

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 17th day of June 2013, a true and correct copy of the within and foregoing **MOTION TO SUPPLEMENT THE RECORD** was served in the manner shown below, to:

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Peter Richardson

143 FERC ¶ 61,232
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Kootenai Electric Cooperative, Inc.

Docket Nos. EL13-59-000
QF11-178-002

NOTICE OF INTENT NOT TO ACT AND DECLARATORY ORDER

(Issued June 14, 2013)

1. In this order, we give notice that we decline to initiate an enforcement action pursuant to section 210(h) of the Public Utility Regulatory Policies Act of 1978 (PURPA)¹ as requested by Kootenai Electric Cooperative, Inc. (Kootenai). However, we find that the Oregon Public Utilities Commission's (Oregon Commission) February 26, 2013 order² misinterprets the Commission's August 31, 2012 order³ and is inconsistent with PURPA. The Oregon Order precludes Kootenai from selling its Fighting Creek Landfill Gas to Energy Station qualifying facility (Fighting Creek QF) output in Oregon. A utility is obligated under PURPA, however, to purchase the output of a QF, even a QF located in another state, as long as the QF can deliver its power to the utility.

Background

2. Kootenai is a member-owned electric cooperative located in Hayden, Idaho. Kootenai's Fighting Creek QF is a 3 MW net capacity landfill gas plant located near Bellgrove, Idaho.⁴ Kootenai seeks to deliver its Fighting Creek QF's output from Idaho across Avista Corporation's (Avista) system to an Idaho Power Company (Idaho Power)

¹ 16 U.S.C. § 824a-3(h) (2006).

² *Kootenai Electric Cooperative, Inc. v. Idaho Power Co.*, Oregon Commission Docket No. UM 1572, Order No. 13-062 (Feb. 26, 2013) (Oregon Order).

³ *Avista Corporation*, 140 FERC ¶ 61,165 (2012) (August 31 Order).

⁴ Kootenai Petition at 3-4.

facility in Oregon and thus receive more favorable Oregon Commission-approved PURPA avoided cost rates and terms.⁵

3. The Lolo-Oxbow line, over which the output will be transmitted, is a 108 mile, 230 kV transmission line with the northernmost 63 miles owned by Avista (operated by Idaho Power for Avista) and the southernmost 45 miles owned by Idaho Power.⁶ The Lolo-Oxbow line generally runs north to south from the Lolo Substation in Idaho to the Oxbow Substation in Oregon. The Lolo-Oxbow line crosses the Idaho-Oregon border into Oregon 43 miles south of the Lolo Substation and the ownership changes from Avista to Idaho Power 20 miles further south near Imnaha, Oregon.⁷

4. On October 19, 2011, Kootenai requested that Idaho Power agree to a standard offer Oregon power purchase agreement (Oregon PPA), but Kootenai states that Idaho Power resisted and requested that the Idaho Public Utilities Commission (Idaho Commission) assert jurisdiction over Kootenai's requested QF sale, thereby requiring Idaho Commission-set avoided cost rates. Kootenai states that it instead executed and delivered an Oregon PPA to Idaho Power on December 27, 2011; Idaho Power acknowledged receipt, but refused to countersign. Kootenai filed a complaint against Idaho Power at the Oregon Commission on January 3, 2012 requesting that the Oregon Commission require Idaho Power to purchase Kootenai's Fighting Creek QF output under the rates and terms contained in the Oregon PPA executed by Kootenai.⁸

5. Kootenai also states that it submitted a request to Avista for point-to-point firm transmission service allowing Kootenai to deliver its Fighting Creek QF's output from Idaho across Avista's system (using the Lolo-Oxbow line) to Idaho Power in Oregon.⁹ Kootenai tendered a long-term firm point-to-point service agreement to Avista on May 31, 2012, and Idaho Power objected. At Kootenai's request, Avista filed the unexecuted transmission service agreement between Kootenai and Avista (Avista Agreement) to the Commission on June 27, 2012. The service agreement describes the point of delivery (POD) as "the point on the Lolo-Oxbow 230 kV transmission line where the 230 kV facilities of Idaho Power Company and Avista are interconnected and, for

⁵ *Id.* at 2, 5.

