



# FERC Escalates PURPA Dispute in the West: Idaho Cases

**Malcolm C. McLellan  
Van Ness Feldman LLP**

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# Outlook



- FERC's PURPA enforcement case
  - Context
  - IPUC Proceedings
  - FERC Proceedings
  - Idaho Supreme Court
  - Settlement
- Additional noteworthy PURPA cases
  - REC Ownership
  - Curtailment of QF Deliveries
  - Point of Delivery

# PURPA

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“directs FERC, in consultation with state regulatory authorities, to promulgate ‘such rules as it determines necessary to encourage cogeneration and small power production’ including rules requiring utilities to offer to sell electricity to, and purchase electricity from, qualifying cogeneration and small power production facilities.”

Idaho Power Co. v. Idaho Pub. Util. Comm’n,  
No. 39151-2011, 2013 WL 6658554 (Idaho Sup. Ct. Dec. 18, 2013) (quoting 16 U.S.C. § 824a-3(b))

# Enforcement Case Context



- Between 2011 and 2013 FERC issues four orders declaring that the IPUC's incorrectly rejected 12 QF power purchase agreements
- March 22, 2013, FERC filed a complaint in U.S. District Court against the Idaho Public Utility Commission (**Case no. 1:13-cv-141**)

**STOP THE ROGUE UTILITY COMMISSION!**

# Flash Back to 2010 . . .



- Wind developers need a customer
  - Load is down
  - Market for wind resources is drying up
  - Utilities must purchase under PURPA
- High eligibility cap in Idaho - 10 aMW
  - 100 kw is PURPA minimum
- Wind and solar projects are easily divided into 10 aMW projects

# The rest of the story . . .



- Idaho Power and Rocky Mountain Power were negotiating 30 QF power sales contracts
  - 12 contracts were accepted
  - 18 contracts were denied
  
- IPUC's rejection of 12 contracts with four developers were challenged at FERC
  - Background on those contracts . . .

# Cedar Creek



- One project became five projects – each 25.3 MW
  - Steep Ridge
  - Rattlesnake Canyon
  - North Point Wind LLC
  - Fine Pine Wind LLC
  - Coyote Hill
- \$685 million over 20-year terms
- Location: Shelly, Idaho
- Purchaser: PacifiCorp d/b/a Rocky Mountain Power



# Rainbow Ranch



- Two wind projects – each 20 MW
  - Rainbow Ranch Wind LLC
  - Rainbow West Wind LLC
- \$208 million over 20-year terms
- Location: Delio, Idaho
- Purchaser: Idaho Power

