

145 FERC ¶ 61,215
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Pioneer Wind Park I, LLC

Docket No. EL14-1-000

ORDER GRANTING PETITION FOR DECLARATORY ORDER IN PART

(Issued December 16, 2013)

1. On October 2, 2013, Pioneer Wind Park I, LLC (Pioneer Wind) filed a petition for declaratory order (Petition), pursuant to Rule 207(a)(2) of the Commission's Rules of Practice and Procedure,¹ requesting that the Commission issue an order finding that PacifiCorp's refusal to execute a Power Purchase Agreement (PPA) with Pioneer Wind, unless Pioneer Wind agrees to allow PacifiCorp to curtail the Pioneer Wind Project ahead of other generators, as if it were a non-firm transmission customer, is inconsistent with: (1) PacifiCorp's mandatory purchase obligation under the Public Utility Regulatory Policies Act of 1978 (PURPA),² as that obligation has been interpreted by the Commission in several recent orders; and (2) Pioneer Wind's entitlement to Network Resource Interconnection Service under Standard Large Generator Interconnection Agreements (LGIA) with PacifiCorp, as well as the non-discrimination provisions of the LGIAs. In addition to the relief requested in its Petition, Pioneer Wind also asks that the Commission declare that PacifiCorp's October 18, 2013 Amendment (October 18th Amendment) filed at the Public Service Commission of Wyoming (Wyoming Commission) would be inconsistent with PURPA and the Commission's PURPA regulations. The Commission will grant the petition for declaratory order, in part, consistent with the discussion below.

¹ 18 C.F.R. § 385.207(a)(2) (2013).

² 16 U.S.C. § 824a-3 (2012).

I. Background

2. Pioneer Wind states that it is a Delaware limited liability company that is developing the Pioneer Wind Project, an 80 MW wind-powered facility to be located in Converse County, Wyoming. Pioneer Wind also states that the Pioneer Wind Project will be a qualifying small power production facility (QF) under PURPA that will be interconnected with the PacifiCorp system pursuant to two executed LGIAs.³

3. Pioneer Wind states that the LGIAs provide that Pioneer Wind will receive Network Resource Interconnection Service,⁴ which: (1) will allow Pioneer Wind to integrate the Pioneer Wind Project with PacifiCorp's transmission system "in a manner comparable to that in which [PacifiCorp] integrates its generating facilities to serve native load customers;"⁵ and (2) will allow the Pioneer Wind Project to be designated by PacifiCorp as a Network Resource, up to the Pioneer Wind Project's net output, on the same basis as existing Network Resources interconnected to PacifiCorp's transmission system.⁶ Pioneer Wind further states that, under the LGIAs, PacifiCorp may require Pioneer Wind to interrupt or reduce deliveries of electricity if such delivery could adversely affect PacifiCorp's ability to perform such activities as are necessary to safely and reliably operate and maintain its transmission system, but any such interruption or reduction must be made on an equitable, non-discriminatory basis with respect to all generating facilities directly connected to the transmission system.⁷ Pioneer Wind explains that, under the LGIAs, it will have a direct interconnection to the PacifiCorp transmission system and, therefore, it does not need, and has not requested, transmission service from PacifiCorp.

³ Pioneer Wind states that it has two LGIAs for the Pioneer Wind Project for 100 MW of interconnection service at the same interconnection point on PacifiCorp's system. Petition at 4 n.6.

⁴ Pioneer Wind further states that, in order to receive Network Resource Interconnection Service, it will fund network upgrades identified in the LGIAs. Petition at 5.

⁵ *Id.* at 4.

⁶ *Id.* at 5.

⁷ *Id.* at 5.

4. Pioneer Wind states that, over several months, it has sought to negotiate a PPA with PacifiCorp under which PacifiCorp would purchase the output of the Pioneer Wind Project at avoided-cost rates established at the time the legally enforceable obligation was incurred.⁸ Pioneer Wind explains, however, that PacifiCorp is refusing to execute this PPA unless Pioneer Wind agrees to include in the PPA a curtailment provision that would allow PacifiCorp to curtail the Pioneer Wind Project ahead of other generators for the period of time before PacifiCorp's Transmission Energy Gateway Segment D transmission project (which is not required as a Network Upgrade under the LGIA) begins service. Pioneer Wind states that this curtailment provision, which PacifiCorp proposed, on September 6, 2013, as section 4.4(b) of the draft PPA, states as follows:

The parties acknowledge the Large Generator Interconnection System Impact Study Report completed for the Seller as Interconnection Customer Q0306 dated May 13, 2010 states 0 MW can be delivered on a firm basis to the Transmission Providers network load. The report further states that until the Energy Gateway projects are in service, the transmission customer will be required to limit scheduled energy from this area of Wyoming (including energy from the Seller's facility) to amounts within PacifiCorp merchants existing rights across the constrained transmission paths in Wyoming (as described in the Large Generator Interconnection System Impact Study Report). The Large Generator Interconnection System Impact Study Report further states that due to the amount of designated network resources being added in eastern Wyoming, it is expected that transmission constraints will significantly limit the use of existing and new generating resource in this area for service to network loads. The Parties agree that *prior to the in-service date of PacifiCorp Transmission Energy Gateway Segment D, Seller shall be curtailed pursuant to Section 4.4 (a) before PacifiCorp is required to curtail any existing PacifiCorp Network Resource that was designated as a Network Resource prior to execution of the Agreement.*⁹

⁸ Pioneer Wind states that these avoided-cost rates were established pursuant to a methodology determined to be just and reasonable by the Wyoming Commission. *Id.* at 5.

⁹ *Id.* at 15 (emphasis added; footnote omitted). Pioneer Wind asserts that prior to PacifiCorp's September 6, 2013 proposal for this curtailment provision, PacifiCorp

(continued...)

