BEFORE THE

PUBLIC UTILITY COMMISSION OF OREGON

KOOTENAI ELECTRIC COOPERATIVE, INC., Complainant, vs. IDAHO POWER COMPANY, Defendant.	))))))))	Docket No. UM 1572 KOOTENAI ELECTRIC COOPERATIVE, INC.'S APPLICATION FOR RECONSIDERATION

I. INTRODUCTION AND SUMMARY

Pursuant to ORS 756.561 and OAR 860-001-0720,[1] Kootenai Electric Cooperative, Inc. ("Kootenai") hereby respectfully requests that the Public Utility Commission of Oregon ("OPUC" or the "Commission") reconsider its Order No. 13-062. That order rejected Kootenai's request that the Commission require Idaho Power Company to purchase qualifying facility ("QF") output made indirectly available from Kootenai's Fighting Creek Landfill Gas plant. On April 17, 2013, Kootenai filed a Petition for Declaratory Order and Petition for Enforcement of the Public Utility Regulatory Policies Act of 1978 ("PURPA") with the Federal Energy Regulatory Commission ("FERC") (*hereinafter* "FERC Petition"). Kootenai requested that FERC correct the OPUC's erroneous conclusions regarding Kootenai's interstate transmission delivery to Idaho Power, and enforce the right of QFs like Kootenai to make indirect sales to an Oregon utility. Kootenai makes this filing as a protective measure to ensure that the Commission's docket in this case remains open so that Order No. 13-062 can be corrected if FERC concludes that the Commission failed to honor Kootenai's PURPA rights. This

[1] The sixtieth day after Order No. 13-062 was Saturday, April 27, 2013. Thus, under OAR 860-001-150(2), this filing is timely made on the next business day, Monday, April 29, 2013.

Application also serves to toll the time that Kootenai would otherwise be required file a petition for review with the Oregon Court of Appeals. *See* ORS 756.561; 183.482(1).

II. STANDARD OF LAW

ORS 756.561(1) authorizes a party to request reconsideration by the Commission of any order within sixty (60) days of service of that order. The Commission may grant reconsideration "if sufficient reason therefor is made to appear." *Id.* OAR 860-001-0720(3) provides that the Commission may grant an application for reconsideration if the applicant shows that there is "(c) An error of law or fact in the order that is essential to the decision."

III. BASIS FOR RECONSIDERATION

Pursuant to OAR 860-001-0720(2), Kootenai asserts the following reasons and bases for reconsideration:

A. OAR 860-001-0720(2) (a): The portion of the challenged order that the applicant contends is erroneous or incomplete.

The Resolution of Order No. 13-062 is erroneous.

B. OAR 860-001-0720(2) (b): The portion of the record, laws, rules, or policy relied upon to support the application.

This Application relies upon the same bases as those set forth in Kootenai's FERC Petition, which Kootenai has attached as Attachment 1 to this Application.[2]

C. OAR 860-001-0720(2) (c): The change in the order that the Commission is requested to make.

As explained in the attached FERC Petition, the Commission erred in failing to require Idaho Power to purchase output from the Fighting Creek Landfill Gas project at Commission-

[2] Kootenai has omitted the lengthy exhibits to the FERC Petition. Those exhibits are available in the FERC Docket No. EL13-059-000, and were service upon the OPUC and Idaho Power at the time Kootenai filed the FERC Petition.

approved PURPA rates. Kootenai requests the Commission to hold this docket open so that the Commission may, consistent with the order Kootenai anticipates FERC will issue, rescind Order No. 13-062 and issue an order enforcing Kootenai's right to sell its QF output indirectly to Idaho Power at the terminus of Avista's transmission system, according to the rates and terms contained in the Schedule 85 PPA executed by Kootenai.

D. OAR 860-001-0720(2) (d): How the applicant's requested change in the order will alter the outcome.

The requested change would keep this docket open to ensure that the Commission may grant relief to Kootenai consistent with the order Kootenai anticipates FERC will issue in response to the attached petition. PURPA provides 60 days for FERC to reach its decision with regard to its discretionary enforcement authority under Section 210(h) of PURPA. *See* 16 U.S.C. § 824a-3(h)(2)(B). Even when FERC decides not to act, FERC typically renders a declaratory order under Section 210(h) of PURPA within this 60-day period, which in this case will be by June 16, 2013. If FERC declines to act, federal law entitles Kootenai to bring its own enforcement action. *Id.* The OPUC may also rescind, suspend, or amend an order "at any time." *See* ORS 756.568. However, Oregon law provides the OPUC with 60 days to rule on this Application for Reconsideration – which is by June 28, 2013. *See* ORS 756.561; 183.482(1).

Thus this Application suspends the procedural schedule in this docket so that the OPUC will have the opportunity to rescind Order No. 13-062, implement PURPA, and enforce Kootenai's right to make indirect PURPA sales under Schedule 85, as Kootenai anticipates FERC will require. This application will also preserve Kootenai's right to appeal in the Oregon courts once FERC has acted.

E. OAR 860-001-0720(2) (e): One or more of the grounds for rehearing or reconsideration in section (3) of this rule.

The Commission should reconsider Order No. 13-062 because the Order contains errors of law and fact that are essential to the decision. OAR 860-001-0720(3)(c). The errors of law and fact are described more specifically in Kootenai's FERC Petition attached to this Application.

IV. CONCLUSION

For the reasons stated herein, the Commission should hold this docket open and suspend enforcement of Order No. 13-062 until such time as FERC acts on the attached FERC Petition.

Respectfully submitted this 29th day of April 2013.

RICHARDSON AND O'LEARY, PLLC

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 29th day of April, 2013, a true and correct copy of the within and foregoing **APPLICATION FOR RECONSIDERATION BY KOOTENAI ELECTRIC COOPERATIVE** was served in the manner shown below, to:

DONOVAN WALKER REGULATORY DOCKETS IDAHO POWER COMPANY PO Box 70 Boise, Idaho 83707-0070 dwalker@idahopower.com dockets@idahopower.com	___ Hand Delivery ___ U.S. Mail, postage pre-paid ___ Facsimile _X_ Electronic Mail
LISA F RACKNER MCDOWELL & RACKNER & GIBSON PC 419 SW 11th Save Ste 400 Portland OR 97205 dockets@mcd-law.com	___ Hand Delivery ___ U.S. Mail, postage pre-paid ___ Facsimile _X_ Electronic Mail

[signature]

Gregory M. Adams

OPUC DOCKET UM 1572

KOOTENAI ELECTRIC COOPERATIVE, INC.

