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DECISION MEMORANDUM

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

FROM: SCOTT WOODBURY

DATE: APRIL 5, 2004

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

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."
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> 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).
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> 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 <u>not</u> 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.

Petition for Declaratory Ruling

Regional organizations, Idaho Power 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, 105 FERC ¶ 61,004, 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 for the facility's environmental attributes and the additional risks associated with the investment in and the design and operation of a renewable energy resource plant.

Idaho Power Company, in this Petition, 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.

On February 20, 2004, the Commission issued Notices of Petition and Modified Procedure in Case No. IPC-E-04-2. The deadline for filing written comments was March 19, 2004. Timely comments were filed by PacifiCorp, Avista, Bonneville Environmental Foundation (BEF), Exergy Corporation, the Northwest Energy Coalition and Advocates for the West, Bob Lewandowski and Mark Schroeder, and Commission Staff. All commenters recommend for different reasons that the ultimate relief requested by Idaho Power, i.e., that the Company be provided a "right of first refusal" to purchase the environmental attributes or green tags associated with required QF purchases, be denied. PacifiCorp and Avista maintain that the environmental attributes or green tags associated with renewable resources are the property of the purchasing utility. The Bonneville Environmental Foundation, Northwest Energy Coalition and Advocates for the West recommend that the Commission confirm that qualifying facility developers own the environmental attributes associated with their projects, free from rights of first refusal. Exergy Corporation, Bob Lewandowski and Mark Schroeder and Commission Staff contend that the Commission has no jurisdiction or authority stemming from either PURPA, FERC implementing regulations or Idaho state law to grant the requested relief. Should the Commission decide not to dismiss Idaho Power's Petition, Mr. Lewandowski and Schroeder contend that the Company's Petition is not appropriate for Modified Procedure and request that the Commission schedule an evidentiary hearing. The comments and recommendations of the parties are more particularly described as follows:

PacifiCorp

By way of background, PacifiCorp notes that the utility has 13 long-term fixed rate contracts with QFs in Idaho, ranging from 80 Kw to 6 MW. None of the QF contracts are levelized. PacifiCorp requests that the Commission deny Idaho Power's request for a "right for first refusal" and instead issue an Order declaring that, pursuant to obligations imposed by PURPA, ownership of all renewable credits associated with energy produced and delivered by a QF pass to the utility that purchases that output of the QF.

Renewable energy credits (RECs) identify generation as having come from a renewable resource. Historically, PacifiCorp contends, QF developers have effectively sold the entire output of their QFs to the purchasing utilities under PURPA-mandated contracts. This bundled output, PacifiCorp contends, includes those characteristics that are now separately identified as renewable energy credits. PacifiCorp characterizes Idaho Power's request as an unbundling of RECs from the overall output of the facilities and the transfer of ownership to the QF without compensation to the purchasing utility. To deny a purchasing utility the RECs associated with the QF purchase, PacifiCorp contends that the QF would then be effectively selling "null" or generic power to the utility. This it states is not the intent of the PURPA requirement. Ratepayers and utilities continue to bear the risks, the utility contends, not QFs. To grant ownership of the renewable energy credits to QFs, PacifiCorp maintains, would result in a windfall to QF developers at the expense of ratepayers.

PacifiCorp maintains that any entity that relies on a mandated purchase at a price that is protected from market forces, such as the QFs, is by definition unlikely to be competitive economically. Otherwise, it argues, the project would stand on its own without PURPA protection. To transfer the right to RECs from the purchasing utility to the QF developer, PacifiCorp contends, would exacerbate this perverse incentive.

PacifiCorp contends that utilities and their ratepayers bear the risks associated with QF generation and should receive the benefits arising therefrom. QFs come into existence, it maintains by choosing not to participate in the market, but rather trigger PURPA, which requires utilities to enter into contracts with them at the utility's avoided costs.