5. Pioneer Wind states that it informed PacifiCorp that, with the exception of this proposed curtailment provision, it would accept PacifiCorp's latest draft PPA.¹⁰ Pioneer Wind asserts that PacifiCorp's refusal to execute the PPA without the proposed curtailment provision is an attempt by PacifiCorp to evade its mandatory purchase obligation under PURPA and to simply "run out the clock" on Pioneer Wind's ability to obtain financing and begin construction of the Pioneer Wind Project by December 31, 2013, and to become eligible to receive federal tax credits.¹¹

II. Petition for Declaratory Order

6. Pioneer Wind argues that, in four Commission decisions issued in the past two years, the Commission has established the rights and obligations of QFs versus purchasing utilities, including that: (1) the QF's obligation to the purchasing utility is limited to delivering energy to the point of interconnection with the purchasing utility; (2) the QF has no additional network upgrade obligations other than those contained in its interconnection agreement with the purchasing utility; (3) the QF is not required to obtain transmission service (either for itself or on behalf of the purchasing utility) in order to deliver its energy from the point of interconnection to the purchasing utility; and (4) the purchasing utility cannot curtail the QF's energy as if the QF were taking non-firm transmission service on the purchasing utility's system.¹² Pioneer Wind asserts that

previously took the position that it did not have to take the QF output from Pioneer Wind because there is no firm transmission service available to deliver the QF output to PacifiCorp's load and that Pioneer Wind would need to pay for system upgrades needed to secure firm transmission service – even though no transmission service is required for Pioneer Wind to deliver the QF output to Pioneer Wind's point of interconnection with PacifiCorp. *Id.* at 12-13.

¹⁰ *Id.* at 6.

¹¹ Because of the end-of-year deadline to become eligible for federal tax credits, Pioneer Wind also requests that the Commission consider the Petition on an expedited basis. *Id.* at 2. Pioneer Wind explains that, in order to become eligible for federal tax credits, it must begin construction of the Pioneer Wind Project by December 31, 2013 and, in order to begin construction, it must have an executed PPA with PacifiCorp in order to obtain financing to begin construction. *Id.*

¹² *Id.* at 7-11. See *Exelon Wind 1, LLC, et al.*, 140 FERC ¶ 61,152, at PP 49-51 (2012) (*Exelon Wind 1*); *Entergy Services, Inc.*, 137 FERC ¶ 61,199, at PP 52-58 (2011) (*Entergy*), *order on reh'g*, 143 FERC ¶ 61,143 (2013); *Southwest Power Pool, Inc.*, 136 FERC ¶ 61,097, at P 15 (2011); *Idaho Wind Partners 1, LLC*, 140 FERC ¶ 61,219, at P 39 (2012) (*Idaho Wind Partners 1*), *order on reh'g*, 143 FERC ¶ 61,248 (2013)).

PacifiCorp's proposed curtailment provision, in proposed section 4.4(b) of the draft PPA, is, effectively, requiring it to agree to be curtailed as if it were a non-firm transmission customer, or requiring it to obtain and pay for system upgrades for Network Transmission Service as if it were a firm transmission customer, so that Pioneer Wind can sell QF energy to PacifiCorp.¹³ Pioneer Wind asserts that, based on these recent Commission precedents, the proposed curtailment provision is inconsistent with PURPA and the Commission's regulations under PURPA.

7. In addition, Pioneer Wind asserts that the proposed curtailment provision is inconsistent with Pioneer Wind's entitlement to Network Resource Interconnection Service under its LGIAs with PacifiCorp, as well as the non-discrimination provisions of its LGIAs. Pioneer Wind explains that, under section 9.6.2 of the LGIAs, PacifiCorp may only require Pioneer Wind to interrupt or reduce deliveries of electric energy if such delivery could adversely affect PacifiCorp's ability to perform such activities as are necessary to safely and reliably operate and maintain PacifiCorp's transmission system, but any such interruption or reduction must be made on an equitable, non-discriminatory basis with respect to all generating facilities connected to PacifiCorp's transmission system.¹⁴ Pioneer Wind adds that its Network Resource Interconnection Service from PacifiCorp provides for comparable treatment of the Pioneer Wind Project compared to other generating facilities; it allows Pioneer Wind to integrate the Pioneer Wind Project with PacifiCorp's transmission system "in a manner comparable to that in which [PacifiCorp] integrates its generating facilities to serve native load customers;" and it allows the Pioneer Wind Project to be designated by PacifiCorp on its transmission system as a Network Resource, up to the Pioneer Wind Project's net output, on the same basis as existing Network Resources interconnected to PacifiCorp's transmission system.¹⁵

8. For these reasons, Pioneer Wind requests that the Commission issue an order finding that PacifiCorp's refusal to execute a PPA with Pioneer Wind, unless Pioneer Wind agrees to allow PacifiCorp to curtail the Pioneer Wind Project ahead of other generators, as if it were a non-firm transmission customer, is inconsistent with PacifiCorp's mandatory purchase obligation under the PURPA and the Commission's recent orders interpreting PURPA, as well as Pioneer Wind's entitlement to Network

¹³ Petition at 6, 13-15.

¹⁴ *Id.* at 16 (citing Exhibit A, LGIAs, Section 9.6.2).

¹⁵ *Id.* at 16-17 (citing Exhibit A, LGIAs, Article 1, Definitions, and Section 4.1.1.2).

Resource Interconnection Service under its LGIAs with PacifiCorp and the non-discrimination provisions of the LGIAs.

III. Notice and Responsive Pleadings

A. Notice

9. Notice of this filing was published in the *Federal Register*, 78 Fed. Reg. 62,014 (2013), with interventions and protests due on or before October 23, 2013. A timely motion to intervene and comments were filed by NorthWestern Corporation (NorthWestern). A timely motion to intervene and answer was filed by PacifiCorp in opposition to the Petition. On October 29, 2013, Pioneer Wind filed a response to the answer. On November 5, 2013, a motion to intervene out-of-time and comments were filed by Northern Laramie Range Alliance (Northern Laramie). On November 6, 2013, PacifiCorp filed an answer to Pioneer Wind's response.