⁶ We note that the point of change in ownership along the Lolo-Oxbow line is the only point at which Avista's and Idaho Power's transmission systems interconnect with each other.

⁷ Idaho Power Protest at 6.

⁸ Kootenai Petition at 7.

⁹ *Id.* at 8.

scheduling purposes, the LOLO POD.” The August 31 Order accepted the Avista Agreement,¹⁰ and stated (at P 21):

We conclude that it is not uncommon for a POR/POD to represent multiple facilities or capacity between multiple transmission service providers, not just a single control area interface. Additionally, we conclude that Avista’s description of the POD provides Kootenai non-discriminatory transmission service all the way across Avista’s transmission system, because the description incorporates the entirety of Avista’s transmission assets on the Lolo-Oxbow line. Finally, we find that Kootenai’s requested clarification that the term “near Imnaha, Oregon” be in the description of the POD or, alternatively, that the order state that Imnaha, Oregon is the only location to which Avista will deliver the QF output for Idaho Power’s purchase and use is unnecessary in light of our finding that Avista’s proposed language meets the standards set forth in both NAESB [North American Energy Standards Board] and NERC [North American Electric Reliability Corporation] guidelines.

6. In its Oregon Order, however, the Oregon Commission has since concluded that Kootenai is not eligible for an Oregon PPA under Idaho Power’s Oregon Schedule 85 (Schedule 85) for the output produced by Kootenai’s Fighting Creek QF (and wheeled by Avista to Idaho Power) essentially because the Oregon Commission determined the POD to be at the Lolo Substation in Lewiston, Idaho, which it stated is not within the state of Oregon. In the Oregon Order, the Oregon Commission explained that a QF can obtain Oregon Commission-approved avoided cost rates under PURPA only if its output will be delivered into the purchasing utility’s control area in Oregon, and the POD will be in Oregon. The Oregon Commission concluded that Kootenai failed to meet either requirement and therefore is not eligible for an Oregon PPA under Schedule 85.

Petition for Enforcement and Petition for Declaratory Order

7. On April 17, 2013, Kootenai filed a petition for declaratory order and petition for enforcement under section 210(h) of PURPA against the Oregon Commission, to correct the Oregon Order that rejected Kootenai’s attempt to sell its Fighting Creek QF output to Idaho Power at Oregon Commission-approved avoided cost rates.

8. Kootenai argues that the Oregon Order ignores language in the Commission’s August 31 Order, such as “we conclude that Avista’s description of the POD provides Kootenai non-discriminatory transmission service all the way across Avista’s

¹⁰ *Avista Corp.*, 140 FERC ¶ 61,165 (2012) (August 31 Order).

transmission system, because the description incorporates the entirety of Avista's transmission assets on the Lolo-Oxbow line."¹¹

9. Kootenai argues that the Oregon Commission's requiring QF output to first enter the purchasing utility's balancing authority area within the geographic boundaries of Oregon is inconsistent with PURPA.¹²

10. Kootenai points out that the Oregon Order would still require Kootenai to pay for power to be delivered down the Lolo-Oxbow line, despite concluding that the wheeling transaction terminates at the Lolo Substation, which is at the beginning of the Lolo-Oxbow line.¹³ Kootenai further states that the Oregon Order effectively allows Idaho Power to use the Avista-owned Lolo-Imnaha section of the line free of charge, while Kootenai and other Avista transmission customers pay for the associated costs.¹⁴