# Murphy Flat



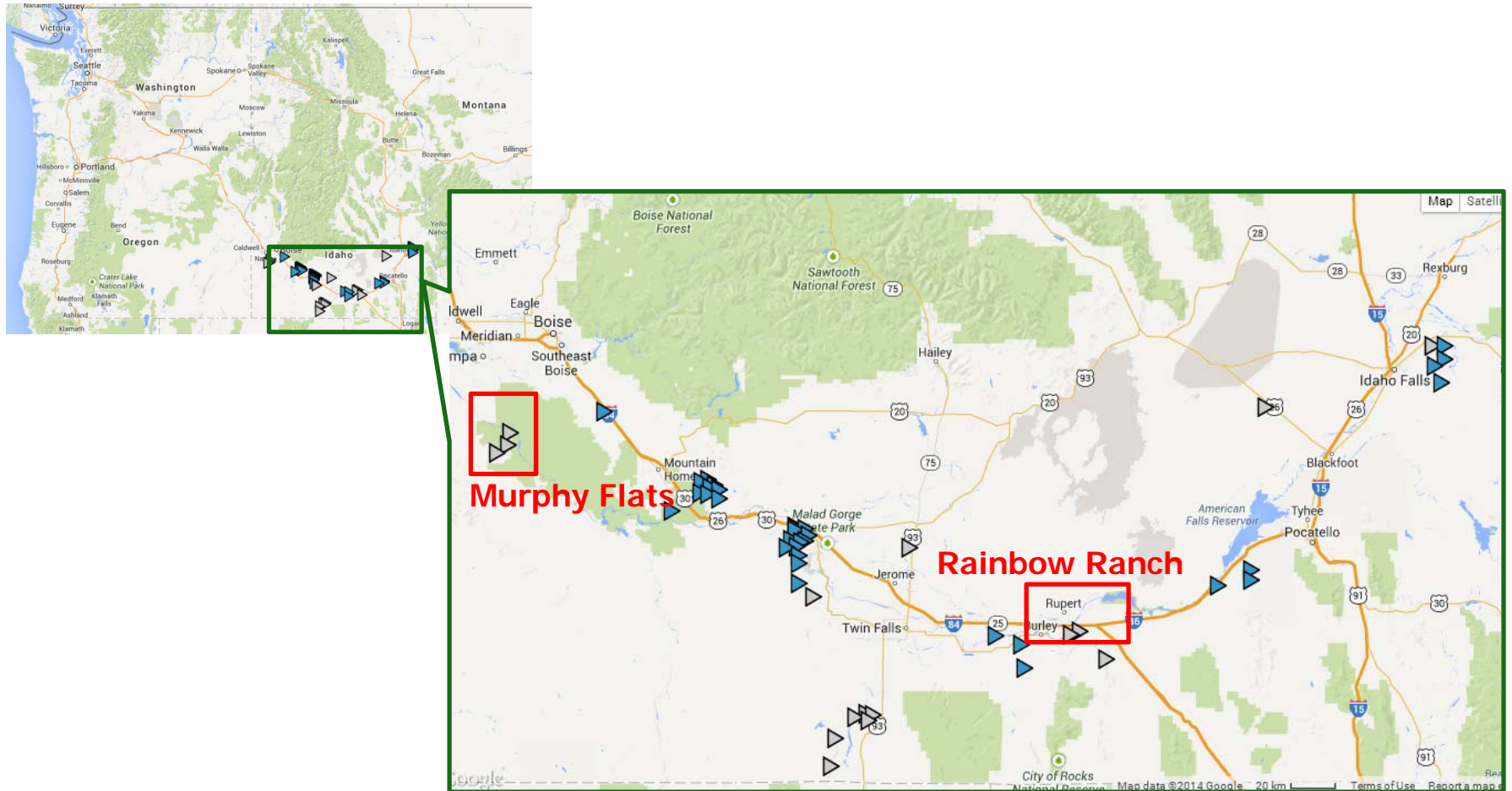
- Three wind projects – each 20.5 MW
  - Murphy Flat Energy, LLC
  - Murphy Flat Mesa, LLC
  - Murphy Flat Wind, LLC
- \$300 million over 20-year terms
- Location: Murphy, Idaho
- Purchaser: Idaho Power

