

145 FERC ¶ 61,229
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Kootenai Electric Cooperative, Inc.

Docket Nos. EL13-59-001
QF11-178-003

ORDER DENYING REQUEST FOR RECONSIDERATION

(Issued December 19, 2013)

1. In this order, the Commission denies Idaho Power Company's (Idaho Power) request for reconsideration of the order issued on June 14, 2013 in this proceeding.¹

Background

2. The Commission issued the June 14 Order in response to a petition for enforcement under section 210(h) of the Public Utility Regulatory Policies Act of 1978 (PURPA)² and a petition for declaratory order filed by Kootenai Electric Cooperative, Inc. (Kootenai). In the June 14 Order, the Commission declined to initiate an enforcement action pursuant to section 210(h) of PURPA; however, the Commission declared that certain statements contained in a February 26, 2012 decision by the Oregon Public Utilities Commission (Oregon Commission)³ – which concluded that output produced by Kootenai's Fighting Creek Landfill Gas to Energy Station qualifying facility (Fighting Creek QF) and wheeled to Idaho Power by Avista Corporation (Avista) is delivered to Idaho Power at the Lolo substation in Idaho and, therefore, Kootenai is not entitled to sell at Oregon Commission-approved avoided cost rates – are inconsistent with the requirements of PURPA and the Commission's regulations implementing PURPA.⁴

¹ *Kootenai Electric Cooperative, Inc.*, 143 FERC ¶ 61,232 (2013) (June 14 Order).

² 16 U.S.C. § 824a-3(h) (2012).

³ *Kootenai Electric Cooperative, Inc. v. Idaho Power Co.*, Oregon Commission Docket No. UM 1572, Order No. 13-062 (Feb. 26, 2013) (Oregon Order).

⁴ See 16 U.S.C. § 824a-3 (2012); 18 C.F.R. Part 292 (2013).

3. On July 15, 2013, Idaho Power filed a pleading styled as a request for rehearing or, in the alternative, request for reconsideration of the June 14 Order.⁵ On July 22, 2013, and November 19, 2013, Kootenai filed answers.

Request for Reconsideration

4. Idaho Power argues that the June 14 Order is based on unsupported factual findings and assumptions, and incorrectly characterizes the Oregon Order as a violation of PURPA.⁶ Idaho Power states that the Commission erred in: (1) finding that the point of delivery does not occur at the Lolo substation in Idaho; (2) finding that the Oregon Order violated a QF's right to choose where to deliver its output; and (3) issuing the June 14 Order rather than abstaining from acting.⁷

5. First, Idaho Power alleges that the June 14 Order incorrectly concludes that the delivery point is not the Lolo substation in Idaho.⁸ Idaho Power explains that the Commission incorrectly implies that the designation of the point of delivery is unimportant and the Commission instead incorrectly focuses on the point of change in ownership on the Lolo-Oxbow line.⁹ Idaho Power states that a QF can certainly deliver output to Idaho Power, but it argues that it is the designated point of delivery – whether in Idaho or in Oregon – that determines the jurisdiction where a QF is entitled to a PURPA contract.¹⁰

⁵ In this order, the Commission refers to Idaho Power's filing as a request for reconsideration.

⁶ Request for Reconsideration at 2.

⁷ *Id.* at 2-3. While Idaho Power identifies this latter argument in its "Statement of Issues," it does not separately expand on this argument in its fuller description of its various claims later in its pleading. Regardless, in the June 14 Order, the Commission chose not to initiate its own enforcement action under section 210(h)(2)(A) of PURPA but instead chose only to issue a declaratory order that the Oregon Order is inconsistent with PURPA. That was within the Commission's authority to do in order to "remove uncertainty" as to the consistency of the Oregon Order with PURPA. 18 C.F.R. § 385.207(a)(2) (2013); *accord* 5 U.S.C. § 554(e) (2012).

⁸ *Id.* at 6.

⁹ *Id.* at 7.

¹⁰ *Id.* at 6-7.

