

151 FERC ¶ 61,223  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Norman C. Bay, Chairman;  
Philip D. Moeller, Cheryl A. LaFleur,  
Tony Clark, and Colette D. Honorable.

PáTu Wind Farm, LLC

v.

Docket No. EL15-6-001

Portland General Electric Company

PáTu Wind Farm, LLC

Docket No. QF06-17-003

ORDER DENYING REHEARING

(Issued June 18, 2015)

1. On February 23, 2015, PáTu Wind Farm, LLC (PáTu), Portland General Electric Company (Portland General), and Community Renewable Energy Association (CREA) filed requests for rehearing<sup>1</sup> of the Commission's January 22, 2015 order<sup>2</sup> issued in response to PáTu's complaint against Portland General, pursuant to sections 206, 306, and 309 of the Federal Power Act (FPA),<sup>3</sup> and Rule 206 of the Commission's Rules of Practice and Procedure<sup>4</sup> (Complaint). For the reasons discussed below, we deny rehearing.

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<sup>1</sup> On February 27, 2015, PáTu filed an erratum to include an attachment missing from PáTu's Request for Rehearing.

<sup>2</sup> *PáTu Wind Farm, LLC v. Portland General Electric Co.*, 150 FERC ¶ 61,032 (2015) (January 22 Order).

<sup>3</sup> 16 U.S.C. §§ 824e, 825e and 825h (2012).

<sup>4</sup> 18 C.F.R. § 385.206 (2014).

## **I. Background**

### **A. PáTu's Complaint**

2. As more fully set forth in the January 22 Order,<sup>5</sup> PáTu is a 9 MW net capacity wind farm located in Sherman County, Oregon. PáTu self-certified as a qualifying facility (QF) in Docket No. QF06-17-002. PáTu is interconnected to Wasco Electric Cooperative, Inc. (Wasco) and has a point-to-point transmission service agreement with Wasco for transmission from PáTu's point of interconnection with Wasco to Bonneville Power Administration (BPA) at BPA's DeMoss Substation. PáTu also has a point-to-point transmission service agreement with BPA for transmission from BPA's DeMoss Substation to Portland General, a vertically-integrated electric utility providing electric service in the State of Oregon, with the point of delivery at Portland General's Troutdale Substation.<sup>6</sup>

3. On April 29, 2010, PáTu and Portland General entered into the Oregon Public Utilities Commission's (Oregon Commission) standard contract under the Public Utility Regulatory Policies Act of 1978 (PURPA)<sup>7</sup> for off-system, intermittent-resource QFs less than or equal to 10 MW nameplate capacity (Standard Contract). PáTu states that its wind farm began commercial operation and began selling output under the Standard Contract in December 2010.

4. In its Complaint, PáTu stated that, when it entered into the Standard Contract, the Oregon Commission required that wind QFs with a nameplate capacity of 10 MW or less receive long-term, standard avoided cost rates without a deduction for wind integration costs and without purchasing wind balancing services.<sup>8</sup> Therefore, PáTu stated that small wind QFs, such as PáTu, are not subject to wind integration charges, and the Standard Contract does not require PáTu to contract with the transmission provider, or any other

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<sup>5</sup> January 22 Order, 150 FERC ¶ 61,032 at PP 4-16.

<sup>6</sup> PáTu Complaint at 6.

<sup>7</sup> 16 U.S.C. § 824a-3 (2012).

<sup>8</sup> PáTu Complaint at 6. PáTu notes that, several years after PáTu's execution of the Standard Contract, the Oregon Commission changed its policy to require that wind QFs sized 10 MW and under receive a reduction to their avoided cost rates to account for the purchasing utility's wind integration costs, or that they secure such balancing services from another utility's balancing authority area. PáTu states, however, that the Oregon Commission expressly stated that this new policy would be effective prospectively for new PURPA contracts, and not existing PURPA contracts. *Id.* at 6-7 & n.15.

third party, to secure wind integration services. PáTu also stated that, consistent with its PURPA rights, the Standard Contract establishes PáTu's right to sell its *entire* Net Output to Portland General.<sup>9</sup>

5. PáTu further stated that dynamic scheduling has been available from BPA, but Portland General has refused to implement such a dynamic schedule.<sup>10</sup> PáTu stated that, after being admitted to BPA's dynamic scheduling pilot program, it again contacted Portland General to establish dynamic scheduling. Portland General's attorney responded, by email dated September 17, 2010, that: "[Portland General] has not agreed to dynamic transfer<sup>11</sup> and contractually, under your Schedule 201 Agreement [the Standard Contract], Section 4.4, you must schedule on an hourly basis, not dynamic transfer."<sup>12</sup>

### **B. January 22 Order**

6. In the January 22 Order, the Commission partially granted the Complaint by ordering Portland General to accept PáTu's entire net output delivered to the Portland General balancing authority area and to do so at avoided cost rates.<sup>13</sup> The Commission found that the Standard Contract does not govern or restrict the manner by which PáTu's output is transmitted and delivered to Portland General's Troutman Substation and, given that PáTu and BPA are willing to deliver the entire net output to Portland General using dynamic scheduling, the Standard Contract does not preclude the ability to do that or Portland General's obligation to purchase PáTu's entire net output through those

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<sup>9</sup> *Id.* at 7 (stating that its Standard Contract defines "Net Output" as "all energy expressed in [kW-hours] produced by the Facility, less station and other onsite use and less transformation and transmission losses").

<sup>10</sup> *Id.* at 7-8.

<sup>11</sup> The terms 'dynamic schedule' and 'dynamic transfer' are used throughout the pleadings without any party distinguishing between the terms.

<sup>12</sup> PáTu Complaint at 9, Attachment 2 (Affidavit of Ormand Hilderbrand) at P 27, and Attachment 4 at 44 (September 17, 2010 email from Richard George to Peter Richardson, Ormand Hilderbrand and James Hall).

<sup>13</sup> January 22 Order, 150 FERC ¶ 61,032 at PP 49, 54.

means.<sup>14</sup> The Commission dismissed portions of the Complaint relating to 15-minute scheduling, Standards of Conduct violations, and monetary reparations.<sup>15</sup>

7. The Commission explained that, while the parties' pleadings focused on dynamic scheduling, the issue in this proceeding is whether Portland General is fulfilling its obligations under PURPA and the Commission's regulations as implemented by the Oregon Commission; the Commission found that Portland General's merchant function has the obligation to purchase PáTu's entire net output at avoided cost rates.<sup>16</sup> The Commission found that the scheduling provisions of the Standard Contract do not limit Portland General's purchase obligation.<sup>17</sup> Indeed, the Commission found that if "Portland General were permitted on this basis to refuse to accept PáTu's entire net output, Portland General and other electric utilities could routinely escape their PURPA mandatory purchase obligation, and indeed the Standard Contract-imposed purchase obligation, by imposing overly restrictive or un-meetable scheduling requirements, or by the purchasing electric utility's failing to arrange the necessary transmission service to dispose of its purchase of the QF's entire net output once it has been delivered to the utility."<sup>18</sup>

## II. Pleadings

### A. PáTu's Request for Rehearing

8. PáTu seeks clarification and rehearing of the January 22 Order on two points: Portland General's cooperation on dynamic scheduling; and Portland General's conditioning dynamic scheduling on PáTu's taking wind integration services. First, PáTu asks the Commission to clarify that Portland General must cooperate to allow PáTu to deliver its entire net output by dynamic scheduling over BPA's system<sup>19</sup> to Portland General. PáTu asserts that while Portland General apparently believes that the January 22 Order does not require such cooperation, any other scheduling arrangement

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<sup>14</sup> *Id.* P 55.

<sup>15</sup> *Id.* P 49.

<sup>16</sup> *Id.* PP 49, 54.

<sup>17</sup> *Id.* PP 51-53.

<sup>18</sup> *Id.* P 53.