Over the past few years, PacifiCorp notes that a secondary market has developed in the identifying feature of the electricity as having come from the QF as a renewable resource. This new market, it contends, has not created anything that was not there before, i.e., a certificate that shows that renewable power was generated and delivered to the grid; rather, it just permits an owner of a renewable resource to sell the certificate generated by that resource into a nascent market that accords positive financial values to the certificate, which until now has always gone with that power. The Commission in this case, PacifiCorp contends, is being asked to permit QFs to withhold from the purchasing utility the very essence of what, under PURPA, requires the utility to purchase the power from the QF in the first place. Renewable energy credits should not be given to the QF to separately sell, PacifiCorp contends, unless the QFs right to require ratepayers to pay avoided costs for the power is also taken.

Traditional regulatory principles, PacifiCorp contends, dictate that rewards should follow risks, or that the bearer of risks and costs should likewise obtain the benefits. Ratepayers have consistently borne the risk of PURPA-mandated contracts, PacifiCorp argues, and should therefore retain the benefits of those contracts. Ratepayers should not be deprived of a benefit they have always gotten for the past quarter-century under PURPA, simply because a secondary market has developed for that portion of the power that identifies it as having qualified under PURPA in the first place. Any other determination, PacifiCorp contends, would result in double-billing the ratepayer and a windfall for the QF.

PacifiCorp notes that utilities do not voluntarily enter into QF contracts. The price for QF energy is based on avoided costs, not market costs, which PacifiCorp contends Congress has determined adequately compensates QFs that would otherwise be unable to compete in the market. Requiring a utility's ratepayers to pay avoided costs as well as the market rate for renewable energy credits, PacifiCorp contends, would result in increased energy costs.

While acknowledging that Idaho does not currently have a renewable portfolio standard (RPS) program that issues green tags, PacifiCorp notes that such programs are intended to promote renewable energy in the market place by attracting the most efficient renewable energy competitors. Resources must compete against each other rather than against a set level of avoided costs. The approach of PURPA, PacifiCorp contends, is inherently less efficient since it does not require competition among similar resources. For load serving entities, one of the potential future benefits of QF contracts, PacifiCorp contends, is that they can help meet future RPS goals, whether at the national or state level. Typically, load serving entities are required to purchase renewables up to a mandated percentage of total load served.

PacifiCorp contends that QFs have voluntarily withdrawn from the market, and utilities bear the risk of that decision. Idaho Power's requested Order, it states, would be a direct detriment to ratepayers. The benefits should follow risks, and the approach proposed by Idaho Power would set in motion a process whereby QFs can set aside non-power features with positive market value for sale, leaving the ratepayers with generic power equivalent to power generated from a non-renewable resource against the intent of PURPA for utilities to buy cleaner power. Further, PacifiCorp contends that granting RECs to QFs can reduce the effectiveness of future national and/or state renewable programs that intend, in part, to incentize more plant investment for local economic development.

Absent the renewable energy credit, PacifiCorp maintains that power generated by QFs is undifferentiated from other power a utility utilizes to meet its obligation to serve and, therefore, the facility that produces this undifferentiated power should no longer be considered a QF. The REC is an essential aspect of a generation facilities output that resulted in the facility being designated a QF under PURPA in the first place.

Avista

Avista expresses concern that any Order issued by the Commission in Idaho Power's docket will be precedent with respect to other companies. Avista recommends that the Commission's Order be limited in effect to Idaho Power and expressly not apply to Avista Corporation. Alternatively, Avista recommends that the Commission declare that ownership of renewable energy credits associated with QF renewable resources be vested or conveyed to the purchasing utility as a condition of a QF receiving a contract.

QFs located in Idaho, Avista contends, receive a benefit and incentive when they contract to sell to a utility at a long-term, fixed rate contract. The QF developers, it states, receive the benefit of the utility's credit standing, and the likely certainty of a steady continued cash flow over a long period of time. Avista submits that ownership of RECs should remain with the purchasing utility company when the utility is compelled to purchase power from the QF.

