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IDAHO PUBLIC
UTILITIES COMMISSION

Attorneys for Idaho Wind Partners 1, LLC

BEFORE THE IDAHO PUBLIC UTILITIES COMMISSION

IN THE MATTER OF THE COMMISSION'S REVIEW OF PURPA QF CONTRACT PROVISIONS INCLUDING THE SURROGATE AVOIDED RESOURCE (SAR) AND INTEGRATED RESOURCE PLANNING (IRP) METHODOLOGIES FOR CALCULATING PUBLISHED AVOIDED COST RATES	Case No. GNR-E-11-03 **LEGAL BRIEF OF IDAHO WIND PARTNERS 1, LLC**

I. Introduction

Intervenor Idaho Wind Partners 1, LLC ("IWP"), on behalf of its wholly-owned subsidiary project companies,[1] respectfully submits this legal briefing to the Idaho Public Utilities Commission ("Commission") to address concerns with the proposed Schedule 74. If approved, Schedule 74 would allow Idaho Power Company ("Idaho Power") to unilaterally curtail its purchases from qualifying facilities ("QFs"), even those with existing fixed-rate contracts, during light loading periods "if, due to operational circumstances purchases from the

[1] Thousand Springs Wind Park, LLC; Tuana Gulch Wind Park, LLC; Oregon Trail Wind Park, LLC; Payne's Ferry Wind Park, LLC; Camp Reed Wind Park, LLC; Yahoo Creek Wind Park, LLC; Salmon Falls Wind Park, LLC; Pilgrim Stage Station Wind Park, LLC; Burley Butte Wind Park, LLC; Milner Dam Wind Park, LLC; Golden Valley Wind Park, LLC (collectively, the "IWP Projects").

Applicable QF would require the Company to dispatch higher cost, less efficient resources to serve system load."[2]

Each of the IWP Projects owns wind generation facilities that have been self-certified as QFs. Each of the IWP Projects also has a power sales agreement with Idaho Power for the sale of all net energy at fixed avoided cost rates for a twenty-year fixed term ("IWP PPAs").[3] The IWP PPAs were executed in 2005 and 2009, and each PPA was approved by the Commission and reflects the Commission orders in effect at that time.[4]

Neither the IWP PPAs nor the related Generator Interconnection Agreements ("GIAs")[5] include provisions allowing Idaho Power to curtail the projects based on the circumstances in the proposed Schedule 74.[6] Rather, these agreements set forth very narrow circumstances for curtailment based on reliability issues, emergency conditions, or specific transmission constraints.[7]

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[2] Schedule 74, Exhibit No. 5 to Direct Testimony of Tessia Park (Jan. 31, 2012) ("Park Direct Testimony").

[3] Exhibits 2102-2112 submitted with the Direct Testimony of Richard Guy on behalf of Idaho Wind Partners 1, LLC (May 21, 2012) ("Guy Direct Testimony").

[4] Eight of the IWP Projects have PPAs approved by the Commission in 2005; three of the IWP Projects have PPAs approved by the Commission in 2009. *See* Order Nos. 29813 (July 1, 2005) (approving the May 5, 2005 Burley Butte Wind Park Project PPA); 30924 (Oct. 8, 2009) (approving the July 9, 2009 Camp Reed Wind Park Project PPA); 29814 (July 1, 2005) (approving the May 5, 2005 Golden Valley Wind Park Project PPA); 29948 (Jan. 10, 2006) (approving the Oct. 14, 2005 Milner Dam Wind Park Project PPA); 29772 (Apr. 25, 2005) (approving the Feb. 18, 2005 Oregon Trail Wind Park Project PPA); 30926 (Oct. 8, 2009) (approving the July 9, 2009 Payne's Ferry Wind Park Project PPA), 29951 (Jan. 10, 2006) (approving the Oct. 14, 2005 Salmon Falls Wind Park Project PPA); 29770 (Apr. 25, 2005) (approving the Feb. 18, 2005 Thousand Springs Wing Park Project PPA); 29773 (Apr. 25, 2005) (approving the Feb. 18, 2005 Tuana Gulch Wind Park Project PPA); and 30925 (Oct. 8, 2009) (approving the July 9, 2009 Yahoo Creek Wind Park Project PPA).