B. PacifiCorp's Answer to the Petition

10. In its answer, PacifiCorp argues that the Commission should deny Pioneer Wind's request for declaratory relief and dismiss the Petition because Pioneer Wind's factual foundation for its claims is untrue. PacifiCorp explains that, contrary to Pioneer Wind's claims that it was required to agree to PacifiCorp's proposed curtailment provision in order to execute a PPA with PacifiCorp, the curtailment provision included in the draft PPA was offered *as an option* that would allow Pioneer Wind to receive higher avoided-cost pricing. PacifiCorp maintains that the curtailment provision was not a requirement for *any* PPA and PacifiCorp has never refused to execute a PPA with Pioneer Wind on the condition that Pioneer Wind agrees to be curtailed ahead of other generators.¹⁶

11. In PacifiCorp's answer and the supporting affidavit of Mr. Paul Clements,¹⁷ PacifiCorp explains that the transmission topology in and around the area of Wyoming where Pioneer Wind seeks to site the Pioneer Wind Project is relevant to PacifiCorp's PPA negotiations with Pioneer Wind and to the avoided-cost rate and curtailment provision PacifiCorp has offered. PacifiCorp explains that the electrical system in

¹⁶ PacifiCorp Answer at 1-2, and 12-13. Mr. Clements testifies that, throughout PacifiCorp's negotiations with Pioneer Wind, PacifiCorp has indicated, in writing and orally, that the indicative prices given by PacifiCorp to Pioneer Wind were one contract pricing option that was contingent upon PacifiCorp's Energy Gateway Project Segment D being built. Clements Affidavit at 5-8.

¹⁷ PacifiCorp Answer at 7-11; Clements Affidavit at 3-4.

eastern Wyoming (Wyoming East) is limited to the east, so that most of the energy generated in Wyoming East must flow westward to get to load. PacifiCorp notes that, in recent years, an influx of generating capacity in Wyoming East has placed a significant burden on transmission lines needed to move this energy to load in the west. In order for its transmission lines to stay within scheduling and physical limitations, PacifiCorp states that it must, at times, back down its Dave Johnson and Wyodack thermal generating projects, as well as various wind generation projects.¹⁸

12. PacifiCorp asserts that the Wyoming Commission's avoided cost methodology takes into account a wide range of factors affecting PacifiCorp's system, including how the availability of transmission capacity can affect avoided costs, so that retail ratepayers remain indifferent as to the cost of QF power.¹⁹ PacifiCorp explains that for a QF built east of its transmission constraints, like Pioneer Wind, the QF's energy will be trapped in the constrained area so that only the lower cost resources, which are located in the constrained area, will be avoided and therefore the QF will receive lower avoided costs.²⁰

13. Rather than offer Pioneer Wind lower avoided costs based on today's transmission constraints, PacifiCorp states that, on September 6, 2013, it offered Pioneer Wind higher avoided costs (based on the assumption that the Energy Gateway Segment D project, described *supra*, would be built) in exchange for a priority curtailment provision. PacifiCorp also states that, on October 9, 2013, after the filing of this Petition, PacifiCorp

¹⁸ PacifiCorp Answer at 8; Clements Affidavit at 4. In order to relieve this constraint, as well as others on its eastern system, PacifiCorp has proposed the multi-year, multi-billion dollar "Energy Gateway" project, which will add approximately 2000 miles of transmission lines to PacifiCorp's system. One portion of the Energy Gateway project – referred to as "Segment D" – will provide additional east-to-west transmission capacity in Wyoming. PacifiCorp assumes that the Energy Gateway Segment D project will begin commercial operation in December 2019, but states that this date is uncertain because of the permitting process.

¹⁹ PacifiCorp Answer at 8.

²⁰ *Id.* at 8. If the Energy Gateway Segment D project is constructed during the term of the QF's contract, PacifiCorp's system would have greater flexibility to avoid higher cost resources and therefore a QF would receive a higher avoided cost price. *Id.*

provided Pioneer Wind with a revised draft PPA, which included a modified curtailment provision and revised indicative pricing,²¹ to address Pioneer Wind's objections.²²

14. In addition to PacifiCorp's argument that Pioneer Wind's Petition should be dismissed because the factual foundation for its claims is untrue, PacifiCorp also argues that, under Commission precedent, the Petition should be dismissed because it is premature for several reasons. First, PacifiCorp states that, before Pioneer Wind filed its Petition, PacifiCorp told Pioneer Wind that it was willing to negotiate a revised PPA that would address Pioneer Wind's concerns. PacifiCorp claims that Pioneer Wind and PacifiCorp are continuing to engage in negotiations, which leaves any decision on Pioneer Wind's Petition premature because the underlying issues and facts are not settled and are continuing to evolve. Under these circumstances, PacifiCorp asserts that a Commission order on the Petition would not resolve uncertainty in the parties' on-going negotiations.²³

15. Second, PacifiCorp argues that the Petition is premature because the Wyoming Commission, which is responsible for implementing PURPA in the first instance, has established specific procedures for negotiating PPAs and resolving PURPA-related disputes. Specifically, PacifiCorp argues that, before filing a petition at the Commission, Pioneer Wind should be required to use the dispute resolution process outlined in the provisions of PacifiCorp's Schedule 38 on file with the Wyoming Commission.²⁴ Furthermore, PacifiCorp asserts that the issues that Pioneer Wind and PacifiCorp are discussing, including avoided-cost pricing and the implementation and negotiation of PPAs and interconnection requirements for QFs, are all issues that are governed by

²¹ Pioneer Wind states that the October 9, 2013 revised draft PPA from PacifiCorp includes lower avoided-cost rate pricing and it drops the offending, proposed section 4.4(b) curtailment provision. Pioneer Wind Response at 2.

²² PacifiCorp Answer at 11; Clements Affidavit at 8. PacifiCorp also states that, before Pioneer Wind filed its Petition, PacifiCorp informed Pioneer Wind that it would be providing Pioneer Wind with a revised PPA to address Pioneer Wind's objections. *Id.* at 11, 13.

²³ *Id.* at 13-14.

²⁴ *Id.* at 14-16 (citing Rocky Mountain Power (PacifiCorp) Schedule 38, Avoided Cost Purchases From Non-Standard Qualifying Facilities).