APPLICATION FOR RECONSIDERATION

ATTACHMENT 1

UNITED STATES OF AMERICA

FEDERAL ENERGY REGULATORY COMMISSION

	)	
Kootenai Electric Cooperative, Inc.	**)**	**Docket No. EL13-________**
	)	
	)	

PETITION FOR DECLARATORY ORDER PURSUANT TO RULE 207 AND PETITION FOR ENFORCEMENT PURSUANT TO SECTION 210(H) OF THE PUBLIC UTILITY REGULATORY POLICIES ACT OF 1978

I. INTRODUCTION AND SUMMARY

Pursuant to the Federal Energy Regulatory Commission's ("FERC" or the "Commission") Rule of Practice and Procedure 207[1] and Section 210(h) of the Public Utility Regulatory Policies Act of 1978 ("PURPA"),[2] Kootenai Electric Cooperative, Inc. ("Kootenai") hereby respectfully submits this Petition for Declaratory Order and Petition for Enforcement. Kootenai requests that the Commission take prompt action to correct the Oregon Public Utility Commission's ("OPUC") February 26, 2013, Order[3] concerning sale of electric output from Kootenai's Fighting Creek Landfill Gas Station. FERC action is required because:

(1) The OPUC order violates this Commission's August 31, 2012, order[4] (the "August 31 Order") confirming that Avista Corporation ("Avista") properly offered point-to-point transmission service which would have allowed Kootenai to move power from Fighting Creek "all the way across Avista's transmission system," which extends to Imnaha, Oregon. The OPUC Order squarely violates this Commission's order because it holds that Kootenai's wheeling transaction will terminate at Lewiston, Idaho, not Imnaha, Oregon.

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1 18 C.F.R. § 385.207 (2012).

2 16 U.S.C. § 824a-3(h) (2011).

3 *Kootenai Electric Cooperative Inc. v. Idaho Power Co.*, OPUC Docket No. UM 1572, Order No. 13-062 (Feb. 26, 2013) (hereinafter "OPUC Order"). The OPUC Order is attached as Exhibit 1.

4 *Avista Corp.*, 140 FERC ¶ 61,165 (2012).

(2) The OPUC order violates Kootenai's right, unambiguously provided in the Commission's open access transmission and PURPA regulations,[5] to wheel power from the Fighting Creek facility to obtain more favorable terms for the facility's output. Because Fighting Creek is a PURPA qualifying facility ("QF"), Kootenai is entitled to sell Fighting Creek output at avoided cost rates under PURPA, either directly to the interconnected utility (a "direct sale") or indirectly, by wheeling power across the interconnected utility, to another purchasing utility (an "indirect sale"). Kootenai exercised its rights under the Commission's PURPA regulations to wheel power across Avista's system to accommodate an indirect sale to Idaho Power's electrical system in Eastern Oregon, so that it could receive the relatively-favorable OPUC-approved PURPA rates then in effect, and also so that it could retain clear title to the Renewable Energy Credits ("RECs") generated by Fighting Creek.

To allow transfer across Avista's transmission system, Kootenai requested a long-term firm point-to-point service agreement ("PTP Agreement") with Avista that would allow Kootenai to deliver Fighting Creek power all the way across Avista's transmission system to Imnaha, Oregon, where Avista's system interconnects with Idaho Power's system.

This Commission has already confirmed that Avista properly offered Kootenai point-to-point service across its 230-kilovolt ("kV") transmission assets *all the way to Imnaha, Oregon.*[6] Under this arrangement, Kootenai therefore should have received the OPUC-approved rate in force at the time Kootenai committed to sell power from Fighting Creek to Idaho Power, December 27, 2011. Yet the OPUC concluded that Kootenai could not deliver past Avista's Lolo Substation in Idaho, and therefore could not make an indirect QF sale at OPUC-approved avoided-cost rates and terms.

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5 18 C.F.R. § 292.303(a)(2) & (d) (2012).

6 *Avista Corp.*, 140 FERC ¶ 61,165, at ¶ 21.

*   *   *

The OPUC's order violates both this Commission's order concluding that Avista properly offered point-to-point transmission service across the entirety of Avista's transmission system, which terminates at Imnaha, Oregon, and this Commission's PURPA regulations, which give Kootenai the right to compel an indirect PURPA sale to Idaho Power at the terminus of Avista's system. The Commission should act promptly to correct both violations.

II. COMMUNICATIONS

Communications regarding this Petition should be sent to the following persons:

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III. FACTUAL BACKGROUND

A. KOOTENAI ELECTRIC COOPERATIVE, INC.

Kootenai is a member-owned electric cooperative operating under the jurisdiction of the United States Department of Agriculture's Rural Utilities Service, and is an Idaho nonprofit corporation with its principle place of business in Hayden, Idaho. Kootenai currently purchases its full electrical requirements from Bonneville Power Administration ("BPA") to provide electricity to its members located in Northern Idaho and parts of Eastern Washington. Kootenai recently developed its first electric generation plant at Kootenai County's Fighting Creek Landfill, near Bellgrove, Idaho. The plant, powered by landfill gas, has a nameplate capacity of 3.2 megawatts ("MW"). Kootenai intends eventually to use the project's output to serve its own load, but intends to sell the project's output for a period prior to using the resource to service Kootenai's load. Kootenai self-certified the project as a QF.[7] The facility is directly interconnected to Kootenai's electric distribution system, and an interconnection agreement with Avista provides for deliveries to Avista's system in Idaho.

B. KOOTENAI'S ATTEMPTS TO SELL THE QF OUTPUT TO AVISTA UNDER THE IDAHO PUBLIC UTILITIES COMMISSION'S PURPA REGULATIONS.

In 2011, Kootenai attempted to enter into a long-term power purchase agreement ("PPA") with Avista for the sale of the electrical output in Idaho under the Idaho Public Utilities Commission's ("IPUC") rules implementing PURPA. But Kootenai and Avista could not come to terms because Avista relied upon recent IPUC orders to insist upon inclusion of a PPA clause that impaired the Fighting Creek project's clear title to ownership of the RECs produced by Fighting Creek. Kootenai could not agree to this approach because, under Kootenai's fuel purchase agreement with the Kootenai County Landfill, Kootenai does not own all of the environmental attributes produced by Fighting Creek. Hence, although Kootenai's project meets all of the criteria to be a QF, it was effectively precluded from selling the project's output under a long-term PPA in the State of Idaho. Additionally, the Fighting Creek generator was scheduled to be online in early 2012, and Kootenai wished to lock in the long-term avoided cost rates in effect at that time. Kootenai did not wish to become ensnared in recent controversies involving the IPUC's refusal to honor the creation of legally enforceable obligations ("LEOs") under this

[7] *See* 18 C.F.R. § 292.207(a) (2012); FERC Docket No. QF11-178.

Commission's PURPA regulations.[8]

C. KOOTENAI'S ATTEMPTS TO SELL THE QF OUTPUT TO IDAHO POWER UNDER THE PUBLIC UTILITY COMMISSION OF OREGON'S PURPA REGULATIONS.

Because of difficulties in Idaho, Kootenai considered other options. The OPUC has ruled that, when QFs sell power in Oregon, the QF may retain the RECs associated with that power.[9] Idaho Power is subject to the OPUC's ratemaking authority and regulations implementing PURPA for its Eastern Oregon service territory. In accordance with OPUC rules, Idaho Power's standard-offer PURPA PPA for its Eastern Oregon electrical system expressly waives Idaho Power's claim to a QF's environmental attributes. Such an arrangement would allow Kootenai to receive PURPA avoided-cost rates for electrical output from Fighting Creek without compromising rights to separately convey non-energy attributes, such as RECs. Kootenai therefore investigated its rights under this Commission's regulations to wheel power across Avista's transmission system and sell the power in Oregon.

