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December 15, 2010

VIA ELECTRONIC FILING

The Honorable Kimberly D. Bose
Secretary
The Federal Energy Regulatory Commission
888 First Street, N.E.
Washington, DC 20426

Re: Petition for Declaratory Order and Expedited Consideration of Idaho Wind Partners 1, LLC, Docket No. EL11- -000.

Dear Secretary Bose:

Pursuant to Rule 207 of the Federal Energy Regulatory Commission's ("the Commission") Rules of Practice and Procedure, 18 C.F.R. § 385.207 (2010), Idaho Wind Partners 1, LLC ("Petitioner"), on behalf of its wholly owned subsidiary project companies, respectfully submits for filing, the following petition for a declaratory order ("Petition"). Because the Commission's ruling on this Petition can impact Petitioner's participation in the energy and renewable energy credit markets, as discussed in the Petition, as well as near-term transactions and contract execution and performance, we hereby seek expedited consideration of this Petition (within 60 days or less of this filing).

Included in this filing are:

1. this transmittal letter;
2. the Petition; and
3. the required \$23,140.00 fee (submitted electronically).

Communications regarding this Petition should be addressed to the following persons, who are also designated for service in this proceeding:

The Honorable Kimberly D. Bose
December 15, 2010
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Please do not hesitate to contact me should you have any questions regarding this filing.

Respectfully submitted,

/s/ William D. DeGrandis

William D. DeGrandis

Counsel to Idabo Wind Partners 1, LLC

Enclosures

**UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION**

IDAHO WIND PARTNERS 1, LLC)
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)
)

Docket No. EL11-____-000

**PETITION FOR DECLARATORY ORDER AND
REQUEST FOR EXPEDITED CONSIDERATION OF
IDAHO WIND PARTNERS 1, LLC**

Pursuant to Rule 207 of the Federal Energy Regulatory Commission’s (“the Commission” or “FERC”) Rules of Practice and Procedure, 18 C.F.R. § 385.207 (2010), Idaho Wind Partners 1, LLC (“Petitioner”), on behalf of its wholly owned subsidiary project companies,¹ respectfully submits the following petition for a declaratory order (“Petition”). The Petition concerns certain Commission-jurisdictional issues implicated in connection with an instantaneous sale of energy and renewable energy credits (“RECs”) by the Project Companies identified herein to a third-party offtaker (“Third Party”), with an instantaneous buy-back of the energy only (“Proposed Transaction”). The Third Party would eventually deliver the RECs into the California market.

As described in more detail below, Petitioner seeks a ruling that the Proposed Transaction (1) would not violate any of the Commission’s anti-manipulation rules, and (2) would in no way result in the loss of small power producer qualifying facility (“QF”)

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 Farm, LLC, Milner Dam Wind Farm LLC, Golden Valley Wind Farm, LLC (collectively, the “Project Companies”).

status for any of the wind generation facilities owned by the Project Companies and would not disqualify the ultimate sale of electric power from the Project Companies to the local utility from being considered an avoided cost sale by a QF pursuant to the Public Utility Regulatory Policies Act of 1978, as amended (“PURPA”).² Because the Commission’s ruling can impact the ability of the Project Companies and the Third Party to participate in the energy and REC markets discussed herein, and can impact near-term contract execution and performance, Petitioner seeks expedited consideration by the Commission of this Petition.

I. COMMUNICATIONS

All communications concerning this Petition and any other aspect of this proceeding should be addressed to the following persons, and the same persons should be included in the official service list maintained by the Secretary for this proceeding:

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II. BACKGROUND

The purpose of the sale/instantaneous buy-back structure of the Proposed Transaction is to satisfy the California Renewable Portfolio Standards (“RPS”) market requirements for RECs.³ The RPS governs the eligibility requirements for the sale from

² Pub. L. No. 109-58 § 1253, 119 Stat. 594, 967-70 (2005).

³ The California market requirements require sellers to “bundle” the RECs with power, as the RECs cannot currently be sold separately “unbundled” from the energy component of the

(continued...)

renewable generators – including those located outside the state – that sell RECs into the California market. Issuing a declaratory order granting the Petition (“Declaratory Order”) will allow renewable resources outside of California to sell RECs for use in California.⁴ Because revenue from REC sales is a significant factor relied upon in financing construction of renewable energy projects, an order approving this Petition would greatly help promote the development and financing of renewable resources in the United States.⁵ At the same time, granting the Petition will not undercut or adversely impact any Commission precedent or policy, as discussed in more detail below.

Each of the Project Companies owns wind generation facilities that have been certified as QFs.⁶ Each of the Project Companies also has a power purchase agreement

(...continued)

generation in the California market. The full details of the California market requirements are set forth in Section II.A. of this Petition.

⁴ See *infra* Section III for the specific issues for which Petitioner seeks the Declaratory Order.

⁵ See *e.g.*, White House, Energy & Environment, (last updated June 15, 2010) *available at* <http://www.whitehouse.gov/issues/energy-and-environment> (discussing President Obama’s policy towards development of clean energy, quoting the President as stating “[e]ach of us has a part to play in a new future that will benefit all of us. As we recover from this recession, the transition to clean energy has the potential to grow our economy and create millions of jobs – but only if we accelerate that transition. Only if we seize the moment. And only if we rally together and act as one nation – workers and entrepreneurs; scientists and citizens; the public and private sectors”); Department of Energy, *Secretary Chu Announces More Than \$20.5 Million for Community Renewable Energy Deployment Projects*, (January 21, 2010), *available at* http://www1.eere.energy.gov/recovery/news_detail.html?news_id=15759 (quoting Secretary Chu as stating “[s]maller, more localized renewable energy systems need to play a role in our comprehensive energy portfolio. These projects will help create jobs, expand our clean energy economy, and help us cut carbon pollution at the local level”).