[5] Exhibits 2113-2118 submitted with Guy Direct Testimony.

[6] *See* Park Direct Testimony at 15 (explaining that Schedule 74 would allow curtailment that is not contemplated by existing Schedule 72 and existing firm energy sales agreements with QFs).

[7] IWP's agreement to be subject to curtailment through the use of Generator Output Limiting Controls ("GOLCs") was expressly limited to defined circumstances, which did not include those contemplated by Schedule 74. *See* Attachments 4 and 5 of the GIAs. The language in the GIAs setting forth the limited use of GOLCs was the result of the Cassia Gulch settlement and order, in which the

In this docket, Idaho Power and Commission Staff have taken the position that, notwithstanding the explicit provisions of the PPAs, Schedule 74 is authorized by Section 292.304(f) ("Section 304(f)")[8] of the Federal Energy Regulatory Commission's ("FERC") regulations implementing the Public Utility Regulatory Policies Act of 1978, as amended ("PURPA").[9] However, FERC's regulations and orders make clear that Section 304(f) does not allow Idaho Power to unilaterally stop buying energy from QF holders of fixed-rate contracts. This is the case as a matter of law, regardless of any factual determinations of (1) whether operational circumstances that trigger the applicability of Section 304(f) actually exist and (2) whether the QF's avoided cost rates already take into account such circumstances. Because it is contrary to FERC's regulations, any Commission order allowing the proposed curtailment of fixed-rate contracts is preempted by federal law.

If approved, Schedule 74 would have significant economic consequences for IWP and similarly situated QFs and, further, would discourage investment in regulated and other industries in Idaho by undermining the certainty of contracts. IWP requests the Commission to decline to approve the proposed Schedule 74.

II. Because it is contrary to FERC's regulations, as a matter of law, the Commission may not allow a utility to curtail fixed-rate QFs as contemplated by Schedule 74.

a. QFs may opt for fixed-rate contracts.

Under FERC's regulations promulgated pursuant to PURPA, electric utilities must purchase all energy and capacity that is made available to them by a QF.[10] QFs may choose to

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Commission explained: "Idaho Power will call for a Cassia Redispatch only when necessary to respond to system emergencies or when identified transmission lines are out of service."

[8] 18 C.F.R. § 292.304(f) (2012).

[9] 16 U.S.C. § 824a-3 (2012).

[10] 18 C.F.R. § 292.303(a) (2012). An electric utility may make an application with FERC to be exempted from its obligation to purchase from QFs under certain circumstances, but Idaho Power has not filed for or received such an exemption. *Id.* §§ 292.309-292.310.

sell that energy and/or capacity to the utility either (1) where the avoided costs are calculated at the time of delivery or (2) where the avoided costs are calculated at the time the legally enforceable obligation for the delivery of energy or capacity over a specified term is incurred.[11] The IWP PPAs are the latter category—"fixed-rate contracts"—where the avoided cost rate was calculated at the time the obligation was incurred and fixed for the term of the contract.

FERC's regulations recognize that, once parties have entered into fixed-rate contracts, the actual avoided cost rates at the time of delivery may differ from the fixed rate (i.e. the avoided cost rate that was estimated and fixed at the time of contracting). FERC regulations at 18 C.F.R. § 292.304(b)(5) ("Section 304(b)(5)") state:

> In the case in which the rates for purchases are based upon estimates of avoided costs over the specific term of the contract or other legally enforceable obligation, the rates for such purchases do not violate this subpart if the rates for such purchases differ from avoided costs at the time of delivery.

Not only does FERC allow in Section 304(b)(5) that fixed rates may differ from actual avoided cost rates, but FERC has also confirmed that this circumstance does not excuse the parties' performance under the contract. In Order No. 69,[12] in which FERC first established its rules for mandatory purchases from QFs and other PURPA implementation issues, FERC explains:

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[11] 18 C.F.R. § 292.304(d) (2012). *See also Cedar Creek Wind, LLC,* Notice of Intent not to Act and Declaratory Order, 137 FERC ¶ 61,006 (2011) (affirming a QF's right to choose to provide energy or capacity pursuant to a legally enforeceable obligation for delivery over a specified term at rates based on avoided costs calculated at the time the obligation is incurred). The Commission has also confirmed that QFs "are entitled to fixed-term, fixed-rate agreements." Order No. 19769 (June 1985) (upholding Idaho Order No. 19442 (Feb. 8, 1985)).