Wyoming state law and fully within the state's jurisdiction in the first instance, which makes a Commission determination at this time premature.²⁵

16. Furthermore, PacifiCorp argues that the Commission should dismiss the Petition because failing to do so would establish a policy that encourages parties to file for preemptive declaratory relief at the Commission before the negotiation process, contemplated by section 301(b) of the Commission's PURPA regulations,²⁶ is complete. PacifiCorp asserts that a Commission decision to entertain the Petition while negotiations are on-going would not be in the public interest, because it would be disruptive and administratively inefficient for the parties and the Commission.²⁷

17. PacifiCorp states that it is committed to negotiating with Pioneer Wind, in good faith, to reach a mutual agreement on PPA terms and conditions. It asks that the Commission not short-circuit the negotiation process by entertaining the Petition.²⁸

18. PacifiCorp also states that Pioneer Wind's desire for a quick resolution of this case is not due to any delay on PacifiCorp's part. PacifiCorp asserts that Pioneer Wind failed to commercially prosecute its project, which put Pioneer Wind behind schedule and introduced the time pressure that Pioneer Wind asserts in its Petition.²⁹ PacifiCorp argues that the Commission should not use Pioneer Wind's timing issues as a justification for short-changing PacifiCorp's rights to a full and fair process.

19. Should the Commission decide not to dismiss Pioneer Wind's Petition, PacifiCorp requests that the matter be set for hearing because the Petition raises material issues of disputed fact that cannot be appropriately resolved otherwise. PacifiCorp asserts, for example, that the Petition involves a large number of facts about the operational limitations of PacifiCorp's system, the intention behind PacifiCorp's negotiation positions, the implementation details of the Wyoming Commission's approved avoided

²⁵ *Id.* at 17-19.

²⁶ 18 C.F.R. § 292.301(b) (2013).

²⁷ PacifiCorp Answer at 20.

²⁸ *Id.* at 4.

²⁹ *Id.* at 3-4. PacifiCorp notes that, in 2010, Pioneer Wind and its affiliate executed power purchase agreements with PacifiCorp, which were subsequently terminated as a result of Pioneer Wind's default and non-performance. *Id.* at 4, 6, and Clements Affidavit at 1-2.

cost methodology, the question of whether Pioneer Wind is legally barred from seeking a PPA from PacifiCorp because of its failure to meet commercial deadlines under prior PPAs,³⁰ and other issues.³¹

20. In addition, PacifiCorp maintains that Pioneer Wind's Network Resource Interconnection Service does not guarantee firm transmission service, as a Designated Network Resource under PacifiCorp merchant function's Network Integration Transmission Service Agreement, and it does not guarantee the deliverability of Pioneer Wind's QF output to the PacifiCorp merchant function's designated network loads.³²

21. PacifiCorp further argues that its proposed curtailment provision, in proposed section 4.4(b) of the draft PPA, is consistent with the system emergency exception, in section 292.307(b) of the Commission's regulations,³³ permitting the curtailment of QF output.³⁴ In particular, PacifiCorp explains that, under the proposed section 4.4(b) curtailment provision, it will be able to curtail Pioneer Wind's QF output in the system emergency circumstances defined in proposed section 4.4(a). PacifiCorp explains that, under section 4.4(a), PacifiCorp will not be obligated to purchase Pioneer Wind's output if there is a transmission provider directive to curtail, reduce or redispatch generation in

³⁰ PacifiCorp explains that the 2010 PPA with Pioneer Wind contained a provision which stated that, in the event of default, Pioneer Wind would be barred for the 20-year term of the PPA from seeking to require PacifiCorp to enter into a QF PPA for the project. Therefore, because of Pioneer Wind's default under the 2010 PPA, PacifiCorp maintains that it is under no obligation to enter into a QF PPA for Pioneer Wind's revised project. PacifiCorp states that, in response, Pioneer Wind argues that the provision does not apply because the revised project is different from the previously-contemplated project. PacifiCorp Answer at 10.

³¹ PacifiCorp Answer at 21-32.

³² *Id.* at 22-26.

³³ 18 C.F.R. § 292.307(b) (2013) (permitting the purchasing utility to discontinue purchases during any system emergency if such purchases would contribute to such emergency). *See* 18 C.F.R. § 292.101(b)(4) (2013) (defining a "system emergency" to mean "a condition on a utility's system which is likely to result in imminent significant disruption of service to customers or is imminently likely to endanger life or property.").

³⁴ PacifiCorp Answer at 29-32.

the constrained eastern Wyoming area, or in order to meet PacifiCorp's obligations to the transmission provider to operate within system limits.³⁵

22. Finally, PacifiCorp argues that, if the Commission decides to issue an order without a hearing, the scope of the order should be limited to only those issues appropriate for declaratory relief, which are based on undisputed facts. Accordingly, PacifiCorp argues that the Commission should find that: (1) Network Resource Interconnection Service does not ensure firm transmission service and does not ensure deliverability of Pioneer Wind's QF output to PacifiCorp load; and (2) PacifiCorp's proposed curtailment language is consistent with PURPA and PacifiCorp's Wyoming Commission-approved avoided-cost rate methodology.³⁶

C. NorthWestern's Comments

23. In its comments, NorthWestern complains that Pioneer Wind is asking the Commission to impose cost responsibility for transmission system upgrades necessary for firm transmission service on PacifiCorp and, ultimately, PacifiCorp's retail customers. NorthWestern states that Pioneer Wind can point to no case supporting the proposition that Pioneer Wind does not need transmission service and that it should remain free of incremental transmission costs that the Pioneer Wind project would impose on PacifiCorp's system. NorthWestern asserts that, when conducting a resource planning analysis, one of its key considerations in the overall valuation of the QF project is the location of a QF project and the impact of the QF project on potential transmission costs. NorthWestern argues that if the Commission grants the Petition, NorthWestern and other similarly situated utilities would be barred from considering these transmission costs

³⁵ PacifiCorp states that section 4.4(a) of the PPA states that PacifiCorp will not be obligated to purchase Pioneer Wind's output if, among other things, the "Transmission Provider or Network Service Provider directs a general curtailment, reduction, or redispatch of generation in the area, (which would include the Net Output) for any reason (excluding curtailment of purchases for general economic reasons unilaterally directed by PacifiCorp acting solely in its merchant function capacity and not otherwise directed as provided herein), even if such curtailment or redispatch directive is carried out by PacifiCorp, which may fulfill such directive by acting in its sole discretion; or if PacifiCorp curtails or otherwise reduces the Net Output in order to meet its obligations to the Transmission Provider or Network Service Provider to operate within system limitations." *Id.* at 30.

