143 FERC ¶ 61,248
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Idaho Wind Partners 1, LLC Docket No. EL12-74-001

ORDER ON REHEARING

(Issued June 20, 2013)

1. On September 20, 2012, the Commission granted Idaho Wind Partners 1, LLC's (Idaho Wind's) petition for declaratory order. In that order, we found that a proposed tariff filed by Idaho Power Company (Idaho Power) before the Idaho Public Utilities Commission (Idaho Commission), Schedule 74, would be inconsistent with the Public Utility Regulatory Policies Act of 1978 (PURPA)[1] and the Commission's regulations.[2] On October 22, 2012, Idaho Power requested rehearing or reconsideration of the Commission's September 20 Order. That same day, PacifiCorp also requested clarification or rehearing of the Commission's September 20 Order. In this order, the Commission denies rehearing, reconsideration, and clarification of its September 20 Order.

Background

2. Idaho Power, a utility, and Idaho Wind, a parent company of several qualifying facilities (QF), have signed several QF power purchase agreements (PPA) that have been approved by the Idaho Commission. On January 31, 2012, Idaho Power filed Schedule 74 with the Idaho Commission. Schedule 74, as proposed and as relevant here, would permit Idaho Power to curtail its purchases from QFs with 10 MW or more of nameplate capacity "if, due to operational circumstances, purchases from the Applicable QF would require [Idaho Power] to dispatch higher cost, less efficient resources to serve system load or to make Base Load Resources unavailable for serving the next anticipated

[1] 16 U.S.C. § 824a-3 (2006).

[2] *Idaho Wind Partners 1, LLC*, 140 FERC ¶ 61,219 (2012) (September 20 Order).

load."[3] Idaho Power and the Idaho Commission staff claimed that Schedule 74 was valid pursuant to section 292.304(f)(1) of the Commission's regulations[4] and Commission precedent; section 292.304(f)(1) allows curtailment of QF purchases during light loading periods under certain conditions.

3. On June 15, 2012, Idaho Wind asked the Commission to declare Schedule 74 inconsistent with PURPA and the Commission's regulations. Idaho Wind argued that 18 C.F.R. § 292.304(f)(1) does not apply where a utility's legally enforceable obligation to purchase from QFs is made pursuant to a contract with fixed avoided-cost rates established at the time that the legally enforceable obligation is incurred.

4. On September 20, 2012, the Commission granted Idaho Wind's petition for declaratory order. We found Schedule 74, if approved, would be inconsistent with PURPA and the Commission's regulations. We held that Idaho Power, a utility that is party to PPAs with QFs whose long-term avoided-cost rates were determined at the time legally enforceable obligations were incurred, may not curtail during light loading periods.[5] We further found a lack of factual dispute over whether fluctuations in the value of electric energy were taken into account when the Idaho Wind PPAs were signed; we found that, as a matter of law, changes over time, such as light loading periods, are considered in the calculation of avoided cost rates in a long-term bilateral PPA that provides for an avoided-cost rate determined at the time the legally enforceable obligation is incurred.[6]

<u>Requests for Rehearing, Reconsideration, and Clarification</u>

5. Idaho Power raises three specifications of error that it believes warrant rehearing or reconsideration of the Commission's September 20 Order. First, Idaho Power construes the September 20 Order as a Commission enforcement action against the Idaho Commission pursuant to section 210 of PURPA. Idaho Power argues that such an enforcement action, before the Idaho Commission acted on Schedule 74, was an improper usurpation of the role and flexibility of the Idaho Commission in the PURPA process. Second, Idaho Power states that the Commission was wrong to find that fixed avoided-cost rates in long-term PPAs *per se* account for light loading periods and associated

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[3] Idaho Wind's petition for declaratory order included a copy of Schedule 74. *See* Petition, Ex. A, "Idaho Power Company Proposed Schedule 74" (Schedule 74).

[4] 18 C.F.R. § 292.304(f)(1) (2012).