11. Kootenai asks the Commission to declare that: (1) the POD for Fighting Creek QF output is at the point of change of ownership of the Lolo-Oxbow transmission line near Imnaha, Oregon; (2) Idaho Power cannot assert title to output from the Fighting Creek QF prior to delivery of that output at the Imnaha POD; (3) Kootenai is entitled to the Oregon Commission's avoided cost rates in effect for Idaho Power at the time it tendered a signed QF contract to Idaho Power on December 27, 2011; (4) the Oregon Commission has violated the right of QFs to make indirect sales to Oregon utilities; (5) PURPA provides no justification to discriminate against out-of-state QFs; and (6) the Oregon Commission's actions unduly burden interstate commerce in electricity and are contrary to the Commission's policies promoting open competition in the electric generation market.¹⁵

12. Kootenai requests that the Commission initiate an enforcement action under section 210(h) of PURPA to ensure that the rights of QFs to make indirect sales are protected, and promote the Commission's policy interest in unimpeded flow of electric power in interstate commerce and open access to the nation's electric transmission system.¹⁶

¹¹ Kootenai Petition at 12-13 (citing *Avista Corp.*, 140 FERC ¶ 61,165 (2012)).

¹² *Id.* at 19.

¹³ *Id.* at 21.

¹⁴ *Id.* at 15-16.

¹⁵ *Id.* at 24-25.

¹⁶ *Id.* at 25.

Notice of Filing and Responsive Pleadings

13. Notice of Kootenai's filing was published in the *Federal Register*, 78 Fed. Reg. 24,404 (2013), with interventions and protests due on or before May 7, 2013. The Oregon Commission and Idaho Power each filed interventions and protests.

14. The Oregon Commission explains that in its Oregon Order it: (1) denied Kootenai's request to compel Idaho Power to enter into an Oregon PPA; (2) nevertheless affirmed that under PURPA an electric utility is required to purchase any energy and capacity that is made available to the electric utility either directly or indirectly from a QF; but (3) ultimately concluded that Kootenai was not entitled to a PURPA PPA in Oregon because its output would be delivered to Idaho Power in the state of Idaho.¹⁷

15. The Oregon Commission clarifies that the Oregon Order does not and was not intended to conflict with the Commission's August 31 Order. The Oregon Commission explains that it interpreted the August 31 Order as approving the unexecuted Avista Agreement without determining whether Kootenai is eligible for a PURPA contract in Oregon, which it states is a question properly resolved by the Oregon Commission.¹⁸

16. The Oregon Commission and Idaho Power argue that the only valid POD is the Lolo Substation in Idaho, asserting that the Lolo Substation is the only designated POD listed on both the Open Access Same-time Information System (OASIS) and NERC's Transmission System Information Network (TSIN) directory.¹⁹

17. The Oregon Commission adds that it has not discriminated against out-of-state QFs. According to the Oregon Commission, it has not concluded that all wheeling transactions stop at the boundary of a balancing authority area. Rather, the Oregon Commission concludes that, in this particular circumstance, the POD is in Idaho and thereby Kootenai is not eligible for an Oregon PURPA PPA. The Oregon Commission argues that an in-state QF would be treated no differently.²⁰

18. Idaho Power protests Kootenai's petition because it: (1) mischaracterizes the facts of the case; (2) mischaracterizes the August 31 Order; (3) misconstrues the Oregon

¹⁷ Oregon Commission Protest at 1-2.

¹⁸ *Id.* at 2.

¹⁹ Oregon Commission Protest at 7-8; Idaho Power Protest at 6-7.

²⁰ Oregon Commission Protest at 15.

Order; (4) sets forth 'as applied' claims which are beyond the Commission's jurisdiction; and (5) seeks claims that are procedurally barred.²¹

19. The Oregon Commission and Idaho Power request that the Commission deny Kootenai's request for an order declaring that the POD is in Oregon, and its request to initiate an enforcement action against the Oregon Commission.²²

20. On May 14, 2013, Kootenai filed a motion for leave to answer and answer to the protests. Kootenai contends that Idaho Power raises many meritless procedural arguments that, if accepted, would create procedural impediments for the Commission to enforce the open access transmission regime established by Order No. 888, and to correct state policies that are inconsistent with PURPA.²³