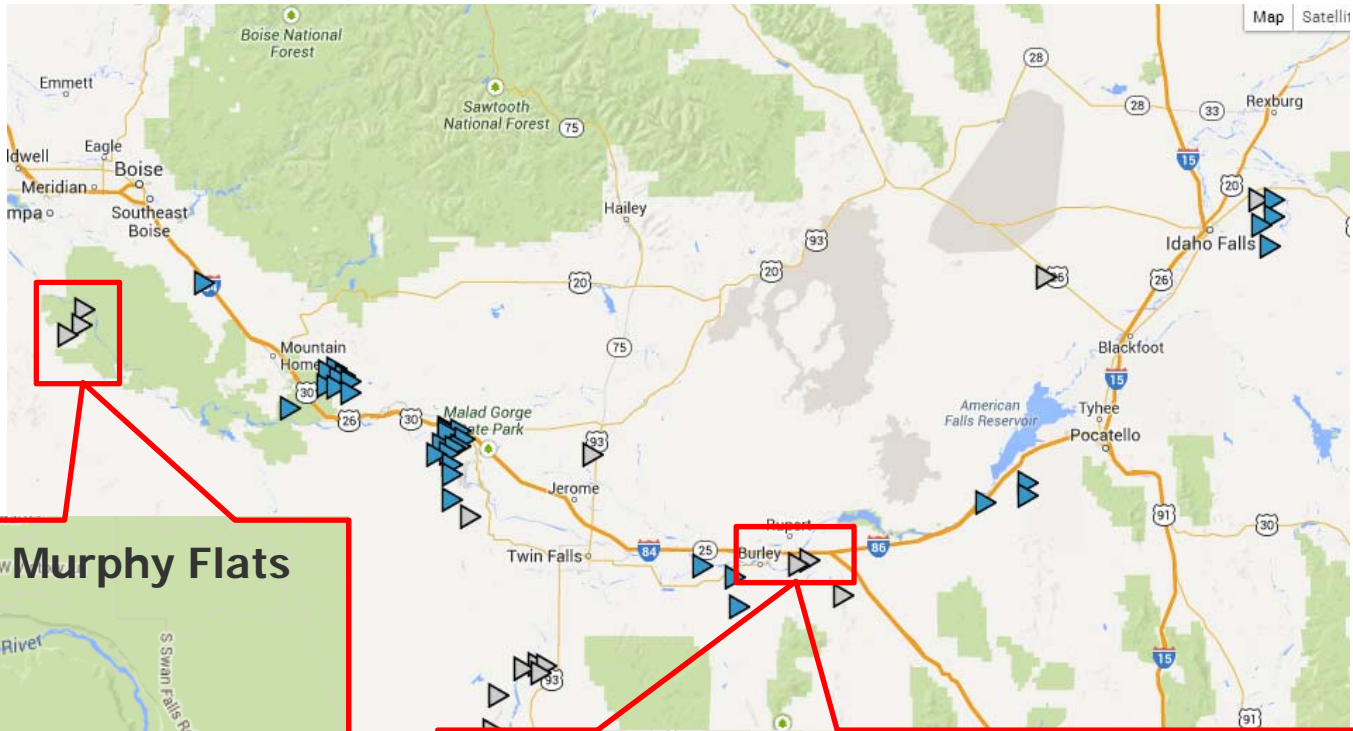
# Grouse Creek



- Two wind projects – each 21 MW
  - Grouse Creek Wind Park, LLC
  - Grouse Creek Wind Park II, LLC
- \$230 million over 20-year terms
- Location: Lynn, Utah
- Purchaser: Idaho Power
  - Power wheeled through Raft River Coop

# The wind projects next door





# Utility & Ratepayer Context



- Rates can't account for how quickly the new contracts were signed

“[IPUC] Staff emphasizes that, ‘[w]hen large QFs are added to a utility’s renewable portfolio, but the QFs disaggregate in order to qualify for the published rate, the avoided cost paid to the QF becomes inaccurate, because under the published rate methodology, there’s no mechanism to reflect the utility’s reduced avoided cost.’ Staff further maintains that obligating utilities to accept generation that they do not need unnecessarily increases the rates paid by the utilities’ customers...”

IPUC Order No. 32176 page 8 (February 7, 2011)

# What's at stake

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- Ratepayer responsibility for over \$1.423 billion of power purchase agreements!

**\$1,423,000,000.00**

# IPUC Proceedings



- November 5, 2010 – Idaho Power, Avista and PacifiCorp petitioned IPUC to:
  - Investigate avoided cost rates
  - “Lower the published avoided cost rate eligibility cap from 10 aMW to 100 kw to be effective immediately”
  
- December 3, 2010 – IPUC Order
  - Reduced eligibility from 10 aMW to 100 kw
  - Wind and solar resources only

} Effective  
Dec. 14, 2010
  
- Race to obtain a contract before new rules apply



# Contracting Sequence



DECEMBER 2010						
SUN	MON	TUES	WED	THU	FRI	SAT
				2	3	4
	5	6	7	8	9	10
11	12	13	14	15	16	17
18	19	20	21	22	23	24
25	26	27	28	29	30	31

# IPUC Rejects the PPA



- IPUC rejected each PPA because each exceeded the 100 kw cap that became effective Dec. 14.
- Controversial issue:
  - “The [Idaho Public Utilities] Commission does not consider a utility and its ratepayers obligated until both parties have completed their final reviews and signed the agreement.”

E.g., Cedar Creek, IPUC Order No. 32260 (June 8, 2011)

# FERC Proceedings



- Developers argued that IPUC’s orders violated PURPA regulations since IPUC recognized the contracts based on the date a contract was fully executed, rather than the date a legally enforceable obligation was incurred.

E.g., Cedar Creek Petition, page 2., FERC Docket No. EL11-59-000

- FERC accepted developers’ arguments, and found IPUC’s orders inconsistent with PURPA because they “[ignore] the fact that a legally enforceable obligation may be incurred before the formal memorialization of a contract in writing.”