[5] September 20 Order, 140 FERC ¶ 61,219 at PP 39-40.

[6] *Id.* P 41.

additional costs envisioned by 18 C.F.R. § 292.304(f). Idaho Power argues that whether such costs are built into any PPA is a factual issue to be determined by the Idaho Commission and that there is no basis in the record for the Commission to have concluded that these costs were taken into account in the PPAs signed by Idaho Wind and Idaho Power. Third, Idaho Power asserts that the September 20 Order improperly favors QFs at the expense of ratepayers because it forces utilities and their ratepayers to purchase QF power pursuant to PPAs where light loading periods were not considered.

6. PacifiCorp echoes Idaho Power's concern that the September 20 Order has no basis to find that all long-term fixed avoided-cost rate PPAs necessarily account for electricity price fluctuations caused by light loading periods. PacifiCorp asks the Commission to clarify whether the September 20 Order deems all long-term fixed avoided-cost rate PPAs as presumed to have considered the fluctuation in electricity prices.

Discussion

Issuing a Declaratory Order

7. Idaho Power's suggestion that our September 20 Order prematurely "enforces" the Commission's regulations ignores the nature of our September 20 Order. In that order, we expressly stated that Idaho Wind did not ask for, and thus we did not grant, any enforcement petition. The September 20 Order was simply a declaratory order, evincing no intent by the Commission to bring an enforcement action at that time due to the fact that the Idaho Commission had not yet acted on Schedule 74.[7]

8. We reject Idaho Power's notion that the Commission's interpretation of the validity of Schedule 74 somehow supplanted the Idaho Commission's role in the PURPA process by moving against the Idaho Commission before it acted. Rather, the Commission issued a declaratory order, intended "to terminate a controversy or remove uncertainty."[8] Consistent with the Administrative Procedure Act and the Commission's Rules of Practice and Procedure, and pursuant to our "sound discretion,"[9] the September 20 Order served "to remove uncertainty" regarding the direction the Commission would take in the event it would be presented with an enforcement petition. This was hardly an arbitrary, capricious, or unsound exercise of that discretion.

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[7] *See id.* P 33.

[8] 18 C.F.R. § 385.207(a)(2) (2012).

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

Interpretation of 18 C.F.R. § 292.304(f)(1), Schedule 74, and the Idaho Wind PPAs

9. We disagree with Idaho Power's and PacifiCorp's claims that our interpretation of 18 C.F.R. § 292.304(f)(1), Schedule 74, and the Idaho Wind PPAs in this proceeding was arbitrary and capricious. Our conclusion that PURPA PPAs with fixed avoided-cost rates necessarily account for fluctuations in electric energy prices rested primarily on a finding of law. To provide a proper context for that finding, we first provide a brief background of 18 C.F.R. § 292.304(f)(1).

10. A central mechanism of the Commission's implementation of PURPA, subject to certain exceptions not relevant here, is a rule that a utility must buy energy and capacity made available by a QF to that utility.[10] The price of such a purchase does not have to be any higher than that utility's avoided costs of producing that energy and capacity itself or purchasing that energy and capacity from another source, which is commonly referred to as the utility's "avoided costs."[11] We agree with Idaho Power[12] and PacifiCorp[13] that state regulatory authorities largely determine what specific methodology is used to calculate these avoided costs. Such methodology, however, must be in accordance with the Commission's parameters for such rates. We explained what these general parameters were in our September 20 Order.[14]

11. Section 292.304(f)(1) of the Commission's regulations was written to address a very specific scenario: a utility operating only base load units *and* buying power from

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[10] 18 C.F.R. § 292.303(a) (2012).

[11] *Id.* § 292.304(a)(2). The Commission's regulations define avoided costs as "the incremental costs to an electric utility of electric energy or capacity or both which, but for the purchase from the qualifying facility or qualifying facilities, such utility would generate itself or purchase from another source." *Id.* § 292.101(b)(6).

[12] *See* Idaho Power Rehearing Request at 6.