⁶ QF Self Recertification of Burley Butte Wind Park, LLC, Docket No. QF05-90-003 (Oct. 8, 2010); QF Self Recertification of Camp Reed Wind Park, LLC, Docket No. QF08-25-002 (Oct. 8, 2010); QF Self Recertification of Golden Valley Wind Park, LLC, Docket No. QF05-89-003 (Oct. 8, 2010); QF Self Recertification of Milner Dam Wind Park, LLC, Docket No. QF06-7-002 (Oct. 8, 2010); QF Self Recertification of Oregon Trail Wind Park, LLC, Docket No. QF05-60-002 (Oct. 8, 2010); QF Self Recertification of Payne’s Ferry Wind Park, LLC, Docket No. QF08-31-002 (Oct. 8, 2010); QF Self Recertification of Pilgrim Stage Station Wind Park, LLC, Docket No. QF05-25-002 (Oct. 8, 2010); QF Self Recertification of Salmon Falls Wind Park, LLC,

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with the local utility, Idaho Power Company (“Idaho Power”), for the sale of all of each Project Companies’ net energy at Idaho Power’s avoided cost rate (“QF PPAs”). Those avoided cost rates were properly established by the Idaho Public Utilities Commission (“Idaho PUC”), pursuant to its implementation of PURPA. The QF PPAs explicitly exclude the sale and transfer of RECs to Idaho Power as part of the sale of energy because Idaho Power does not need the RECs. Because Idaho Power will not purchase the RECs, the Project Companies desire to sell the RECs into California in order to monetize this valuable byproduct of the Project Companies. Each of the Project Companies applied for market-based rate authority (“MBR Authority”) on October 25, 2010, which applications are currently pending, for the purpose of facilitating the Proposed Transaction.⁷ Under the Proposed Transaction, the energy output of the wind turbines will be sold to a Third Party solely for the purpose of disaggregating the REC component from the energy component of the production. The energy component will be instantaneously sold back to the Project Companies by the Third Party, with the Third Party only retaining title to the REC component of the wind turbine production. The sale

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Docket No. QF06-8-003 (Oct. 8, 2010); QF Self Recertification of Thousand Springs Wind Park, LLC, Docket No. QF05-56-002 (Oct.8, 2010); QF Self Recertification of Tuana Gulch Wind Park, LLC, Docket No. QF05-59-2002 (Oct. 8, 2010); QF Self Recertification of Yahoo Creek Wind Park, LLC, Docket No. QF08-37-002 (Oct. 8, 2010).

⁷ Burley Butte Wind Park, LLC, *et al.*, Consolidated Application for Expedited Acceptance of Initial Tariffs, Market Based Rate Authority, Docket Nos. ER11-1881-000, *et al.* (Oct. 25, 2010), as supplemented November 17, 2010 and November 19, 2010; Camp Reed Wind Park, LLC, *et al.*, Consolidated Application for Expedited Acceptance of Initial Tariffs, Market Based Rate Authority, Docket Nos. ER11-1890-00, *et al.* (Oct. 25, 2010), as supplemented November 17, 2010 and November 19, 2010 (collectively, the “MBR Applications”). As explained in Section III.B.1, the sales of the energy component to the Third Party are made at a non-avoided cost rate. Pursuant to 18 C.F.R. § 292.601(c), each of the foregoing Project Companies is authorized to make its contracted sales to Idaho Power under the QF PPAs of wind generated QF power without any authorization from this Commission.

of the energy component to the Third Party is a non-PURPA sale and is an underlying reason for the MBR Applications filed by the Project Companies.

The bundled sale of the energy and REC components with the instantaneous buy-back of the energy component only will occur “inside the fence” within each project boundary before the wind energy is physically injected into the transmission grid. The sale of RECs under the Proposed Transaction is not a QF sale under PURPA. The Third Party will not sell any power back to the Project Companies other than the power that it had purchased from the Project Companies. The Project Companies will sell only QF power produced by the wind generation facilities under the QF PPAs to Idaho Power.

A. Background of the California Market Requirements for RECs

1. The RPS

While the Commission has disclaimed jurisdiction over RECs,⁸ the following information is provided because the need to comply with the California market requirements for RECs is the underlying basis for the transaction structure that implicates issues subject to the Commission’s jurisdiction and that are the subject of this Petition.

One of the requirements for the REC sales to be eligible under California’s RPS rules⁹ is for the first sale of RECs from the Project Companies to occur as a “bundled” transaction. A “bundled” transaction is one in which the power and green attributes (*i.e.*, RECs) arising from the generation of electricity by an eligible renewable resource facility

⁸ See *infra* n. 44 and accompanying text.

⁹ See Cal. Pub. Util. Code § 399.16 (2009); see also *Order Instituting Rulemaking to Develop Additional Methods to Implement the California Renewables Portfolio Standard Program*, CPUC D.08-08-028, 2008 Cal. PUC LEXIS 330 at *14-57 (Aug. 21, 2008).

(“ERR”) are sold together as part of a single transaction. The Proposed Transaction has been structured to satisfy these requirements.