E.g., Cedar Creek, 137 FERC 61,006 P 15 (October 4, 2011)

- FERC didn’t discuss *when* a legally enforceable obligation incurred:

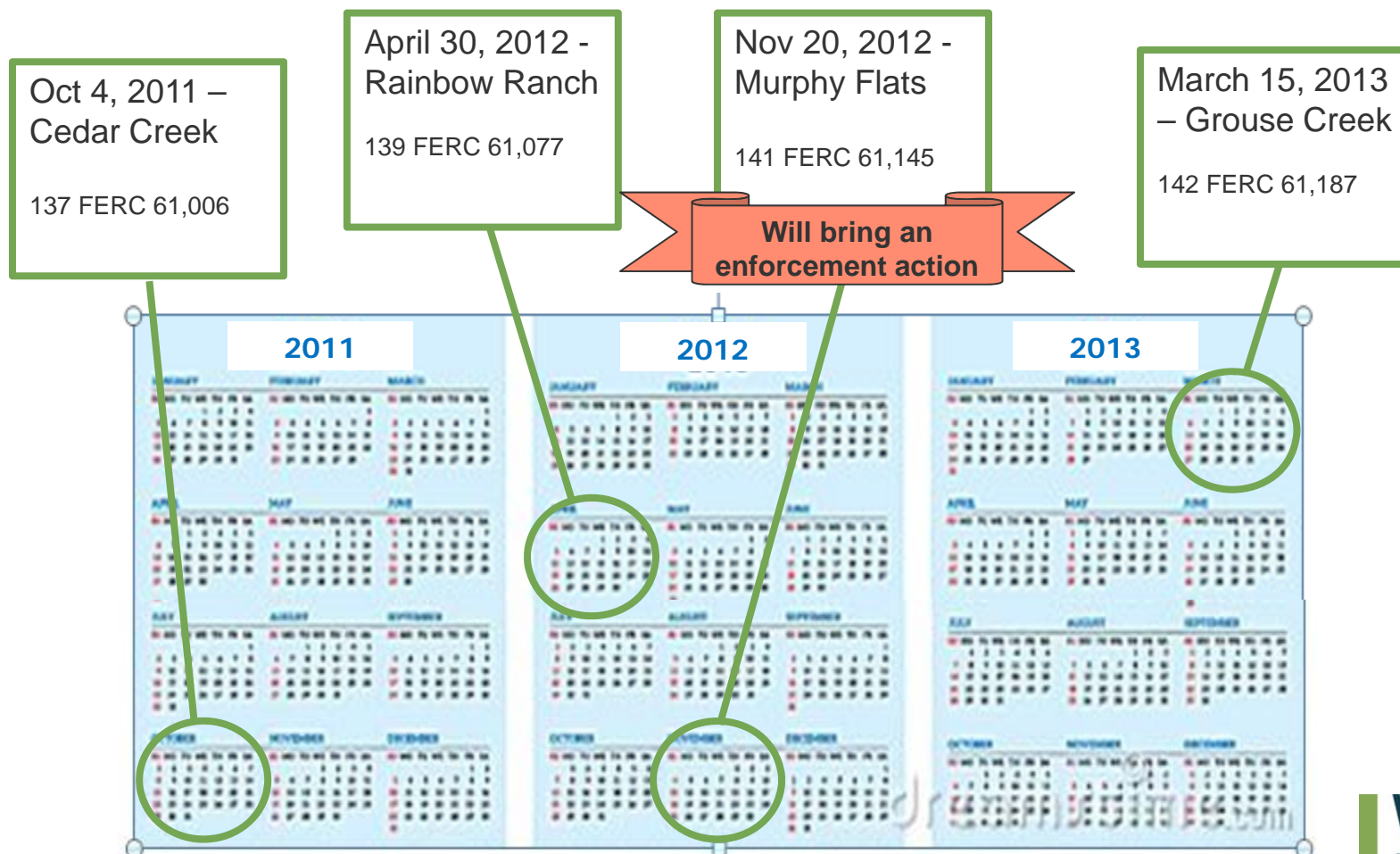
“These extensive negotiations between the parties are persuasive and point to the reasonable conclusion that Cedar Creek did commit itself to sell electricity to Rocky Mountain Power. . . these commitments result either in contracts or in non-contractual, but binding, legally enforceable obligations.”

Order at P 39.

# Enforcement Decisions



- Dec. 14, 2010 IPUC deadline spurs FERC cases spanning three years



# FERC Split on Enforcement Decisions



Commissioner Clark's dissent:

“while PURPA was designed as a foot in the door for emerging renewable resources and small generators, I sympathize with concerns that PURPA is increasingly being used as a cudgel that could force consumers to bear undue burdens. . . the PURPA construct itself creates a challenge for states charged with balancing the integration of variable resources with the needs of end use consumers. . . The Commission's decision seems to be mostly an act of exasperation at a string of cases within a single state. . . this action may be within the Commission's legal discretion, but that does not necessarily make it advisable.”