³⁶ *Id.* at 32.

when determining the customer impacts of QF projects, which is inconsistent with prudent resource planning and cost-causation principles.³⁷

D. Pioneer Wind's Response

24. In response to PacifiCorp's answer, Pioneer Wind points out that PacifiCorp has failed to respond to Pioneer Wind's arguments that Commission precedent establishes that: (1) the QF's obligation to the purchasing utility is limited to delivering energy to the point of interconnection with the purchasing utility; (2) the QF has no additional network upgrade obligations other than those contained in its interconnection agreement with the purchasing utility; (3) the QF is not required to obtain transmission service (either for itself or on behalf of the purchasing utility) in order to deliver its energy from the point of interconnection to the purchasing utility; and (4) the purchasing utility cannot curtail the QF's energy as if the QF were taking non-firm transmission service on the purchasing utility's system.³⁸ Pioneer Wind also points out that, in arguing that Pioneer Wind's Petition is premature, PacifiCorp concedes that the Commission has previously issued declaratory orders before state proceedings have ended and that the Commission has previously issued declaratory orders regarding whether a utility can curtail a QF's output after the long-term avoided cost has been determined.³⁹ Additionally, Pioneer Wind argues that, contrary to PacifiCorp's assertions, the PPA negotiations are not ongoing because Pioneer Wind accepted: (1) the price offered in August 2013; and (2) all of the terms, except for the proposed section 4.4(b) curtailment provision, in the September 6, 2013 draft PPA. Accordingly, Pioneer Wind argues that because the binding legal precedent and the utility's intent are so clear, there is no reason for the Commission to postpone the issuance of a declaratory order in this proceeding.⁴⁰

25. In addition to the relief requested in its Petition, Pioneer Wind also asks that the Commission declare that PacifiCorp's October 18th Amendment at the Wyoming Commission would be inconsistent with PURPA and the Commission's PURPA regulations.⁴¹ Pioneer Wind explains that, after the filing of its Petition, PacifiCorp filed

³⁷ NorthWestern Comments at 2-3.

³⁸ Pioneer Wind Response at 3-4. *See supra* P 6 & n.12.

³⁹ Pioneer Wind Response at 4 (citing *Idaho Wind Partners 1*, 140 FERC ¶ 61,219 (2012), *order on reh'g*, 143 FERC ¶ 61,248 (2013)).

⁴⁰ Pioneer Wind Response at 5.

⁴¹ *Id.* at 2.

the October 18th Amendment to PacifiCorp's Rate Schedule 38⁴² in order to "better inform QFs" that the avoided costs will change depending on whether a certain transmission project will be built.⁴³ Pioneer Wind explains that the October 18th Amendment includes two options regarding the treatment as to how proposed, but not yet in-service, transmission projects are to be treated in the calculation of avoided costs pricing: (1) the QF will receive higher avoided cost pricing if it agrees to be curtailed before any existing network resource until such time as the proposed transmission project is in service; or (2) the QF will receive lower avoided-cost rates based on the assumption that the proposed transmission project will not be completed.⁴⁴

⁴² Rocky Mountain Power (PacifiCorp) Schedule 38, Avoided Cost Purchases From Non-Standard Qualifying Facilities.

⁴³ Pioneer Wind Response at 6. Pioneer Wind characterizes PacifiCorp's Filing at the Wyoming Commission as a last-minute modification designed to undermine the potential for the Commission to act on its Petition.

⁴⁴ *Id.* at 7. The October 18th Amendment to PacifiCorp's Rate Schedule 38 added the following provisions (*see* Pioneer Response, Attachment A, for the October 18th Amendment):

IV. Transmission Capacity and Avoided Costs Pricing:

If a QF project is located in a geographic location that is transmission constrained or in which transmission capacity is physically available, but contractually constrained or unavailable, then the value of the QF must reflect the conditions of moving the energy into the Company's transmission system.

If there is insufficient existing available transmission capacity to fully integrate the QF project at its full nameplate capacity, a QF project has two options regarding how proposed but not yet in-service transmission projects are treated in the calculation of avoided cost pricing:

- 1) The QF may elect to receive avoided cost pricing that assumes proposed transmission projects are completed. If this election is made, the QF will be required to agree to contract terms and conditions in which the QF project agrees to be curtailed before any existing network resource until such time as the proposed transmission projects are in-service.

(continued...)

26. Pioneer Wind argues that the October 18th Amendment prevents QFs from locking in avoided-cost rates, despite a QF's clear right to do so under court and Commission precedent.⁴⁵ Pioneer Wind also argues that the October 18th Amendment would unlawfully: (1) allow a purchasing utility to treat a QF as a non-firm transmission customer when it sells power at the point of interconnection with the purchasing utility; and (2) allow a utility to curtail a QF, on a discriminatory basis, ahead of other network customers.⁴⁶ Pioneer Wind asserts that the October 18th Amendment creates a Hobson's Choice in which a QF must either agree to give PacifiCorp a curtailment right beyond those curtailment rights provided for in the Commission's PURPA regulations, or accept lower avoided-cost rate pricing. Therefore, Pioneer asserts that the Commission should declare that the October 18th Amendment violates the utility's purchase obligation under PURPA.⁴⁷

27. Additionally, Pioneer Wind responds that PacifiCorp's argument - that Network Resource Interconnection Service does not ensure firm transmission service and does not ensure deliverability of Pioneer Wind's QF output to PacifiCorp's load - is irrelevant because Pioneer Wind did not seek, and does not require, firm transmission service. Consistent with Commission precedent, Pioneer Wind maintains that Pioneer Wind does not need firm transmission service to deliver Pioneer Wind's QF output to the point of interconnection with PacifiCorp. Furthermore, Pioneer Wind asserts that it is not responsible for transmission system upgrades to ensure firm transmission service, which are beyond the system upgrades that Pioneer Wind has agreed to fund to obtain its Network Integration Interconnection Service from PacifiCorp.⁴⁸

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- 2) The QF may elect to receive an avoided cost price that does not assume any proposed transmission projects are completed. If this election is made, the QF project will be required to agree to contract terms and conditions that include the Company's standard curtailment language.