[12] FERC Order No. 69, 45 Fed. Reg. 12214 (Feb. 19, 1980) (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. P 30,128, *order on reh'g*, Order No. 69-A, FERC Stats. & Regs. P 30,160 (1980), *aff'd in part and vacated in part, American Electric Power Service Corporation v. FERC*, 675 F.2d 1226, 219 U.S. App. D.C. 1 (D.C. Cir. 1982), *rev'd in part, American Paper Institute, Inc. v. American Electric Power Service Corporation*, 461 U.S. 402, 103 S. Ct. 1921 (1983) ("Order No. 69")).

> Paragraph (b)(5) addresses the situation in which a qualifying facility has entered into a contract with an electric utility, or whether the qualifying facility has agreed to obligate itself to deliver at a future date energy and capacity to the electric utility. The import of this section is to insure 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 an electric utility; should the actual avoided costs be higher than those contracted for, the electric utility is nevertheless entitled to retain the benefit of its contract for, or otherwise legally enforceable, lower price for purchases from the qualifying facility. This subparagraph will thus insure the certainty of rates for purchases from a qualifying facility which enters into a commitment to deliver energy or capacity to a utility.[13]

In its decisions, FERC has reiterated that fixed rates continue to comply with statutory and regulatory requirements – including the requirement to be just and reasonable – and remain binding on the parties, even if circumstances have changed such that purchases from QFs will result in costs greater than those the utility would incur if it did not make such purchases but instead generated an equivalent amount of energy itself.[14] FERC has explained that allowing a utility to revisit a fixed-rate contract in this circumstance: "(a) would disturb the settled and legitimate expectations of the parties; (b) could lead to difficulty in financing generation projects and impairment of wholesale competition; and (c) would be inconsistent with Congressional intent underlying PURPA and the Energy Policy Act of 1992."[15]

These FERC regulations and orders describing the sanctity of fixed-rate contracts provide an important context for understanding why, in Section 304(f), FERC likewise does not allow a

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13 *Id.* at 45 Fed. Reg. 12214, 12224 (emphasis added).

14 *New York State Electric & Gas Corporation* ("*NYSEG*"), 71 FERC ¶ 61027, *14-15 (1995), *rehearing denied* 72 FERC ¶ 61067, 61341 (1995) (rejecting utility's argument that changed circumstances mandates recalculation of rates in existing contracts based on avoided costs as of the time of the new circumstances); *West Penn Power Company* ("*West Penn*"), 71 FERC ¶ 61153, 61495 (1995) (noting similarities to *NYSEG* and again rejecting utility's argument that changed circumstances mandates recalculation of rates in existing contracts based on avoided costs as of the time of the new circumstances).

15 *NYSEG,* 72 FERC ¶ 61067, 61341 (Order denying reconsideration).

utility to cease QF purchases under a fixed-rate contract, even if in certain periods operational circumstances cause a negative avoided cost rate.

b. Section 304(f) does not relieve a utility of its obligation to purchase energy pursuant to fixed-rate contracts.

Section 304(f) provides that an electric utility "will not be required to purchase electric energy or capacity during any period during 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] FERC's implementing order further provides that, of the two rate categories described above, Section 304(f) only applies to the first category—where the avoided costs are calculated at the time of delivery—and does not "override contractual or other legally enforceable obligations incurred by the electric utility to purchase from a qualifying facility."[17]

In Order No. 69, FERC explained the limited purpose of Section 304(f) – to alleviate a potential burden on certain QFs with "time-of-delivery" pricing, not to provide utilities the option to favor their own resources. If a utility operating only base load units during light loading periods is forced to cut back output to accommodate purchases from QFs, then the base load units might not be able to increase output rapidly when the system demand later increased. As a result, the utility would be required to use less efficient, higher cost units with faster startup to meet the demand. FERC explained that this situation, when applied to a QF contract whose avoided cost rate is determined at the time of delivery, could actually force the QF to have to *pay* the utility to take its power. To avoid this "anomalous result", FERC proposed a curtailment option by which a utility could notify the QF not to deliver during those periods.