In October 2011, Kootenai determined from Avista Transmission that Avista's transmission system interconnected with Idaho Power's electrical system on the Lolo-Oxbow 230 kV line, and Kootenai understood that it could move power from the Fighting Creek facility across Avista's system for delivery to Idaho Power's electrical system in Eastern Oregon.[10] The

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[8] As the Commission is aware, QFs have generally had difficulty in obtaining the IPUC's assistance in enforcing rights to a LEO over a utility's objection. *See Grouse Creek Wind Park, LLC*, 142 FERC ¶ 61,187 (2013); *Murphy Flat Power, LLC*, 141 FERC ¶ 61,145 (2012); *Rainbow Ranch Wind, LLC*, 139 FERC ¶ 61,077 (2012); *Cedar Creek Wind, LLC*, 137 FERC ¶ 61,006 (2011).

[9] *See In Re Rulemaking*, OPUC Order No. 05-1229, pp. 8-9, Docket No. AR 495 (2005), available online at http://apps.puc.state.or.us/orders/2005ords/05-1229.pdf (last accessed April 11, 2013); Ore. Admin. Rules 860-022-0075 (2012), available online at http://arcweb.sos.state.or.us/pages/rules/oars_800/oar_860/860_022.html (last accessed April 11, 2013).

[10] For a diagram of the Lolo-Oxbow line, *see Avista's Transmittal Letter*, FERC Docket No. ER12-2119-000 (June 27, 2012) (hereinafter "*Avista's Transmittal Letter*"), which Kootenai has provided as Exhibit 2 to this Petition.

following facts are undisputed regarding the Lolo-Oxbow line:[11]

- The Line was constructed under a 1958 Interconnection Agreement between Washington Water Power (which is now Avista), Idaho Power, and PacifiCorp, and the 1958 Interconnection Agreement specifies that the Point of Delivery between Idaho Power and Avista is the point of change in ownership of the Lolo-Oxbow Line.[12]

- The 1958 Interconnection Agreement is still on file with this Commission and therefore remains in effect under the filed rate doctrine.

- Since 2000, the point of change in ownership of the 230 kV Lolo-Oxbow line has been at a point located at the approximate mid-point of the line at Imnaha, Oregon. Avista currently owns the 63 miles of the line from Avista's Lolo Substation in Idaho to Imnaha, Oregon, and Idaho Power owns the remaining 45 miles of the line from Imnaha, Oregon to Idaho Power's Oxbow Substation in Oregon.[13]

- The 1958 Interconnection Agreement calls for line losses to be imputed to the Point of Delivery – again, the point near Imnaha, Oregon.[14]

- Although the metering equipment is located at the Lolo Substation at the boundary of Idaho Power's Balancing Area Authority ("BAA"), the utilities currently impute line losses to Avista up to the point near Imnaha, Oregon.[15]

- The Lolo-Imnaha section of the line is included in the rate base used by Avista to calculate transmission rates and line losses applicable for Avista's point-to-point

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[11] *See* Exhibit 1, OPUC Order at 3-5. These facts were undisputed at the OPUC and before this Commission in FERC Docket No. ER12-2119.

[12] *See First Revised 1958 Interconnection Agreement Among Idaho Power Co., Washington Water Power Co., and Pacific Power and Light Co.*, FERC Docket Nos. ER03-953-001, ER03-954-001, ER03-964-001, at Original Sheet No. 16, Article VII (filed Sept. 12, 2003) (hereinafter "*1958 Interconnection Agreement*"). Kootenai has provided this currently effective version of the 1958 Interconnection Agreement as Exhibit 3.

[13] *See Idaho Power Company, Avista Corp.*, 93 FERC ¶ 62,206 (2000) (authorizing the sale to Avista of the section of the line from the Idaho-Oregon border to Imnaha, Oregon, and noting that under the 1958 Interconnection Agreement the capacity on the transmission line from Lolo to Imnaha would be posted on Avista's OASIS as available transmission capacity on the Avista transmission system); *Idaho Power Company, Avista Corp.*, 96 FERC ¶ 62,135 (2001) (approving amendment of project licenses of Avista and Idaho Power to reflect change in ownership of the line and describing the line segments and length); *see also* Exhibit 3, *1958 Interconnection Agreement*, at Original Sheet Nos. 51-53.

[14] Exhibit 3, *1958 Interconnection Agreement*, at Original Sheet No. 16, Article X.

[15] Exhibit 2, *Avista's Transmittal Letter* at 3 (stating that "the interchange metering is compensated to reflect line losses between Lolo and the point of change of ownership").

service to Idaho Power's system.[16]

On October 19, 2011, Kootenai requested that Idaho Power agree to a standard offer Oregon PPA with deliveries made over the Lolo-Oxbow line to Imnaha, Oregon. But, without even discussing the matter with Kootenai, Idaho Power immediately filed a petition at the IPUC requesting that the IPUC assert jurisdiction over Kootenai's requested QF sale and require use of the IPUC's PURPA rules.[17] Despite the plain language of the 1958 Interconnection Agreement, Idaho Power insisted that Avista's delivery from Fighting Creek would terminate at Avista's Lolo Substation in Idaho, rather than at the point of change in ownership of the Lolo-Oxbow Line at Imnaha, Oregon. But, for the reasons noted above, Kootenai had already decided it could not to use the IPUC's PURPA rules for its long-term PPA.

In the face of continued resistance from Idaho Power, on December 27, 2011, Kootenai executed and delivered a standard offer Oregon PPA, creating a LEO under the OPUC's PURPA rules.[18] Idaho Power acknowledged receipt, but refused to counter-sign the Oregon PPA. On January 3, 2012, Kootenai filed a complaint against Idaho Power at the OPUC, requesting that the OPUC require Idaho Power to accept and pay for Kootenai's QF deliveries under the rates and terms contained in the Oregon PPA executed by Kootenai.[19]

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16 *See Avista's Corporation's Open Access Transmission Tariff*, §§ 13.7(C), 15.1, 15.7, Schedules 7 and 8 (FERC Electric Tariff Vol. 8, Revision Date Aug. 1, 2012) (*hereinafter* "*Avista's OATT*"); *see also Avista Corporation*, FERC Docket No. ER10-169 (containing Avista's filing of its current transmission rates); *Avista's 2010 Quarter 4 FERC Form 1* at p. 422, lines 20-21, 34.

17 Idaho Power's Petition before the IPUC and all other filings therein are available online at http://www.puc.idaho.gov/internet/cases/summary/IPCE1123.html (last accessed April 11, 2013). As of the date of this filing, the IPUC has not ruled on Idaho Power's Petition to assert jurisdiction over Kootenai's QF.

18 The OPUC PPA executed and delivered by Kootenai is attached as Exhibit 4.

19 All filings and issuances in the OPUC Complaint proceeding are available online at http://apps.puc.state.or.us/edockets/docket.asp?DocketID=17250 (last accessed April 11, 2013).

D. AVISTA'S OFFER OF POINT-TO-POINT TRANSMISSION SERVICE TO THE POINT OF INTERCONNECTION OF 230 KV FACILITIES AT IMNAHA, OREGON.

