb on the scale prior to the state commission even finishing its work, we could inhibit the parties' willingness, or the Idaho Commission's ability, to come to a flexible, tailored accommodation that may meet the concerns of multiple parties—most important, Idaho consumers. While a state commission may ultimately be unable to bring about such a resolution, untimely FERC intervention can limit a state's ability to do so.

Accordingly, I respectfully dissent.

_____
Tony Clark
Commissioner