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16 18 C.F.R. § 292.304(f) (2012).

17 Order No. 69, 45 Fed. Reg. 12214, 12228.

FERC explained in Order No. 69 the justification for the curtailment provision, i.e., that a utility's net costs would be higher during these periods than if it did not purchase from a QF, does not apply and therefore curtailment under Section 304(f) is not authorized, if purchases are made pursuant to a fixed-rate contract:

> The Commission does not intend that this paragraph 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 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. The occurrence of such periods may similarly be taken into account in determining rates for purchases.[18]

FERC's recent decision involving Entergy Services, Inc. ("Entergy"), further confirms that Section 304(f) does not apply to fixed-rate contracts.[19] Among other issues raised in a compliance filing, Entergy sought to curtail unscheduled QF energy "on the same basis as other non-firm, secondary transmission service, when necessary to relieve congestion."[20] In its December 2011 Order, FERC denied Entergy's curtailment proposal, finding that Section 304(f) did not relieve Entergy of its statutory obligation to purchase unscheduled QF energy.[21] FERC explained:

> 56. Many avoided cost rates are calculated on an average or composite basis, and already reflect the variations in the value of the purchase in the lower overall rate. In such circumstances, the utility is already compensated, through the lower rate it generally pays for unscheduled QF energy, for any periods during which it purchases unscheduled QF energy even though that energy's value is lower than the true avoided cost. On the other hand, for avoided cost rates that are determined in real-time, such avoided costs

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18 Order No. 69, 45 Fed. Reg. 12214, 12228 (emphasis added).

19 *Entergy Services, Inc.*, Order on Compliance Filing, 137 FERC ¶ 61,199, ¶¶ 52-58 (Dec. 15, 2011) ("*Entergy* Order").

20 *Id.* at ¶ 30.

21 *Id.* at ¶¶ 52-54, 58.

> adjust to reflect the low (zero or negative) value of the unscheduled QF energy, allowing the QF to make its own curtailment decisions. In neither case is the utility authorized to curtail the QF purchase unilaterally.[22]

Thus, FERC's orders establish that a utility may not rely on Section 304(f) to avoid its obligations to purchase from a fixed-rate QF, even if in certain periods operational circumstances cause a negative avoided cost rate.

c. FERC exempts from Section 304(f) all fixed-rate contracts, not just those that explicitly calculated low loading expenses in the avoided cost rate.

Based on the rebuttal testimony of Commission Staff Rick Sterling and recent filings submitted to FERC, Commission staff appears to take the position that if the parties to a fixed-rate contract did not explicitly calculate low loading expenses in the fixed avoided cost rate – then Section 304(f) allows curtailment.[23] This position has no support in FERC's regulations or orders. Parties to fixed-rate contracts are not required to have anticipated, much less agreed to, every circumstance that might affect actual avoided cost rates through the duration of a contract before they get the benefit of their bargain. To the contrary, FERC's regulations and orders provide that operational circumstances that cause actual avoided cost rates to differ from those fixed at the time of contracting do <u>not</u> justify overriding the terms of fixed-rate contracts.[24]

Sterling bases his argument on the following quote from the *Entergy* Order (with emphasis added by Sterling):

> "<u>Many</u> avoided cost rates are calculated on an average or composite basis, and already reflect the variations in the value of the purchase in the lower overall rate. <u>In such circumstances</u>, the

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22 *Id.* at ¶ 56.

23 Rebuttal Testimony of Rick Sterling, pp. 4-6 (June 29, 2012) ("Sterling Rebuttal Testimony").

24 Order No. 69, 45 Fed. Reg. 12214, 12224 ("The import of this section [304(b)(5)] is to insure that a qualifying facility which has obtained the certainty of an arrangement <u>is not deprived of the benefits of its commitment as a result of changed circumstances</u>." (emphasis added)); *id.* at 12228 ("The Commission does not intend that this [section 304(f)] override contractual or other legally enforceable obligations incurred by the electric utility to purchase from a qualifying facility."); *NYSEG* at *14-15; *West Penn* at 61495.