While the OPUC was considering Kootenai's complaint, Kootenai submitted a request to Avista for point-to-point transmission service so that Kootenai could deliver Fighting Creek output to Idaho Power's electrical system in Eastern Oregon. On May 31, 2012, Avista tendered the PTP Agreement, which, consistent with the 1958 Interconnection Agreement, defines the point of delivery 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 scheduling purposes, the LOLO point of delivery.[20]

The PTP agreement therefore unambiguously stated that deliveries will occur where the 230-kV facilities of Avista and Idaho Power meet, near Imnaha, Oregon. Nonetheless, Idaho Power objected to Avista's agreement and threatened to challenge the transmission agreement if it were executed and filed with this Commission for approval.

Therefore, on June 11, 2012, Kootenai requested that Avista file the unexecuted agreement with this Commission. In the August 31 Order, this Commission determined Avista's proposed agreement met all applicable requirements, and therefore approved it.[21] With respect to the point of delivery, the Commission explained, "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 <u>*the entirety of Avista's transmission assets on the Lolo-Oxbow line*</u>."[22] But Idaho Power still refused to accept and pay for QF deliveries made at Imnaha, Oregon, the terminus of Avista's transmission assets on the Lolo-

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20 *Avista Corp.*, 140 FERC ¶ 61,165, ¶ 2. The point-to-point agreement offered by Avista is contained in Exhibit 2, *Avista's Transmittal Letter.*

21 *Avista Corp.*, 140 FERC ¶ 61,165, at ¶ 18.

22 *Id.* at ¶ 21 (emphasis added).

Oxbow line, under the Oregon PPA.[23]

E. THE OPUC'S ORDER REFUSING TO IMPLEMENT PURPA

Kootenai submitted this Commission's August 31 Order approving Avista's proposed PTP agreement to the OPUC. But the OPUC refused to honor this Commission's conclusion that the PTP Agreement provides for delivery "all the way across Avista's transmission system," including "the entirety of Avista's transmission assets on the Lolo-Oxbow line." Instead, the OPUC concluded that, regardless of terms of the 1958 Transmission Agreement, the PTP Agreement between Avista and Kootenai, and this Commission's order interpreting the PTP Agreement, a QF can obtain PURPA rates in Oregon only if the QF's output will first enter the purchasing utility's BAA at a geographic location in Oregon.[24] The OPUC's new rule is crafted entirely from tariff language drafted and filed with the OPUC *by Idaho Power*.[25]

IV. ARGUMENT

A. THE COMMISSION SHOULD DECLARE THAT AVISTA WILL PROVIDE POINT-TO-POINT TRANSMISSION SERVICE ALL THE WAY ACROSS ITS SYSTEM TO IMNAHA, OREGON.

The OPUC has defied this Commission's order stating plainly that power would be delivered by Avista under a PTP Agreement to Imnaha, Oregon. This Commission concluded that, under the PTP Agreement, Avista would provide point-to-point service "*all the way across Avista's transmission system,* because the description *incorporates the entirety of Avista's*

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23 Because Kootenai was unable to use the point-to-point service for its intended purpose over Idaho Power's objections pending completion of the OPUC proceeding, Kootenai was forced to reach an agreement with Avista whereby the unexecuted agreement for take-and-pay transmission service was terminated. Kootenai understands that transmission capacity is still available and can be obtained for a new PTP agreement as soon as Idaho Power agrees to accept and pay for such deliveries under the Oregon PPA Kootenai executed.

24 Exhibit 1, OPUC Order at 6.

25 *Id.* at 5-6. For the OPUC tariff, *see* Exhibit 4, OPUC PPA at Appendix E.

transmission assets on the Lolo-Oxbow line."[26] It is undisputed that Avista owns all of the 230 kV transmission facilities on the Lolo-Oxbow line to Imnaha, Oregon, and that Idaho Power owns no 230 kV transmission facilities on the line north of Imnaha. Thus the Commission's prior order can mean only one thing – that the point-to-point transmission service terminates at the point near Imnaha, Oregon. The Commission should therefore issue a declaratory order requiring the OPUC to comply with its August 31 Order.

1. The Commission Should Declare that Avista's Point-to-Point Transmission Service Will Terminate at Imnaha, Oregon, and Idaho Power Will First Take Title to the QF Output at that Location.

Kootenai requested the PTP Agreement with Avista under Avista's Commission-approved Open Access Transmission Tariff ("OATT"), which contains the terms and conditions under which Avista provides open access transmission service in accordance with the Commission's landmark Order No. 888.[27] The August 31 Order interprets Avista's obligations under its OATT. By refusing to comply with the plain terms of the August 31 Order, the OPUC's order creates uncertainty – indeed, it creates completely contradictory interpretations – of Avista's obligations to provide open access transmission service. Therefore, under its power to issue declaratory orders under Section 554(e) of the Administrative Procedure Act and Section 207(a)(2) the Commission's Rule of Practice and Procedure,[28] the Commission should issue a declaratory order making clear that Avista's obligation to provide open access service encompasses its entire system, including the Lolo-Oxbow line between Lewiston, Idaho, and

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[26] *Avista Corp.*, 140 FERC ¶ 61,165, at ¶ 21.

[27] *See* 16 U.S.C. §§ 824(b), 824d and 824e (2011); *Promoting Wholesale Competition Through Open Access Nondiscriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities,* Order No. 888, FERC Stats. & Regs. ¶ 31,036, ¶¶ 31,635-31,636 (1996), 61 Fed.Reg. 21,540 ("Order No. 888"), *on reh'g,* Order No. 888-A, FERC Stats. & Regs. ¶ 31,048, 62 Fed.Reg. 12,274 (1997), *on reh'g,* Order No. 888-B, 81 FERC ¶ 61,248 (1997), *on reh'g,* Order No. 888-C, 82 FERC ¶ 61,046 (1998).

[28] 5 U.S.C. § 554(e) (2011); 18 C.F.R. § 385.207(a)(2) (2012); *see also Idaho Wind Partners 1, LLC*, 140 FERC ¶ 61,219, ¶ 33 (2012); *USGen New England, Inc.*, 118 FERC ¶ 61,172, ¶ 18 (2007).

Imnaha, Oregon. The Commission should also declare that, in order to act consistently with this Commission's August 31 Order, the OPUC is obligated to treat Imnaha as the point of delivery where Idaho Power takes title to electricity under its PURPA regulations.

2. The OPUC Ignores This Commission's Clear Holdings in the August 31, 2012, Order.

The only possible reading of the Commission's August 31 Order is that, under the PTP Agreement, power will be delivered to Idaho Power at Imnaha, Oregon, the terminus of Avista's transmission system. Relying on language in its state PURPA tariff, the OPUC concluded that power is delivered under the PTP Agreement not at Imnaha, Oregon, but at the Lolo Substation, near Lewiston, Idaho.

The OPUC's position is not supported by anything contained in this Commission's August 31 Order or in Avista's Commission-approved OATT. Rather, it relies on language proposed by Idaho Power in the OPUC's PURPA tariffs, which requires power to be delivered to Idaho's BAA in the State of Oregon. Under this logic, because, "as Idaho Power explains, its [BAA] extends to the Lolo substation in Idaho," the OPUC is free to treat the Lolo substation as the relevant point of delivery "regardless of where ownership of the Lolo-Oxbow transmission line shifts."[29] Accordingly, the OPUC concludes, regardless of the Commission's conclusions in the August 31 Order, "*the POR/POD will remain at Lolo, in Idaho*."[30]

In addition to the fact that the OPUC's conclusion is flatly inconsistent with this Commission's August 31 Order, the OPUC's conclusion is unsupportable for several additional reasons.