Murphy Flat, 141 FERC 61,145 (emphasis added)

# FERC Acts / State Blowback

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- March 22, 2013 – FERC files complaint against IPUC in US District Court for the District of Idaho (Case no. 1:13-cv-141).
- Swift NARUC Opposition:

“We are deeply disappointed in the Federal Energy Regulatory Commission’s action in this case. It is not at all clear why FERC would take this drastic and unprecedented step at this time, said NARUC President . . .”

[http://legislature.idaho.gov/sessioninfo/2013/interim/windenergy1001\\_puc.pdf](http://legislature.idaho.gov/sessioninfo/2013/interim/windenergy1001_puc.pdf)



# Stage Set for Settlement



- Wellinghoff Resigns; La Fleur becomes Acting Chairman (November 25, 2013)
  
- Idaho Supreme Court upholds the IPUC's decision rejecting Grouse Creek PPAs (December 18, 2013)
  - Why . . .



# Idaho Supreme Court untangles the madness



- IPUC statements “create confusion”
  - IPUC “does not consider a utility and its ratepayers obligated until both parties have completed their final reviews and signed the agreement.”

IPUC Order 32257.
  - “A legally enforceable obligation is incurred and a contract is fully executed upon the signature of both parties.”

IPUC Order 32299.
  
- “These statements suggest the IPUC failed to recognize that a utility may be obligated to purchase a QF’s energy even if it does not agree to the terms of a QF’s commitment to sell to it.”

Idaho Power Co. v. Idaho Pub. Util. Comm’n, at 18 (Idaho Sup. Ct. Dec. 18, 2013).

# Untangling continues...



- However, Idaho Supreme Court noted that the IPUC rehearing order correctly applied the law:

“[w]hen a contract has been entered into by the parties and submitted for approval, there is no need for a determination regarding any other legally enforceable obligation.” *Id. at 19.*

- The Supreme Court also noted that the IPUC’s findings were not challenged:

“no conduct by the utility unnecessarily delayed or impeded Grouse Creek’s ability to enter into its Agreements.” *Id. at 11.*

# The madness untangled



“An LEO is a significant protection for a QF that is dealing with an intransigent electric utility. By committing itself to sell its output to an electric utility, a QF has an alternate non-contractual route to pursue. It does not require signatures or all of the attendant features of a contract. However . . . Once voluntary contracts were entered into by the parties, the non-contractual LEO alternative was no longer necessary for, or available to, Grouse Creek. It had an actual LEO. Unfortunately for Grouse Creek, it had voluntarily agreed to terms that turned out not to be to its advantage.”

(page 19) Idaho Power v Grouse Creek, Docket No. 39151-2011 (December 18, 2013) (emphasis added).

# Settlement

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- December 24, 2013, FERC Acting Chairman LaFleur and IPUC President Kjellander sign an MOU between FERC and IPUC that settles FERC's enforcement case

“The Idaho PUC acknowledges that a legally enforceable obligation may be incurred prior to the formal memorialization of a contract to writing.”

# Looking forward...



- Likelihood of future enforcement actions
  - Declaratory orders – yes
  - FERC enforcement cases – no
  
- Prediction
  - Collaboration between states and FERC
  - Minimize areas of conflict between states and FERC
  
- Here's why . . .



# Why state collaboration



- Acting Chairman LaFleur priorities need state cooperation:
  - Reliability
  - Grid security
  - Regional transmission planning
  - Supporting clean and diverse power supply
- Settled jurisdictional differences with CFTC
- FERC commissioners strong state backgrounds
- Norman Bay? ? ?

# Additional QF Issues

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- REC Ownership
- Curtailment of QF Deliveries
- Point of Delivery

# REC Ownership



- Clearwater Paper: Who owns a REC in Idaho – generator or purchaser?

145 FERC 61,140 (Nov 19, 2013)

- Facts:

- Apr 2013: Clearwater-Avista non-PURPA electric service agreement
- Through Docket No. GNR-E-11-03, IPUC concluded:
  - PURPA and state law are silent on RECs
  - There is no requirement that RECs be addressed in a PURPA contract

“If a dispute arises between the parties over RECs, IPUC will apportion them equally between the utility and QF when using the IRP [integrated resource planning] Methodology, and assign all RECs to the QF when using SAR [surrogate avoided resource] Methodology.”