> utility is already compensated, through the lower rate it generally pays for unscheduled QF energy, for any periods during which it purchases unscheduled QF energy even though that energy's value is lower than the true avoided cost."[25]

This quote is taken out of context. The very next sentence in Paragraph 56 of the *Entergy* Order states: "On the other hand, for avoided cost rates that are determined in real-time, such avoided costs adjust to reflect the low (zero or negative) value of the unscheduled QF energy, allowing the QF to make its own curtailment decisions."[26] The quote excerpt beginning with "Many" does not describe a subset of fixed-rate contracts, but rather one of the rate categories identified in FERC's regulations[27]—namely, the fixed-rate category. The sentence beginning with "On the other hand" describes another category—namely, avoided costs determined in real time (i.e., time of delivery where rates can be zero or negative). The *Entergy* Order does not distinguish among different types of fixed-rate contracts or the pricing methodologies they may reflect, and it does not state that curtailment applies to some fixed-rate contracts and not others. In fact, FERC concludes in this same paragraph 56 that in neither of these two categories is the utility authorized to curtail the QF purchase unilaterally.[28]

Further, Sterling's argument that the avoided cost rate methodology and other pricing terms in the IWP PPAs did not specifically calculate low loading scenarios and thus the PPAs are subject to curtailment fails to acknowledge that this methodology and these pricing terms were (1) based on the approved orders of the Commission and (2) specifically approved by the Commission as establishing a valid avoided cost rate for these PPAs. In adopting the SAR methodology, the Commission accepted that this was an adequate tool for estimating avoided

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25 Sterling Rebuttal Testimony at 4 (quoting *Entergy*, with emphasis added by Sterling).

26 *Entergy* at ¶ 56 (emphasis added).

27 18 C.F.R. § 292.304(d) (2012).

28 *Entergy* at ¶ 56.

cost rates.[29] And the Commission-approved pricing adjustments and firming provisions further tailor the published rates to account for variations in avoided costs.[30] The Commission cannot use Section 304(f) as a trump card for subsequently alleged inadequacies in the approved avoided cost rate methodology and pricing adjustments to change approved PPA terms.

Of course, the parties and Commission may choose to explicitly calculate low loading impacts in setting the avoided cost rate, along with any other variables that affect the estimated operating costs.[31] Or, they may choose to incorporate a comprehensive but un-enumerated approach to address the variability in costs of operating an evolving generation mix. Or, they may choose to allow economic, or light loading, curtailment outside of the avoided rate calculation (i.e., in the terms and conditions of the contract), just as they agreed in the IWP PPAs to allow curtailment for reliability and emergency purposes. But once a state commission approves a PPA, the contract rates and terms are not subject to future change absent the express language of the PPA or the mutual agreement of the parties.[32]

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[29] Order No. 29124 at 13 ("It is the Commission's belief that in issuing this Order we are establishing a platform for avoided cost pricing that is reasonable and will appropriately reflect the avoided cost of each utility into the future." (emphasis added))

[30] *See* Order No. 30415 at 1 (Sept. 7, 2007) (approving seasonalization factors because "[s]easonal avoided cost rates recognize that energy delivered by QFs has different values based on when it is delivered"); Order No. 18190 at 11-12 (July 21, 1983) (establishing heavy versus light load hour adjustments "to more precisely value the energy being delivered"); Order No. 30488 at 12 (Feb. 20, 2008) (approving the wind integration charge and finding the use of such adjustment to the published avoided-cost rate for wind QFs "results in net rates that represent the full avoided cost of wind generation; rates that are fair, just and reasonable." *Id.* (emphasis added)); Order No. 29632 at 20 (Nov. 22, 2004) (establishing the 90%/110% band) ("excess energy is not accepted by the Company without consequence. If unplanned for and not easily integrated the energy may as suggested by the Company have to be sold in the surplus market or other more valuable resources of the Company backed down.").

[31] "The occurrence of such periods may similarly be taken into account in determining rates for purchases." Order No. 69, 45 Fed. Reg. 12214, 12228 (emphasis added).

