

DECISION MEMORANDUM

TO: COMMISSIONER KJELLANDER
COMMISSIONER SMITH
COMMISSIONER HANSEN
COMMISSION SECRETARY
COMMISSION STAFF
LEGAL

FROM: SCOTT WOODBURY

DATE: FEBRUARY 13, 2004

SUBJECT: CASE NO. IPC-E-04-2 (Idaho Power)
PETITION FOR DECLARATORY ORDER
OWNERSHIP OF MARKETABLE “ENVIRONMENTAL ATTRIBUTES”
ASSOCIATED WITH PURPA QF

On February 5, 2004, Idaho Power Company (Idaho Power; Company) filed a Petition with the Idaho Public Utilities Commission (Commission) requesting an Order determining ownership of the marketable “environmental attributes”¹ associated with a PURPA qualifying facility (QF) when Idaho Power enters into a long-term, fixed rate contract to purchase the energy produced by that QF. Reference IDAPA 31.01.01.101.

Background

In June 2003, the Federal Energy Regulatory Commission (FERC) received a Petition for Declaratory Order from PURPA QFs seeking FERC interpretation of its avoided cost rules under PURPA. Specifically, Petitioners sought an Order declaring that avoided cost contracts entered into pursuant to PURPA, absent express provisions to the contrary, do not inherently convey to the purchasing utility any renewable energy credits (RECs) or similar tradable certificates. It was the contention of Petitioners that the power purchase price that the utility pays under such a contract compensates a QF only for the energy and capacity produced by that facility and not for any environmental attributes associated with the facility. Reference FERC Docket EL03-133-000.

¹ Idaho Power does not define “environmental attributes.” A good definition is included in a white paper prepared by the Energy Trust of Oregon Inc. __ Green Tag Ownership and Disposition (September 17, 2003). See attached “Appendix A.”

In an Order issued on October 1, 2003 (105 FERC ¶ 61,004), FERC granted the Petitioners request for a declaratory order, to the extent that the petition asked the Commission to declare that Commission's avoided cost regulations did not contemplate the existence of RECs and that the avoided cost rates for capacity and energy sold under contracts entered into pursuant to PURPA do not convey the RECs, in the absence of an expressed contractual provision. FERC's Order made the following specific findings:

19. Section 210(a) of PURPA requires the Commission to prescribe rules imposing on electric utilities the obligation to offer to purchase electric energy from QFs. Under Section 210(b) of PURPA, such purchases must be at rates that are: (1) just and reasonable to electric consumers and in the public interest; (2) not discriminatory against QFs; and (3) not in excess of the incremental cost to the electric utility of alternative electric energy. Section 210(d) of PURPA, in turn, defines "incremental costs of alternative electric energy" as "the cost to the electric utility of the electric energy of which, but for the purchases from [the QF], such utility would generate or purchase from another source."
20. The Commission implemented the purchase obligations set forth in PURPA in Section 292.303 of its regulations, 18 CFR § 292.303(a) (2003), which provides:

Each electric utility shall purchase in accordance with Section 292.304, any energy and capacity which is made available from a qualifying facility. . . .

Section 292.304, in turn, requires that rates for purchases shall: (1) be just and reasonable to the electric customer of the electric utility and in the public interest; and (2) not discriminate against qualifying cogeneration and small power production facilities. 18 CFR § 292.304(a)(1) (2003). The regulation further provides that nothing in the regulation requires any electric utility to pay more than the avoided costs for purchases. 18 CFR § 292.304(a)(2) (2003). "Avoided costs" is defined 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." 18 CFR § 292.101(b)(6) (2003).

21. Section 292.304 sets forth what factors are to be considered in determining avoided costs. See 18 CFR § 292.304(e) (2003). The factors to be considered include:
 - (1) The utility's system cost data;
 - (2) The availability of capacity or energy from a QF during the system daily and season peak periods;

- (3) The relationship between the availability of energy or capacity from the QF to the ability of the electric utility to avoid costs; and
 - (4) The costs or savings resulting from variations in line losses from those that would have existed in the absence of purchases from the QF.
22. Significantly, what factor is not mentioned in the Commission's regulations is the environmental attributes of the QF selling to the utility. This is because avoided costs were intended to put the utility into the same position when purchasing QF capacity and energy as if the utility generated the energy itself or purchased the energy from another source. In this regard, the avoided costs that a utility pays a QF does not depend on the type of QF, i.e., whether it is a fossil-fuel-cogeneration facility or a renewable-energy small power production facility. The avoided costs rates, in short, are not intended to compensate the QF for more than capacity and energy.
 23. As noted above, RECs are relative recent creations of the states. Seven states have adopted renewable portfolio standards that use unbundled RECs. What is relevant here is that the RECs are created by the states. They exist outside the confines of PURPA. PURPA thus does not address the ownership of RECs. The contracts for sales of QF capacity and energy, entered into pursuant to PURPA, likewise do not control the ownership of the RECs (absent an express provision in the contract). States, in creating RECs, have the power to determine who owns the REC in the initial instance, and how they may be sold and traded; it is not an issue controlled by PURPA.
 24. We thus grant Petitioners' Petition for Declaratory Order, to the extent that they ask the Commission to declare that contracts for the sale of QF capacity and energy entered into pursuant to PURPA do not convey RECs to the purchasing utility (absent an express provision in a contract to the contrary). While a state may decide that a sale of power at wholesale automatically transfers ownership of the state-created RECs, that requirement must find its authority in state law, not PURPA.