6. Idaho Power adds, in support, that costs included in a transmission rate do not define the point of delivery.¹¹ Idaho Power opines that “[w]hile a rate for transmission service may include costs for other items or facilities that are necessary for the transaction and extend beyond the point of delivery, components of a rate do not define the point where the actual transfer of title and control occurs.”¹² Idaho Power states that, regardless of specific transmission rate costs, the designated point of delivery is where the transfer of ownership and control occurs.¹³ Idaho Power argues that a control area boundary, as well as a point-to-point transmission agreement, must be established at a designated point of delivery.¹⁴

7. In the same fashion, Idaho Power further argues that the Commission erred in concluding that the point of change of ownership along the Lolo-Oxbow line is the only point at which Idaho Power can receive delivery of power from Avista, and disputes whether a delivery to Imnaha, Oregon is possible.¹⁵ Idaho Power explains that it cannot receive energy at an unmetered point on a transmission line, stating that a point of delivery must be clearly defined, requires a primary interchange meter, and determines the point where energy movement across a line is managed.¹⁶

8. Idaho Power alleges that the Commission erroneously relied upon the application approved in the December 18, 2000 delegated letter,¹⁷ specifically a statement explaining that the change in ownership of a portion of the line would not alter the manner in which Avista posts capacity and that the line would continue to be used in the same way, in finding that delivery occurs at the point of change in ownership.¹⁸ Idaho Power argues that the Commission is correct that the use of the Lolo-Oxbow line is not altered because the Lolo-Oxbow line is still within Idaho Power’s balancing authority area and Idaho Power, although it no longer owns the line, still controls the line for purposes of

¹¹ *Id.* at 7.

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.* at 8.

¹⁶ *Id.* at 10.

¹⁷ *Id.* at 8-9 (citing the application filed in and accepted by *Idaho Power Co. & Avista Corp.*, 93 FERC ¶ 62,206 (2000) (December 18, 2000 delegated letter order)).

¹⁸ *Id.* at 8.

operating and managing the line.¹⁹ Idaho Power notes that the 1958 Transmission Line Agreement states that a point of delivery shall be where “ownership or control of the facilities changes” and claims that this means that the point of delivery at issue here will be the Lolo substation.²⁰

9. Idaho Power adds that the Commission’s determination leads to unintended, problematic effects.²¹ Specifically, Idaho Power opines that “[i]t leads to an implication that so long as some facilities in a state are included in the rate for a point-to-point transmission service agreement, a QF may be entitled to a PURPA PPA in that state.”²² Idaho Power argues that such a practice would lead to regulatory uncertainty and thwart a state’s ability to implement PURPA.²³

10. Finally, Idaho Power concludes that the Oregon Order does not hinder a QF’s ability to wheel power.²⁴ Idaho Power claims that the Oregon Order instead found, in Idaho Power’s view, that “factually, under the circumstances proposed by Kootenai, a delivery to Idaho Power from Avista was not a delivery to Idaho Power’s control area within the state of Oregon because the point of delivery is at the Lolo substation in Idaho and thus is delivered to Idaho Power’s control area in the state of Idaho.”²⁵

Discussion

Procedural Matters

11. Because this proceeding arises under section 210(h) of PURPA, formal rehearing does not lie, either on a mandatory or a discretionary basis.²⁶ We will, however, treat Idaho Power’s filing as a request for reconsideration, and we will deny reconsideration as discussed below.

¹⁹ *Id.* at 9.

²⁰ *Id.* at 10.

²¹ *Id.*

²² *Id.* at 11.

²³ *Id.*

²⁴ *Id.* at 12.

²⁵ *Id.* at 13.

²⁶ See *Southern California Edison Co.*, 71 FERC ¶ 61,090, at 61,305 (1995); *New York State Electric & Gas Corp.*, 72 FERC ¶ 61,067, at 61,340 (1995).

12. The Commission's Rules of Practice and Procedure, although silent with respect to requests for reconsideration and answers to requests for reconsideration, do not normally permit answers to requests for rehearing.²⁷ We have previously indicated that the concerns that militate against answers to requests for rehearing similarly should apply to answers to requests for reconsideration.²⁸ Accordingly, we reject Kootenai's answers.

Commission Determination

13. We deny Idaho Power's request for reconsideration. Nothing raised in the request warrants a change to the June 14 Order.

14. Idaho Power hypothesizes that the language found in the Commission's June 14 Order implies that the Commission believes that the designation of the point of delivery is unimportant.²⁹ We disagree; we never said that the designation of the point of delivery is unimportant. To the contrary, in the June 14 Order, the Commission concluded that "[t]he Avista Agreement enables Kootenai to physically deliver power to Idaho Power at the point of change of ownership on the Lolo-Oxbow line in Oregon."³⁰ The Commission went on to explain that "the point of change in ownership along the Lolo-Oxbow line is the only point at which Avista's transmission system directly connects with Idaho Power's transmission system . . . [and] is the only point at which Idaho Power can receive delivery of power from the Avista transmission system[.]"³¹ The Commission thus clearly identified the relevant point of delivery as the point of change in ownership,³² and therefore, we find no merit to Idaho Power's argument.

²⁷ 18 C.F.R. § 385.713(d) (2013).