First, the 1958 Interconnection Agreement provides Kootenai with the right to point-to-point transmission service all the way across Avista's transmission system to the point of

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[29] Exhibit 1, OPUC Order at 6.

[30] *Id.* (emphasis added).

interconnection near Imnaha, Oregon. Because the 1958 Interconnection Agreement remains on file with this Commission, the filed rate doctrine binds Avista, Idaho Power, and the relevant state commissions as a matter of federal law.[31] Article VII of that Agreement states:

> The Points of Delivery for energy supplied between the parties hereto, unless otherwise specified, shall be at the place and in the interconnecting circuit between the parties where ownership or control of the facilities changes.[32]

It is undisputed that ownership of the Lolo-Oxbow line changes at Imnaha, Oregon.[33]

Second, Avista's OATT, which also is binding under the filed rate doctrine, provides: "The Transmission Provider will provide Firm and Non-Firm Point-to-Point Transmission Service *over, on or across its Transmission System* to any Transmission Customer that has met the requirements of Section 16."[34] Under a PTP Agreement, Kootenai would pay Avista's postage stamp point-to-point rates for service all the way across Avista's system.[35] Avista offered Kootenai such point-to-point service, and the OPUC has no authority to declare that Avista provides something less than point-to-point service all the way across its system.

Third, the OPUC improperly substitutes the Open Access Same-time Information System ("OASIS") website identifier "LOLO," which merely identifies the POD for scheduling purposes, with the Imnaha point of delivery, where power physically passes from Avista's system to Idaho Power's. The OPUC fixates on language in this Commission's August 31 Order noting that "it is not uncommon for a POR/POD to represent multiple facilities or capacity between multiple transmission service providers, not just a single [BAA] interface," while ignoring the sentence immediately following, which makes clear that the physical point of

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31 *See Cargill Power Markets, LLC v. Pub. Serv. Co. of N.M.*, 132 FERC ¶ 61,079, ¶ 23 (2010).
32 Exhibit 3, *1958 Interconnection Agreement*, at Original Sheet No. 16, Art. VII.
33 *See Idaho Power Company, Avista Corp.*, 93 FERC ¶ 62,206; Exhibit 3, *1958 Interconnection Agreement*, at Original Sheet Nos. 15-16, Art. 6, and Original Sheet Nos. 51-53.
34 *Avista's OATT* at § 15.1 (emphasis added).
35 *Id*. at § 13.7(C) and Schedule 7 (charging for reserved capacity regardless of distance of the path).

delivery, which "incorporates the entirety of Avista's transmission assets on the Lolo-Oxbow line," is the relevant point of delivery for purposes of the PTP Agreement. "LOLO" is merely a scheduling convention and, as quoted language from the August 31 Order makes clear, it does not identify the specific facilities where physical delivery of power occurs.

This is clear from Avista's PTP Agreement itself, which defines the "point of delivery" as "[t]he point on the Lolo-Oxbow 230 kV Transmission Line where the 230 kV facilities of Idaho Power Company and Avista are interconnected," and makes clear that "the LOLO point of delivery" is to be used only "for scheduling purposes."[36] If there were any doubt about the intent of this language, Avista made clear in its filing explaining the PTP Agreement before this Commission that:

> From a *transmission service standpoint*, Avista 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*. From a *scheduling standpoint*, consistent with all applicable reliability standards, energy scheduled between Avista and IPC is exchanged or "handed off" at the balancing authority boundary between the two systems.[37]

This Commission's August 31 Order likewise repeatedly recognizes the distinction between transmission service, which results in physical delivery of power to the point of change of ownership on the Lolo-Oxbow line, and the "LOLO" POD, which is used for scheduling purposes only, and which identifies a large assemblage of facilities rather than a specific point.[38]

In fact, scheduling points on OASIS and the North American Electric Reliability Corporation's ("NERC") Transmission System Information Network ("TSIN") registry are not intended to deprive transmission customers of open access. The TSIN registry "facilitates

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[36] *Avista Corp.*, 140 FERC ¶ 61,165, ¶ 2. The point-to-point agreement offered by Avista is contained in Exhibit 2, *Avista's Transmittal Letter.*

[37] *Request for Leave to Answer and Answer of Avista Corp.*, FERC Docket No. ER12-2119-000, at 4 (July 30, 2012) (emphasis added) (hereinafter "*Avista's Answer*"). Kootenai has included *Avista's Answer* as Exhibit 5 to this Petition**.**

[38] *See Avista Corp.*, 140 FERC ¶ 61,165, at ¶¶ 18- 21.

identification and communication of interchange transactions between parties in accordance with the NERC Interchange Scheduling and Coordination Reliability Standards."[39] However, "it is not uncommon for a POR/POD to represent multiple facilities or capacity between multiple transmission service providers, not just a single [BAA] interface."[40] The purpose of OASIS is to "allow transmission customers to determine the availability of transmission capacity and will help ensure that public utilities do not use their ownership, operation, or control of transmission to deny access unfairly."[41] The OPUC's interpretation turns these purposes on their head, giving utility monopolists like Idaho Power a new tool to restrict transmission access by asserting title to wheeled power at the border of their BAAs, even if doing so would deny transmission access unfairly.

The fourth reason the OPUC's conclusion is untenable is because it would allow BAA boundaries to become a barrier to the continuous flow of interstate transmission. As this Commission noted in Order No. 888, "[a BAA] is part of an interconnected power system with a common generation control system. *It may contain one or several utilities*."[42] Accordingly, the OPUC's theory that an open access wheeling transaction terminates at the BAA boundary is inconsistent with the Commission's open access regime because it would bar transmission access to the utilities embedded within a BAA. In fact, the Commission's regulations demonstrate that a posted POD/POR identifier is not necessarily limited to a BAA boundary and that the point-to-

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39 *Id.* at ¶ 20.

40 *Id.* at ¶ 21.

41 *Open Access Same-Time Information System and Standards of Conduct*, Order No. 889, FERC Stats. & Regs. ¶ 31,035, ¶ 31,590, 61 Fed. Reg. 21,737 (1996), *on reh'g* , Order No. 889-A, 78 FERC ¶ 61,221 (1997), *on reh'g,* Order No. 889-B, 81 FERC ¶ 61,253 (1997). Order No. 889 uses the term "control area." For purposes of this Petition, Kootenai has substituted "BAA," which reflects current industry usage.

42 Order No. 888, FERC Stats. and Regs. ¶ 31,036 at ¶ 31,704 n.350 (emphasis added).

point service need not stop at the BAA boundary.[43] The OPUC's theory also would create an artificial restriction on the flow of electric power in interstate commerce since wheeling transactions would be artificially restricted by BAA boundaries that often, as in this case, cross multiple state lines.