Avista contends that the foundation principle of PURPA is that the power that a utility purchases at avoided cost rates from QF projects is intended to displace power from resources that the utility otherwise would have had to construct or purchase. The utility and its customers, Avista contends, should incur no more costs, and receive no less economic benefit from a QF purchase, than had the utility owned the generating unit and operated it for its customers. A purchasing utility, Avista contends, normally expects to acquire all of the attributes and value of the output that it purchases from a QF pursuant to a published avoided cost rate. If the utility does not acquire all of the value of the QF output then Avista contends there is not an equivalence of value between a QF project and a comparably sized utility owned resource. Utility customers will receive less value from QF purchases, it maintains, if the monetary benefit of RECs is assigned to the project developer instead of flowing with the power to the benefit of utility customers. It is consistent with the principles of PURPA, Avista contends, that the monetized value of QF renewable resource development be retained by the utility customers, in the same manner that the customers would benefit from monetized value of RECs associated with utility generation.

QF development, Avista contends, would not be significantly deterred if renewable energy credits are retained by utilities that purchase power from QFs at published avoided cost rates. QFs, it states, are not precluded from taking their electricity output and RECs to the wholesale markets, if they perceive that the wholesale markets offer greater rewards then they will receive at Commission determined avoided cost rates.

The monetary value of RECs, Avista contends, are not preserved to the utility and its customers, if the QF developer retains ownership of the renewable energy credits, even if the QF developer assigns a "right of first refusal" to the utility. The utility and its customers, Avista contends, should be able to benefit from any increase in the value over time of RECs, irrespective of whether the renewable energy credits are associated with utility owned generation, or are acquired by purchase from a QF at published avoided cost rates.

Bonneville Environmental Foundation (BEF).

BEF is non-profit business that markets green tags representing the environmental attributes of the output of certain renewable power generating facilities. BEF supports and encourages the Commission to adopt the general proposition that the environmental attributes or green tags, associated with the output of renewable power facilities are and remain the property of the owner of that facility until and unless the owner consents to a transfer of those green tags to another party. Similar to federal or state tax credits or other incentives employed by the owner to develop its facility, BEF contends that unless otherwise specified, these incentives are intended by the public bodies that established them to be employed in aggregate by a developer of a renewable facility, in recognition that often the economic disincentives act in aggregate to discourage such developments. Thus, the federal government does not demand custody of the green tags from a project that takes advantage of federal tax credits and decelerated depreciation.

Thus, also a cogeneration facility that uses fossil fuels and may have no green tags to sell is not disqualified from exercising its QF rights under PURPA.

BEF applauds Idaho Power's recognition of the compelling value to the State of Idaho of incenting prospective facility developers to proceed with their renewable projects. Oregon, Washington and other states in which renewable facilities are being actively developed, BEF notes, do not challenge the owners' green tag rights.

BEF parts company with Idaho Power on the narrower question of whether Idaho Power should obtain a "right of first refusal" for the green tags from the facilities in question. BEF understands the Company's reasoning in seeking to protect its customer access to the tags but believes that the market will meet this concern. A right of first refusal, BEF contends, effectively diminishes the market value of the tags to the owners by discouraging a third party from expending the effort and paying the opportunity cost of negotiating to purchase such tags, only to have Idaho Power exercise its right of first refusal. As a marketer, if BEF has an equivalent opportunity to acquire tags from another seller not constrained by such a right of first refusal, BEF will out of necessity prefer the unencumbered tags and seller.

Northwest Energy Coalition and Advocates for the West

The Northwest Energy Coalition is a multi-state association of energy efficiency, clean energy, environmental and other public interest organizations engaged in promoting a clean, reliable and economic energy future for the Pacific Northwest. Advocates for the West is a non-profit conservation law and advocacy center, which supports renewable energy resources and energy efficiency improvements. The commenters concur with the comments of Bonneville Environmental Foundation. BEF's comments, they contend, deserve careful consideration in no small part because BEF markets and sells green tags in Idaho for Idaho Power's green power program.