The California Legislature established the RPS in S.B. 1078 (2002), “to attain a target of generating 20 percent of total retail sales of electricity in California from [ERRs] by December 31, 2010.”¹⁰ Responsibility for oversight of the RPS is divided between the California Public Utilities Commission (“CPUC”) and the California Energy Commission (“CEC”). The CEC is responsible for certifying generators as qualifying ERRs under the California RPS and the CPUC is responsible for reviewing utility procurement from such ERRs.¹¹ The CPUC does not certify generators as RPS compliant—the CEC does. The CPUC authorizes jurisdictional utilities to enter into PPAs with CEC-certified ERRs without further examining the CEC’s certification. The CPUC will not overrule a CEC determination that a generator is an ERR.¹²

Although the Project Companies and facilities are all located outside of California, the California RPS requirements drive the structure of the Proposed Transaction because the Third Party intends to use the Petitioner’s RECs in California. The Third Party has no interest in the underlying electricity generated by the Petitioner’s Project Companies. Therefore, the Proposed Transaction is designed to enable each of the Project Companies to become an ERR so that the RECs that the Third Party is buying from the Project Companies will satisfy the California RPS standards.

¹⁰ Cal. Pub. Util. Code § 399.11(a); *see generally*, Tom Mounteer, “To Bundle or Not to Bundle,” 40 Env. Law Rptr. News & Analysis 10, 119 (Feb. 2010).

¹¹ *See generally*, *Order Instituting Rulemaking to Develop Additional Methods to Implement the California Renewables Portfolio Standard Program*, CPUC D.10-03-021, 2010 Cal. PUC LEXIS 70 at *20-22 (Mar. 11, 2010) (“CPUC D.10-03-021”) (discussing the RPS regulatory framework).

¹² *Id.*

A “bundled” purchase of energy and RECs is a prerequisite for ERR Certification.

The requirements for becoming an ERR are statutory:

- An ERR is “an electric generating facility that meets the definition of ‘in-state renewable electricity generation facility’ in [Cal. Pub. Res. Code § 25741].”¹³ California defines “in-state” facilities, however, to include those facilities outside of the state if they are “connected to the transmission network within the Western Electricity Coordinating Council.”¹⁴
- Cal. Pub. Res. Code § 25741 in turn requires, among other things, that “RPS-eligible energy must be delivered to California customers in order to be counted for RPS compliance.”¹⁵

The California RPS deliverability requirements that apply to out-of-state entities such as the Project Companies drive the structure of the Proposed Transaction, and Petitioner would not have structured the Proposed Transaction in this way but for these California RPS requirements. Petitioner’s projects are in Idaho, but Petitioner’s Project Companies must satisfy the CEC’s “deliverability” requirements to qualify as an ERR in California.

The CEC has published a Guidebook setting out the deliverability requirements applicable to out-of-state generation. The CEC requires that to satisfy the deliverability requirement, an ERR must bundle the initial sale of a REC with the sale of the underlying energy generated by the ERR.¹⁶ However, once the RECs and the power are initially sold as a bundled commodity in the initial transaction, the CEC permits the RECs, which were a component of the initial sale, to be “unbundled” from the associated power and

¹³ Cal. Pub. Util. Code § 399.12(c).

¹⁴ Cal. Pub. Res. Code § 25741(b)(2)(B)(i). The statute also requires that the electricity meets CEC delivery requirements, as discussed *infra*.

¹⁵ CPUC D.10-03-021 at *23.

¹⁶ See California Energy Commission, Renewables Portfolio Standard Eligibility Guidebook at 24 (3rd ed. 2008) (“CEC Guidebook”) (“[t]o count generation from out-of-state facilities for RPS compliance, the RPS-certified facility must enter a power purchase agreement with a retail seller, procurement entity or third party, and a *matching quantity of electricity must be delivered to an in-state market hub ...*”) (emphasis added).

“rebundled” with other power that is delivered to customers in California.¹⁷ The RECs can be “matched” with power generated from any imported source, renewable or non-renewable,¹⁸ in order for “firmed and shaped” electricity to be subsequently delivered to customers in California.¹⁹ The CEC presents the following as an example of contracting structures that would meet the RPS-delivery requirements:

The retail seller [buying from the ERR] could provide firming and shaping services. *The retail seller could buy energy and RECs from an RPS-eligible facility, sell the energy back to the facility, and “match” the RECs with energy delivery into California from a second PPA and/or with imports under a pre-existing PPA.*²⁰

The CEC Guidebook thus expressly contemplates purchase-and-instantaneous-sell-back transactions as a way to satisfy the deliverability requirement applicable to ERRs and to facilitate “firmed and shaped” transactions for importing renewable energy to the state of California. The Proposed Transaction is precisely such an arrangement.

¹⁷ See *id.* at n. 2, # 3.

¹⁸ The CEC Guidebook refers to the sources of such power only generally. These rules specify that such electricity may be “generated at a different location than that of the RPS-certified facility” or generated from “another source” of electricity. See *id.* at 23. Nonetheless, in describing the firming and shaping of renewable resources at RPS certified facilities, the CEC cites to a CPUC white paper that does expressly refer to the use of conventional generation, such as gas-fired turbines, for use in firming and shaping. *Id.*; see also CPUC Staff White Paper: *Renewable Energy Certificates and the California Renewable Portfolio Standard*, Appendix A: Firmed and Shaped Renewable Energy Products (Apr. 20, 2006), available at http://docs.cpuc.ca.gov/word_pdf/REPORT/55606.doc#_Toc132014305. As such, it seems clear that the CEC had the use of “brown” power (*i.e.*, conventionally generated) in mind when it drafted the guidelines allowing the use of energy from a second PPA to be paired with REC transactions.

