

106 FERC ¶ 61,197  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Pat Wood, III, Chairman;  
Nora Mead Brownell, Joseph T. Kelliher,  
and Suedeen G. Kelly.

Idaho Power Company

Docket No. ER03-1138-001

ORDER GRANTING REHEARING  
AND PROVIDING CLARIFICATIONS

(Issued March 4, 2004)

1. Idaho Power Company (Idaho Power) filed a request for rehearing and for clarification of the Commission's September 25, 2003 Order in this proceeding.<sup>1</sup> That order dismissed, as premature, Idaho Power's notice of intent to cancel Service Agreement No. 147 (Agreement) between itself and an affiliate of Arizona Public Service Company (Arizona Public Service).<sup>2</sup> In this order, we will grant rehearing and provide the requested clarifications.

**Background**

2. On March 16, 2001, in Docket No. EL01-22-000, the Commission found that, for purposes of Section 2.2 of Idaho Power's Open Access Transmission Tariff (OATT),<sup>3</sup>

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<sup>1</sup> Idaho Power Company, 104 FERC ¶ 61,325 (2003) (September 25 Order).

<sup>2</sup> As we noted in that order, consistent with our prior orders, we will refer to the affiliate, Pinnacle West Capital Corp., as Arizona Public Service.

<sup>3</sup> Section 2.2 of Idaho Power's OATT provides, in relevant part:

If, at the end of the contract term, the Transmission Provider's Transmission System cannot accommodate all of the requests for transmission service, the existing firm service customer must agree to accept a contract term at least equal to a competing

(continued...)

Arizona Public Service's November 9, 2000 request to roll over its existing service and an October 24, 2000 request for transmission service from IP Merchant, which would use the same available transmission capacity, were not competing requests. Arizona Public Service was contractually limited to 18-month increments;<sup>4</sup> IP Merchant was not so limited and had requested transmission service for ten years. The Commission found that the two requests were not substantially the same in all respects, and therefore not subject to Section 2.2's tie-breaking mechanism. It directed Idaho Power to honor Arizona Public Service's exercise of its rollover rights, and to extend the existing transmission service for 18 months.<sup>5</sup>

3. On review, the United States Court of Appeals for the District of Columbia Circuit (Court) reversed the Commission, finding that Arizona Public Service's request and IP Merchant's request were competing requests. The Court held that Arizona Public Service's 18-month limitation did not affect the terms of a competitor's request for transmission service, and that for Arizona Public Service to exercise its rollover rights, it would have had to offer a contract term at least as long as that offered by IP Merchant. The Court remanded the case to the Commission for appropriate action.<sup>6</sup>

4. On remand, the Commission concluded that the two requests for transmission service were competing requests, and that the tie-breaking mechanism contained in section 2.2 of Idaho Power's OATT governs. Since Idaho Power is unable to accommodate both competing requests, the Commission stated that section 2.2 requires Arizona Public Service either to match IP Merchant's longer-term transmission service request or to forfeit its transmission service request. The Commission continued that, as the Court had ruled, Idaho Power's OATT does not excuse the incumbent customer from

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request by any new Eligible Customer and to pay the current just and reasonable rate, as approved by the Commission, for such service.

<sup>4</sup>A prior entitlement to the transmission capacity and the 18 months needed to complete upgrades for additional capacity limit Arizona Public Service's use of the transmission capacity to 18-month increments. See Idaho Power Company, 94 FERC ¶ 61,311 at 62,143 n.2 (2001).

<sup>5</sup>See Docket No. EL01-22 proceedings: Idaho Power Company, 94 FERC ¶ 61,311, order on reh'g, 95 FERC ¶ 61,224 (2001), rev'd and remanded sub nom. Idaho Power Co. v. FERC, 312 F.3d 454 (D.C. Cir. 2002) (No. 01-1314), order on remand, 104 FERC ¶ 61,016 (Remand Order), reh'g pending.

<sup>6</sup> 312 F.3d at 465.

matching a competitor's longer-term offer on the grounds that the incumbent customer cannot match a competing request due to system constraints or contractual constraints. The Commission concluded that because Arizona Public Service cannot match IP Merchant's ten-year service request, Idaho Power is not required to honor Arizona Public Service's 18-month rollover request, but could instead provide the transmission service requested by IP Merchant.<sup>7</sup> Arizona Public Service filed a request for rehearing of the Remand Order (Docket No. EL01-22-003).