21. Kootenai argues that the POD is at the point of change of ownership of the Lolo-Oxbow line, near Imnaha, Oregon. According to Kootenai, Avista clarified that it "provides transmission service over the entirety of its assets on the Lolo-Oxbow 230 kV Transmission Line, and therefore provides transmission service to the point of change of ownership."²⁴

22. Kootenai explains that the Oregon Order recognized that the POD in Lolo will represent a number of facilities, including facilities in Oregon. Kootenai states that it will make QF deliveries to a POD that includes facilities in Oregon and that such circumstances require the state to implement PURPA.²⁵

Discussion

Procedural Matters

23. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2012), the notice of intervention and timely, unopposed motion to intervene serve to make the entities that filed them parties to this proceeding. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2012), prohibits an answer to a protest or answer unless otherwise ordered

²¹ Idaho Power Protest at 1-2.

²² Oregon Commission Protest at 15; Idaho Power Protest at 31.

²³ Kootenai Answer at 2.

²⁴ *Id.* at 11.

²⁵ *Id.* at 17-18.

by the decisional authority. We will accept Kootenai's answer because it has provided information that assisted us in our decision-making process.

Commission Determination

24. Section 210(h)(2)(B) of PURPA²⁶ permits any electric utility, qualifying cogenerator, or qualifying small power producer to petition the Commission to act under section 210(h)(2)(A) of PURPA²⁷ to enforce the requirement that a state commission implement this Commission's regulations. As the Commission stated in its 1983 Policy Statement, we have discretion in choosing whether to exercise that enforcement authority under section 210(h)(2)(A) of PURPA.²⁸ We may choose to exercise our enforcement authority, or, where the Commission refuses to bring an enforcement action within 60 days of the filing of a petition, under section 210(h)(2)(B) of PURPA, the petitioner may bring its own enforcement action directly against the state regulatory authority or non-regulated electric utility in the appropriate United States district court.²⁹

25. In this order, we give notice that we do not intend to go to court to enforce PURPA on behalf of Kootenai; Kootenai thus may bring its own enforcement action against the Oregon Commission in the appropriate United States district court. Notwithstanding our decision not to go to court to enforce PURPA on behalf of Kootenai, we find that the Oregon Order is inconsistent with PURPA in certain respects, as we explain below.

26. Section 210(h) of PURPA requires that an aggrieved party, before bringing an enforcement petition in federal district court, first petition this Commission to bring its own enforcement action against the state commission. The Commission can and often does issue a declaratory order in response to an enforcement petition.³⁰ That declaratory

²⁶ 16 U.S.C. § 824a-3(h)(2)(B) (2006).

²⁷ *Id.* § 824a-3(h)(2)(A).

²⁸ *Policy Statement Regarding the Commission's Enforcement Role Under Section 210 of the Public Utility Regulatory Policies Act of 1978*, 23 FERC ¶ 61,304, at 61,645 (1983) (1983 Policy Statement).

²⁹ In those circumstances where the Commission refuses to act, the Commission may intervene as of right in an enforcement action brought by such a petitioner. 16 U.S.C. § 824a-3(h)(2)(B) (2006).

³⁰ *See, e.g., Rainbow Ranch Wind, LLC*, 139 FERC ¶ 61,077; *Morgantown Energy Associates*, 139 FERC ¶ 61,066 (2012), *denying reconsideration*, 140 FERC ¶ 61,223 (2012); *Cedar Creek Wind, LLC*, 137 FERC ¶ 61,006 (2011); *Southern California Edison Co.*, 70 FERC ¶ 61,215, *order on reconsideration*, 71 FERC ¶ 61,269 (1995).

order, issued separate from the Commission's authority under PURPA's section 210(h) enforcement regime, is within the Commission's purview to issue "to remove uncertainty."³¹ A notice of intent to act and the accompanying declaratory order represent both the Commission's exercise of its discretion on such an enforcement action, as well as a statement of the Commission's position on the matter; the statement of position by the Commission can provide assistance to a court on the Commission's thinking in the event that the Commission and/or such petitioner decide to bring enforcement cases.³²

27. We find that the Oregon Order terminating Kootenai's wheeling transaction at a Lewiston, Idaho point of delivery has misinterpreted this Commission's August 31 Order that accepted the Avista Agreement.