¹⁹ See *id.*

²⁰ CEC Guidebook at n. 2 (emphasis added).

2. The CPUC has Approved Jurisdictional Utilities' Entry into Contracts for Firmed and Shaped Power

The CEC does not publish material relating to requests for certification as an ERR, beyond a list of applications and application status. In its role as overseer of utility procurement, however, the CPUC regularly reviews and approves procurement of firmed and shaped renewable power and generally describes the firming and shaping arrangements.²¹ Petitioner is aware of at least three instances in which the CPUC approved purchases by a jurisdictional utility of RECs and energy pursuant to a firming and shaping arrangement virtually identical to the Proposed Transaction involving out-of-state Party A's purchase-and-instantaneous-sell-back transaction with Party B.²² In addition, three similar transactions are now before the CPUC for review.²³

B. Description of the Proposed Transaction

The Proposed Transaction would be structured as follows:

1. a bundled sale of RECs and energy from eleven wind QFs to the Third Party prior to (upstream of) the busbar interconnection with the grid;
2. the QFs' instantaneous buy-back of *just the energy* (i.e., exclusively the same electric energy generated by the Project Companies' ERRs, but

²¹ See, e.g., Resolution E-4291, pp. 20-21 (Dec. 3, 2009) (PG&E/Shell), available at http://docs.cpuc.ca.gov/WORD_PDF/FINAL_RESOLUTION/110803.PDF; Resolution E-4285, pp. 25-30 (Nov. 20, 2009) (PG&E/ PacifiCorp), available at http://docs.cpuc.ca.gov/WORD_PDF/FINAL_RESOLUTION/110401.PDF.

²² See Resolution E-4192, p. 26 (Oct. 2, 2008) (SDG&E/NaturEner), available at http://docs.cpuc.ca.gov/WORD_PDF/FINAL_RESOLUTION/91720.PDF (this Resolution approved two transactions), and Resolution E-4277 (Nov 29, 2009), available at http://docs.cpuc.ca.gov/PUBLISHED/FINAL_RESOLUTION/110403.

²³ See PG&E Advice Letter 3620-E, submitted to the CPUC on February 22, 2010 (PG&E/Greengate), available at http://www.pge.com/notes/rates/tariffs/tm2/pdf/ELEC_3620-E.pdf. All of the Greengate projects are located in Canada. The Greengate projects filed their applications with the CEC for pre-certification as eligible renewable resources on January 19, 2010. The applications are still pending before the CEC. See http://www.energy.ca.gov/portfolio/documents/List_RPS_CERT.pdf.

stripped of their RECs) at the same delivery point prior to (upstream of) the busbar interconnection with the grid; and

3. the QFs resale of the QF power to Idaho Power at the busbar interconnection with the grid.²⁴

The sale and instantaneous buy-back ensures that each Project Company will only sell and deliver QF energy from the wind generation facilities to Idaho Power. In fact, the Proposed Transaction would occur entirely “inside the fence” of each generation facility, so would therefore occur behind the busbar interconnection with the grid. The Project Companies have sought MBR Authority for the sale of the wind energy at a non-avoided cost rate to the Third Party.²⁵ The Third Party will not be delivering to the Project Companies any power purchased from any other source, and would be selling back solely the wind energy purchased from the Project Companies within the Projects’ boundaries, in order to “unbundle” the RECs after the required “first sale” of bundled energy and RECs from the ERR. These protections guarantee that none of the QF power generated by the Project Companies is ever co-mingled with power from any other power source. Each Project Company would then sell its QF power to Idaho Power under its QF PPA, which is a long-term agreement with levelized avoided cost rates pursuant to an Idaho PUC order.²⁶

²⁴ See diagram of the Proposed Transaction attached at Exhibit A. This Petition seeks Commission review only of the Proposed Transaction (and its three steps), but seeks no review or ruling on any downstream transaction involving sales of RECs or electricity into the California market. In addition, this Petition does not seek any Commission ruling on the PURPA status of the Project Companies’ power sales agreements, since the rulings of the Idaho PUC are dispositive on this issue.

²⁵ See *supra* n. 7.

²⁶ See, e.g., *In the Matter of the Application of Idaho Power Company for Approval of a Firm Energy Sales Agreement For the Sale and Purchase of Electric Energy Between Idaho Power Company and Camp Reed Wind Park LLC*, Order No. 30924, 2009 Ida. PUC LEXIS 210 (Oct. 8, 2009); see also *In the Matter of the Fuel-Cost-Related Adjustment to Published Idaho*

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The Third Party would take title of the RECs at the Project Companies' facilities, and would rebundle or match the RECs to other imported energy that is delivered into California to ensure compliance with California RPS rules for the delivery of imported renewable energy. The Third Party already holds MBR Authority for the wholesale sale of the energy component back to the Project Companies.

III. PETITION

Petitioner seeks a Commission order confirming that the Proposed Transaction, if implemented, (1) would not violate any of the Commission's anti-manipulation and related rules, and (2) would in no way result in the loss of QF status for any of the wind generation facilities owned by the Project Companies, nor would the sale and instantaneous buy-back of energy disqualify the sale of QF power from each of the Project Companies to Idaho Power under the QF PPAs from being considered an avoided cost sale pursuant to PURPA. The Petition does not seek any determinations regarding the eventual sale of RECs by the Third Party to the California market.