At the time a pricing request is made under Section I.B 2, the QF shall inform the Company as to which option it desires. If no selection is made by the QF, the Company will provide pricing based on option 2.

⁴⁵ Pioneer Wind Response at 7-8.

⁴⁶ *Id.* at 7-13.

⁴⁷ *Id.* at 2.

⁴⁸ *Id.* at 14-15.

28. Finally, Pioneer Wind responds to NorthWestern's comments, which state that Pioneer Wind can point to no case supporting the proposition that Pioneer Wind does not need transmission service and that Pioneer Wind should remain free of incremental transmission costs that the Pioneer Wind project may impose. Pioneer Wind states that, to the contrary, it has, indeed, explained that Commission precedent imposes the transmission burden on the purchasing utility, not the QF.⁴⁹ Therefore, it argues that NorthWestern's comments should be disregarded.

E. Northern Laramie's Comments

29. In its comments, Northern Laramie states that it agrees with PacifiCorp's and NorthWestern's position that, if the Commission grants Pioneer Wind's Petition requesting a PPA without the proposed section 4.4(b) curtailment provision, PacifiCorp will pay Pioneer Wind more than avoided costs, which violates PURPA and prejudices PacifiCorp's ratepayers. Northern Laramie states that Congress intended that utility customers remain indifferent between the utility's provision of power and the utility's purchase of QF power at avoided costs rates pursuant to PURPA.⁵⁰ If the Commission grants the Petition, Northern Laramie asserts that its members, which are PacifiCorp ratepayers, could face higher cost electricity in violation of this standard for ratepayer indifference.⁵¹

F. PacifiCorp's Answer to Pioneer Wind's Response

30. PacifiCorp asserts that the foundation for Pioneer Wind's Petition and request for relief is that PacifiCorp refused to sign a PPA unless Pioneer Wind agreed to certain priority curtailment provisions and, in Pioneer Wind's response, Pioneer Wind now concedes that PacifiCorp has offered Pioneer Wind another, new draft PPA without curtailment provisions.⁵² PacifiCorp points out that Pioneer Wind's response proves that PacifiCorp has not insisted on a priority curtailment provision.⁵³ PacifiCorp notes that

⁴⁹ *Id.* at 16 (citing *Exelon Wind 1*, 140 FERC ¶ 61,152 at 50, citing *Entergy*, 137 FERC ¶ 61,199 at 52).

⁵⁰ Northern Laramie Comments at 4 (citing PURPA generally and *Ca. Public Util. Comm'n, et al.*, 134 FERC ¶ 61,044, at P 31 (2011)).

⁵¹ Northern Laramie Comments at 4.

⁵² PacifiCorp's Answer to Response at 2.

⁵³ *Id.* at 2 n.4.

Pioneer Wind now objects to the avoided-cost calculation in the new draft PPA. PacifiCorp responds that it remains willing to discuss PPA terms with Pioneer Wind. Under these circumstances, PacifiCorp asserts that granting Pioneer Wind's Petition would not only misapprehend the facts, but also undermine the negotiation process contemplated by the Commission's PURPA regulations.

31. Contrary to Pioneer Wind's characterizations that the new draft PPA, as well as PacifiCorp's recent amendment at the Wyoming Commission, are after-the-fact attempts to undermine Pioneer Wind's Petition, PacifiCorp states that both of these actions were planned before the filing of Pioneer Wind's Petition and that Pioneer Wind knew, before the filing of its Petition, that PacifiCorp would offer it a new draft PPA without the curtailment provisions to which Pioneer Wind objects.⁵⁴

32. PacifiCorp also asserts that Pioneer Wind's response clarifies that Pioneer Wind is seeking to cherry-pick PPA provisions to its advantage. PacifiCorp states that, at this juncture, Pioneer Wind is not complaining about the curtailment provisions *per se*, but rather, Pioneer Wind is arguing about the various PPA terms that it has been offered during the negotiation process, including the calculation of avoided costs.⁵⁵ PacifiCorp states that now the parties have moved past the priority curtailment provision, Pioneer Wind simply believes that the avoided-cost rate in the most recent offer is too low.⁵⁶ PacifiCorp asserts that Pioneer Wind simply dislikes the commercial terms PacifiCorp has offered as part of the negotiation process contemplated by the Commission's PURPA regulations.⁵⁷ PacifiCorp further asserts that Pioneer Wind seeks the Commission's assistance in cherry-picking from among the two PPA options that PacifiCorp has offered, which PacifiCorp has offered to Pioneer Wind as mutually exclusive offers.⁵⁸

⁵⁴ *Id.* at 2-3.

⁵⁵ *Id.* at 3-4 (citing Pioneer Wind's Response at 2 (emphasis added) stating "PacifiCorp is requiring that, in order to secure a PPA, Pioneer must make the Hobson's Choice of either agreeing to give PacifiCorp curtailment rights beyond those provided in the Commission's regulations, *or accepting a lower "avoided cost" rate.*").

⁵⁶ *Id.* at 4.

⁵⁷ 18 C.F.R. § 292.301(b) (2013).

⁵⁸ PacifiCorp's Answer to Response at 4.

IV. Procedural Matters

33. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure,⁵⁹ the timely, unopposed motions to intervene serve to make those entities that filed them parties to this proceeding. Pursuant to Rule 214(d) of the Commission's Rules of Practice and Procedure,⁶⁰ we will grant Northern Laramie's late-filed motion to intervene given its interest in the proceeding, the early stage of the proceeding, and the absence of undue prejudice or delay.

34. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure⁶¹ prohibits an answer to a protest, or an answer, unless otherwise ordered by the decisional authority. We will accept the answer, response and answer to the response because they have provided information that assisted us in our decision-making process.