<sup>19</sup> PáTu's wind farm is located in BPA's balancing authority area.

limits PáTu from delivering its entire net output to Portland General, in violation of the January 22 Order.<sup>20</sup>

9. PáTu contends that this clarification logically flows from the January 22 Order. First, PáTu states that the Commission found that “PáTu and BPA are willing to deliver PáTu’s entire net output to Portland General using dynamic scheduling, and . . . that the Standard Contract does not preclude the ability to do that or Portland General’s obligation to purchase PáTu’s entire net output by those means.”<sup>21</sup> Next, PáTu states that the Commission held that Portland General is obligated to pay avoided cost rates for PáTu’s entire net output, less only on-site uses and losses, and granted the Complaint against Portland General on this point.<sup>22</sup> Further, PáTu asserts that the Commission, in agreeing with the Oregon Commission, correctly concluded that nothing in the Standard Contract governing Portland General’s purchase of power from PáTu trumps Portland General’s obligation to purchase the entire net output or requires any particular form of scheduling.<sup>23</sup>

10. PáTu also asserts that, in accordance with PURPA,<sup>24</sup> the Commission properly concluded that Portland General is prohibited from imposing “overly restrictive or un-meetable scheduling requirements” on QFs that would allow utilities to “routinely escape their PURPA mandatory purchase obligation.”<sup>25</sup> PáTu contends that, while the Commission made clear that Portland General is free to choose whatever form of delivery it desires to move power from the Troutdale Substation to its end-use consumers, the Commission nevertheless found that Portland General is obligated to “take from PáTu its entire net output” delivered to the Troutdale Substation and to pay the avoided cost rate for that entire net output.<sup>26</sup>

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<sup>20</sup> PáTu Request for Rehearing at 2.

<sup>21</sup> *Id.* at 7 (citing January 22 Order, 150 FERC ¶ 61,032 at P 55).

<sup>22</sup> *Id.* (citing January 22 Order, 150 FERC ¶ 61,032 at P 54).

<sup>23</sup> *Id.* at 7-8 (citing January 22 Order, 150 FERC ¶ 61,032 at P 52).

<sup>24</sup> 16 U.S.C. § 824a-3 (2012).

<sup>25</sup> PáTu Request for Rehearing at 8 (citing January 22 Order, 150 FERC ¶ 61,032 at P 53).

<sup>26</sup> *Id.* (citing January 22 Order, 150 FERC ¶ 61,032 at P 54).

11. PáTu contends that Portland General's merchant function is obligated to accept delivery of PáTu's output via dynamic scheduling. Next, PáTu asserts that hourly scheduling in whole MW blocks is problematic for small wind farms like PáTu because small variations in wind intensity can produce large and unpredictable deviations, making it impossible for PáTu to accurately predict its entire net output.<sup>27</sup> PáTu also asserts that the requirement to schedule in whole MW blocks creates an unworkable or "un-meetable" scheduling convention because PáTu's output is almost never equal to a whole MW value so it is forced to under-schedule or over-schedule its output.<sup>28</sup> PáTu also states that, while the Standard Contract requires Portland General to take all of PáTu's output, measured in kW-hours, Portland General insists that it schedule in whole MW-hour blocks. PáTu asserts that the scheduling convention that Portland General has imposed upon PáTu has prevented PáTu from receiving compensation for all of its output on many days.<sup>29</sup>

12. PáTu states that, although BPA and PáTu have agreed to dynamic scheduling, Portland General has refused to accept and pay avoided cost rates for PáTu's net output, and Portland General has done this by refusing to cooperate in implementing this dynamic schedule. PáTu argues, however, that PURPA<sup>30</sup> and the Commission's open access policies<sup>31</sup> compel Portland General's cooperation to establish a dynamic schedule.

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<sup>27</sup> *Id.* at 8-9.

<sup>28</sup> PáTu asserts that the Commission found, in Order No. 764, that hourly scheduling is generally unworkable for wind generation because wind variations over the hour can be dramatic, and causes actual wind output to vary significantly from forecasted amounts. *Id.* at 9.

<sup>29</sup> *Id.*

<sup>30</sup> *Id.* at 11-12 (citing *Xcel Energy Services, Inc. v. Southwest Power Pool, Inc.*, 118 FERC ¶ 61,232, at P 27 (2007) (PáTu states that the Commission held in an analogous context that "[w]hile purchasing utilities are not required under PURPA and related regulations to register QF facilities as resources under coordination arrangements, . . . , such agreements are consistent with the PURPA purchase obligation, and we expect utilities, such as Xcel, that are requested to enter into such arrangements, will in good faith negotiate and enter into such arrangements.")).

<sup>31</sup> *Id.* at 11 (citing *New Horizon Electric Cooperative, Inc. v. Duke Power Co.*, 95 FERC ¶ 61,146, at 61,470 (2001) (stating that "[u]nder Order Nos. 888 and 888-A, transmission providers may not raise unreasonable obstacles to dynamic scheduling"), and Order No. 888, FERC Stats. & Regs. ¶ 31,036, 61 Fed. Reg. at 21,583-21,584

(continued...)

13. Second, PáTu asks the Commission to find that Portland General cannot condition acceptance of dynamic scheduling on PáTu's agreement to pay Portland General for wind integration services,<sup>32</sup> because PáTu's forecasted avoided cost rates were specifically calculated so that no wind integration charges would be assessed to PáTu; PáTu states that "the Oregon Commission required that wind QFs with a nameplate capacity of 10 MW or less receive long-term, avoided cost rates *without a deduction for wind integration costs and without purchasing wind balancing reserves.*"<sup>33</sup> According to PáTu, Portland General will continue to force PáTu to pay for wind integration charges by either: (1) forcing PáTu to pay wind integration charges to BPA as a result of Portland General's refusal to accept a dynamic schedule; or (2) requiring PáTu to pay wind integration charges to Portland General as a condition of Portland General's acceptance of dynamic scheduling.<sup>34</sup> PáTu asserts that Portland General cannot require PáTu to pay wind integration costs because it would force PáTu to recover less than full avoided cost rates for its entire net output, in violation of PURPA, the Commission's policies, Commission precedent,<sup>35</sup> and the January 22 Order.<sup>36</sup>

14. PáTu also requests rehearing of the January 22 Order on three other issues. First, PáTu asserts that the Commission erred by rejecting PáTu's November 14, 2014 answer. PáTu argues that its answer was filed in response to Portland General's October 30, 2014 motion for summary disposition and was therefore proper under the Commission's Rules of Practice and Procedure, which provide an opportunity to answer a motion.<sup>37</sup>

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(stating that "[i]f the customer wants to purchase [dynamic scheduling] service from a third party, the transmission provider should make a good faith effort to accommodate the necessary arrangements between the customer and the third party for metering and communication facilities.")).

<sup>32</sup> *Id.* at 2-3.

<sup>33</sup> *Id.* at 13 (citing January 22 Order, 150 FERC ¶ 61,032 at P 57 n.99 (emphasis added)).

<sup>34</sup> *Id.* at 14.

<sup>35</sup> *Id.* at 15 (citing *Southwest Power Pool, Inc.*, 125 FERC ¶ 61,314, at P 38 (2008), *clarif. denied*, 126 FERC ¶ 61,135, *correcting order*, 127 FERC ¶ 61,008 (2009)).

<sup>36</sup> *Id.* at 14-16.

<sup>37</sup> *Id.* at 14 (citing 18 C.F.R. § 385.213 (2014)).

15. Second, PáTu asserts that the Commission erred by refusing to consider evidence of transmission discrimination. According to PáTu, the evidence establishes that Portland General uses dynamic scheduling for imports from its own generating resources to its balancing authority area<sup>38</sup> and required dynamic scheduling for flexible capacity resources bidding into Portland General's request for proposals, but has systematically denied dynamic scheduling for imports from PáTu and other QFs.<sup>39</sup> PáTu also notes that Portland General offered to accept bids from any renewable generator delivering to Portland General's balancing authority area via dynamic scheduling, unless that generator were a QF.<sup>40</sup> PáTu contends that, because Portland General offers dynamic scheduling, Portland General is required to provide non-discriminatory terms for that service in its open access transmission tariff (OATT).<sup>41</sup> PáTu adds, however, that Portland General never added dynamic scheduling provisions to its OATT or dynamic scheduling business practices to its Open Access Same-time Information System. PáTu concludes that Portland General's actions violate anti-discrimination requirements of PURPA<sup>42</sup> and the Commission's open access transmission regime, and allow Portland General to reserve use of dynamic scheduling solely for its own commercial purposes, and that the Commission has ignored Portland General's pattern and practice of illegal transmission discrimination.<sup>43</sup>

16. Third, PáTu argues that the Commission erred in concluding that no Standards of Conduct violations occurred because it misinterpreted PáTu's evidence, which demonstrates that Portland General's merchant personnel improperly directed transmission operations in violation of the Commission's Standards of Conduct.<sup>44</sup> PáTu

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<sup>38</sup> *Id.* at 3.