A. Commission Anti-Manipulation Rules

Petitioner seeks Commission confirmation that the Proposed Transaction would not violate the Commission's anti-manipulation rules. Specifically, Petitioner seeks confirmation that the sale and instantaneous buy-back of the same amount of energy at the same price and within the Project Companies' boundaries, solely for the purpose of

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Avoided Cost Rates For Idaho Power Company, et al., Order No. 30744, 2009 Ida. PUC LEXIS 37 (Mar. 16, 2009).

unbundling the RECs, would not be considered an unlawful “wash trade” or other impermissible transaction prescribed under the Commission’s rules.

Under the Commission’s anti-manipulation rules, jurisdictional transactions are prohibited if an entity intends to employ fraud or deceit to manipulate the energy market:

It shall be unlawful for any entity, directly or indirectly, in connection with the purchase or sale of electric energy or the purchase or sale of transmission services subject to the jurisdiction of the Commission,

(1) To use or employ any device, scheme, or artifice to defraud,... [or]

(3) To engage in any act, practice, or course of business that operates or would operate as a fraud or deceit upon any entity.²⁷

In Order No. 670, the Commission confirmed that, as a prerequisite for a violation of the anti-manipulation rules, there must be evidence of intent, *i.e.*, conduct designed to deceive or defraud other market participants by controlling or artificially affecting energy prices.²⁸ Further, the anti-manipulation rules impose a duty on sellers to refrain from conduct that would impair or obstruct the operation of a well-functioning and competitive energy market.²⁹ Even after the Commission introduced the anti-manipulation rules in the Energy Policy Act of 2005 (“EPAc 2005”),³⁰ certain pre-existing safe harbors and affirmative defenses from the previous past market behavior rules were determined to be

²⁷ 18 C.F.R. § 1c.2.

²⁸ *Prohibition of Energy Market Manipulation*, Order No. 670, 114 FERC ¶ 61,047 at P 52 (2006).

²⁹ *See Amaranth Advisors, L.L.C.*, 120 FERC ¶ 61,085 at P 44 (2007).

³⁰ The Commission implemented the new authority by adopting regulations that are set forth in 18 C.F.R. § 1c.2, which became effective on January 26, 2006. *See Energy Policy Act of 2005*, sections 261 *et seq.*, Publ. L. No. 109-58, § 1253(b), 119 Stat. 594 (2005).

still available, with the exception of the “legitimate business purpose” defense.³¹

However, the Commission has noted that it will consider the “intent behind and rationale for” a person’s conduct in determining whether that conduct constitutes manipulative behavior, after examining the totality of the circumstances.³²

First, the Proposed Transaction does not violate any anti-manipulation rules because there is no underlying intent to deceive or defraud. The underlying intent of the Proposed Transaction is solely to comply with applicable California RPS requirements so that the RECs can be monetized and sold in the California market. If Idaho Power had wanted to acquire the RECs, the Proposed Transaction would not be necessary. Specifically, the Proposed Transaction would not be a “wash trade” or any similar transaction prohibited by the Commission because there is no intent or ability to deceive or defraud.³³ The Proposed Transaction therefore has the legitimate business purpose of ensuring that the RECs are sold to the Third Party in a fashion that allows the Third Party to rebundle and deliver them into California. The sale to, and instantaneous buy-back from, the Third Party of the same power produced by the Project Companies is necessary to enable the REC sale to satisfy the California RPS requirements. Moreover, in implementing the Proposed Transaction, the parties will not defraud or engage in an act,

³¹ *Investigation of Terms and Conditions of Pub. Util. Market-Based Rate Authorizations*, 114 FERC ¶ 61,165 at P 29 (2006) (finding that this defense is no longer necessary because reasons given by an entity for its actions are part of the totality of circumstances that will be weighed as part of determining whether the actions were manipulative behavior).

³² *Id.*

³³ The Commission, prior to the current anti-manipulation rules, specifically prohibited “wash trades,” which the Commission determined were by their very nature manipulative and devoid of any legitimate business purpose. This is consistent with Commission findings that such wash trades are contrary to the Commission’s original intent in authorizing market-based sales. *See Enron Power Marketing, Inc, et al.*, 103 FERC ¶ 61,343 at P 68 (2003), *order on reh’g*, 106 FERC ¶ 61,024 (2004).

practice, or course of business that operates as a fraud or deceit upon any entity, as made explicitly clear by the fact that Petitioner is publicly seeking the Commission's determination of these issues.

Second, not only is there no *intent* to manipulate the wholesale electric markets, there would also be no *ability* to impair or obstruct the operation of a well-functioning and competitive energy market or to adversely affect prices in the market. All of the wind power from the QFs will be sold to Idaho Power under the QF PPAs pursuant to levelized avoided cost rates set by the Idaho PUC, as opposed to rates determined by the Project Companies. In addition, both the wind energy sold to, and purchased back from, the Third Party by the Project Companies will be priced the same. None of the Project Companies or their affiliates has the ability to affect, modify or change either the avoided cost rates determined for Idaho Power by the Idaho PUC or the wholesale power markets. Therefore, implementing the Proposed Transaction would not violate the anti-manipulation rules because there is neither the intent, nor ability, to manipulate wholesale rates in the bulk power markets or to otherwise obstruct or impair the electricity markets in the region.

B. Qualifying Facility and PURPA Issues

Petitioner also seeks Commission confirmation that the Proposed Transaction would not (i) jeopardize the continued eligibility of the Project Companies for QF status, or (ii) result in the loss of avoided cost PURPA sale status of the power sold to Idaho Power under the QF PPAs.