The commenters appreciate and agree with the general position taken by Idaho Power Company that green tag ownership should stay with project owners. Commenters base their argument on the utility's obligation to price QF power at the utility's avoided cost and the monopsonist power of Idaho Power. The commenters also note that green tags are just one collateral value that PURPA QFs can have, apart from the production of electrons. Methane digesters installed at dairies can improve overall waste management. Canal-drop hydro systems can have independent value to their owners for channel maintenance, water flow management or other reasons. These values are real and separate from the production of electricity at QFs, but a utility could not possibly claim ownership of them.

Regarding Idaho Power's request for "right of first refusal" to purchase green tags from QFs, commenters support BEF's position. Quite simply, they do not believe the Company has presented any legal or other compelling basis to obtain such a right. The Northwest Energy Coalition and the Advocates for the West recommend that the Commission confirm that QF developers own the environmental attributes associated with their projects, free from rights of first refusal.

Exergy Corporation

Exergy Corporation contends that one ruling should be the contemporaneous authority on the subject of environmental attributes: the October 1, 2003, ruling by FERC (Docket No. EL03-133- 00) dominates in elucidation. This Order, it states, clearly indicates where and under what circumstances state authority for ascertaining ownership of environmental attributes embedded in renewable programs exists. Under the tenets incorporated into PURPA, whereby the utility is required to purchase energy and capacity only, the environmental attributes is not part of the protocol. Furthermore from the review of Exergy Corporation, no Idaho enabling statute exists for a decision on the question of ownership of an environmental attribute by the Idaho Public Utilities Commission.

With all due respect to the Idaho Commission, Exergy Corporation contends that without a specific legislative, regulatory, or legal provision in the Idaho Code or in the Idaho Administrative Rules, there appears to be no legal mechanism to authorize the Commission to create new law. Absent of those provisions, without an existing statute to interpret, a directive from the state legislature or superceded by federal mandate, Exergy contends that the Commission cannot implement a decision deleterious to either the generator, the utility, or contrary to FERC and PURPA. Where no state initiated mandatory guidelines are evident, Exergy contends that the environmental attribute remains with the generator.

But the question of whether law exists, Exergy contends, should be moot regardless. Such a law is inappropriate based on the single fact that the QF bears the risk of compliance [which is born in capital cost and schedule when negotiating the energy sales agreement], therefore, the QF should also have the benefit of environmental attributes. The QF is solely responsible to mitigate pollution consequences, not the customer or utility, and all the liabilities or attributes of that generation lie with the QF. Indeed, it may be argued that if a renewable resource generator is required to relinquish the environmental attributes to the customer of the product, foreseen as possibly offsetting the cost of energy for the consumer, then the opposite, it states, should also hold true.

The inception of the tradable renewable certificates or green tags derived from the environmental attributes, Exergy Corporation contends, was designed towards proliferation of renewable generation sources. The rationale was to provide to the generator, it states, an additional source of income from the potential offset of fossil-fuel emissions and other environmentally sensitive generators. Since renewable generation carries a disproportionately larger installed cost with no ability to pass through fuel risk, any additional inducement results in expanded opportunities to increase the amount of renewable resources.

Exergy Corporation notes that the decision behind the avoided cost rate for a QF in Idaho is based on a natural gas-fired generator. There is no environmental attribute associated with this baseline generator, only capacity and energy. They alone are the basis for the avoided cost rate mandated by the Commission for QFs. No environmental attribute is associated with this mandate. Equally as important, it states, not all QFs are necessarily renewable energy based resources. Therefore, not all QFs in the less than 10 MW category can even demonstrate an environmental attribute.

But there is a more germane argument to be voiced under the concept of Integrated Resource Planning, Exergy Corporation states. Even if the environmental attribute is "stripped" from the renewable resource generation, there still is no rational nexus which purports the generating source to be anything other than nonpolluting. A renewable resource generator stripped of the environmental attribute, is still a nonpolluting generator resource and displacing fueled or hydro generation. No paper commodity will modify the evolution of the electrons produced. Given this transparency, Exergy Corporation contends that the environmental attribute need not be part and parcel of any societal generation mix. The generator is nonpolluting and the potential to offset existing facilities, new emission or social-impact generation is tangible.