28. In the August 31 Order, the Commission stated (at P 21):

We conclude that it is not uncommon for a POR/POD to represent multiple facilities or capacity between multiple transmission service providers, not just a single control area interface. *Additionally, we conclude that Avista's description of the POD provides Kootenai non-discriminatory transmission service all the way across Avista's transmission system, because the description incorporates the entirety of Avista's transmission assets on the Lolo-Oxbow line.* Finally, we find that Kootenai's requested clarification that the term "near Imnaha, Oregon" be in the description of the POD or, alternatively, that the order state that Imnaha, Oregon is the only location to which Avista will deliver the QF output for Idaho Power's purchase and use is unnecessary in light of our finding that Avista's proposed language meets the standards set forth in both the NAESB and NERC guidelines. [Emphasis added.]

29. In the Oregon Order, the Oregon Commission states (at page 6):

Turning to the merits, we conclude that Kootenai is not eligible for a PPA under Schedule 85 for the electricity produced by its QF project and wheeled by Avista to Idaho Power. Eligibility for a Schedule 85 PPA requires a QF to show that the power it proposes to sell will be delivered to

³¹ See 5 U.S.C. § 554(e) (2006); 18 C.F.R. § 385.207(a)(2) (2012).

³² *Industrial Cogenerators v. FERC*, 47 F.3d 1231, 1234-35 (D.C. Cir. 1995) (comparing a declaratory order to "a memorandum of law prepared by the FERC staff in anticipation of a possible enforcement action; the only difference is that the Commission itself formally used the document as its own statement of position"); see also *Niagara Mohawk Power Corp. v. FERC*, 117 F.3d 1485, 1488 (D.C. Cir. 1997).

Idaho Power's "control area" within the state of Oregon, and that its POD will be in Oregon. Kootenai fails on both counts because, as Idaho Power explains, its control area extends to the Lolo substation in Idaho, and, regardless of where ownership of the Lolo-Oxbow transmission line shifts, the Lolo substation serves as the formal scheduling point and POD/POR for receipt and delivery of energy between Idaho Power and Avista.

We agree with Idaho Power that FERC's order, while relevant to the question of whether Avista's proposed interconnection agreement should be approved, cannot conclusively address how Idaho Power's Oregon Schedule 85 tariff should be interpreted. That question falls within our jurisdiction. We point out, however, that FERC's order does not state the POR/POD for Avista and Idaho Power will be at Imnaha, Oregon. Rather, the order simply states that a POR/POD may "represent multiple facilities." In this instance, the POR/POD in Lolo will represent a number of facilities, including facilities in Oregon. Regardless, the POR/POD will remain at Lolo, in Idaho.

Further, we reject Kootenai's argument that denying the proposed transaction violates the dormant commerce clause of the United States Constitution by excluding an out-of-state QF from participating in the benefits of a PPA in Oregon. Our analysis of Idaho Power's PPA rests on the terms of the PPA and the point at which power enters Idaho Power's control area. Out-of-state QFs, like any QF located within Oregon, must comply with the terms of PPAs approved by this Commission. Furthermore, to the extent that Kootenai is pursuing an Oregon PPA with Idaho Power because the terms available in Idaho were less attractive, we decline to find that an out-of-state QF is legally entitled to access to more advantageous terms in Oregon when the QF fails to meet the terms of service of a utility as approved by this Commission.