²⁸ See *JD Wind 1, LLC*, 130 FERC ¶ 61,127, at P 13 (2010); *CGE Fulton, L.L.C.*, 71 FERC ¶ 61,232, at 61,880-81 (1995); *Connecticut Light & Power Co.*, 71 FERC ¶ 61,035, at 61,151 (1995).

²⁹ Request for Reconsideration at 7. Idaho Power concedes that Avista "owns that segment of the line" and "it is included in Avista's transmission rate." *Id.* at 9.

³⁰ June 14 Order, 143 FERC ¶ 61,232 at P 30.

³¹ *Id.* P 31. Moreover, Kootenai has reserved capacity on the Avista transmission system to deliver the Fighting Creek QF output to that point. *Id.*

³² While Idaho Power at times appears to conflate a change of ownership and a change of control, at other times it appears to recognize that the two are different. Compare Request for Reconsideration at 6-7 ("the designated location of a point of delivery where a utility takes ownership and control of the energy, . . . necessarily determines the jurisdiction under which a QF is entitled to a PURPA contract") *with id.*

15. Idaho Power argues that the costs encompassed in a transmission rate do not define the point of delivery.³³ A QF has the discretion to choose to sell to a more distant utility,³⁴ and thus has the discretion where to sell, as long as the QF can deliver its power to the utility. And the Commission stated that “[t]he Avista Agreement enables Kootenai to physically deliver power to Idaho Power at the point of change of ownership on the Lolo-Oxbow line in Oregon.”³⁵ The Commission therefore correctly found that Kootenai can choose (as it has here) to sell its power to Idaho Power at that specific point – where ownership of the line changes – in Oregon.

16. Idaho Power claims that it controls the capacity of the Lolo-Oxbow line past the Lolo substation in Idaho. Idaho Power claims that transmission past the Lolo substation is pursuant to Idaho Power’s Open Access Transmission Tariff (OATT).³⁶ However, Idaho Power provides no documentation to support this claim. Indeed, Idaho Power acknowledges that Avista’s OATT controls much of the transmission on the line.³⁷ And Avista has represented to the Commission in its recent June 27, 2012 transmission service agreement filing (Docket No. ER12-2119-000), and the Commission has found, that from the transmission service standpoint it, Avista, provides transmission service over the entirety of its assets on the Lolo-Oxbow line, and therefore provides transmission service

at 7 (“Ownership of facilities can and does exist separately from a utility’s control area and Balancing Authority Area”) *with id.* at 9 (a point of delivery “shall be where ‘ownership or control of the facilities changes’”). As the Commission explained in the June 14 Order and in this order, however, the relevant point of change here is the point of change in ownership – and that occurs in Oregon. *See* June 14 Order, 143 FERC ¶ 61,232 at PP 30-32.

It is Avista that ultimately controls the capacity of the facilities it owns since it is Avista that owns that capacity, and it is Avista that provides transmission service over the facilities it owns; that Avista and Idaho Power, as a practical accommodation, apparently have allowed Idaho Power to separate the line (apparently for scheduling purposes, as explained below) is of no moment for present purposes. *See* June 14 Order, 143 FERC ¶ 61,232 at PP 30-32.

³³ Request for Reconsideration at 7.

³⁴ June 14 Order, 143 FERC ¶ 61,232 at P 33; 18 C.F.R. § 292.303(d) (2013).

³⁵ June 14 Order, 143 FERC ¶ 61,232 at P 30.

³⁶ Request for Reconsideration at 9.

³⁷ *Id.* at 4.

to the point of the change of ownership.³⁸ Moreover, Idaho Power and Avista together represented to the Commission, in their earlier November 20, 2000 joint application seeking transfer of the Lolo-Oxbow line from Idaho Power to Avista, that even at that early date “the capacity on the transmission line is currently posted on Avista’s OASIS as available capacity on the Avista transmission system, and it will continue to be posted on Avista’s OASIS after the proposed transaction.”³⁹ In fact, the transmission service agreement more recently filed in and accepted in Docket No. ER12-2119-000 was for transmission service for Kootenai to the point of the change of ownership, and was in response to a request for transmission service submitted via Avista’s OASIS.⁴⁰ Finally, as explained in Avista’s recent June 27, 2012 transmission service agreement filing, the basis for Idaho Power’s claim is that, notwithstanding that Avista, in fact, provides transmission service to the point of the change in ownership, from a “scheduling standpoint” the parties “hand off” the electric energy at the balancing authority area boundary.⁴¹ But that scheduling perspective does not, however, change the fact that Avista provides transmission service over its assets to the point of the change in ownership. Under these circumstances, we cannot find that Avista lacks control over its assets, and that Idaho Power instead controls Avista’s assets, beyond the Lolo substation up to the point of the change in ownership.