<sup>39</sup> *Id.* at 20 (citing *In re Portland General Electric Co.: Request for Capacity Resources*, OPUC Docket No. UM 1535, Order No. 11-371, at 4 (2011)).

<sup>40</sup> *Id.* at 20 (citing PáTu Complaint at Attachment 11 at 29).

<sup>41</sup> *Id.* at 21 (citing *PJM Interconnection, LLC*, 134 FERC ¶ 61,048, at P 36 (2011), and *Cal. Ind. System Operator Corp.*, 107 FERC ¶ 61,329, at PP 21-22 (2004)).

<sup>42</sup> For example, PáTu asserts that, under PURPA, the "rates for purchases by electric utilities . . . shall not discriminate against . . . qualifying small power producers." *Id.* at 18 & n.48 (citing 16 U.S.C. § 824a-3(b) (2012)). *Id.* at 18-19 & nn.51, 52 (also citing, as examples, 18 C.F.R. §§292.303(c)(1), 292.303(d) and 292.306(a) (2014)).

<sup>43</sup> *Id.* at 17.

<sup>44</sup> *Id.* at 5-6.

argues that the communications between Portland General's merchant function and transmission function personnel violated both the non-discrimination rule and the independent functioning rule. PáTu asserts that Portland General's transmission function, in violation of the independent functioning rule, took direction from Portland General's merchant function. PáTu also asserts that Portland General's transmission function violated the non-discrimination rule by refusing to provide PáTu with the transmission services necessary to accept dynamic scheduling while it was at the same time providing those same services to Portland General's merchant generation fleet. Finally, PáTu argues that the transparency rule does not override the non-discrimination rule and the independent functioning rule.<sup>45</sup>

17. PáTu adds that BPA is implementing a 15-minute scheduling program that will begin October 1, 2015. PáTu also states that, if Portland General must cooperate to implement dynamic scheduling, it will be unnecessary for PáTu to make the substantial investment necessary to participate in BPA's 15-minute scheduling program.<sup>46</sup>

#### **B. CREA's Request for Rehearing**

18. CREA argues that clarification of the January 22 Order is necessary because Portland General has made public statements that it is already in compliance with the order. While CREA agrees with the Commission that nothing in PURPA or the Standard Contract excuses Portland General from the obligation to purchase PáTu's entire net output by the means BPA and PáTu are willing to make,<sup>47</sup> CREA requests that the Commission clarify that Portland General must accept PáTu's entire net output via the methods of scheduling and delivery that BPA and PáTu are willing to make.<sup>48</sup>

19. According to CREA, any limitation on a small QFs' ability to use intra-hour schedules or dynamic schedules would cause harm to small Oregon QFs because the favorable renewable energy sites in Oregon are not directly interconnected to the utilities

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<sup>45</sup> *Id.* at 26. PáTu contends that the Commission reasoned that the transparency rule, in 18 C.F.R. § 358.7(b) (2014), broadly permits communications between a transmission provider's merchant and transmission functions concerning transmission service to the extent the merchant function is a transmission customer. *Id.* at 22 & n.66 (citing January 22 Order, 150 FERC ¶ 61,032 at P 56).

<sup>46</sup> *Id.* at 4, 6.

<sup>47</sup> CREA Request for Rehearing at 1-2 (citing January 22 Order, 150 FERC ¶ 61,032 at P 55).

<sup>48</sup> *Id.* at 1, 4.

with the most attractive avoided costs, and, as such, require an intermediate transmission provider. CREA states that Portland General's refusal to accept a dynamic scheduling arrangement has precluded PáTu from delivering and selling its entire net output at the avoided cost rates in its Standard Contract. CREA argues that, as a result, PáTu is unable to use the forms of transmission made available by its transmission provider and, therefore, PáTu will not be compensated for any generation in excess of the amount that is scheduled in hourly full MW quantities.<sup>49</sup>

20. CREA states that, because the Oregon Commission has refused to address PáTu's right to make deliveries to Portland General using dynamic scheduling based on the rationale that the Commission has exclusive jurisdiction over transmission schedules, the Oregon Commission will not issue an order requiring Oregon utilities under its jurisdiction to accept deliveries made by any form of intra-hour scheduling or dynamic scheduling. CREA posits that other utilities in Oregon may also adopt a narrow reading of the January 22 Order and refuse to offer the minimal cooperation necessary to make an indirect purchase of QF output delivered through newly-available intra-hour scheduling methods.<sup>50</sup>

### C. Portland General's Request for Rehearing

21. Portland General requests clarification of the January 22 Order because it does not understand why the Commission would order Portland General to accept PáTu's entire net output delivered to Portland General when it has purchased, and will continue to purchase, all of the energy generated by PáTu and delivered to Portland General in accordance with the Standard Contract.<sup>51</sup> Portland General therefore asks the Commission to clarify that Portland General's current practice is consistent with the January 22 Order, which, as Portland General asserts, acknowledged that PáTu's delivery of its output to Portland General is a component of the mandatory purchase obligation.<sup>52</sup>

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<sup>49</sup> *Id.* at 2-3.

<sup>50</sup> *Id.* at 3-4.

<sup>51</sup> Portland General Request for Rehearing at 1-2.

<sup>52</sup> *Id.* at 9. Portland General also asserts that the Commission's reference in the January 22 Order to the *Entergy Services, Inc.* case is inapposite because it concerned a QF directly interconnected to the purchasing utility, while the PáTu facility is an off-system QF that is responsible for arranging and paying for the transmission required to deliver its off-system QF energy to the Portland General border. *Id.* at 9 n.24 (citing January 22 Order, 150 FERC ¶ 61,032 at P 54 n.96 (citing *Entergy Services, Inc.*, 137 FERC ¶ 61,199, at P 52 (2011) (*Entergy*)).

22. In its rehearing request, Portland General states that the following facts are relevant to the Commission's reconsideration of this matter: (1) at all times during the QF arrangement, Portland General has purchased at full avoided cost rates from PáTu 100 percent of the energy generated by PáTu and delivered to Portland General; (2) when PáTu overschedules (i.e., PáTu produces less energy than it schedules), BPA delivers to Portland General all of PáTu's output, as well as integration energy produced by BPA, and Portland General pays PáTu the avoided cost rate for PáTu's QF energy and the market proxy price for the integration energy produced by BPA; (3) when PáTu underschedules (i.e., PáTu produces more energy than it schedules), BPA delivers the scheduled amount to Portland General, for which Portland General pays PáTu the avoided cost rate for the scheduled amount, and BPA compensates PáTu at the market rate for PáTu's excess energy; (4) BPA does not deliver any unscheduled QF energy from PáTu to Portland General; and (5) PáTu sets its own transmission schedule to deliver power to Portland General.<sup>53</sup>

23. Portland General introduces a new Exhibit PGE-1, which includes a spreadsheet with PáTu's output and scheduling for the entire 2014 calendar year.<sup>54</sup> Portland General states that only in very few circumstances (i.e., 7.4 percent of the netting periods in 2014) has PáTu under-scheduled its output, and that PáTu succeeded in delivering 98.99 percent of its metered output to Portland General in 2014. Portland General states that if PáTu were paid Portland General's avoided cost rate for the remaining 1.01 percent, it would have only received an additional \$8,411 in 2014. Portland General argues that PáTu's high success rate in delivering its output to Portland General indicates that the scheduling process is neither "overly restrictive" nor "un-meetable," as contemplated by the January 22 Order.<sup>55</sup>

24. Portland General asks the Commission to clarify that PáTu is responsible for any transmission service and associated costs necessary to deliver its output to Portland General. Portland General states that the Commission's regulations<sup>56</sup> and precedent require a QF to arrange and pay for transmission service necessary to move its output to a

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<sup>53</sup> *Id.* at 7-9.

<sup>54</sup> *Id.* at 4 n.12.

<sup>55</sup> *Id.* at 4-6, 10 (referencing the figures in Exhibit PGE-1).