[13] *See* PacifiCorp Rehearing Request at 7.

[14] *See* September 20 Order, 140 FERC ¶ 61,219 at P 35 ("A QF has two vehicles through which it may provide such energy or capacity to a utility: (1) the QF may sell the electric energy that is determines is available; or (2) the QF may sell pursuant to a legally enforceable obligation over a specified term. If the QF sells energy or capacity pursuant to a legally enforceable obligation, then that sale may be priced at either the utility's 'avoided costs calculated *at the time of delivery*' or the utility's 'avoided costs calculated *at the time the obligation is incurred*." (footnotes omitted)).

QFs may be forced to cut back its own output during light loading periods in order to accept the QF's output, but may then need to increase its output when system demand becomes heavier. Because the utility's most efficient base load units would take too long to ramp up, the utility would need to use less efficient, higher cost units with faster startup times to achieve the level of output the utility would have had from its base load units but for its QF purchases. A consequence of this scenario is that running these units with faster ramp-up times would be costs greater than what the utility's costs would have been had the utility been able to run its base load units at that level without having to make QF purchases. The difference in the utility's normal avoided costs versus the cost of using these additional units during light loading periods due to QF purchases would be a negative value. It would thus result in "negative avoided-cost rates," effectively forcing the QF to pay the utility to take the QF's power.[15] Section 292.304(f)(1) addresses this issue by relieving the electric utility of the obligation "to purchase electric energy or capacity during any period which, due to operational circumstances, purchases from qualifying facilities will result in costs greater than those which the utility would incur if it did not make such purchases, but instead generated an equivalent amount of energy itself."[16]

12. Section 292.304(f)(1)'s concern -- that operational circumstances during light loading periods due to a utility's QF purchases would impose on that utility costs higher than its normal avoided costs -- does not exist in a regulatory vacuum, however, and it does not apply to all relationships between utilities and QFs.[17] Rather, in Order No. 69, the Commission stated that section 292.304(f)(1)'s relieving an electric utility from its obligation to purchase is not meant to

> override contractual or other legally enforceable obligations incurred by the electric utility to purchase from a qualifying facility. *In such arrangements, the established rate is based*

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[15] *See* September 20 Order, 140 FERC ¶ 61,219 at PP 37-38 (citing *Small Power Production and Cogeneration Facilities; Regulations Implementing Section 210 of the Public Utility Regulatory Policies Act of 1978,* Order No. 69, FERC Stats. & Regs. ¶ 30,128, at 30,886, *order on reh'g sub nom.* Order No. 69-A, FERC Stats. & Regs. ¶ 30,160 (1980), *aff'd in part & vacated in part, Am. Elec. Power Serv. Corp. v. FERC,* 675 F.2d 1226 (D.C. Cir. 1982), *rev'd in part sub nom. Am. Paper Inst. v. Am. Elec. Power Serv. Corp.,* 461 U.S. 402 (1983)); *see also Entergy Servs., Inc.*, 137 FERC ¶ 61,199, at P 55 (2011).

[16] 18 C.F.R. § 292.304(f)(1) (2012).

[17] *See Gregory R. Swecker v. Midland Elec. Coop. and State of Iowa*, 137 FERC ¶ 61,200, at PP 34-35 (2011); *Entergy Servs.*, 137 FERC ¶ 61,199 at PP 55-56.

> *on the recognition that the value of the purchase will vary with the changes in the utility's operating costs*. These variations ordinarily are taken into account, and the resulting rate represents the average value of the purchase over the duration of the obligation.[18]

In other words, Order No. 69 described the purpose of section 292.304(f)(1) as remedying scenarios where a utility's avoided costs *determined at the time of delivery* would fluctuate dramatically and yield negative avoided costs -- in that scenario, an electric utility need not purchase. But Order No. 69, in acknowledging the fact that parties may negotiate with light loading periods and other kinds of fluctuations in mind, did not say that section 292.304(f)(1)'s relieving an electric utility from its obligation to purchase was tied to whether rates had expressly taken into account light loading periods. In *Entergy Services*, the Commission reiterated that these conditions often are incorporated into PPAs.[19]