30. There is thus a controversy about the POD for the transmission service provided under the Avista Agreement. The issue for PURPA purposes is not so much the designation of the POD, but rather whether the QF can deliver its output to Idaho Power. The transmission service being provided is Commission-jurisdictional transmission service³³ and the Commission's August 31 Order concluded that Avista provides Kootenai non-discriminatory transmission service "all the way across Avista's transmission system, because the description incorporates the entirety of Avista's transmission assets on the Lolo-Oxbow line." The Avista Agreement enables Kootenai

³³ See 16 U.S.C. § 824(b)(1) (2006).

to physically deliver power to Idaho Power at the point of change of ownership on the Lolo-Oxbow line in Oregon.³⁴

31. The point of change in ownership along the Lolo-Oxbow line is the only point at which Avista's transmission system directly connects with Idaho Power's transmission system. While Idaho Power operates the line and the Lolo Substation is at the boundary between the balancing authority areas of Avista and Idaho Power, Avista nevertheless controls the capacity on the segment that it owns and provides transmission access to that capacity under its Open Access Transmission Tariff (OATT). This point was made clear when Avista acquired the additional segment of the line from Idaho Power in 2000.³⁵ Thus the point of change in ownership along the Lolo-Oxbow line is the only point at which Idaho Power can receive delivery of power from the Avista transmission system, and Kootenai has reserved capacity on the Avista system to deliver the Fighting Creek QF output at that point.

32. We agree with Kootenai that the practical effect of the Oregon Order, if it were to be upheld, is that Kootenai would be paying for its reservation for point-to-point transmission (and line losses) all the way to Imnaha, Oregon under Avista's Commission-jurisdictional OATT and at Commission-jurisdictional transmission rates, but at the same time Kootenai would be denied the benefit of delivery to Imnaha by terminating the transaction at the Lolo Substation in Idaho.

³⁴ The Commission's August 31 Order recognized the distinction between, on the one hand, transmission service, which results in the physical delivery of power to the point of change of ownership on the Lolo-Oxbow line (i.e., incorporating the entirety of Avista's transmission assets on the Lolo-Oxbow line) and, on the other hand, the LOLO POD, which is used for scheduling purposes only, and which represents multiple facilities or capacity between multiple transmission service providers, not just a single control area interface. The Oregon Commission refers to the LOLO POD used in OASIS and TSIN as if it is a single POR/POD at the physical Lolo Substation, but as explained in the August 31 Order, it does not necessarily represent such a single point. As quoted above, the Oregon Order itself concluded that the LOLO POD, in fact, represents a number of facilities, including facilities located in Oregon, but then inexplicably concluded the POD under the Avista Agreement is the physical Lolo Substation in Idaho. Moreover, we note that OASIS and TSIN are intended to facilitate, and not restrict or unfairly deny, transmission access to transmission customers taking OATT service.

³⁵ Kootenai Answer, Exh. 3 at 7 ("After the transfer of the facilities, the line will continue to be used in the same way [consistent with the 1958 Transmission Line Agreement], and Avista will continue to post the available transmission capacity on its OASIS.")

33. The Oregon Order would prevent Kootenai from receiving Oregon avoided cost rates under PURPA because the Oregon Commission has determined that Kootenai does not meet the terms of service by setting the POD at the Lolo Substation. The QF has the discretion to choose to sell to a more distant utility (as it has here),³⁶ and thus where to sell, as long as the QF can deliver its power to the utility. A sale at Imnaha, Oregon would allow Kootenai to receive Oregon Commission-approved avoided cost rates under PURPA. The Oregon Order violates Kootenai's PURPA rights to choose whether to sell the Fighting Creek QF output at Oregon Commission-approved avoided cost rates by delivering such output at the point where Avista's and Idaho Power's transmission systems interconnect. A utility is obligated under PURPA to purchase the output of a QF as long as the QF can deliver its power to the utility.³⁷

The Commission orders:

(A) Notice is hereby given that the Commission declines to initiate an enforcement action under section 210(h)(2)(A) of PURPA.

(B) The Commission hereby finds that the Oregon Commission's Oregon Order is inconsistent with PURPA and the Commission's regulations, as discussed in the body of this order.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

³⁶ 18 C.F.R. § 292.303(d) (2012).

³⁷ *Public Service Co. of New Hampshire v. New Hampshire Electric Cooperative, Inc.*, 83 FERC ¶ 61,224 at 61,998, *reh'g denied*, 85 FERC ¶ 61,044 (1998).