<sup>56</sup> *Id.* at 12 (citing 18 C.F.R. § 292.303(d) (2014) (stating that "...[t]he rate for purchase by the electric utility to which such energy is transmitted shall be adjusted up or down to reflect line losses pursuant to § 292.304(e)(4) and shall not include any charges for transmission.")).

purchasing utility with which it is not interconnected.<sup>57</sup> Portland General therefore asserts that it is PáTu's obligation to obtain and pay for the transmission service necessary to deliver its output to Portland General.<sup>58</sup>

25. Portland General also requests clarification that the January 22 Order does not change the Commission's policy that delivery of a QF's energy to the purchasing utility's system is a prerequisite for receiving avoided cost rates. Portland General argues that requiring payment for undelivered power would not meet the just and reasonable standard and, therefore, its payment obligations only extend to energy generated by PáTu and delivered to Portland General.<sup>59</sup>

26. Portland General also asks that the Commission clarify that any of the following scheduling options would allow Portland General to satisfy its obligations under the January 22 Order: (1) PáTu could submit transmission schedules based upon a high range estimate of its expected output to reduce and potentially eliminate under-scheduled hours; or (2) PáTu and Portland General could move to a netting system using a longer period, such as a week or a month.<sup>60</sup> Portland General suggests that both scheduling options would satisfy its obligation to purchase PáTu's entire delivered net output, while adhering to the Standard Contract and maintaining the current Commission policy that the QF is responsible for entering into all of the necessary transmission service arrangements for the delivery of energy.<sup>61</sup>

27. Portland General also seeks clarification that the Commission did not find that PURPA requires dynamic scheduling. Portland General states that, consistent with Commission precedent, the January 22 Order appears to allow the purchasing utility (i.e., Portland General's merchant function) a choice whether to use dynamic scheduling

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<sup>57</sup> *Id.* at 12 & n.30 (citing e.g., *Avista Corp.*, 140 FERC ¶ 61,165 (2012) (*Avista*) (approving an arrangement in which a QF purchased transmission rights on Avista's system to wheel power to Idaho Power, the purchasing utility); *Kootenai Elec. Coop. Inc.*, 143 FERC ¶ 61,232, at P 32 (2013) (*Kootenai*); and *W. Mass. Elec. Co. v. FERC*, 165 F.3d 922, 923 (D.C. Cir. 1999).

<sup>58</sup> *Id.* at 12.

<sup>59</sup> *Id.* at 14-15.

<sup>60</sup> *Id.* at 15-17. Portland General states that, currently, it is netting PáTu's output over two daily blocks – a 16-hour “on-peak” block and an 8-hour (or 24-hour, on Sundays or holidays) “off-peak” block. *Id.* at 16.

<sup>61</sup> *Id.* at 18.

or some other method to meet its obligation to purchase the entire delivered net output from PáTu.<sup>62</sup>

28. In the alternative, Portland General seeks rehearing of the January 22 Order. Portland General argues that the Commission erred by: (1) partially granting PáTu's Complaint, because the evidence shows that Portland General has purchased all output generated by PáTu and delivered to Portland General's system; (2) allowing a QF to impose transmission and delivery costs upon a purchasing utility, in contravention of both PURPA and Commission precedent; (3) not strictly enforcing the scheduling provisions in the Standard Contract; and (4) inappropriately substituting its judgment for that of the Oregon Commission and failing to dismiss the Complaint against Portland General on procedural grounds.<sup>63</sup>

29. Portland General argues that the evidence before the Commission does not support a finding that Portland General must change its scheduling or payment practices for PáTu. Portland General argues that Commission precedent makes clear that, in the case of a QF that sells power to a utility to which the QF is not directly interconnected, the PURPA purchase obligation extends only to the delivered output.<sup>64</sup> Portland General states that only the power scheduled on BPA's transmission system is delivered to Portland General and, accordingly, no unscheduled power arrives at its Troutdale Substation. Portland General claims that the January 22 Order ignores this distinction because the order suggests that the Standard Contract "does not state that Portland General need only purchase what PáTu has scheduled, either in day-ahead preschedules or in real-time schedules."<sup>65</sup>

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<sup>62</sup> *Id.* at 17-18 (citing *Connecticut Valley Electric Co. Inc. v. Wheelabrator Claremont Co.*, 82 FERC ¶ 61,116, at 61,416 n.13 (1998), *order on reh'g and clarification*, 83 FERC ¶ 61,136 (1998)).

<sup>63</sup> *Id.* at 18-19.

<sup>64</sup> *Id.* at 20 & n.44 (citing *Kootenai*, 143 FERC ¶ 61,232, at P 32 (2013) (emphasis added) (stating that "[a] utility is obligated under PURPA to purchase the output of a QF as long as *the QF* can deliver its power to the utility."); *Pioneer Wind Park I, LLC*, 145 FERC ¶ 61,215, at P 38 (2013) (holding that a QF must deliver power "to the point of interconnection by the QF with [the] purchasing utility"); and *Pub. Serv. Co. of New Hampshire. v. New Hampshire Elec. Coop., Inc.*, 83 FERC ¶ 61,224, at 61,999-62,000 (1998) *reh'g denied*, 85 FERC ¶ 61,044 (1998)).

<sup>65</sup> *Id.* at 20 (citing January 22 Order, 150 FERC ¶ 61,032 at P 52).

30. According to Portland General, the practical effect of dynamically scheduling would enable PáTu to avoid all integration charges for transmission on the BPA system and, as a result, Portland General would be responsible for the integration costs on its own system.<sup>66</sup> Portland General states that PáTu is responsible for the transmission-related costs, including all ancillary and integration services associated with the transmission service agreement, to deliver its output to Portland General's electrical border.<sup>67</sup>

31. Portland General observes that the January 22 Order failed to acknowledge that the Commission is changing its position.<sup>68</sup> Portland General notes that the Supreme Court has stated that “[a]n agency may not . . . depart from a prior policy *sub silentio* or simply disregard rules that are still on the books.”<sup>69</sup> Portland General asserts that this ensures that an agency's changes are deliberate, and do not ignore policy and precedent.<sup>70</sup> Further, Portland General contends that a heightened standard applies when the “prior policy has engendered serious reliance interests which must be taken into account[,]”<sup>71</sup> and that the Oregon Commission and utilities under its jurisdiction have relied on the Commission's policy to limit the purchasing utility's obligation to the energy produced and delivered by the QF.<sup>72</sup>

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<sup>66</sup> *Id.* at 22-23.

<sup>67</sup> *Id.* at 23-24 & n.52, 54 (citing 18 C.F.R. § 292.303(d) (2014) (emphasis added) (stating that “[t]he rate for purchase by the [purchasing utility] . . . shall not include any charges for transmission.”); *Avista*, 140 FERC ¶ 61,165 (approving an arrangement in which a QF purchased transmission rights on Avista's system to wheel power to Idaho Power, the purchasing utility); *Kootenai*, 143 FERC ¶ 61,232 at P 32; and *W. Mass. Elec. Co. v. FERC*, 165 F.3d 922, 923 (D.C. Cir. 1999)).

<sup>68</sup> *Id.* at 24 & n.55 (citing *F.C.C. v Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009) (*Fox Television*), and *Mary V. Harris Found. V F.C.C.*, 776 F.3d 21, 24-25 (D.C. Cir. 2015)).

<sup>69</sup> *Id.* at 24-25 & n.57 (citing *Fox Television*, 556 U.S. at 515).

<sup>70</sup> *Id.* at 25 & n.58 (citing *Dillmon v. Nat. Transp. Safety. Bd.*, 588 F.3d 1085, 1089 (D.C. Cir. 2009)).

<sup>71</sup> *Id.* at 25 & n.59 (citing *Fox Television*, 556 U.S. at 515).

<sup>72</sup> *Id.* at 25 & n.60.