V. Commission Determination

A. Removing Uncertainty

35. Exercising our discretion to remove uncertainty, we find it appropriate at this juncture to address Pioneer Wind's Petition. Section 554(e) of the Administrative Procedure Act and section 207(a)(2) of the Commission's Rules of Practice and Procedure provide us the authority and discretion to rule on a petition for declaratory order in order to "remove uncertainty."⁶² Although Pioneer Wind and PacifiCorp have not executed a final PPA and the Wyoming Commission procedures have not concluded with respect to the PPA, these facts are not determinative of our ability to exercise our discretion to act on the Petition at this time and we, therefore, reject PacifiCorp arguments to this effect. Rather, the record demonstrates that Pioneer Wind and PacifiCorp have an irreconcilable controversy as to whether the proposed curtailment provision in section 4.4(b) of the draft PPA may be properly included in the PPA, consistent with PURPA and the LGIA's provisions. Moreover, this controversy represents the last remaining issue to complete the negotiation of the PPA between

⁵⁹ 18 C.F.R. § 385.214 (2013).

⁶⁰ 18 C.F.R. § 385.214(d) (2013).

⁶¹ 18 C.F.R. § 385.213(a)(2) (2013).

⁶² See 5 U.S.C. § 554(e) (2012); 18 C.F.R. § 385.207(a)(2) (2013); *accord Idaho Wind Partners I*, 143 FERC ¶ 61,248 at P 8; *USGen New England, Inc.*, 118 FERC ¶ 61,172, at P 18 (2007).

Pioneer Wind and PacifiCorp and we have addressed similar issues to this case in orders that we have issued over the past two years. It is appropriate, and within our discretion, to act at this time to address our policies under PURPA. Deferring resolution in such circumstances would also result in more uncertainty and could lead to unnecessary and potentially significant financial consequences for Pioneer Wind and similarly situated QFs.

B. Proposed Section 4.4(b) Curtailment Provision

36. We find that the proposed section 4.4(b) curtailment provision violates PURPA and the Commission's PURPA regulations. The Commission's PURPA regulations

permit a purchasing utility to curtail a QF's output in two circumstances:⁶³ (1) in system emergencies, pursuant to section 292.307(b) of the Commission's regulations;⁶⁴ or (2) in light load periods, pursuant to section 292.304(f) of the Commission's regulations,⁶⁵ but only if the QF is selling its output on an "as available" basis.⁶⁶ It is undisputed here that Pioneer Wind and PacifiCorp intend to enter into 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." Under these circumstances, the Commission's PURPA regulations only permit PacifiCorp to curtail Pioneer Wind's QF output during system emergencies, pursuant to section 292.307(b) of the Commission's regulations.

37. The proposed section 4.4(b) curtailment provision would unlawfully permit the purchasing utility to curtail purchases from the QF in broader circumstances than those permitted by the Commission's PURPA regulations which authorize curtailments in system emergencies. Specifically, the Commission's regulation in section 292.307(b) permits the purchasing utility to discontinue purchases during any system emergency if

⁶³ *Entergy*, 137 FERC ¶ 61,199 at PP 54-57 (describing the limited circumstances in which, consistent with PURPA, a QF's energy may be curtailed, including system emergencies and light load periods, under sections 307(b) and 304(f) of the Commission's PURPA regulations, respectively); *Exelon Wind I*, 140 FERC ¶ 61,152 at P 48.

⁶⁴ 18 C.F.R. § 292.307(b) (2013).

⁶⁵ 18 C.F.R. § 292.304(f) (2013).

⁶⁶ *Idaho Wind Partners I*, 140 FERC ¶ 61,219 at PP 38-40.

such purchases would contribute to such emergency.⁶⁷ The Commission's regulations define a "system emergency" to mean "a condition on a utility's system which is likely to result in imminent significant disruption of service to customers or is imminently likely to endanger life or property."⁶⁸ The proposed section 4.4(b) curtailment provision requires Pioneer Wind to agree that, prior to the in-service date of PacifiCorp's Transmission Energy Gateway Segment D project, PacifiCorp can curtail Pioneer Wind's QF output, in accordance with section 4.4(a) of the draft PPA,⁶⁹ before it curtails any existing PacifiCorp Network Resource that was designated as a Network Resource prior to execution of the PPA between Pioneer Wind and PacifiCorp.⁷⁰ Therefore, PacifiCorp's proposed section 4.4(b) curtailment provision would provide PacifiCorp with the right to curtail Pioneer Wind's QF output *before* any existing PacifiCorp Network Resource, which was designated as a Network Resource prior to execution of the PPA, and, importantly, *regardless* of whether the purchase from Pioneer Wind contributes to the emergency at issue.⁷¹ Moreover, this proposed curtailment provision violates the non-discrimination protections for QFs, included in PURPA and the Commission's PURPA regulations,⁷² by granting a preference in curtailment priority to PacifiCorp's existing Network Resources, which were designated as Network Resources prior to execution of the PPA with Pioneer Wind, as compared to Pioneer Wind.

38. In addition to the fact that the proposed curtailment provision is broader than the purchasing utility's right to curtail purchases in system emergencies under section 292.307(b) of the Commission's PURPA regulations, and unduly discriminatory, the proposed curtailment provision, in effect, treats Pioneer Wind as if it were a non-firm transmission customer, which is in direct violation of the Commission's PURPA policies. The Commission has specifically held that: (1) the QF's obligation to the purchasing

⁶⁷ 18 C.F.R. § 292.307(b) (2013).

⁶⁸ 18 C.F.R. § 292.101(b)(4) (2013).

⁶⁹ Pioneer Wind does not object to section 4.4(a) of the draft PPA.

⁷⁰ *See supra* P 4 for the proposed section 4.4(b) curtailment provision.

⁷¹ Any redesign of the proposed section 4.4(b) curtailment provision, which provides PacifiCorp with the right to curtail Pioneer Wind's QF output in broader circumstances than that permitted by the Commission's PURPA regulations, in section 292.307(b), authorizing curtailments in system emergencies, would violate PURPA and the Commission's PURPA regulations.