[32] *See Freehold Cogeneration Associates v. Board of Regulatory Commissioners of the State of New Jersey*, 44 F.3d 1178 (3d Cir. 1995) (holding "that once the [state commission] approved the power purchase agreement between Freehold and JCP&L on the ground that the rates were consistent with avoided cost, any action or order by the [state commission] to reconsider its approval or to deny passage of those rates to JCP&L's consumers under purported state authority was preempted by federal law."); *Independent Energy Producers Assoc. v. California Public Util. Comm.*, 36 F.3d 848 858-59 (9th Cir. 1994) ("the fact that the prices for fuel, and therefore the Utilities' avoided costs, are lower than

The IWP PPAs do not contain any provision that allows Idaho Power to curtail the projects as contemplated by Schedule 74.[33] Further, the IWP PPAs state, "No modification to this Agreement shall be valid unless it is in writing and signed by both Parties and subsequently approved by the Commission."[34] IWP has not agreed to modify the IWP PPAs to allow such curtailment or to incorporate the terms of Schedule 74 if approved. If the Commission could allow a utility to use extra-contractual means to curtail purchases, then it would disturb the settled and legitimate expectations of the parties and lead to difficulty in financing generation projects and impairment of wholesale competition, contrary to FERC's stated policies.[35]

d. A Commission decision to allow Idaho Power to unilaterally curtail fixed-rate QFs is contrary to FERC regulations and thus is preempted by PURPA.

Section 210(f)(1) of PURPA provides that "each State regulatory authority shall ... implement" the rules adopted by FERC "for each electric utility for which it has ratemaking authority."[36] Such state implementation must be "pursuant to and consistent with [FERC's] regulations under PURPA."[37] If a state regulatory action fails to implement or violates PURPA,

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estimated, does not give the state and the Utilities the right unilaterally to modify the terms of the standard offer contract"); *NYSEG* at *14-15 (rejecting utility's argument that changed circumstances mandates recalculation of rates in existing contracts based on avoided costs as of the time of the new circumstances); *West Penn* at 61495 (as in *NYSEG*, rejecting utility's argument that changed circumstances mandates recalculation of rates in existing contracts based on avoided costs as of the time of the new circumstances); *Rosebud Enterprises v. Idaho PUC*, 128 Idaho 609, 622-23 (1996) (allowing alteration of avoided cost rates *prior to* the execution of the purchase contract and noting that the rates are not locked in until the QF has obtained a legally enforceable obligation); *Grand View Solar PV Solar Two, LLC v. Idaho Power Company*, Order No. 32580 at 14 (June 21, 2012) ("Once a PPA has been executed and approved by the Commission – once the contract terms are set – they are generally not subject to future change absent the express language of the PPA, or the agreement of the parties.").

33 *See* Park Direct Testimony at 15 (explaining that Schedule 74 would allow curtailment that is not contemplated by existing Schedule 72 and existing firm energy sales agreements with QFs).

34 Section 26.1 in the 2005 IWP PPAs; Section 23.1 in the 2009 IWP PPAs.

35 *NYSEG*, 72 FERC ¶ 61067, 61341 (Order denying reconsideration).

36 16 U.S.C. § 824a-3(f)(1). *See also* Order No. 69, 45 Fed. Reg. 12214, 12216 ("[E]ach State regulatory authority or nonregulated utility must implement [FERC's] rules."); *Power Resource Group Inc. v. PUCT*, 422 F.3d 231, 236 ("§ 824a-3(f) requires state regulatory agencies like the [Texas] PUC to implement the FERC regulations").

37 *Connecticut Light & Power Co.*, 70 FERC ¶ 61,012 at 61,023 (1995) ("*CL&P*").

such action is preempted by federal law.[38] Because it is contrary to FERC's regulations, as described in the preceding sections, any Commission order allowing the proposed curtailment of fixed-rate contracts is preempted by federal law.

III. The IWP Projects would be significantly harmed by Schedule 74.

The IWP Projects relied on the fixed energy prices in the IWP PPAs to forecast a revenue stream and to secure debt and equity financing. The revenue projections included no allowances for curtailment for the circumstances in Schedule 74 since Idaho Power has no such right under the IWP PPAs. The financing and investment in these projects—approximately $450 million to date—is jeopardized by the proposed curtailment.