32. Portland General states that basic principles of contract interpretation require that the contract in question be interpreted as a whole.<sup>73</sup> According to Portland General, the January 22 Order suggests that the scheduling section of the Standard Contract (i.e., Section 4.4) is severable from the sections detailing purchase and delivery obligations (i.e., Sections 1.18 and 4.1), and implies that the relationship of these sections may somehow be unclear.<sup>74</sup> Portland General contends that the Commission selectively read the contract provisions because scheduling is a necessary predicate to delivery and delivery is a necessary predicate to payment; therefore, the only reading of the contract that gives effect to all contractual provisions is that the hourly preschedules are intended to ensure that the QF's output is actually delivered to Portland General at the contractually-designated point of delivery. Portland General argues that the Standard Contract provides a mix of cost and benefits, and selectively reading the contract to detach PáTu's obligation to schedule from Portland General's purchase obligation reshapes the contract in a manner not originally intended.<sup>75</sup>

33. According to Portland General, altering a state-jurisdictional PURPA contract, such as the Standard Contract, through a complaint is contrary to PURPA, which establishes general regulations that must be implemented by state public utility commissions. Portland General asserts that the authority granted to states is broad, and that numerous compliance options can satisfy PURPA as long as they "are reasonably designed to give effect to the [Commission's] rules."<sup>76</sup> Portland General asserts the Standard Contract "gives effect" to the Commission's PURPA rules because PáTu was able to deliver 98.99 percent of its metered output to Portland General in 2014, and that PáTu received the avoided cost rate for all scheduled and delivered output. Portland General therefore argues that the scheduling requirements are not un-meetable or otherwise unreasonable.<sup>77</sup>

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<sup>73</sup> *Id.* at 26 & n.61 (citing *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 63 (1995)).

<sup>74</sup> *Id.* at 26-27 (citing January 22 Order at P 52 & n.93).

<sup>75</sup> *Id.* at 27.

<sup>76</sup> *Id.* at 28 (citing *FERC v. Mississippi*, 456 U.S. 742, 753 (1982) (stating that "a state commission may comply with the statutory requirements by issuing regulations, by resolving disputes on a case-by-case basis, or by taking any other action reasonable designed to give effect to FERC's rules."); and *Indep. Energy Producers Ass'n v. Cal. Pub. Utils. Comm'n*, 36 F.3d 848 (9th Cir. 1994)).

<sup>77</sup> *Id.* at 28-29.

34. Portland General argues that, if the Commission believes that the scheduling provisions of the Standard Contract are inconsistent with its PURPA regulations, the Commission must utilize the statutory mechanism under section 210(h)(2)(B) of PURPA,<sup>78</sup> which authorizes enforcement actions against state regulatory authorities, not a public utility located in the state. Portland General therefore argues that PáTu's Complaint is not an appropriate method to seek relief under PURPA and, to the extent that the January 22 Order found that Portland General's adherence to the Standard Contract violated PURPA, PáTu's Complaint should be dismissed.<sup>79</sup>

**D. Additional Pleadings**

35. On February 26, 2015, PáTu filed a motion to strike new evidence included in Portland General's request for rehearing. On March 10, 2015, Portland General filed an answer to the requests for clarification by PáTu and CREA, and PáTu's motion to strike evidence. On March 16, 2015, PáTu filed a motion to strike Portland General's answer.

36. Also, on March 10, 2015, PacifiCorp filed a motion to intervene out-of-time and comments. On March 16, 2015, PáTu filed an answer in opposition to PacifiCorp's motion for late intervention.

37. PacifiCorp argues that good cause exists to grant its motion to intervene out-of-time because PáTu's request for rehearing seeks to impose relief beyond that requested in its Complaint by arguing that the integration costs of off-system QFs should be imposed on the purchasing utility.<sup>80</sup> PacifiCorp asserts that its intervention will not prejudice other parties, delay the proceeding, or place any additional burdens on any party to the proceeding. PacifiCorp argues that it is directly and substantially affected by any assertions that dynamic scheduling is required under PURPA, and it only recently became aware of the dynamic scheduling assertions in this proceeding. PacifiCorp states that it supports Portland General's arguments regarding dynamic scheduling under PURPA.<sup>81</sup>

38. PáTu responds that PacifiCorp filed its pleading four months after the intervention was due in this proceeding, and weeks after requests for rehearing were due. PáTu asserts that the Commission imposes a particularly high bar before it will allow

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<sup>78</sup> 16 U.S.C. § 824a-3(h)(2) (2012).

<sup>79</sup> Portland General Request for Rehearing at 29-30.

<sup>80</sup> PacifiCorp Motion to Intervene Out-of-Time and Comments at 3.

<sup>81</sup> *Id.* at 4.

interventions after a dispositive order has been issued and the rehearing deadline has passed,<sup>82</sup> and PacifiCorp has failed to meet that burden.

### **III. Discussion**

#### **A. Procedural Matters**

##### **1. PacifiCorp's Late-Filed Motion to Intervene and Comments**

39. In ruling on a late-filed motion to intervene, we apply the criteria set forth in Rule 214(d) of the Commission's Rules of Practice and Procedure,<sup>83</sup> and consider, among other things, whether the movant had good cause for failing to file the motion within the time prescribed. Late intervention at the early stages of a proceeding generally does not disrupt the proceeding or prejudice the interests of any party. We are therefore more liberal in granting late intervention at the early stages of a proceeding, but more restrictive as the proceeding nears its end.<sup>84</sup> Thus, a petitioner bears a higher burden to show good cause for late intervention after issuance of a final order in a proceeding, and generally it is Commission policy to deny late intervention at the rehearing stage, even when the petitioner claims that the decision establishes a broad policy of general application.<sup>85</sup>

40. PacifiCorp's attempted justification does not meet the higher burden for late intervention at the rehearing stage. In particular, PacifiCorp argues that good cause exists to grant its late-filed motion to intervene because PáTu's request for rehearing seeks to impose relief beyond that requested in its Complaint by arguing that the integration costs of off-system QFs should be imposed on their purchasing utilities. Contrary to PacifiCorp's assertions, PáTu's Complaint specifically sought monetary reparations from Portland General in the form of integration costs,<sup>86</sup> and therefore PacifiCorp cannot

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<sup>82</sup> PáTu Answer at 2 & n.4 (citing *Calpine Oneta Power, LP*, 121 FERC ¶ 61,189, at P 11 (2007)).

<sup>83</sup> 18 CFR § 385.214(d) (2014).

<sup>84</sup> See, e.g., *Columbia Gas Transmission Corp.*, 113 FERC ¶ 61,066, at 61,243 (2005).

<sup>85</sup> *Id.*

<sup>86</sup> PáTu Complaint at 31-32, Attachment 2 at PP 49-55, Attachment 13, Attachment 14; *accord*, January 22 Order, 150 FERC ¶ 61,032 at PP 2, 28.

reasonably argue that, only on rehearing, did PáTu, an off-system QF, seek the recovery of integration costs from Portland General, the purchasing utility.

41. In any event, even if we were to grant PacifiCorp's late-filed intervention, we would reject its comments in response to PáTu's request for rehearing. These comments amount to a late-filed request for rehearing. Untimely requests for rehearing are barred under section 313(a) of the FPA<sup>87</sup> and Rule 713(b) of the Commission's Rules of Practice and Procedure.<sup>88</sup>

## **2. Portland General's New Exhibit PGE-1**

42. Portland General seeks to introduce new evidence in this proceeding, in Exhibit PGE-1, which includes: (1) data based on PáTu's scheduling experience from October 1, 2014 through December 31, 2014; and (2) arithmetic computations using this data and other pre-existing data (included in PáTu's Complaint) detailing PáTu's scheduled, generated, and delivered output for the entirety of 2014. We will reject as untimely the new Exhibit PGE-1, which Portland General includes in its request for rehearing.<sup>89</sup> Parties are not permitted to introduce new evidence for the first time on rehearing since such practice would allow an impermissible moving target, and would frustrate needed administrative finality.<sup>90</sup> For the same reason, we also reject those portions of Portland General's request for rehearing that contain arguments and factual claims that are based on the rejected exhibit.

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<sup>87</sup> 16 U.S.C. § 8251(a) (2012).

<sup>88</sup> 18 C.F.R. §385.713(b) (2014). *See City of Campbell v. FERC*, 770 F.2d 1180, 1183 (D.C. Cir. 1985) (“The 30-day time requirement of [the FPA] is as much a part of the jurisdictional threshold as the mandate to file for a rehearing”). Further, even if we granted PacifiCorp's untimely motion to intervene, and even if we treated their pleading as an answer, the Commission's Rules of Practice and Procedure do not permit an answer to a request for rehearing. 18 C.F.R. § 385.713(d) (2014).