17. Idaho Power claims that delivery and the associated transfer of ownership and control cannot occur at an unspecified, unmetered point located midway through a transmission line.⁴² But Idaho Power identifies no statutory prohibition, nor any precedent, that would bar such a point of delivery. That aside, first, as explained above, the Commission clearly designated the relevant point of delivery in the June 14 Order as the point of change of ownership on the Lolo-Oxbow line; therefore, Idaho Power’s argument that the point of delivery is unspecified is without merit. Second, Idaho Power fails to explain why delivery cannot occur at an unmetered point along a transmission

³⁸ *Avista Corp.*, 140 FERC ¶ 61,165, at PP 4, 21 (2012); *see* Avista Application at 3, Docket No. ER12-2119-000 (June 27, 2012).

³⁹ December 18, 2000 delegated letter order, 93 FERC at 64,414.

⁴⁰ *Avista Corp.*, 140 FERC ¶ 61,165 at P 2; *see* Avista Application at 2, Docket No. ER12-2119-000 (June 27, 2012).

⁴¹ Avista represented to the Commission that it was only “[f]rom a scheduling standpoint,” that “energy scheduled between Avista and IPC is exchanged or ‘handed off’ at the balancing authority area boundary between the two systems.” *Avista Corp.*, 140 FERC ¶ 61,165, at P 4 (2012) (emphasis added); *see* Avista Application at 3-4, Docket No. ER12-2119-000 (June 27, 2012).

⁴² Request for Reconsideration at 10.

line. Indeed, power sales in foreign commerce (e.g., between Canadian and United States utilities) often take place at the international border even though there may be no substation at the border.⁴³ Similarly, power sales within the United States can occur and have occurred at state borders even though there is no substation at the border.⁴⁴ In any event, interchange metering data from the Lolo substation could be, and we understand is,⁴⁵ adjusted to reflect line losses across the Lolo-Oxbow line up to the point of change of ownership. Idaho Power has not convinced us that this would or does result in an unreasonable result. We thereby find Idaho Power's argument to be unpersuasive.

18. Idaho Power also claims that the Commission's determination leads to unintended, problematic effects, including regulatory uncertainty.⁴⁶ On the contrary, we find that the June 14 Order provided clarity by specifying that the point of change of ownership is the point at which Idaho Power is connected with and receives delivery from the Avista system. It also: (1) clarified a QF's rights under PURPA; (2) explained that the Oregon Order was inconsistent with PURPA; and (3) identified the adverse consequences if the Oregon Order were instead to be found consistent with PURPA.

⁴³ *H.Q. Energy Services (U.S.) Inc.*, 82 FERC ¶ 61,234 at 61,898 n.9 (1998). *appeal dismissed*, 198 F.3d 950 (D.C. Cir. 2000) (referring to power sales at borders). E.g., *Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities*, 79 FERCat 61,867, *order denying stay*, 79 FERC ¶ 61,367 (1997) (referring to power sales at the border, with title transferring at the border).

⁴⁴ In *Public Utilities Commission of Rhode Island v. Attleboro Steam & Electric Co.*, 273 U.S. 83 (1927), the Supreme Court was presented with just such a circumstance. In describing a transaction that it ultimately found to be a transaction in interstate commerce, the Supreme Court described the transaction as involving "current to be delivered by the Narragansett[, Rhode Island] Company at the State line between Rhode Island and Massachusetts and carried over connecting transmission lines to the station of the Attleboro Company in Massachusetts, where it was to be metered." *Id.* at 84; *accord id.* at 86 (referring to "the fact that the current is delivered at the State line" and noting that "[t]he transmission of electric current from one State to another. . . is interstate commerce, . . . and its essential character is not affected by a passing of custody and title at the state boundary, not arresting the continuous transmission to the intended destination").

⁴⁵ Petition for Declaratory Order, Exhibit 2 at 3; *accord* Avista Application at 3, Docket No. ER12-2119-000 (June 27, 2012) (Avista stated that "interchange metering is compensated to reflect line losses between Lolo and the point of change of ownership.").

⁴⁶ Petition for Declaratory Order, Exhibit 2 at 10-11.

19. We conclude that nothing raised by Idaho Power on reconsideration convinces us that our finding that certain statements in the Oregon Order are inconsistent with PURPA is erroneous.

The Commission orders:

Idaho Power's request for reconsideration is hereby denied.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.