Answer of IPUC, FERC Docket No. 13-91 (Oct. 11, 2013) (citing Order No. 32697 at pages 46 and 47).



# REC Ownership



- Clearwater Paper challenged IPUC REC allocation at FERC

FERC Docket No. EL13-91 (September 20, 2013)

- Utilities receive 50% of the RECs while paying no more than the IRP-based avoided cost rates.
- IPUC policy discriminates against QFs who sell into the market and those that sell at avoided costs.

- FERC declined to take action on the petition

Notice of Intent Not to Act, FERC Docket No. EL13-91 (Nov 19, 2013)

# Curtailment of QFs



## Idaho Wind Partners

18 CFR 292.304(f)(1): relieves a utility from purchasing QF power during “any period which, due to operational circumstances, purchases from qualifying facilities will result in costs greater than those which the utility would incur if it did not make such purchases, but instead generated an equivalent amount of energy itself.”

## Facts

- A tariff before IPUC allowed curtailment of QF purchases during LLH when base load units are backed down to operational minimums. IPUC Docket No. GNR-E11-03
- Running the higher cost fast ramping units imposes a higher cost than would occur had the base load units been available.
- Negative economic condition is avoided by tariff before IPUC.

## FERC

- Proposed tariff violates PURPA: “as a matter of law, [avoided cost rates] already represent each party’s taking into consideration various changes in circumstances over time such as light loading. . .”

143 FERC 61,248 at P17 (June 20, 2013)(emphasis added).

**No action by the IPUC on Idaho Power’s proposed Schedule 74.**

# Curtailment of QFs



## Pioneer Wind Park

### Facts

- Pending before the Wyoming Public Service Commission was an unexecuted PPA that included a provision that allows the generation to be curtailed before PacifiCorp's Network Resources, i.e., curtailment equivalent to secondary network service.

WPSC Docket No. 20000-388-EA-11 (Nov 4, 2011)

### FERC

- Proposed provision violates PURPA because purchasing utilities can curtail a QF “(1) in system emergencies, pursuant to section 292.307(b). . . or (2) in light load periods, pursuant to section 292.304(f). . . , but only if the QF is selling its output on an ‘as available’ basis.” 145 FERC 61,215 at P36 (Dec 16, 2013).
- The second situation doesn’t apply as the PPA is a “long-term, fixed rate PPA based on avoided costs calculated *at the time the obligation is incurred*; Pioneer Wind’s sale here is not intended to be on an ‘as available basis.’” Order at P36.
- Provision violates PURPA because the provision allows curtailment “regardless of whether the purchase from Pioneer Wind contributes to the emergency at issue.” Order at P37.

**Unclear whether action has been taken by the Wyoming PSC.**

# Delivery of Power



## *Kootenai Case*

### ■ Facts

- Idaho Power's avoided cost rates are higher in Oregon than in Idaho
- Generator located in Idaho wants to wheel power through Avista's transmission and deliver to Idaho Power in Oregon
- Ownership of the transmission line changes from Avista to IPC at an unmetered point located in Oregon
- Metering point, scheduling point, and Avista/IPC control area boundary is at a substation located in Idaho.

### ■ Oregon PUC

Docket No. UM 1572, Order No. 13-062 (Feb 26, 2013)

- Power is delivered to IPC at the substation located in Idaho.
- **NO** to Oregon avoided cost rates