In addition, the OPUC's theory conflates the function of a BAA with the function of a transmission provider. The BAA merely maintains load and resource balance within its Balancing Area, may provide ancillary services, and is one of the entities subject to NERC reliability standards.[44] But the BAA is not necessarily the same as the transmission provider, which must offer point-to-point transmission services over its transmission facilities.[45] For example, in pleadings associated with the August 31 Order, Avista stated that its "MIDC" POR/POD identifier represents Avista's transmission capacity rights on a jointly-owned transmission line that runs through and past Avista's BAA interface with PacifiCorp, and through PacifiCorp's BAA to PacifiCorp's interface with PUD No. 2 of Grant County, Washington at Grant's Wanapum 230 kV Substation.[46]

Most importantly, the BAA boundary cannot determine where Idaho Power's Merchant arm takes title to the electricity delivered from Avista's system. Idaho Power admitted in discovery in the OPUC proceeding that it is the BAA operator for an area that contains 17

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43 18 C.F.R. § 37.6(b)(1)(i) (2012) (requiring transmission providers to post available capacity across "Posted Paths," which includes "any control area to control area interconnection."); 18 C.F.R. § 37.6(b)(1)(iv) (2012) ("The word *interconnection*, as used in the definition of 'posted path,' means all facilities connecting two adjacent systems or control areas.").

44 Order No. 888, FERC Stats. and Regs. ¶ 31,036, at ¶¶ 31,704-31,705; 18 C.F.R. § 40.1 (2012) (applying reliability standards to "all users, owners and operators of the Bulk Power System").

45 *See* Order No. 888-A, FERC Stats. and Regs. ¶ 31,048 at ¶ 30,511 (describing different responsibilities for the control area operator and transmission provider). *See also Avista's OATT* at § 3.

46 Exhibit 5, *Avista's Answer* at 6.

different utilities.[47] Idaho Power cannot abuse its status as the BAA for this vast area by being allowed to assert title to the electricity on any lines in its BAA regardless of who owns the facilities or pays for the point-to-point transmission service and associated line losses. In fact, because the Lolo-Imnaha section of the line is not included in Idaho Power's transmission revenue requirement, the OPUC's order effectively allows Idaho Power Merchant to use the line from Lolo Substation to Imnaha free of charge, while Kootenai and other Avista transmission customers pay both the costs of building and maintaining the Avista-owned line segment and the line losses on that segment.[48]

Regulated utility monopolists cannot defeat legitimate requests for open access transmission service simply by limiting that service to POD/POR abbreviations used in the TSIN registry. To do so would be antithetical to the purposes of the Commission's open access transmission regime and to the free flow of interstate commerce in electricity. The Commission should declare that – consistent with this Commission's prior determination – Avista will provide point-to-point transmission service all the way across its system to the point of interconnection on the 230 kV Lolo-Oxbow line, and that point is located in Oregon. The Commission also should declare that Idaho Power may not assert title to the output prior to receiving that output at Imnaha, Oregon, where Idaho Power first assumes ownership of the 230 kV facilities and responsibility for line losses.

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[47] Kootenai has included relevant discovery responses as Exhibit 6*; see also* W. Elec. Coordinating Council, *Western Interconnection Balancing Authorities* (2012), *available at* http://www.wecc.biz/library/WECC%20Documents/Publications/WECC_BA_Map.pdf (last accessed April 11, 2013), which Kootenai has also included as Exhibit 7.

[48] *See* Exhibit 6, Idaho Power's Response to Kootenai Data Request 2.4 (stating that "the portion of the Lolo-Oxbow 230 kilovolt ('kV') line from the Lolo substation to Imnaha is not included in Idaho Power's Total Transmission Revenue Requirement or otherwise included in calculation of Idaho Power's transmission rates").

B. THE OPUC HAS FAILIED TO IMPLEMENT PURPA'S REQUIREMENTS ALLOWING QF'S TO MAKE INDIRECT SALES.

Under PURPA, it is well established that a QF may either sell power directly to an interconnected utility at avoided cost rates or wheel that power across the transmission system of the interconnected utility so that the QF may seek out a more favorable transaction. The OPUC's order violates Kootenai's right to wheel power in order to obtain more favorable avoided-cost rates and terms. The Commission should therefore initiate an enforcement action against the OPUC under Section 210(h)(2) of PURPA that would require the OPUC to grant Kootenai the right to sell power delivered to Idaho Power's Eastern Oregon electrical system at the OPUC-approved avoided cost rates that were in effect at the time Kootenai submitted an executed PPA on December 27, 2011.[49] In the alternative, the Commission should issue a declaratory order making clear that the OPUC's actions violate the Commission's PURPA regulations.[50]

1. PURPA Requires States to Implement Indirect Sales of QF Output.

The basic right of QFs is spelled out in Section 210(b) of PURPA, which requires an electric utility to enter into a long-term contract to buy a QF's electrical output at a rate equal to the utility's "avoided costs."[51] As the Commission recently noted, "[u]tilities have an *absolute obligation to purchase* a QF's output, unless the Commission expressly grants relief from that purchase obligation."[52] The Commission's regulations accordingly require: "Each electric utility shall purchase . . . any electric energy and capacity which is made available from a qualifying facility."[53] The purchase obligation extends to any power that is made available "[i]ndirectly to

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49 16 U.S.C. § 824a-3(h)(2) (2011); *Cedar Creek Wind, LLC*, 137 FERC ¶ 61,006, at ¶ 28.

50 *See, e.g., Cedar Creek Wind, LLC*, 137 FERC ¶ 61,006, at ¶ 30.

51 16 U.S.C. § 824a-3 (a), (b), (d) (2011); 18 C.F.R. § 292.304(a), (b), (d)(2)(ii) (2012).

52 *Southwest Power Pool, Inc.*, 143 FERC ¶ 61,018, at ¶ 17 (2013) (emphasis added).

53 18 C.F.R. § 292.303(a) (2012).

the electric utility in accordance with" the Commission's PURPA regulations.[54] Those regulations, in turn, provide QFs with the unequivocal right to wheel power across the interconnected utility's system rather than sell to the interconnected utility at its avoided-cost rates, and require the utility receiving such wheeled QF power to purchase the power at its avoided-cost rates:

> If a qualifying facility agrees, an electric utility which would otherwise be obligated to purchase energy or capacity from such qualifying facility may transmit the energy or capacity to any other electric utility. *Any electric utility to which such energy or capacity is transmitted shall purchase such energy or capacity under this subpart as if the qualifying facility were supplying energy or capacity directly to such electric utility*.[55]

As this Commission has explained, "a QF is not obligated to sell its electric energy to the directly interconnected electric utility and the QF may instead choose which particular electric utility to sell its electric energy to."[56] "There are several circumstances in which a qualifying facility might desire that the electric utility with which it is interconnected not be the purchaser of the qualifying facility's energy and capacity, but would prefer instead that an electric utility with which the purchasing utility is interconnected make such a purchase."[57] This rule is "*intended to provide qualifying facilities some flexibility in determining which utility receives its power so that it may receive the highest rate.*"[58]

A QF possesses the same rights as any other eligible transmission customer to use open access transmission tariffs in order to facilitate indirect PURPA sales.[59] Such indirect sales are

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54 18 C.F.R. § 292.303(a)(2) (2012).

55 18 C.F.R. § 292.303(d) (2012) (emphasis added).

56 *Morgantown Energy Assoc.*, 140 FERC ¶ 61,223, at ¶23 n. 48 (2012).