<sup>89</sup> In addition, we accept PáTu's motion to strike new evidence and the portion of Portland General's March 10, 2015 answer that responds to PáTu's motion to strike Portland General's evidence as a permissible answer to a motion. 18 C.F.R. § 385.213(a)(3) (2014).

<sup>90</sup> *See, e.g., Commonwealth Edison Co. & Commonwealth Edison Co. of Indiana*, 127 FERC ¶ 61,301, at 62,540 (2009) (*Commonwealth Edison*).

### 3. Answers to Requests for Rehearing

43. We find PáTu's petition for clarification and request for rehearing, Portland General's request for clarification or, in the alternative, request for rehearing, and CREA's motion for clarification to be, in substance, requests for rehearing.<sup>91</sup>

Accordingly, we will deny the portion of Portland General's March 10, 2015 answer that responds to PáTu's and CREA's requests for clarification as an impermissible answer to requests for rehearing.<sup>92</sup> We also will dismiss as moot the portion of PáTu's March 16, 2015 answer responding to this portion of Portland General's March 10, 2015 answer.

#### B. Substantive Matters

##### 1. Portland General's Purchase Obligation

44. The Commission determined in the January 22 Order that “. . . regardless of the transmission service that Portland General's merchant function uses to subsequently deliver the net output to Portland General's load, Portland General must take from PáTu its *entire* net output (all energy less onsite uses and losses) delivered and to do so at avoided cost rates.”<sup>93</sup> The Commission observed that “[i]f . . . Portland General were permitted on this basis to refuse to accept PáTu's entire net output [by only accepting delivery of scheduled net output], Portland General and other electric utilities could routinely escape their PURPA mandatory purchase obligation . . . by imposing overly restrictive or un-meetable scheduling requirements, or by the purchasing electric utility's failing to arrange the necessary transmission service to dispose of its purchase of the QF's entire net output once it has been delivered to the utility.”<sup>94</sup> The Commission further observed, “PáTu and BPA are willing to deliver PáTu's entire net output to Portland General using dynamic scheduling, and we find that the Standard Contract does not preclude the ability to do that or Portland General's obligation to purchase PáTu's entire net output by those means.”<sup>95</sup> Despite this explanation, Portland General still maintains that PáTu must deliver its output through an hourly scheduling arrangement

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<sup>91</sup> *Stowers Oil and Gas Company, et al.*, 27 FERC ¶ 61,001, at 61,002 n.3 (1984).

<sup>92</sup> Rule 713(d)(1) of the Commission's Rules of Practice and Procedure prohibits an answer to a request for rehearing. 18 C.F.R. § 385.713(d)(1) (2014); *see, e.g., California Indep. Sys. Operator Corp.*, 91 FERC ¶ 61,026, at 61,085 (2000).

<sup>93</sup> January 22 Order, 150 FERC ¶ 61,032 at P 54 (footnote omitted).

<sup>94</sup> *Id.* P 53.

<sup>95</sup> *Id.* P 55.

with BPA, and that PáTu's unscheduled net output is not actually delivered to Portland General and therefore Portland General is not obligated to purchase that portion of PáTu's net output.<sup>96</sup>

45. As the Commission noted in the January 22 Order, the Oregon Commission addressed the scheduling provisions of the Standard Contract and it concluded that the Standard Contract does not mention how PáTu should honor the prescheduled amount.<sup>97</sup> Specifically, the Oregon Commission stated that:

The contract addresses scheduling coordination between [Portland General] and [PáTu], and requires [PáTu] to honor the prescheduled amount. The [Standard Contract] does not specify how [PáTu] should honor the prescheduled amount—whether by dynamic transfer, the purchase of imbalance and wind integration services, or in some other manner. Again, we note that the [Standard Contract] is a standard contract not tailored to specific situations. One or both parties may decide to take certain actions to implement the [Standard Contract], such as setting up dynamic transfer or entering into a third party contract for imbalance and wind integration services, but such actions are not mandated by the contract, whether directly by its terms or indirectly by contractual principles such as good faith and fair dealing.<sup>98</sup>

46. Based on the record, it is clear that Portland General (and not PáTu) has dictated the manner by which PáTu currently delivers its net output to Portland General to honor the prescheduled amount. By requiring a firm, whole MW-hour product from PáTu, Portland General prevents PáTu from delivering its entire net output and Portland General is thereby able to escape its mandatory purchase obligation as it applies to PáTu's unscheduled net output. In *Entergy*, however, the Commission found that such actions were impermissible: “[e]xcept in certain limited circumstances, Entergy is obligated under federal law to purchase unscheduled QF energy.”<sup>99</sup> While

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<sup>96</sup> Portland General Request for Rehearing at 14-15.

<sup>97</sup> January 22 Order, 150 FERC ¶ 61,032 at P 52.

<sup>98</sup> PáTu Complaint, Attachment 9 at 14 (*PáTu Wind Farm, LLC vs. Portland General Electric Co.*, Docket No. UM 1566, Order No. 14-287 (Oregon Commission Aug. 13, 2014)). See January 22 Order, 150 FERC ¶ 61,032 at P 52 n.94.

<sup>99</sup> *Entergy*, 137 FERC ¶ 61,199 at P 52.

Portland General argues that the Commission's reference to *Entergy* is inapposite because it considered the obligation to purchase an on-system QF's output, whereas here, PáTu is an off-system QF.<sup>100</sup> Portland General seeks to establish a distinction not previously recognized by the Commission; the Commission's regulations require that "any electric utility . . . shall purchase such energy or capacity [made available indirectly from the off-system QF] . . . as if the qualifying facility were supplying energy or capacity directly to such electric utility."<sup>101</sup> The Commission's finding in *Entergy* applies equally to the facts in this proceeding because the Commission's regulations require the electric utility's purchase obligation to be applied to both off-system as well as on-system QFs on a comparable basis. Portland General must treat PáTu, an off-system QF, as it would treat an on-system QF, and Portland General must purchase PáTu's entire net output. Where PáTu has made arrangements to transmit to Portland General its entire net output pursuant to a dynamic schedule with BPA, Portland General may not require a different type of schedule and then claim that it is only obligated to purchase and pay avoided cost rates for a lesser amount of energy delivered pursuant to that different type of schedule.

47. Accordingly, we find unpersuasive Portland General's argument that its current practice is consistent with the January 22 Order, and we disagree with Portland General's argument that the January 22 Order is inconsistent with Commission precedent. Of course, under PURPA and the Commission's regulations and precedent, the QF is responsible for delivering its net output to the purchasing utility.<sup>102</sup> The issue in this proceeding, however, is whether the purchasing utility, Portland General, may take actions and dictate scheduling requirements that limit the deliverability of the QF's net output so that the purchasing utility can avoid its mandatory obligation to purchase the QF's entire net output. In the January 22 Order, the Commission found that it cannot.

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<sup>100</sup> Portland General Request for Rehearing at 9 n.24.

<sup>101</sup> 18 C.F.R. § 292.303(d) (2014).

<sup>102</sup> The Commission has specifically held that the QF's obligation to the purchasing utility is limited to delivering energy to the point of interconnection by the QF with that purchasing utility, and it is the purchasing utility's obligation to obtain transmission service in order to, in turn, deliver the QF energy from the point of interconnection with the purchasing utility to the purchasing utility's load. *Pioneer Wind Park I, LLC*, 145 FERC ¶ 61,215, at P 38 (2013). In the case of PáTu, an off-system QF resource, PáTu's transmission responsibility ends, and Portland General's transmission responsibility begins, with the delivery of PáTu's net output to the Portland General system at the Troutdale Substation.