13. Order No. 69's reference to PPA parties' "ordinarily" taking price fluctuations into account does not mean that parties are entitled to re-negotiate PPA terms if they belatedly find that they did not take every type of price fluctuation into account. Similarly, Idaho Power misconstrues P 56 of *Entergy Services*. In that case, we divided long-term PURPA PPAs into those with rates calculated at the time of delivery and those calculated at the time the obligation was incurred. We explained that rates are calculated for "many" long-term PPAs at the time the obligation is incurred and that these incorporate price fluctuations.[20] This does not mean that we envisioned PPAs with rates calculated at the time the legally enforceable obligations were incurred to have ignored the possibility of price fluctuations.

14. In this case, moreover, our application of this approach to PURPA PPAs with avoided-cost rates calculated at the time the legally enforceable obligations were incurred rested on language from these PPAs that we referenced in our September 20 Order.[21]

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

[19] *See Entergy Servs.*, 137 FERC ¶ 61,199 at P 56.

[20] *Id.*

[21] September 20 Order, 140 FERC ¶ 61,219 at PP 35 & n.31, 41 (citing Petition, Ex. E, Thousand Springs PPA at 7-11 (Feb. 18, 2005) (PPA providing for sale of all of QF's net energy at "the non-levelized energy price in accordance with [Idaho] Commission Order 29646 with seasonalization factors applied"); *id.*, Ex. F, Yahoo Creek PPA at 17-21 (July 9, 2009) (PPA providing for sale of all of QF's net energy at "the levelized energy price for a Facility scheduled to come on-line during calendar year 2010,

(continued . . .)

And because no party disagrees with our findings that the Idaho Wind PPAs entailed avoided-cost rates determined at the time these legally enforceable obligations were incurred, we disagree with Idaho Power and PacifiCorp that the September 20 Order did not explain from where we drew our conclusions.[22]

15. The fact that the PPAs at issue in this proceeding incorporated avoided-cost rates calculated at the time the legally enforceable obligations were incurred[23] means that such rates have incorporated fluctuations, such as operational circumstances during light loading periods. As we stated in our September 20 Order, it does not matter how explicitly the particular scenarios at issue here (operational circumstances during light loading periods) were identified in these PURPA PPAs.[24] In contrast to PacifiCorp's argument, our September 20 Order's finding as a matter of law took this view based on the language of Order No. 69, the order in which the Commission implemented section 210 of PURPA. The assumption applied in this proceeding thus did not represent any drastic change in Commission policy.

16. In relation to section 292.304(f)(1), an earlier part of section 292.304, i.e., section 292.304(b)(5), instructs that where avoided-cost rates are determined over the term of a legally enforceable obligation, such rates do not violate the Commission's PURPA regulations (including section 292.304(f)(1)) if they "differ from avoided costs at the time of delivery."[25] As we acknowledged in our September 20 Order, section 292.304(b)(5) demonstrates the Commission's priority of preserving the expectations of parties to long-

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for a contract term of twenty (20) years in accordance with [Idaho] Commission Order 30744, 30738 and adjusted in accordance with [Idaho] Commission Order 30415 for Heavy Load Hour Energy deliveries, and adjusted in accordance with Commission Order 30488 for the wind integration charge and with seasonalization factors applied")).

[22] This renders irrelevant Idaho Power's citation to Idaho Commission staff testimony -- further discussed below -- that purportedly contradicts our legal and factual conclusions. *See* Idaho Power Rehearing Request at 6-9.

[23] Setting rates in a PURPA PPA at the time a legally enforceable obligation is incurred, rather than at the time of delivery, is one method of calculating avoided-cost rates that is available to parties to such PPAs. 18 C.F.R. § 292.304(d)(2)(i)-(ii) (2012). Our September 20 Order held, and neither Idaho Power nor PacifiCorp disputes, that the rates in the Idaho Wind PPAs were calculated at the time the legally enforceable obligations were incurred. *See* September 20 Order at P 35 & n.31.