As discussed above, the energy generated by the Project Companies' wind generating facilities would be sold as a non-PURPA transaction and instantaneously bought back from the Third Party before its ultimate sale by the Project Companies to Idaho Power under the QF PPAs. During each step of the Proposed Transaction, the energy should be considered QF power, and it should therefore be eligible for an avoided cost PURPA sale. Specifically, the energy, even once it is bought back from the Third Party, could not be anything but QF energy generated by the Project Company facilities because it would never have left the wind generation facility. The Third Party would have no contractual obligation or ability to provide or deliver other power—non-QF or otherwise—to the Project Companies and the sale and buy-back will occur at the same point of delivery within the project sites of the Project Companies. The Third Party's sole electric power obligation under the Proposed Transaction is to immediately sell the wind energy at the time it purchases it from the Project Companies, at the same price for which it was purchased.

1. There should be no loss of QF status of the Project Companies or of the power sold to Idaho Power.

Prior to EPAAct 2005, the Commission determined that an entity risks losing its QF status by making wholesale sales of power produced by a facility other than a QF, where the sale is in excess of the QF's net output.³⁴ The net output requirement was part of the

³⁴ See *Central Hudson Gas & Electric Corporation*, 90 FERC ¶ 61,231 (2000) (stating that a QF is within the bounds of the then-existing ownership requirement and all other requirements of PURPA when it buys and then re-sells energy imbalance service, even though this is not clearly within the typical QF transactions, when it is only selling QF power and it is not attempting to sell more than its actual net output). The prohibition against a QF's selling in excess of its net output derived from the ownership restriction under PURPA in effect prior to EPAAct 2005, which provided that a qualifying facility be "owned by a person not primarily
(continued...)

ownership restriction under PURPA and the Commission's implementing regulations.

As noted above, the Project Companies will only sell their own net output to Idaho Power, and non-QF power will not be commingled in any way with such QF power sold to Idaho Power.

In Order No. 671, the Commission considered the implications of the elimination of the ownership requirement and related net capacity restriction for QFs. In reviewing the amendments to PURPA under EAct 2005, the Commission rejected arguments made by some commenters during the rulemaking proceeding that the elimination of the ownership requirement should preclude a QF from selling electric energy other than energy produced by itself or another QF. Instead, the Commission concluded that removal of the ownership restriction removed "the bar to a QFs selling non-QF electric energy while retaining QF status."³⁵

However, the Commission further stated that removal of the ownership restriction did not mean that utilities must purchase non-QF power at an avoided cost rate. Instead, non-PURPA sales must be sold pursuant to the Federal Power Act ("FPA").³⁶ As noted above, the non-PURPA sale by the Project Companies of the wind energy to the Third

(...continued)

engaged in the generation or sale of electric power (other than electric power solely from cogeneration facilities or small power production facilities)." This portion of PURPA has been repealed by EAct 2005. Publ. L. No. 109-58, § 1253(b), 119 Stat. 594, 970.

³⁵ See *Revised Regulations Governing Small Power Production and Cogeneration Facilities*, Order No. 671, FERC Stats. & Regs. ¶ 31,203 at P 101, *clarified*, 114 FERC ¶ 61,128, *order on reh'g*, Order No. 671-A, FERC Stats. & Regs. ¶ 31,219 (2006).

³⁶ *Id.*

Party will be pursuant to the MBR Authority for which the Project Companies have applied.³⁷

The Commission further clarified that electric energy from QF facilities includes “electric energy produced by the QF and not non-QF electric energy which the QF has purchased or has produced itself through a process that does not satisfy the technical requirements for QF status.”³⁸ Explaining its interpretation of the amendments to PURPA, the Commission further stated that where a “small power production QF decides to produce electric energy by burning a non-small power fuel, the electric energy would not be subject to the PURPA purchase obligation and the sales of such electric energy should not be exempt from Sections 205 and 206 of the FPA.”³⁹ In addition, to address the concerns of some commenters that QFs might “attempt to substitute lower-cost non-QF electric energy for the electric energy that utilities are purchasing pursuant to the purchase obligation of Section 210 of PURPA, the Commission does not believe that such purchases are required by PURPA.”⁴⁰ Thus, QF power would be subject to the PURPA purchase obligation, but power not produced by a QF would not be covered by such obligation.

The structure of the Proposed Transaction satisfies these requirements and concerns, and ensures that the sale of the wind energy from the QFs owned by the Project Companies to Idaho Power is QF power subject to the PURPA purchase obligation. First,

³⁷ See *supra* n. 7 and accompanying text.

³⁸ Order No. 671 at P 101 (rejecting the notion that a QF could substitute lower-cost non-QF electric energy).

³⁹ *Id.*

⁴⁰ *Id.*

the power produced by the wind generation QFs never contractually leaves the wind generation facility because the sale and buy-back occur instantaneously and within the project fence, such that there is no possibility of the energy being sold to Idaho Power as being anything but the production of the QF. Moreover, the effect and the intent of the instantaneous sale and buy-back is that there is no moment in time during the sale and buy-back in which the wind energy from the QFs is, for all FPA and PURPA purposes, delivered outside the Projects' sites but instead occurs "inside the fence" of the Projects. Second, while the transfer of the RECs makes this a legitimate business transaction for value, the sale and buy-back of the energy merely serves a regulatory compliance function of unbundling the RECs for subsequent rebundling by the Third Party with other energy imported into California. The wind energy from the QFs is not taken into account when pricing the RECs. Wind energy sold by the Project Companies to the Third Party and the buy-back of such wind energy by the Project Companies from the Third Party are priced the same. Because sales occur instantaneously, the sale by the Project Companies and their buy-back of the wind energy from the Third Party occur at the same price and thus there is no earning of net revenue from the Third Party with regard to the sale and buy-back of the wind energy.