An environmental attribute, whether monetized or not, Exergy Corporation contends, is separate from the energy and capacity of generation source. Until such time as the State of Idaho decides to enact legislation essentially (1) forcing PURPA projects to relinquish the environmental attribute to the ratepayer or utility, (2) creating a renewable portfolio standard or (3) implementing another such mandate for renewable resource generation requirements into the IRP of the utilities serving the Idaho customer (and the energy sales price reflects this requirement), the irrefutable answer to the question posed by Idaho Power, Exergy Corporation contends, is that the environmental attribute remains with the QF, unless otherwise mutually agreed upon between QF and purchasing utility.

Bob Lewandowski and Mark Schroeder

Mr. Lewandowski is the current owner of Idaho's first commercial wind power generating facility located south of Interstate 84 between Boise and Mountain Home. Mr. Schroeder currently owns and farms several 1,000 acres contained within the Bell Rapids Irrigation District. Given the cost of electric power to irrigate his farm and its location in a desirable wind resource area, Mr. Schroeder is currently actively planning to construct a large (under 10 MW) wind facility.

Commenters suggest that the Commission should reject Idaho Power's Petition for "right of first refusal" to purchase green tags from QFs. Idaho Power, they contend, has no interest in, or right to, green tags created by QFs.

Commenters dispute the Company's contention that QF developers receive value from Idaho Power for the electricity the QFs generate beyond the purchase price of the energy. The Company's avoided cost rates, they state, are totally unrelated to a QFs' internal finances. Avoided cost rates are determined based on the utility's cost of bringing on a new resource. The Company's assertion that QFs receive additional value over and above the avoided cost rates by virtue of 20-year contracts, they contend, is simply wrong. Contract length, they state, is not at all relevant to the question of whether or not the Company should be bestowed with the right of first refusal. The commenters point out that 20-year contracts are not required in surrounding states. Commenters state that it is worth noting that every single state that is adjacent to Idaho has multiple tax incentives, including outright monetary grants to encourage the development of renewable energy projects. The State of Idaho has no such incentives. If the assertions contained in the Company's Petition relative to QFs in Idaho being over compensated remain in the record, the commenters contend that Modified Procedure is inappropriate and request a full evidentiary hearing.

The commenters contend that the Idaho Commission has only limited authority and has no authority to rule on the ownership of green tags. The Commission's jurisdiction they state is limited and must be found entirely in its enabling statutes. It is clear, they state, that the Idaho Courts view the Commission's jurisdiction relative to QFs as stemming solely from PURPA and FERC's implementing regulations. It is also clear, they state, that this Commission has no authority other than that conferred upon it by Idaho law or through its role as a state agency regulating utilities under PURPA. What then, they query, are the FERC's PURPA regulations this Commission is charged with implementing that deal with ownership of (including rights of first refusal to) green tags. Simply put, they state that there are none. In fact, they note that FERC has ruled that in order for a state regulatory commission to exercise any authority over green tag ownership there must be a state law bestowing that authority upon the Commission. FERC has made it clear that there is nothing in PURPA or FERC's regulations granting the Commission authority to adjudicate ownership of green tags. FERC has declared that since states created RECs they may regulate how those credits are traded. Since Idaho has not created RECs, commenters suggest that there is nothing for the state to regulate. A REC or green tag, the commenters state, is private property owned and created by the QF. It is no different, they argue, from any other ancillary benefit that might accrue to a QF as a result of building a renewable energy resource. Idaho Power's request for right of first refusal they maintain is different only in degree from asking for outright ownership. Commenters recommend that Idaho Power's Petition be denied.

Commission Staff

Staff recommends that the Company s Petition for Declaratory Order be denied. Alternatively, should the Commission determine that it has jurisdiction, Staff recommends that the Commission issue a declaratory order stating that mandatory purchases from QFs under PURPA do not convey ownership of any marketable environmental attributes. Accordingly, any environmental attributes associated with QF generation remain with the QF. Staff further recommends that the Commission deny the Company's proposal to require that QF developers from whom Idaho Power purchases energy grant Idaho Power a "right of first refusal" to purchase the environmental attributes associated with the QF facility.