[24] *Id.* P 41.

[25] 18 C.F.R. § 292.304(b)(5) (2012).

term PURPA PPAs.[26] Given that the PPAs at issue here calculated avoided costs at the time the legally enforceable obligations were incurred, the concern that light loading periods would yield in some particular hour or hours negative avoided costs is irrelevant; it is relevant only when the QF energy is delivered and priced "as available" energy, as described above, and that is not the case here.[27] Moreover, Idaho Power's contention that our September 20 Order somehow deprives Idaho Power of the "benefit of the bargain" is belied by the fact, explained above, that these PPAs took price fluctuation into account.

17. Idaho Power's rehearing request references an Idaho Commission staff witness's testimony denying the incorporation of light loading periods into the Idaho Wind PPAs. Yet, our September 20 Order held as a matter of law that, where an avoided cost rate is calculated at the time a legally enforceable obligation is incurred, "the rates set in the PPAs for such bilateral transactions . . . already represent each party's taking into consideration various changes in circumstances over time such as light loading when deciding to be bound by the PPA's terms."[28] Our September 20 Order interpreted our PURPA-implementing regulations regardless of how explicitly light loading periods were identified in the Idaho Wind PPAs. The September Order thus did not wade inappropriately into the Idaho Commission's fact-finding responsibilities.[29]

18. Idaho Power's rehearing request also mentions language from an Idaho Wind PPA that the "rates, terms, and conditions of the agreements will be construed in accordance

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[26] September 20 Order, 140 FERC ¶ 61,219 at P 39 & n.39 (citing Order No. 69, FERC Stats. & Regs. ¶ 30,128 at 30,880 ("The import of [section 292.304(b)(5)] is to ensure that a qualifying facility which has obtained the certainty of an arrangement is not deprived of the benefits of its commitment as a result of changed circumstances. This provision can also work to preserve the bargain entered into by the electric utility; should the actual avoided cost be higher than those contracted for, the electric utility is nevertheless entitled to retain the benefit of its contracted for, or otherwise legally enforceable, lower price for purchases from the qualifying facility.")); *cf. Rail Splitter Wind Farm, LLC v. Ameren Servs. Co.*, 142 FERC ¶ 61,047, at PP 31-32 (2013) (emphasizing the importance of stability and regulatory certainty in the Commission's decision-making process).

[27] *See* 18 C.F.R. § 292.304(d)(1) (2012).

[28] September 20 Order, 140 FERC ¶ 61,219 at P 41.

[29] We disagree with Idaho Power's argument that the September 20 Order inappropriately favored QFs at the expense of ratepayers. The September 20 Order instead applied to Schedule 74 the Commission's longstanding regulations adopted pursuant to section 210(a) of PURPA and the approach taken in 1980 in Order No. 69.

with sections 292.303 – 292.308 of the Commission's regulations implementing PURPA."[30] In Idaho Power's view, "application of [section 292.304(f)(1)] is part of the established bargain under the PPAs."[31] We agree that our regulations are binding on PURPA PPAs—regardless of whether parties negotiate application of such bilaterally. But this citation to the Commission's regulations in the PPAs does nothing more than state that they are binding; it does not alter how or when the parties agree that section 292.304(f)(1) should apply. Moreover, as we stated above, section 292.304(f)(1) exists within a larger context. A bilateral incorporation of that regulation among other binding regulations does not alter its applicability. Therefore, we reject Idaho Power's claim that the Commission's September 20 Order somehow modifies the Idaho Wind PPAs.

<u>The Commission orders</u>:

The requests for rehearing, reconsideration, and clarification are hereby denied, as discussed in the body of this order.

By the Commission. Commissioner Clark is dissenting.

(S E A L)

Kimberly D. Bose,
Secretary.

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[30] Idaho Power Rehearing Request at 8.

[31] *Id.*