Regional organizations, the Company contends, exist to facilitate green energy transactions from resources that have been certified as green energy compliant by those organizations e.g., Bonneville Environmental Foundation (BEF). These entities issue tradable "green tags" to certified renewable energy producers. Green tags are also known as green certificates, renewable energy credits (RECs) and tradable renewable certificates (TRCs). A green tag represents the environmental and other non-power attributes associated with 1 megawatt hour (MWh) of electricity generated from a renewable resource. Some of the QFs from whom Idaho Power anticipates making purchases in the future, the Company contends, have indicated an

intention to obtain marketable green tags as a result of entering into contracts with Idaho Power. Green tags avoid the need to package the electricity with its environmental attributes. The tags provide a way in which to “unbundle” the environmental attributes from the electricity and permit the sale of the environmental attributes of renewable generation separately from the electricity generated. In effect, the Company states that green tags are a currency that can be traded to individuals and entities wishing to support “green” energy. Example: Idaho Power Schedule 62__ Green Energy Purchase Program (Case No. IPC-E-00-18, Order No. 28655).

Referencing the foregoing FERC Order, Idaho Power states that FERC suggested that individual states may decide ownership of the green tags. As a result, the Company seeks guidance from the Commission as to ownership of potentially marketable certificates in Idaho.

Idaho Power contends that in Idaho, a utility and its customers confer additional value on QFs by virtue of the long-term, levelized, fixed rate contracts that the utility enters into with the QFs. That value, it asserts, is in addition to the avoided costs paid to the QFs for the energy produced. Vesting the utility with some ownership interest in the green tags, it states, would remunerate the utility for the additional value conferred to the QFs. The QF position, the Company represents, is that QF ownership of the green tags provides the incentive they need to invest in the production of energy from a renewable resource. They assert that the sale of the green tags associated with the generation of green power compensates the QF with the facility’s environmental attributes and rewards the additional risks associated with the investment in and the design and operation of a renewable energy resource plant.

In this Petition, Idaho Power Company requests a declaratory order from the Commission clarifying ownership of these green tags. The “respective arguments” of the Company and QFs are presented in the Company’s Petition.

Despite Idaho Power’s interest in owning the green tags, the Company acknowledges that retention of those tags by the QF developers may encourage the development of additional green energy resources in Idaho without the need to increase energy purchase prices. Given the heightened public interest in the development of new renewable resources, Idaho Power respectfully recommends that the Commission determine that the developers of such generation facilities receive full ownership rights in any green tags issued to them conditioned upon the requirement that the QF developers who qualify for green tags and from whom Idaho Power purchases energy grant the Company a “right of first refusal” to purchase those tags.

COMMISSION DECISION:

Idaho Power requests that its Petition for Declaratory Ruling be processed pursuant to Modified Procedure, i.e., by written submission rather than by hearing. Reference Commission Rules of Procedure, IDAPA 31.01.01.201-204. Staff concurs with the requested procedure and recommends that a standard comment period be established. Does the Commission agree?

Scott D. Woodbury

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APPENDIX A

Energy Trust Green Tag Definition

"Environmental Attributes" means any and all credits, benefits, emissions reductions, offsets, and allowances, howsoever entitled, resulting from the avoidance of the emission of any gas, chemical, or other substance to the air, soil, or water attributable to the Specified Resource, which are deemed of value by a Green Tag purchaser. Environmental Attributes include but are not limited to: (1) any avoided emissions of pollutants to the air, soil, or water such as (subject to the foregoing) sulfur oxides (SO_x), nitrogen oxides (NO_x), carbon monoxide (CO), and other pollutants; (2) any avoided emissions of carbon dioxide (CO₂), methane (CH₄), and other greenhouse gases (GHGs) that have been determined by the United Nations Intergovernmental Panel on Climate Change to contribute to the actual or potential threat of altering the Earth's climate by trapping heat in the atmosphere; and (3) the Green Tag Reporting Rights to these avoided emissions. Subject to the foregoing, Environmental Attributes do not include any energy, capacity, reliability, or other power attributes from the Specified Resource nor production tax credits or certain other financial incentives existing now or in the future associated with the construction or operation of the Specified Resource.

"Green Tag" means the Environmental Attributes associated with the power generated from the Specified Resource, together with the Green Tag Reporting Rights associated thereto. One Green Tag represents the Environmental Attributes made available by the generation of 1 MWh from the Specified Resource.

"Green Tag Reporting Right(s)" means the right of a Green Tag purchaser to report ownership of Green Tags in compliance with federal or state Law, if applicable, and to a federal or state agency, or other parties at the Green Tag purchaser's discretion, and include those accruing under Section 1605(b) of the Energy Policy Act of 1992, or under any present or future domestic, international, or foreign emissions trading program.