57 *Small Power Production and Cogeneration Facilities; Regulations Implementing Section 210 of the Public Utility Regulatory Policies Act of 1978* (hereinafter "*Order No. 69*"), 45 Fed. Reg. 12,214, 12,219 (Feb. 25, 1980).

58 *Florida Power & Light Co. et al.*, 29 FERC ¶ 61,140, ¶¶ 61,293-61,294 (1984) (emphasis added).

59 *See Pub. Serv. Co. of N.H. v. N.H. Elec. Coop., Inc.*, 83 FERC ¶ 61,224, ¶¶ 61,998 - 62,000 (1998), *reh'g denied*, 85 FERC ¶ 61,044, at ¶ 61,133 (1998).

not subject to the purchasing utility's consent.[60] In fact, this Commission views this right as sufficiently important that is has held the right cannot be bargained away by contract.[61] As with all of PURPA's requirements, Section 210(f) of PURPA requires each state utility commission to implement the QFs' right to make indirect sales to each utility for which it has ratemaking authority.[62]

2. The OPUC Has Failed to Implement PURPA's Requirement for Indirect Sales.

The OPUC's new rule is inconsistent with PURPA. Although Oregon law and regulations re-state the QF's right to make indirect sales,[63] the OPUC's new rule improperly limits that right by creating a new requirement, based entirely on language in a tariff drafted by Idaho Power, that the QF power must first enter the purchasing utility's BAA within the geographic boundaries of Oregon.[64] This new requirement goes well beyond what is allowed under the Commission's regulations because the Commission's regulations require the QF only to pay transmission and line losses to wheel its power to the purchasing utility.[65] The OPUC impermissibly imposes a new and additional requirement, unsupported by any language in either PURPA or the Commission's regulations implementing PURPA, allowing indirect sales in Oregon only if the QF somehow arranges for its output to first enter the purchasing utility's BAA at a location within Oregon.[66]

While the Commission's PURPA regulations require the QF, like any other transmission

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60 *Id.*

61 *Id.*

62 16 U.S.C. § 824a-3(f) (2011); *FERC v. Mississippi*, 456 U.S. 742, 751, 759-61 (1982).

63 *See* Ore. Rev. Stat. 758.525(2) (2011); Ore. Admin. R. 860-029-0030(1)(b) (2013).

64 Exhibit 1, OPUC Order at 5-6. For the OPUC tariff, *see* Exhibit 4, OPUC PPA at Appendix E.

65 For indirect sales, the Commission's regulations provide: "The rate for purchase by the electric utility to which such energy is transmitted shall be adjusted up or down to reflect line losses pursuant to § 292.304(e)(4) and shall not include any charges for transmission." 18 C.F.R. § 292.303(d) (2012).

66 Exhibit 1, OPUC Order at 6.

customer, to pay for transmission and line losses up to the point of delivery, nothing in the PURPA regulations allow states to impose additional requirements on such deliveries, such as the OPUC's requirement of delivery to a BAA boundary within Oregon.[67] The OPUC's new requirement creates a substantial and unfair burden on Kootenai because, under Avista's approved OATT and transmission rates, Kootenai must pay for point-to-point transmission and line losses all the way to Imnaha, Oregon, but the OPUC denies Kootenai the benefit of delivery to Imnaha, recognizing the wheeling transaction only so far as the Lolo substation in Lewiston, Idaho.

An examination of the OPUC-approved PPA and tariff makes clear that the OPUC's implementation of PURPA would force a QF to pay for transmission service and line losses on the Lolo-Oxbow line but strip the QF of the benefit of transmission service on that line. The OPUC-approved PPA requires a QF to accept responsibility for line losses up to the point where the electricity reaches Idaho Power's electrical system.[68] Idaho Power's OPUC tariff, attached as an exhibit to the approved PPA, defines the "Point of Delivery" as the point "where the Company's and the Seller's host transmission provider's electrical facilities are interconnected."[69] Thus Kootenai completed the standard PPA by describing the point of delivery as "The point of change in ownership between Idaho Power's and Avista's systems on the 230 kilovolt Lolo to Oxbow line . . . ."[70] The PPA specifically requires a QF to pay for transmission and line losses on lines, like Lolo-Oxbow, that are within Idaho Power's BAA but not a part of Idaho Power's transmission system.[71]

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67 *See Order No. 69*, 45 Fed. Reg. at 12,220.
68 Exhibit 4, OPUC PPA at Arts. 1.19, 9, and Appendix B-5 and B-6.
69 *Id.* at Appendix E (containing the OPUC Schedule 85 tariff, which defines "Point of Delivery" on Original Sheet No. 85-2).
70 *Id.* at Appendix B-5.
71 *Id.* at Appendix B-6(a).

The OPUC's order is therefore logically indefensible. It would require Kootenai to pay for power to be delivered all the way to the point of change of ownership of the Lolo-Oxbow line at Imnaha, Oregon, yet at the same time conclude that Kootenai's wheeling transaction terminates 63 miles short of Imnaha, at the Lolo substation. The OPUC cannot treat Kootenai's transmission right as ending at Lolo Substation for purposes of defining Kootenai's PURPA rights yet at the same time treat the transaction as ending the Imnaha, Oregon, point of change in ownership for purposes of Kootenai's payment obligations to the transmission provider.

Even the most generous reading of the OPUC's order leads to an indefensible result. The linchpin of the order is the OPUC's conclusion that, because the PTP Agreement specifies "LOLO" as the POD for scheduling purposes, power delivered to Idaho Power "will remain at Lolo, in Idaho."[72] But this Commission's August 31 Order makes clear that "LOLO," like other scheduling points, may "represent multiple facilities or capacity between multiple transmission service providers, not just a single [BAA] interface."[73] Thus, the OPUC recognizes that "the POR/POD in Lolo will represent a number of facilities, *including facilities in Oregon*."[74] Hence, even the OPUC itself recognizes that scheduling QF output to the LOLO POD does nothing to prevent power from crossing the state line and being delivered at "facilities in Oregon." PURPA requires each state to implement indirect sales for QF output delivered to the purchasing utilities in that state. Even the internal reasoning of the OPUC order provides no justification for Oregon to shirk this responsibility.

Under the Commission's PURPA regulations, the OPUC must implement the indirect sale to Idaho Power at Imnaha just as if Kootenai were directly interconnected to Idaho Power's

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72 *See* Exhibit 1, OPUC Order at 6.
73 *Avista Corp.*, 140 FERC ¶ 61,165, at ¶ 21.
74 *See* Exhibit 1, OPUC Order at 6 (emphasis added).

system at that point.[75] The OPUC cannot "interpret" a state tariff filed by Idaho Power to defeat Kootenai's federal PURPA rights or in a manner that is contrary to the Commission's PURPA regulations.[76]

3. The Commission Should Declare that PURPA Provides No Justification to Discriminate Against Out-of-State QFs.

The Commerce Clause "denies States the power unjustifiably to discriminate against or burden the interstate flow of articles of commerce."[77] Absent clearly expressed authorization from Congress to burden or discriminate against interstate commerce, states must allow the free flow of commerce across state lines.[78]

This obligation is particularly compelling in the case of interstate transmission of electric power because, as the U.S. Supreme Court has observed, "it is difficult to conceive of a more basic element of interstate commerce than electric energy, a product used in virtually every home and every commercial or manufacturing facility."[79] Further, as this Commission recently explained in approving a settlement that will allow a greater number of interstate transactions between the Pacific Northwest and California, such transactions "result in increased market efficiency" by, for example, allowing market participants "to address congestion more efficiently and reliably."[80] Accordingly, the Commission has concluded "it would be inconsistent with our open access policies to prevent QFs from seeking to participate fully in the competitive

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75 *See* 16 U.S.C. § 824a-3(f) (2011); *Mississippi*, 456 U.S. at 759-61; *Pub. Serv. Co. of N.H.*, 83 FERC ¶ 61,224, at ¶¶ 61,998 - 62,000.