Curtailment has a direct impact on the IWP Projects' revenues, without compensating for fixed costs or increased costs as a result of the curtailment, as described in the Direct Testimony of Richard Guy. The IWP Projects are only paid for the hours when energy is produced. Curtailment may also hinder the IWP Projects' ability to comply with the "firming" requirements of the IWP PPAs (the 90%/110% performance band and 85% Mechanical Availability Guarantee), thus subjecting the IWP Projects to lower pricing and/or penalties. Curtailment also has a direct impact on the IWP Projects' sale of renewable energy credits, which are only created when energy is produced. Lower revenues could affect the IWP Projects' ability to comply with

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[38] *See, e.g., CL&P* at 61,023 (finding that a Connecticut state law establishing a methodology to determine avoided cost rates to be preempted because it violated PURPA and the Commission's implementing regulations); *Midwest Power Systems, Inc.*, 78 FERC ¶ 61,067 at 61,246-48 (1997) (finding that orders of the Iowa Utilities Board implementing a state statute on avoided costs were preempted because they violated PURPA and the Commission's PURPA regulations); *Cedar Creek Wind, LLC,* 137 FERC ¶ 61,006 (2011), and *Rainbow Ranch Wind, LLC and Rainbow West Wind, LLC,*139 FERC ¶ 61,077 (2012) (finding that the Commission had violated PURPA by issuing orders denying QFs a legally enforceable obligation); *JD Wind 1, LLC*, 129 FERC ¶ 61,148 at 61,632-33 (2009) (finding that the Texas Public Utility Commission's determination that "legally enforceable obligations are only available to sellers of 'firm power,' as defined by Texas law, [was] inconsistent with PURPA and [FERC's] regulations implementing PURPA"); *SoCal Edison*, 70 FERC at 61,676-78 (finding that the California Public Utilities Commission's avoided cost methodology violated PURPA and the Commission's PURPA regulations). *See also Grand View Solar PV Solar Two, LLC v. Idaho Power Company*, Order No. 32580 (June 21, 2012) (because the Commission found that the provision at issue "would not subject the PPA to changing conditions", the Commission decided that it was "not preempted by PURPA.")

existing credit terms with their lenders, the effect of which could lead to various penalties and, ultimately, default of the debt financing.

IV. Conclusion

As a matter of law, Section 304(f) does not authorize a utility to unilaterally curtail QF purchases under fixed-rate contracts. The proposed Schedule 74 is contrary to PURPA and FERC regulations, and therefore the Commission is preempted by federal law from approving Schedule 74.

The terms in the IWP PPAs reflect the parties' and the Commission's determination at the time of contracting of the anticipated avoided costs for the entire twenty-year term of the contracts. If Idaho Power believes that the SAR methodology, seasonal and loading adjustments, wind integration charges, and firming provisions accepted by the parties and the Commission and incorporated into the IWP PPAs did not accurately predict avoided cost rates during certain operational circumstances, then it is appropriate for Idaho Power to seek to change those methodologies and terms in new contracts.[39] However, FERC's regulations and orders under PURPA prohibit Idaho Power and the Commission from unilaterally modifying the PPAs to allow curtailment in such circumstances.

Schedule 74 would amount to a unilateral modification of the IWP PPAs and would undercut the balance of rights and obligations negotiated by Idaho Power and the IWP Projects and established by the Commission. Further, the approval by the Commission of the proposed Schedule 74 would send a chilling message to the financial community that one cannot rely on

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[39] *See Independent Power Producers Assoc.*, 36 F.3d at 848-49 ("although the avoided cost rates calculated in the Utilities' contracts are in fact higher than the Utilities' current short term avoided cost rates, the proper remedy for such a situation is to ensure that future standard offer contracts contain more flexible pricing mechanisms"). Indeed, the Commission historically has applied these types of changes *prospectively*.

executed contracts in Idaho. This would affect more than just the wind industry as it would discourage all future investments in Idaho in regulated industries and in general.

IWP respectfully requests that the Commission decline to adopt the proposed Schedule 74.

DATED this 20th day of July 2012.

GIVENS PURSLEY LLP

By: Deborah E. Nelson

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Attorneys for Idaho Wind Partners 1, LLC

CERTIFICATE OF SERVICE

I hereby certify that on the 20th day of July 2012 the foregoing was served upon the following individuals by the means indicated:

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