48. Furthermore, Portland General's proposal that PáTu should over-schedule energy<sup>103</sup> is built on a faulty premise – that Portland General is only required to purchase PáTu's scheduled net output delivered to Portland General. Again, it is Portland General's responsibility, under PURPA and the Commission's regulations, to purchase PáTu's net output, scheduled and unscheduled, and therefore Portland General cannot set requirements that limit its purchase to only PáTu's scheduled net output. Portland General's proposal that PáTu over-schedule energy is also inconsistent with Section 4.4 of the Standard Contract, which provides that PáTu "shall make commercially reasonable efforts to schedule in any hour an amount equal to its expected Net Output for such hour."<sup>104</sup> Also, in order to over-schedule, PáTu must incur additional charges and penalties beyond the reasonable cost of transmitting its power over BPA's system to Portland General. Essentially, Portland General is only willing to accept PáTu's entire net output if PáTu over-schedules and incurs additional charges and penalties. Portland General's actions, even if PáTu chooses to intentionally over-schedule in response (as PáTu appears to have done), are inconsistent with PURPA,<sup>105</sup> the Commission's regulations,<sup>106</sup> and the Standard Contract.<sup>107</sup>

49. Portland General claims that, to the extent that the January 22 Order held that the scheduling provisions of the Standard Contract violate PURPA, the Commission should direct its attention to the Standard Contract and the Oregon Commission, and not

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<sup>103</sup> Portland General Request for Rehearing at 15-16.

<sup>104</sup> PáTu Complaint, Attachment 3 at 8, Section 4.4 of the Standard Contract.

<sup>105</sup> 16 U.S.C. § 824a-3(a) (2012) (encouraging small power production).

<sup>106</sup> 18 C.F.R. § 292.303(d) (2014) (finding that any "electric utility . . . shall purchase such energy or capacity [made available indirectly] . . . as if the qualifying facility were supplying energy or capacity directly to such electric utility.").

<sup>107</sup> While we have chosen to comment on Portland General's proposal that PáTu over-schedule its energy because it appears that PáTu has over-scheduled its energy, we note that Portland General's over-scheduling proposal and its netting proposal were submitted to us for the first time in Portland General's rehearing request, and it is improper to submit not just new evidence, but also new theories at the rehearing stage of a proceeding. *See, e.g., Commonwealth Edison*, 127 FERC ¶ 61,301 at 62,540; *Midcontinent Indep. Sys. Operator, Inc.*, 150 FERC ¶ 61,024, at P 16 (2015); *Ca. Indep. Sys. Operator Corp.*, 129 FERC ¶ 61,144, at P 59 (2009).

Portland General.<sup>108</sup> However, the January 22 Order did not find that the Standard Contract violates PURPA.<sup>109</sup> On the contrary, it is Portland General's actions dictating the manner by which PáTu delivers its net output, which are not mandated by the Standard Contract, that are in violation of PURPA. Therefore, PáTu's filing a FPA section 206 Complaint against Portland General was appropriate.

50. Portland General also argues that the Commission failed to interpret the Standard Contract as a whole. We disagree. The January 22 Order considered the entire Standard Contract and relied upon the provisions that are relevant to the proceeding. For example, the January 22 Order noted that the Standard Contract defines "Net Output" in kW-hours, yet Portland General unilaterally requires PáTu to schedule and deliver its output in whole MW-hour increments.<sup>110</sup> Further, the January 22 Order observed that the Standard Contract defines Portland General's obligation to purchase PáTu's entire Net Output.<sup>111</sup> The January 22 Order also found that "Section 4.4 does not define those best efforts [to schedule] as Portland General's purchase obligation."<sup>112</sup> The Commission noted that "Section 4.4 does not state that Portland General need only purchase what PáTu has scheduled, either in day-ahead pre-schedules or in real-time schedules."<sup>113</sup>

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<sup>108</sup> Portland General Request for Rehearing at 28-30 (arguing that to the extent the January 22 Order held that the scheduling provisions of the Standard Contract violate PURPA, the Commission must proceed against the state regulatory agency in an enforcement action under PURPA section 210(h)(2), 16 U.S.C. § 824a-3(h)(2) (2012)).

<sup>109</sup> Indeed, the Commission found that Sections 1.18 and 4.1 of the Standard Contract, which expressly provide for the sale to Portland General of the net output produced by PáTu and delivered to Portland General at its Troutdale Substation, is consistent with section 292.303(a) of the Commission's regulations that requires each electric utility to purchase "any energy and capacity which is made available from a [QF]." January 22 Order, 150 FERC ¶ 61,032 at P 51.

<sup>110</sup> *Id.* P 6 n.7 (citing Complaint, Attachment 3, Standard Contract §1.18).

<sup>111</sup> *Id.* PP 50-51 & n.89 (citing Complaint, Attachment 3, Standard Contract §4.1 & Exhibit A).

<sup>112</sup> *Id.* P 52 n.92.

<sup>113</sup> *Id.* P 52 & n.93 (citing *Florida Power & Light Co.*, 67 FERC ¶ 61,141, at 61,396 & n.11 (1994) ("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"; the Commission repeated that "[i]t is a

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51. By contrast, while the January 22 Order considered the Standard Contract in its entirety, Portland General's interpretation of the Standard Contract narrowly relies on one provision (i.e., Pricing Options for Standard Contracts) from Schedule 201, which provides the avoided cost information for the Standard Contract.<sup>114</sup> Portland General's argument appears to be that, because scheduling is a predicate to delivery and delivery is a predicate to payment, Portland General is only required to purchase the net output PáTu pre-schedules. However, nothing in the Standard Contract precludes Portland General from paying PáTu for a more precise quantity (i.e., to the nearest kW-hour of PáTu's actual net output delivered to Portland General); therefore, we are not persuaded by Portland General's argument that it is only required to purchase PáTu's pre-scheduled output.

## 2. Dynamic Scheduling

52. Portland General asserts "that the purchase price . . . was for a more valuable scheduled product delivered to [Portland General] and to accept the variable output PáTu should pay the integration costs to preserve the economic benefit of agreement."<sup>115</sup> However, in its Order No. 05-584, the Oregon Commission "conclude[d] that intermittent and firm resources should be valued equally, and direct[ed] utilities to pay full avoided costs pursuant to the appropriate methodology for all energy delivered under a QF standard contract, but only up to the nameplate rating of the facility."<sup>116</sup> Therefore, Portland General's contention that the avoided cost rate it pays for PáTu's output is for a more valuable scheduled product is, in fact, at odds with the Oregon Commission's policy. Moreover, we note that Portland General has provided no basis for us to find that the purchase price in the Standard Contract was for a more valuable scheduled product.

53. Furthermore, PáTu argues that, under Oregon Commission policy, small wind QFs, such as PáTu, were not subject to wind integration charges at the time of execution

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reasonable interpretation device to conclude that what someone has not said, someone has not meant"); *accord, e.g., Discovery Gas Transmission LLC*, 148 FERC ¶ 61,183, at P 42 (2014)).

<sup>114</sup> Portland General Request for Rehearing at 27 (citing Complaint, Attachment 3 at 23).

<sup>115</sup> PáTu Request for Rehearing, Attachment 1, letter sent from Portland General to Gregory Adams at Richardson Adams, LLC, dated February 6, 2015.

<sup>116</sup> *Staff's Investigation Relating to Electric Utility Purchases from Qualifying Facilities*, Docket No. UM 1129, Order No. 05-584 at 28 (footnote omitted) (Oregon Commission May 13, 2005).

of PáTu's Standard Contract. PáTu points to the Oregon Commission's finding adopting its staff's position that "[f]or small wind projects under standard contracts, . . . the method for calculating standard avoided cost rates adopted in Order No. 05-584 is a reasonable estimate of the costs the utility will avoid by purchasing from the small QF and the standard avoided costs should not be adjusted for integration costs."<sup>117</sup> Thus, the Oregon Commission has found that, under the Standard Contract pursuant to which PáTu sells to Portland General, small QFs such as PáTu are not responsible for additional wind integration costs because those costs were already taken into account in calculating the avoided cost rate.

54. With regard to Portland General's assertion that wind integration service costs are transmission and delivery costs that should be paid for by PáTu, we note that the Commission's regulations provide factors that state commissions shall, to the extent practicable, take into account in their determination of a utility's avoided cost rates.<sup>118</sup> As the Commission has previously explained, "states are allowed a wide degree of latitude in establishing an implementation plan for section 210 of PURPA, as long as such plans are consistent with our regulation. Similarly, with regard to review and enforcement of avoided cost determination under such implementation plans, we have said that our role is generally limited to ensuring that the plans are consistent with section 210 of PURPA . . . ."<sup>119</sup> In stating that "intermittent and firm resources should be

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<sup>117</sup> PáTu Complaint at 6 (citing *In re Staff's Investigation into Qualifying Facilities*, Docket No. UM 1129, Order No. 07-360 at 24 (Oregon Commission Aug. 20, 2007)).