In applying the Commission's rules that implement the EPAct 2005 amendments to PURPA, the Proposed Transaction will not in any way jeopardize the continued QF status of the QFs owned by the Project Companies.⁴¹ If the sale of non-QF power by the owner of a QF does not jeopardize QF status, then the sale and immediate buy-back of

⁴¹ See *supra* n. 6.

the QF wind energy by the Project Companies should not jeopardize the QF status of the wind generation facilities owned by the Project Companies.

In addition, the structure of the Proposed Transaction directly addresses the Commission's concerns in Order No. 671 that non-QF power not be sold pursuant to the purchase obligation of Section 210 of PURPA. Only the wind energy produced by the wind generation facilities certified as QFs and owned by the Project Companies would be sold to Idaho Power under the QF PPAs. Petitioner recognizes that the apparently unique sale and buy-back structure of the Proposed Transaction is not directly addressed by the Commission's statements in Order No. 671. However, the Proposed Transaction furthers the intent of PURPA of promoting more alternative energy production while at the same time, the Proposed Transaction structure does not abridge in any way the purchase obligation under Section 210 of PURPA and the Commission's related concerns. As noted above, the Third Party will not, and has no obligation to, sell back to the Project Companies any power other than the wind energy that it has purchased from the Project Companies and instantly sold back. Wind energy never leaves the Project Companies' sites and the sale and buy-back all occur "inside the fence." The QF PPAs contain rate terms in accordance with the Idaho PUC's implementation of PURPA, and the Idaho PUC will have oversight over such QF PPAs.

Finally, the Commission has recognized in the context of a QF project the need to satisfy other applicable laws (such as environmental and land use) without jeopardizing QF status. Specifically, though not involving a sale of RECs, the Commission in *Ormesa* found that applicable environmental and land use laws required a geothermal QF to dispose of certain fluids – a byproduct of power generation – in a certain manner, by

reinjecting them into the ground.⁴² The Commission found that because the spent fuel is a byproduct of power production, and it must be disposed of in some way, it is therefore an essential part of power generation and such disposal did not jeopardize the project's QF status.⁴³ Similar to *Ormesa*, in this situation, RECs are a byproduct of renewable energy production, and they must be disposed of in order to be monetized. Therefore, the power sale and buy-back used to "unbundle" the RECs to satisfy the California RPS requirements should be considered a necessary transaction to satisfy REC regulatory requirements.

Granting this Petition for Declaratory Order will therefore accomplish an important policy objective of promoting renewable energy facilities, while still furthering the goals of PURPA. Because RECs were created to incentivize the development of renewable resources, the ability to actually monetize those RECs is an essential element of the Project Companies' financial ability to operate.

In granting this Petition, in its Declaratory Order, the Commission could include any appropriate conditions to ensure that the sale and buy-back structure is not utilized by others in a way that could undercut PURPA and the Commission's implementing regulations. Making clear that granting the Petition is based upon the sale and buy-back of the wind energy occurring within the Project Companies' boundaries, on an instantaneous basis, with no non-QF energy delivered to the Project Companies for resale

⁴² See *Ormesa LLC*, 107 FERC ¶ 61,043 (2004), *reh'g denied*, 108 FERC ¶ 61,299 (2004), *aff'd*, *So Cal. Edison v. FERC*, 443 F.3d 94 (D.C. Cir. 2006) (finding that not only the extraction of geothermal fluids, but also the reinjection of spent fluids into the ground as required by applicable environmental and land use laws, are both integral part of the power production process and thus, considered station power).

⁴³ *Ormesa*, 107 FERC at P 21.

to Idaho Power, would be appropriate conditions that would define the scope of the Commission's Declaratory Order. In addition, as noted above, this Petition seeks no determinations regarding the eventual sale by the Third Party of the RECs into the California market.

2. There is no Commission jurisdiction over the RECs themselves.

The sale of the RECs to the Third Party will not raise any PURPA issues with the Commission. The Commission in fact has disclaimed all jurisdiction over RECs or other environmental attributes under PURPA because avoided costs were intended to place the utility in the same position when purchasing QF capacity and energy as if the utility generated the energy itself or purchased the energy from another source.⁴⁴ The Commission stated categorically, "States, in creating RECs, have the power to determine who owns the REC in the initial instance, and how they may be sold or traded; it is not an issue controlled by PURPA."⁴⁵ In this regard, the avoided cost that a utility pays a QF does not depend on the type of QF, and the avoided cost rates are not intended to compensate the QF for anything other than the capacity and energy produced by the wind QFs. Likewise, the contracts for sales of QF capacity and energy, entered into pursuant to PURPA, do not control the ownership of the RECs absent an express provision in the contract.⁴⁶

The state commission has oversight over the determination of such rates, which are determined pursuant to PURPA and the state's implementation of that statute. With

⁴⁴ See *Covanta Energy Group, et al.*, 105 FERC ¶ 61,004 at P 23 (2003).