# Delivery of Power



## ■ FERC

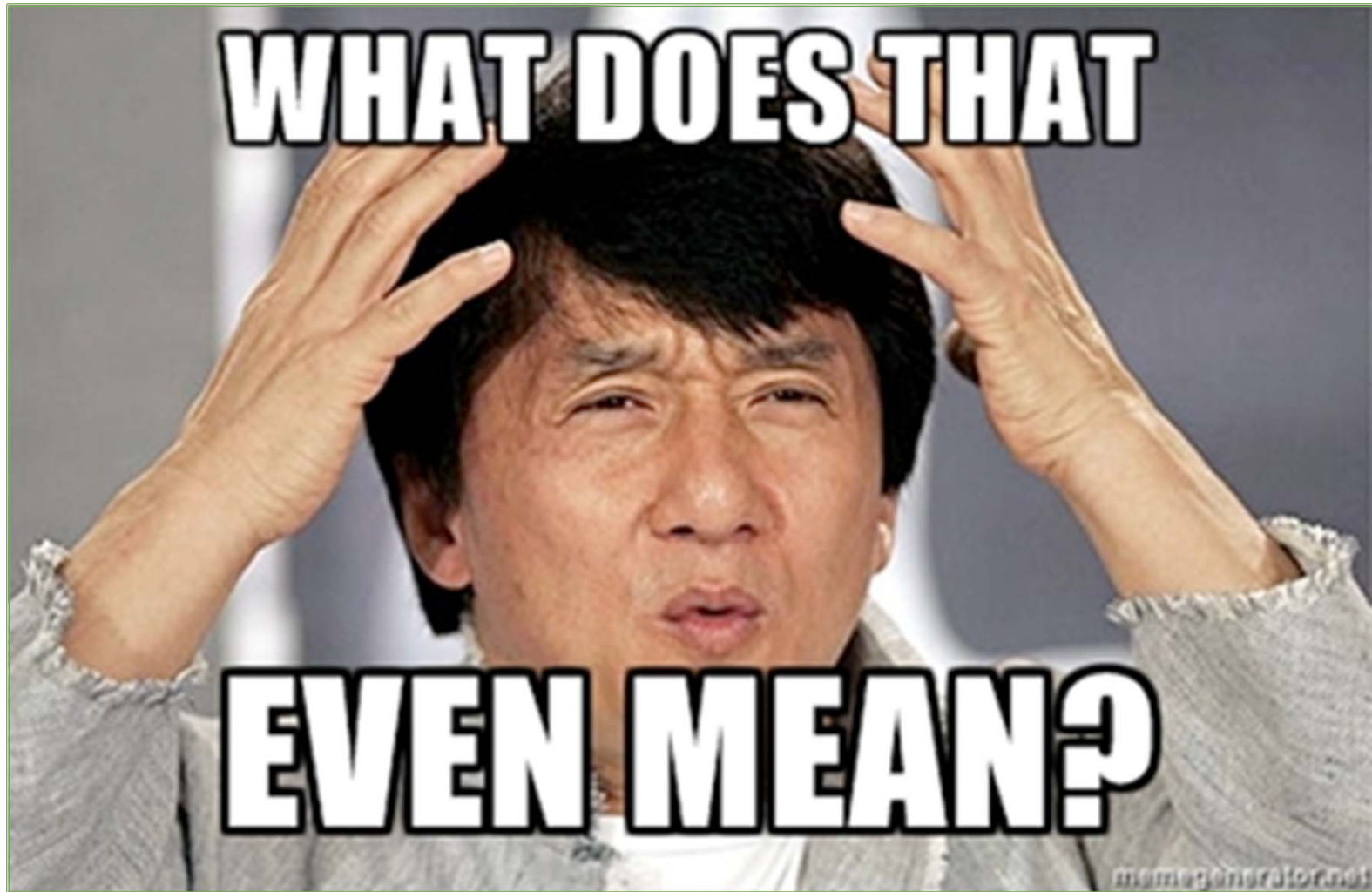
Rehearing Order, 145 FERC 61,229 (December 19, 2013)

- Power is delivered to IPC at the point of change of ownership
  - “Power can be delivered at an unmetered point along a transmission line”
  - Scheduling location and control area boundary are not determinative
  - **Key:** Kootnai’s transmission service agreement with Avista provided transmission service to the point in change of ownership
- **YES** to Oregon avoided cost rates

## ■ Oregon PUC

Order No. 14-013 (January 9, 2014)

- Withdrew February 26, 2013 Order holding that power was delivered at the substation located in Idaho
- Declared that power is delivered at the change in ownership located in state of Oregon, so Oregon avoided costs rates apply



# Takeaways



## ■ FERC's PURPA enforcement case

When negotiating a QF contract, file a state proceeding to establish the legally enforceable obligation. Do not wait for a fully executed contract, if utility is delaying.

## ■ REC Ownership will vary state to state and is not settled law

## ■ Curtailment of QF Deliveries only under limited circumstances

Is FERC wrong? Someone should test FERC's policy in the Court of Appeals

## ■ Point of Delivery

Transmission rights – rather than scheduling, metering, and balancing area – seem to define the location where energy is delivered.



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**Thank You!**

**Malcolm McLellan**

206-829-1814  
mcm@vnf.com

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