5. In the September 25 Order, the Commission dismissed Idaho Power's notice of cancellation as premature because of the lack of finality in the Docket No. EL01-22 proceedings. The Commission relied on Article 8.0 of the Agreement, finding that it obligated Idaho Power to provide transmission service subject to the outcome of the Docket No. EL01-22 proceeding and "any appeal thereof."<sup>8</sup> Because Arizona Public Service's rehearing request of the Remand Order was pending, the Commission held that the Docket No. EL01-22 proceeding was not yet final, and that Idaho Power remained obligated to provide transmission service to Arizona Public Service.<sup>9</sup>

6. The Commission further required, upon Idaho Power becoming no longer obligated to provide transmission service to Arizona Public Service, that Idaho Power submit a notice of cancellation and a transmission service agreement with IP Merchant for 400 MW and a period of ten years.<sup>10</sup>

### **Idaho Power's Rehearing Request**

7. On rehearing, Idaho Power contends that, in light of the Court's decision in No. 01-1314, and the Commission's Remand Order, Arizona Public Service lost its entitlement under the Agreement to 75 MW of transmission service as of April 1, 2001 (the expiration date of the original 18-month service agreement). Idaho Power objects

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<sup>7</sup> 104 FERC ¶ 61,016 at P 16-18.

<sup>8</sup> Article 8.0 of the Agreement, in Attachment C of Idaho Power's July 31, 2003 notice of cancellation. In its entirety, Article 8.0 states: "The Transmission Provider's obligation to provide service under this Service Agreement is subject to the outcome of Idaho Power Company, FERC Docket No. EL01-22, Idaho Power Company v. FERC, No. 01-1314 (D.C. Cir.), and any appeal thereof."

<sup>9</sup> 104 FERC ¶ 61,325 at P 11.

<sup>10</sup> Id. at P 12.

that the September 25 Order permits Arizona Public Service to receive the contested transmission service through March 31, 2004 (the Agreement's expiration date), if Arizona Public Service's appeals are not exhausted before then. This, Idaho Power urges, is directly contrary to the Court's directive to the Commission to award this service to IP Merchant. Idaho Power urges the Commission to implement the Court's decision by terminating service to Arizona Public Service.

8. Idaho Power disputes the Commission's interpretation of Article 8.0 of the Agreement. It states that the article originated in the first roll-over service agreement (covering April 1, 2001 through September 30, 2002), which it filed to comply with the Commission's directive to award the contested service to Arizona Public Service. It explains that the article ensured that if Idaho Power was successful on rehearing or in its appeal of the Commission's order, there could be no question that the service to Arizona Public Service would terminate, permitting the award of the service to IP Merchant. It maintains that the article does not state that the outcome of the proceeding must be a final outcome, no longer subject to judicial review. Idaho Power propounds that, according to the current outcome in Docket No. EL01-22, IP Merchant is entitled to the 75 MW, and that if the outcome should change, Arizona Public Service may be entitled to a restoration of service.

9. Idaho Power urges the Commission, if it believes that Article 8.0 is susceptible of interpretation in two ways, to interpret it to implement the Court's decision. Regardless of the language in the Agreement, Idaho Power points out that the Commission has clear authority to terminate service that was wrongly granted, as the Court held. Idaho Power filed a notice of termination only to comply with the Commission's regulations that view termination as a change in rate under section 205 of the FPA, 16 U.S.C. § 824(d) (2000).

10. Idaho Power argues that the Commission's September 25 Order effectively stays both the Court's decision and the Commission's Remand Order, without a request for stay ever having been submitted or justified. This, it continues, violates the Commission's regulation that unless otherwise ordered by the decisional authority, a request for rehearing does not operate as a stay of the order for which rehearing is sought.<sup>11</sup> Moreover, continues Idaho Power, the Commission has no authority to stay the action of the Court. Idaho Power fears a cycle of the Commission denying Arizona Public Service's request for rehearing of the remand order followed by Arizona Public Service appealing that order to the Court which will simply return the case to the

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<sup>11</sup> See Rule 713(e) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.713(e) (2003).

Commission for further order, of which Arizona Public Service could again seek rehearing and Court appeal.

11. Idaho Power requests clarification that the required amount of capacity in the forthcoming service agreement with IP Merchant is for 75 MW, the subject of the Docket No. EL01-22 competing requests proceeding, and not for 400 MW, the total of IP Merchant's requests, as stated in the September 25 Order. Idaho Power seeks assurance that the Commission is not now conditioning IP Merchant's entitlement to the contested 75 MW on purchase of additional capacity, which would require costly transmission upgrades.