<sup>118</sup> 18 C.F.R. § 292.304(e) (2014).

<sup>119</sup> *Ca. Public Util. Comm'n*, 133 FERC ¶ 61,059, at P 24 (2010) (explaining that the determinations that a state commission makes to implement the rate provisions of section 210 of PURPA are by their nature fact-specific and include consideration of many factors, that the Commission is reluctant to second guess a state commission's determinations, and therefore the Commission's regulations provide state commissions with guidelines on factors to be taken into account, to the extent practicable, in determining a utility's avoided cost of acquiring the next unit of generation) (citing *Am. REF-FUEL Co. of Hempstead*, 47 FERC ¶ 61,161, at 61,533 (1989); *Signal Shasta Energy Co., Inc.*, 41 FERC ¶ 61,120, at 61,295 (1987); *LG&E Westmoreland Hopewell*, 62 FERC ¶ 61,098, at 61,712 (1993)), *reh'g denied*, 134 FERC ¶ 61,044 (2011); *see also Policy Statement Regarding the Commission's Enforcement Role under Section 210 of the Public Utility Regulatory Policies Act of 1978*, 23 FERC ¶ 61,304, at 61,646 (1983).

valued equally,”<sup>120</sup> the Oregon Commission has determined that the avoided cost rate for small wind QFs such as PáTu should not be reduced to reflect the cost of wind integration. The Oregon Commission also adopted its staff’s position that “[f]or small wind projects under standard contracts, . . . the method for calculating standard avoided cost rates adopted in Order No. 05-584 is a reasonable estimate of the costs the utility will avoid by purchasing from the small QF and the standard avoided costs should not be adjusted for integration costs.”<sup>121</sup> We therefore defer to the Oregon Commission’s implementation of PURPA and its treatment of integration costs.

55. Accordingly, the January 22 Order did not establish a broad policy as to which party, the purchasing utility or the QF, is responsible for wind integration costs. Rather, here, the Oregon Commission has already considered the issue of wind integration costs as part of its implementation of PURPA and calculation of avoided costs for the Standard Contract.

56. As for PáTu’s request that the Commission clarify that Portland General is required to cooperate to allow PáTu to deliver its entire net output via dynamic scheduling, we see no need to do so. We found in the January 22 Order that Portland General is required to take PáTu’s entire net output delivered by BPA to Portland General’s system at its Troutdale substation.<sup>122</sup> In accordance with Commission precedent, PáTu has the responsibility to deliver its output to Portland General,<sup>123</sup> and PáTu has demonstrated that BPA is willing to provide dynamic scheduling to PáTu so that PáTu can deliver its entire net output to Portland General. Therefore, it is Portland General’s obligation to accept PáTu’s entire net output, whether by dynamic scheduling or some other method. Regardless of the transmission or delivery service Portland General’s merchant function eventually decides to use to deliver PáTu’s net output from Portland General’s system at the Troutdale Substation to Portland General’s load, PURPA and the Standard Contract require Portland General to purchase PáTu’s entire net output, including both the scheduled as well as the unscheduled net output delivered to

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<sup>120</sup> *Staff’s Investigation Relating to Electric Utility Purchases from Qualifying Facilities*, Docket No. UM 1129, Order No. 05-584 at 28 (footnote omitted) (Oregon Commission May 13, 2005).

<sup>121</sup> PáTu Complaint at 6 (citing *In re Staff’s Investigation into Qualifying Facilities*, Docket No. UM 1129, Order No. 07-360 at 24 (Oregon Commission Aug. 20, 2007)).

<sup>122</sup> January 22 Order, 150 FERC ¶ 61,032 at PP 54-55.

<sup>123</sup> *See supra* note 102.

Portland General's system, at full avoided cost rates. For this reason, PáTu's request is unnecessary in order to provide PáTu relief under PURPA and the Standard Contract.

### **3. Standards of Conduct and Discrimination**

57. PáTu asserts that the Commission erred in finding that the communications between Portland General's transmission and merchant function personnel were permissible under the transparency rule, which states that "[a] transmission provider's transmission function employee may discuss with its marketing function employee a specific request for transmission service submitted by the marketing function employee[,]"<sup>124</sup> because the communications concerned delivery of PáTu's output across the BPA transmission system to Portland General's Troutdale Substation, rather than transmission service over Portland General's system from its Troutdale Substation to its load. We disagree. After purchasing PáTu's entire net output at the its Troutdale Substation, Portland General's merchant function must then choose how to deliver that net output on Portland General's system to Portland General's load.<sup>125</sup> Therefore, under the transparency rule, Portland General's merchant function, as the transmission customer, was entitled to discuss with Portland General's transmission function the request for transmission service under the Portland General OATT to deliver PáTu's output to Portland General's load over Portland General's system. It is reasonable that those communications included discussion regarding how PáTu's output would be transmitted on the adjoining BPA system and received by Portland General's merchant function at the border of the Portland General system. However, as noted above, Portland General did act impermissibly by limiting its purchases from PáTu, in violation of PURPA and our PURPA regulations, but it did not violate the transparency rule.

58. Consistent with the Commission's finding under the transparency rule, we also disagree with PáTu's assertion that Portland General's merchant function has violated the independent functioning rule under the Standards of Conduct, which prohibits Portland General's merchant function from conducting a transmission function.<sup>126</sup> Again, as the transmission customer, Portland General's merchant function has the right to choose the form of transmission service it takes to, in turn, deliver PáTu's output to Portland General's load on the Portland General system. Therefore, the merchant function's decision does not constitute the impermissible conducting of a transmission function. Further, we also disagree with PáTu's assertion that Portland General's merchant function violated section 205 of the FPA, which prohibits unreasonable

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<sup>124</sup> 18 C.F.R. § 358.7(b) (2014).

<sup>125</sup> See January 22 Order, 150 FERC ¶ 61,032 at 54.

<sup>126</sup> 18 C.F.R. § 358.5 (2014).

differences in transmission service,<sup>127</sup> and the non-discrimination rule under the Standards of Conduct, which requires the transmission provider to treat transmission customers on a non-discriminatory basis.<sup>128</sup> Again, it is Portland General's merchant function, as the transmission customer, and not PáTu, that requires transmission service over Portland General's transmission system; therefore, there is no evidence pointing towards transmission discrimination against PáTu.

59. We also note that PáTu's request that Portland General be required to include provisions for dynamic scheduling in its OATT was submitted to us for the first time at the rehearing stage of the proceeding. We decline to consider this new form of relief at the late stage of this proceeding. We do not allow complainants to amend their complaint to seek an alternative form of relief on rehearing because such a submission does not allow interested parties sufficient notice of the new relief requested, nor permit an opportunity to respond.<sup>129</sup>

#### **4. PáTu's November 14, 2014 Answer**

60. PáTu seeks rehearing of the Commission's determination to reject its November 14, 2014 answer in response to Portland General's October 30, 2014 answer and motion for summary disposition on the grounds that the Commission's Rules of Practice and Procedure provide an opportunity to answer a motion.<sup>130</sup> While styled as a motion for summary disposition, Portland General's pleading was, in substance, an answer to the Complaint.<sup>131</sup> Therefore, the Commission's rejection of PáTu's November 14, 2014 answer as an improper answer to an answer was within our discretion.<sup>132</sup>

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<sup>127</sup> 16 U.S.C. § 824d(b)(2) (2012).

<sup>128</sup> 18 C.F.R. § 358.4 (2014).

<sup>129</sup> *330 Fund I, L.P. v. N.Y. Indep. Sys. Operator, Inc.*, 126 FERC ¶ 61,151, at P 56 (2009).

<sup>130</sup> PáTu Request for Rehearing at 14 (citing 18 C.F.R. § 385.213 (2014)).

<sup>131</sup> *See supra* note 91.

<sup>132</sup> January 22 Order, 150 FERC ¶ 61,032 at P 48 (citing 18 C.F.R. § 385.213(a)(2) (2014) (prohibiting an answer to an answer unless otherwise ordered by the decisional authority)).

The Commission orders:

PáTu's, CREA's and Portland General's requests for rehearing of the January 22 Order are hereby denied, as discussed in the body of this order.

By the Commission.

( S E A L )

Kimberly D. Bose,  
Secretary.