Staff contends that the initial question before the Commission is one of jurisdiction. Does the Commission have the statutory authority and jurisdiction to determine who owns the "environmental attributes" associated with a QF project that requests a PURPA contract and proposes to sale capacity and energy to a regulated utility? If PURPA and FERC rules do not address and do not require a QF developer to sale "environmental attributes," to the purchasing utility, can the Commission in its implementation of PURPA restrict their sale to other parties? If the Commission has the authority under PURPA, should it restrict their sale? Can the Commission require as a PURPA contract condition that a QF grant a purchasing utility a "right of first refusal" to purchase the "green tags" associated with a QF facility?

It is well settled, Staff states, that the Idaho Commission is a creature of statute and derives its general authority vis-a-vis electric utilities from Title 61, Idaho Code. Under State Law, the Commission has authority over retail electric service. Wholesale power transactions are regulated by the Federal Energy Regulatory Commission. All QF sales to an electric utility are wholesale transactions. FERC in the Order cited by Idaho Power in its Petition (105 FERC ¶ 61,004) states that the contract sale of QF capacity and energy entered into pursuant to PURPA does not convey renewable energy credits to the purchasing utility (absent an express provision in the contract to the contrary). FERC notes that RECs are relatively recent creations of the States and suggested that "States, in creating RECs, have the power to determine who owns the credit in the initial instance, and how they may be sold and traded. "It is not," FERC states, "an issue controlled by PURPA." Staff notes that Idaho is not a State that has established a renewable energy portfolio standard for electric utilities. Nor is it a State that has by legislation created green certificates, green tags, renewable energy credits or tradable renewable certificates or established a market for same. Nor also, it states, is Idaho a state that has provided tax incentives or credits for the development of renewable energy. In short, Staff contends, that there appears to be no hook that gives the Commission jurisdiction over "environmental attributes," not under PURPA or federal law (including the Energy Policies Act of 1992), and not under Title 61 of the Idaho Code.

In the context of PURPA wholesale transactions, Staff notes that FERC has barred state commissions from establishing different wholesale prices for otherwise qualified cogeneration or small power production facilities. 18 C.F.R. § 292.304(a)(ii). Accordingly, contracts for renewable resources cannot be at a higher price than for non-renewable resources, nor can the requirements of contract be different. Discrimination either directly or indirectly is not permitted.

Arguably what Idaho Power proposes, Staff contends, is an impermissible "taking" of property. The Fifth Amendment of the U. S. Constitution states "nor shall private property be taken for public use without just compensation." Idaho Power requests a Commission Order granting the utility by regulatory fiat a "right of first refusal." It proposes no compensation to the QF for the right. Electric utility purchases of energy and capacity from PURPA QFs are mandatory. 18 C.F.R. § 292.303(a). The environmental attributes associated with renewable QF projects, Staff contends, are currently separate from the capacity and energy sold to Idaho utilities. They are not, Staff contends, bundled together as a matter of law. Nor is the cost to purchase environmental attributes included in an Idaho utility's avoided cost. To the extent those attributes have value and provide additional developer incentive, Staff believes they should remain with the developer. At this time, Staff contends that no argument has been advanced nor authority cited to justify or require placing any regulatory restriction by this Commission on their ownership.

COMMISSION DECISION

Idaho Power has requested a declaratory Order determining ownership of the marketable "environmental attributes" 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. Idaho Power recommends that the Commission determine that the QF developers of such facilities receive full ownership rights of any green tags issued to them, conditioned upon the requirement that the QF developers from whom the Company purchases energy grant the Company a "right of first refusal" to purchase those tags.

Does the Commission find that it has jurisdiction to determine the ownership of marketable "environmental attributes"? If not, should the Company's Petition be denied? If the Commission believes that it does have jurisdiction, should the ownership of such environmental attributes be confirmed in the QF or the purchasing utility? If in the QF, should the purchasing utility as a condition of contract be granted a "right of first refusal"?

Scott D. Woodbury

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