⁴⁵ *Id.*

⁴⁶ *Id.*

regard to the sale of the wind energy to Idaho Power pursuant to the QF PPAs, the Idaho PUC has the regulatory authority to set avoided cost rates through the rates set forth in the QF PPAs between the Project Companies and Idaho Power. This ensures that net energy sales from the Project Companies are properly made to Idaho Power, that they are subject to Idaho PUC oversight, and that the QF PPAs are governed by Idaho law.

IV. CONCLUSION

Petitioner respectfully asks that the Commission grant this Petition. Specifically, Petitioner requests that the Commission confirm that the Proposed Transaction does not (i) in any way violate Commission's anti-manipulation or related rules, and (ii) does not result in a loss of QF status for the Project Company owners of the wind generation QFs involved in the Proposed Transaction, nor adversely impact the avoided cost sales by the Project Companies to Idaho Power of the wind energy pursuant to PURPA. The successful resolution of these issues will enable Petitioner to move forward with the Proposed Transaction with full disclosure to the Commission, and will help promote renewable energy projects in the United States. At the same time, granting this Petition will not undercut any of the important goals of PURPA or the Commission's implementing regulations and policies, nor will it establish an adverse precedent that would in any way undermine PURPA or the Commission's anti-manipulation rules or regulations.

Respectfully submitted,

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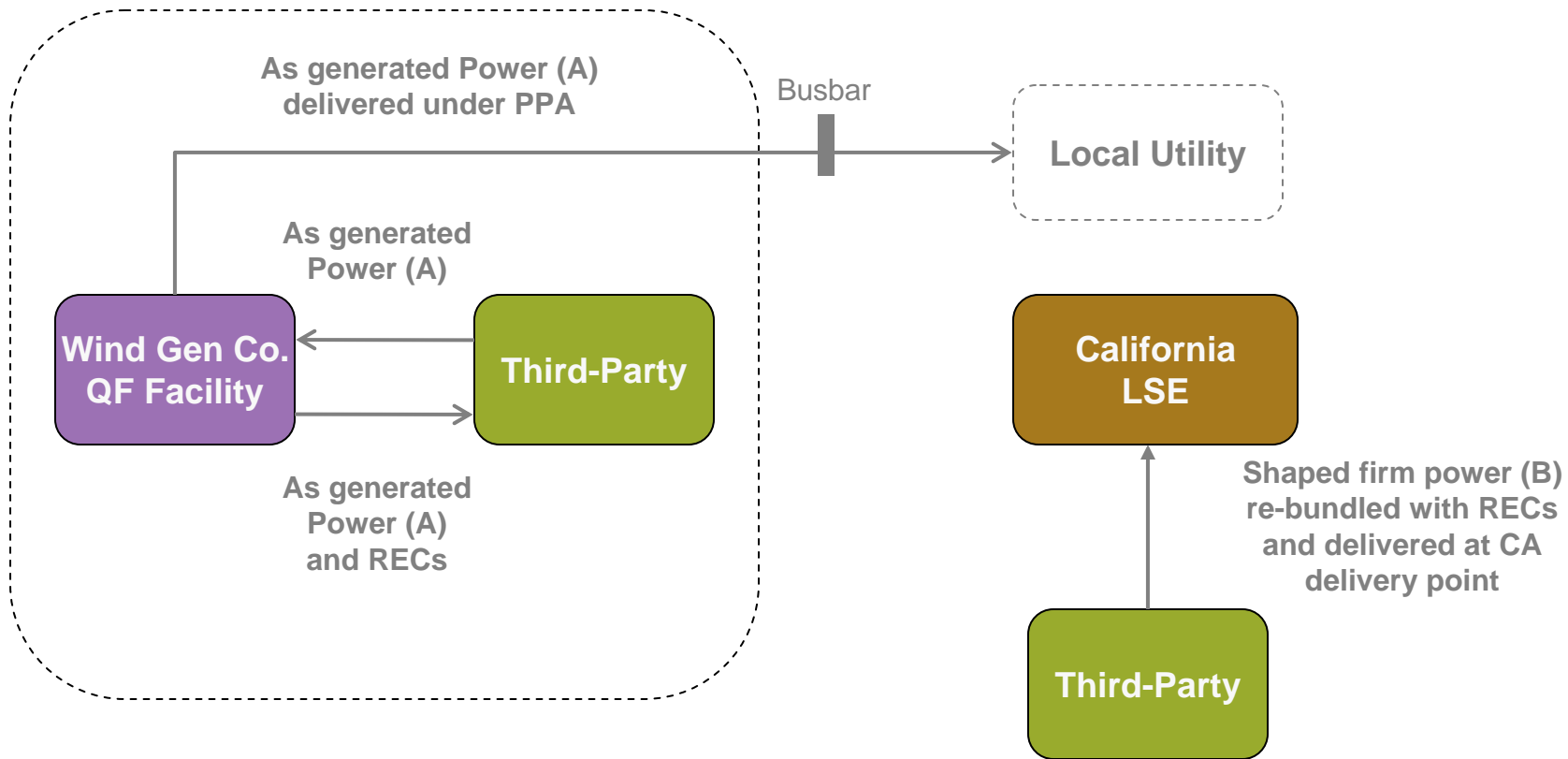
December 15, 2010

Exhibit A

Proposed Transaction Diagram

REC Stripping Transaction with REC Stripping Entity Third Party

As generated QF energy and REC's transferred to Third Party for purposes of stripping REC's from the Energy with instantaneous sell-back of the QF energy for sale to Local Utility under QF PPA's. Third Party then rebundles RECs with unrelated power from the market for delivery to California LSE.



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