⁷² 16 U.S.C. § 824a-3(b)(2) (2012); 18 C.F.R. § 292.304(a)(ii) (2013).

utility is limited to delivering energy to the point of interconnection by the QF with that purchasing utility; (2) the QF is not required to obtain transmission service, either for itself or on behalf of the purchasing utility, in order to deliver its energy from the point of interconnection with the purchasing utility to the purchasing utility's load;⁷³ and (3) the purchasing utility cannot curtail the QF's energy as if the QF were taking non-firm transmission service on the purchasing utility's system.⁷⁴ Contrary to these policies, PacifiCorp's proposed curtailment provision treats Pioneer Wind as if it is the transmission customer⁷⁵ and it curtails Pioneer Wind as if it were a non-firm, secondary network service transmission customer⁷⁶ that can be curtailed by PacifiCorp before any

⁷³ PacifiCorp will be the transmission customer, taking delivery of the QF's output at the point of interconnection between Pioneer Wind and PacifiCorp, and with the resulting responsibility to transmit Pioneer Wind's QF output from the point of interconnection between Pioneer Wind and PacifiCorp across PacifiCorp's transmission system to PacifiCorp's loads. This is not to suggest that the QF is exempt from paying interconnection costs, *see* 18 C.F.R. §§ 292.101(b)(6), 292.306 (2013), which may include transmission or distribution costs directly related to installation and maintenance of the physical facilities necessary to permit interconnected operations. 18 C.F.R. § 292.101(b)(6) (2013). Such permissible interconnection costs do not, however, include any costs included in the calculation of avoided costs. *Id.* Correspondingly, implicit in the Commission's regulations, transmission or distribution costs directly related to installation and maintenance of the physical facilities necessary to permit interconnected operations may be accounted for in the determination of avoided costs if they have not been separately assessed as interconnection costs.

⁷⁴ *Entergy*, 137 FERC ¶ 61,199 at P 52 (holding that the purchasing utility is required to obtain the transmission service needed to deliver the QF output from the point of interconnection between the QF and the purchasing utility to the load on the purchasing utility's transmission system, and that curtailing unscheduled QF output along with non-firm, secondary network service is inconsistent with the purchasing utility's obligations under PURPA); *Exelon Wind 1*, 140 FERC ¶ 61,152 at P 50 (recognizing that the circumstances in which QF purchases may be curtailed is limited under PURPA and the Commission's PURPA regulations, and that the Commission has rejected attempts by purchasing utilities to curtail QFs in other circumstances beyond those limited exceptions).

⁷⁵ *See supra* note 74.

⁷⁶ PacifiCorp will take Network Transmission Service from itself to transmit Pioneer Wind's QF output to PacifiCorp's loads on PacifiCorp's transmission system.

existing PacifiCorp Network Resource that was designated as a Network Resource prior to execution of the PPA between Pioneer Wind and PacifiCorp.

39. For the same reasons that we find that the proposed section 4.4(b) curtailment provision in the draft PPA violates PURPA and the Commission's PURPA regulations, we similarly find that PacifiCorp's proposed curtailment provision in the October 18th Amendment before the Wyoming Commission, which provides a curtailment priority to existing generating resources as compared to QFs,⁷⁷ would also violate PURPA and the Commission's PURPA regulations.

40. Pioneer Wind also asks us to find that the proposed section 4.4(b) curtailment provision, which treats Pioneer Wind as if it were a non-firm transmission customer, is inconsistent with Pioneer Wind's entitlement to Network Resource Interconnection Service under its LGIAs with PacifiCorp, as well as the non-discrimination provisions of the LGIAs.⁷⁸ In light of our finding that the proposed curtailment provision is inconsistent with PURPA and the Commission's PURPA regulations, it is not necessary for us to compare the LGIA provisions with the proposed curtailment provision.

C. Avoided-Cost Rates and the Status of PacifiCorp's Transmission Energy Gateway Segment D Transmission Project

41. In response to our decision here, we would expect that the proposed section 4.4(b) curtailment provision will be removed from the draft PPA, and that PacifiCorp and Pioneer Wind will be able to negotiate PPA prices reflective of each party's view as to fluctuations in the value of capacity and energy, and as to the costs avoided by PacifiCorp as a result of the purchase from Pioneer Wind.⁷⁹ We note that it is the state's responsibility in the first instance to determine an avoided-cost rate consistent with the Commission's PURPA regulations.⁸⁰ Therefore, if Pioneer Wind has concerns regarding

⁷⁷ See *supra* note 44 for the proposed October 18th Amendment.

⁷⁸ Pioneer Wind does not object to the curtailment and non-discriminatory provisions contained in the LGIAs. See *supra* P 3 for a description of the curtailment and non-discriminatory provisions of the LGIAs.

⁷⁹ The parties could, for example, agree to prices that reflect the new transmission project entering service, and also to alternative prices should the new transmission project not enter service.

⁸⁰ *Council of the City of New Orleans, Louisiana*, 145 FERC ¶ 61,057, at P 30 (2013); see *Ca. Public Util. Comm'n*, 133 FERC ¶ 61,059, at P 24 (2010) (explaining that the determinations that a state commission makes to implement the rate provisions of

the ultimate avoided-cost rates for its QF output, it should first pursue such concerns at the Wyoming Commission, which will review and make a determination concerning those avoided-cost rates. After the Wyoming Commission has made its determination and if Pioneer Wind is dissatisfied with that determination, Pioneer Wind may exercise its rights to file a petition pursuant to sections 210(g) and/or 210(h)(2)(B) of PURPA.⁸¹

The Commission orders:

Pioneer Wind's Petition is granted in part, consistent with the discussion in the body of this order.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

section 210 of PURPA are by their nature fact-specific and include consideration of many factors, that the Commission is reluctant to second guess a state commission's determinations, and therefore the Commission's regulations provide state commissions with guidelines on factors to be taken into account, to the extent practicable, in determining a utility's avoided cost of acquiring the next unit of generation) (citing *Am. REF-FUEL Co. of Hempstead*, 47 FERC ¶ 61,161, at 61,533 (1989); *Signal Shasta*, 41 FERC ¶ 61,120, at 61,295 (1987); *LG&E Westmoreland Hopewell*, 62 FERC ¶ 61,098, at 61,712 (1993)); see also *Policy Statement Regarding the Commission's Enforcement Role under Section 210 of the Public Utility Regulatory Policies Act of 1978*, 23 FERC ¶ 61,304, at 61,646 (1983) ("The Commission's regulations allow the States... a wide degree of latitude in establishing an implementation plan. Such latitude is necessary in order for implementation to accommodate local conditions and concerns, so long as the final plan is consistent with statutory requirements").

⁸¹ See 16 U.S.C. § 824a-3(g), (h) (2012).