12. Lastly, Idaho Power requests clarification of the ending date of the ten-year term for IP Merchant's service. It states that the September 25 Order directs Idaho Power to tender a service agreement "for a period of ten years."<sup>12</sup> Idaho Power asks whether the Commission intends the termination date to be the date specified by IP Merchant in its Open Access Same-time Information System (OASIS) request (December 31, 2010) or ten years following the agreement's commencement.

### **Discussion**

13. We will grant Idaho Power's rehearing request with respect to our finding that the existing service agreement for Arizona Public Service cannot be terminated because the proceeding in Docket No. EL01-22 is not yet final and Idaho Power remains obligated to provide transmission service to APS. The Commission based its decision on language in the service agreement providing that "The Transmission Provider's obligation to provide service under this Service Agreement is subject to the outcome of Idaho Power Company, FERC Docket No. EL01-22, Idaho Power Company v. FERC, No. 01-1314 (D.C. Cir.), and any appeal thereof."<sup>13</sup> The Commission determined on the face of that language that Docket No. EL01-22 would have to be final before it would entertain Idaho Power's notice of cancellation. Upon further consideration, we believe that Idaho Power offers the appropriate interpretation of the language.

14. Upon reconsideration, we conclude that the appropriate reading of Article 8.0 is that the language "and any appeal thereof" refers to the Court's decision in No. 01-1314 and means any appeal of that decision to the Supreme Court. Thus, because the Court found that the Commission incorrectly awarded the service to Arizona Public Service,

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<sup>12</sup> 104 FERC ¶ 61,325 at P 12.

<sup>13</sup> Id. at P 11.

and directed the Commission to consider an appropriate remedy in light of the Court's decision, which the Commission has done, we find that Idaho Power is no longer obligated, under Article 8.0, to provide service under the Agreement.

15. While the foregoing is a sufficient basis for granting rehearing, we also note that this interpretation is consistent with Idaho Power's rationale for including the language in the Agreement. As Idaho Power points out, it disagreed with the Commission's order requiring Idaho Power to tender a service agreement to Arizona Public Service, and believed, instead, that the service should be awarded to IP Merchant. Thus, according to Idaho Power, it included the section 8.0 language in the Agreement to ensure that if it were successful on rehearing or in its appeal of the Commission's order, there would be no question that the service to Arizona Public Service would terminate.<sup>14</sup> Further, as Idaho Power points out, interpreting Article 8.0 as the Commission did would only encourage Arizona Public Service to file further appeals and could result in an endless loop of rehearings and appeals that would prevent Idaho Power from terminating the service to APS. This would effectively stay the Court's decision and the Commission's subsequent orders, a result that the Commission did not intend.

16. Accordingly, we will grant rehearing and accept Idaho Power's notice of cancellation on condition, as discussed in the September 25 Order, that Idaho Power submit a transmission service agreement with IP Merchant for 75 MW and for a term that expires on December 31, 2010.<sup>15</sup>

17. We will provide the two clarifications requested by Idaho Power. We will clarify that the capacity to be stated in the transmission service agreement with IP Merchant should be 75 MW, the subject of the competing requests in Docket No. EL01-22, and not

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<sup>14</sup> In this regard, the Court ruled that the Commission incorrectly awarded the service to Arizona Public Service and, on remand, the Commission found that IP Merchant, not Arizona Public Service, is entitled to the service. Moreover, concurrent with the issuance of this order, the Commission is issuing an order denying rehearing of the Remand Order.

<sup>15</sup> See discussion *infra* concerning Idaho Power's requests for clarification. Also, we note that on January 29, 2004, in Docket No. ER04-495-000, Idaho Power filed a service agreement between itself and IP Merchant, and on January 30, 2004, in Docket (No. ER04-503-000, a notice of cancellation of the agreement effective March 31, 2004. We will address those filings in subsequent orders.

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400 MW. Our reference to 400 MW in the September 25 Order was in error.<sup>16</sup> We will clarify also that the termination date for this service agreement should be the date specified by IP Merchant in its OASIS request, December 31, 2010.

The Commission orders:

(A) Idaho Power's request for rehearing in this proceeding is hereby granted, as discussed in the body of this order.

(B) Idaho Power's requests for clarification are hereby provided, as discussed in the body of this order.

By the Commission.

( S E A L )

Magalie R. Salas,  
Secretary.

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<sup>16</sup> See note 5, *supra*. See also Docket No. ER99-4560 proceedings: Idaho Power Co., 90 FERC ¶ 61,009, order on compliance, 91 FERC ¶ 61,108 (2000) (reflecting 75 MW of capacity as at issue).