76 *See Ind. Energy Prods., Inc. v. Cal.Pub. Util. Comm'n,* 36 F.3d 848, 859 (9th Cir. 1994) (state rules that are contrary to PURPA are preempted and unenforceable); *Exelon Wind I, LLC,* 140 FERC ¶ 61,152, at ¶ 44 (2012) ("a state may take action under PURPA only to the extent that that action is in accordance with the Commission's regulations").

77 *Or. Waste Systems, Inc. v. Dept. of Env. Quality of the State of Or.*, 511 U.S. 93, 98 (1994).

78 *Hillsdale Dairy, Inc. v. Lyons*, 539, U.S. 59, 66 (2003); *see also Granholm v. Heald*, 544 U.S. 460, 489-93 (2005).

79 *Mississippi,* 456 U.S. at 757.

80 *California Ind. System Operator,* 142 FERC ¶ 61,246, at ¶ 21 (2013).

market."[81]

The OPUC's unprecedented interpretations of the Commission's open access transmission regime and Oregon's obligations under PURPA threaten to create new and untenable barriers to interstate commerce and to thwart the Commission's efforts to create a competitive wholesale market for generation. This is because, if the OPUC's interpretation is allowed to stand, any state could declare that a wheeling transaction stops at the boundary of a BAA, regardless of the underlying contract transmission path or the configuration of the underlying transmission facilities. And, because many BAAs cover multiple utilities and cross one or more state lines, the resulting restriction could severely retard interstate commerce in electricity and undercut competition in the electric generation market.

The Idaho Power BAA demonstrates the problem. Idaho Power's BAA spans the Oregon-Idaho border.[82] The OPUC's new rule by administrative fiat effectively converts an interstate transmission transaction, beginning at Fighting Creek and ending where Idaho Power's 230-kV transmission facilities begin at Imnaha, into an intrastate transaction that stops at the Lolo substation in Idaho. Using the same logic, the OPUC could, through administrative fiat, thwart most interstate QF transactions moving from Idaho Power's BAA or points east thereof.[83] The problem will be widespread because large, multistate BAAs are common.

Interstate QF transactions are also common. To give a concrete example, two of the QFs that are the subject of the Commission's recently initiated enforcement action against the IPUC – the Grouse Creek Wind QFs – are located in Utah and intend to wheel their output across the Utah-Idaho border for sale to Idaho Power under the IPUC's implementation of PURPA.[84] The

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81 *Pub. Serv. Co. of N.H.*, 83 FERC ¶ 61,224, at ¶ 62,000.

82 *See* Exhibit 7.

83 *See id*.

84 *See Grouse Creek Wind Park, LLC*, 142 FERC ¶ 61,187, ¶¶ 4, 15.

Commission itself is going to court to enforce the PURPA rights of these “out-of-state” QFs.

A similar problem arises because the OPUC treats the “LOLO” scheduling point as though it were a physical location that can be pinpointed to one substation in Idaho. But that is simply untrue. As noted above, the “LOLO” POD/POR used for scheduling purposes encompasses a range of facilities, including the Lolo-Oxbow line that crosses the Idaho/Oregon border and penetrates many miles into each state. Under the OPUC’s logic, a state PUC could select any state covered in the scheduling POD and declare that a transmission wheeling transaction terminates in that state.

An examination of some of the scheduling POD/PORs in the Western Interconnection underscores the dysfunction that would result from the OPUC’s approach. Power schedulers in the West frequently use an entire utility’s system as the designated POD/POR.[85] For example, schedulers frequently use “BPA-T,” as a designated POD/POR, yet this POD encompasses all of Bonneville Power Administration’s multistate transmission system. Allowing a state PUC to arbitrarily designate a particular point within such a broad POD/POR designation as the physical point of delivery for a wheeling transaction, as the OPUC has done in this case, would create untenable restrictions on the flow of electric power in interstate commerce and defeat the Commission’s policy goal of allowing open access to the nation’s electric transmission system.

V. CONCLUSION

For the reasons stated herein, the Commission should, exercising its power under Rule 207(a)(2),[86] issue a declaration that:

- The physical point of delivery for QF output delivered from the Fighting Creek

[85] *See* Northern Tier Transmission Group, List of Common Names for POD/POR, available online http://nttg.biz/site/index.php?option=com_content&task=blogsection&id=10&Itemid=57 (last accessed April 11, 2013). Kootenai has attached this List as Exhibit 8.

[86] 18 C.F.R. § 385.207(a)(2) (2012).

landfill gas generator to Idaho Power is at the point of change of ownership of the Lolo-Oxbow transmission line, near Imnaha, Oregon.

- Idaho Power cannot assert title to QF output from the Fighting Creek facility prior to delivery of that output at the Imnaha, Oregon, delivery point.
- Under this Commission's unambiguous recent authority,[87] Kootenai is entitled to the OPUC's avoided-cost rates in effect for Idaho Power's electrical system in Eastern Oregon at the time it tendered a signed QF contract to Idaho Power for delivery at Imnaha, on December 27, 2011.

The Commission should also initiate an enforcement action under Section 210(h) of PURPA to ensure that the rights of QFs to make indirect sales are protected, as well as promote the Commission's strong policy interest in unimpeded flow of electric power in interstate commerce and open access to the nation's electric transmission system. Even if the Commission declines to initiate an enforcement action, the Commission should declare that the OPUC has violated the right of QFs to make indirect sales to Oregon utilities by failing to recognize Kootenai's contracted-for physical point of delivery in Oregon and failing to honor Kootenai's right to create a legally enforceable obligation when it tendered a signed QF contract to Idaho Power, which occurred on December 27, 2011. The Commission should further declare that PURPA provides no justification to discriminate against out-of-state QFs and that the OPUC's actions in this case unduly burden interstate commerce in electricity and are contrary to the Commission's policies promoting open competition in the electric generation market.

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[87] *See, e.g., Grouse Creek Wind Park, LLC*, 142 FERC ¶ 61,187 (2013); *Murphy Flat Power, LLC*, 141 FERC ¶ 61,145 (2012); *Rainbow Ranch Wind, LLC*, 139 FERC ¶ 61,077 (2012); *Cedar Creek Wind, LLC*, 137 FERC ¶ 61,006 (2011).

Respectfully submitted this 16th day of April 2013.

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I hereby certify that I have this day caused the foregoing document and exhibits to be served upon each of the following persons via electronic mail:

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Dated on April 16, 2013.

Signed: /s/

Eric L. Christensen