

126 FERC ¶ 61,044
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;
Sudeen G. Kelly, Marc Spitzer,
Philip D. Moeller, and Jon Wellinghoff.

Idaho Power Company

Docket Nos. ER06-787-002
ER06-787-003

ORDER ON INITIAL DECISION

(Issued January 15, 2009)

1. This case is before the Commission on exceptions to the Initial Decision issued on August 31, 2007, in this proceeding.¹ The central issue is how certain pre-Order No. 888² transmission agreements should be accounted for in Idaho Power's formula rates for point-to-point transmission service and network integration transmission service. In this order, we affirm the Presiding Judge's determination that the load generated by the agreements should be included as part of the total firm load (i.e., cost-allocated in the denominator of the formula rate) rather than crediting the revenue that Idaho Power receives under the agreements against Idaho Power's total transmission revenue (i.e., revenue-credited in the numerator). In addition, we reverse the Presiding Judge's determination that the 12 coincident peak demand, rather than the contract demand under the agreements should be used as the appropriate measure of the load generated by the

¹ *Idaho Power Co.*, 120 FERC ¶ 63,014 (2007) (Initial Decision).

² *Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities*, Order No. 888, FERC Stats. & Regs. ¶ 31,036 (1996), *order on reh'g*, Order No. 888-A, FERC Stats. & Regs. ¶ 31,048, *order on reh'g*, Order No. 888-B, 81 FERC ¶ 61,248 (1997), *order on reh'g*, Order No. 888-C, 82 FERC ¶ 61,046 (1998), *aff'd in relevant part sub nom. Transmission Access Policy Study Group v. FERC*, 225 F.3d 667 (D.C. Cir. 2000), *aff'd sub nom. New York v. FERC*, 535 U.S. 1 (2002).

agreements and his determination that OATT short-term firm point-to-point service must be cost-allocated rather than revenue-credited, as discussed below.

I. Background

2. Idaho Power provides point-to-point transmission service and integration service to jurisdictional customers pursuant to its open access transmission tariff (OATT). Idaho Power's principal 230 kV power lines run from Brownlee, Oxbow and Hells Canyon in northwest Idaho south through Midpoint and Adelaide, and end at substations in Borah and Kinport in southeast Idaho. Idaho Power also owns a 345 kV power line running from the Jim Bridger power plant in Wyoming westward to Goshen in southeastern Idaho. The Jim Bridger power plant is a four-unit coal-fired electric power plant and related facilities located in Sweetwater County, Wyoming in which Idaho Power has a one-third ownership share and PacifiCorp³ has a two-thirds ownership share. Power flows generally eastward from Idaho Power's sources in the northwest to its principal loads in south-central and southeastern Idaho.

3. Prior to Idaho Power's application in the instant proceeding, Idaho Power's transmission rates, established in 1996, were based on specific, "stated" rates for point-to-point transmission service and network integration transmission service.⁴ In addition, starting in the 1960s, Idaho Power entered into long-term transmission service agreements with Pacific Power & Light Company (PP&L), Utah Power & Light Company (UP&L), and PacifiCorp.⁵ These agreements, generally referred to as the "Legacy Agreements," include (1) the Restated Transmission Services Agreement Between PacifiCorp and Idaho Power Company (Restated Transmission Agreement), (2) the Transmission Facilities Agreement Between Idaho Power Company, Pacific Power & Light Company, and Utah Power & Light Company (Facilities Agreement), and (3) the Agreement for Interconnection and Transmission Services Between Idaho Power Company and Utah Power & Light Company (Interconnection Agreement). Generally, these agreements were executed to support Idaho Power's and PP&L's efforts to build and operate the Jim Bridger power plant in western Wyoming to serve their respective electric loads, to provide transmission service between the Jim Bridger plant and PacifiCorp's western power loads in Oregon and Washington, and to provide bi-

³ PacifiCorp, an investor-owned utility, is primarily engaged in the business of providing electric service to retail customers in six western states: Oregon, Washington, California, Wyoming, Utah, and Idaho.

⁴ See *Idaho Power Co.*, 76 FERC ¶ 61,276 (1996).

⁵ PP&L and UP&L have merged into PacifiCorp.

directional service across Idaho Power's lines between PacifiCorp's Wyoming system and its Utah system.⁶

4. Under the Legacy Agreements, PP&L built two 345 kV power lines running from the Jim Bridger power plant westward through Utah and southeastern Idaho to Idaho Power's lines at Borah and Kinport, and a 500 kV power line running westward from Midpoint to Summer Lake, Oregon. In addition, UP&L built a 345 kV power line that connects Goshen to Kinport. PacifiCorp now owns the lines built by its predecessors. PacifiCorp's power flows westward from the Jim Bridger power plant along its lines and along Idaho Power's lines on the path from Midpoint to Summer Lake and along the "Northwest Path," consisting of Idaho Power's 230 kV power lines that interconnect with PacifiCorp's western system at La Grande, Enterprise and Divide to PacifiCorp's principal loads in Oregon and Washington.

5. The Restated Transmission Agreement provides for PacifiCorp to transfer up to 1,600 MW (currently limited to 1,410 MW)⁷ of electric power, including its share of output from the Jim Bridger station and certain other resources, from the Borah and Kinport points of receipt on Idaho Power's system to PacifiCorp's system at its 500 kV Midpoint-Summer Lake transmission line and along Idaho Power's Northwest Path. In exchange, PacifiCorp is required to pay Idaho Power periodically for specific facilities that Idaho Power constructed under the agreement and to pay certain other charges.

6. The services provided by Idaho Power to PacifiCorp under the Restated Transmission Agreement consist of the "East to West Transfer Service" and "Other Services." The East to West Transfer Service has three components: Bridger Integration Service, Other Resource Transfer Service, and Additional East to West Transfer Service.⁸ Bridger Integration Service consists of the scheduled transfer of all or any portion of PacifiCorp's share of the Jim Bridger station generation from east to west across Idaho Power's system. Other Resource Transfer Service allows PacifiCorp to schedule and transfer power from its resources (other than output from the Jim Bridger station) from east to west across Idaho Power's system within the 1,600 MW limit of the East to West

⁶ Initial Decision at P 41. Idaho Power's Exhibit 29, as provided in the Initial Decision, is a map of the Idaho Power transmission system detailing the principal pathways and interconnections covered by the Legacy Agreements. This map is provided in the Appendix of this order.

⁷ The transfer capability is currently limited to 1,410 MW due to the rating on the transmission limitations west of the Jim Bridger power plant. *See* Initial Decision at P 93.

⁸ Initial Decision at P 78.

Transfer Service and restricted to 350 MW in a single hour and up to 124 MW per hour on an annual average basis.⁹ Additional East to West Transfer Service consists of the scheduled transfer of other resources (i.e., non-Jim Bridger) from east to west across Idaho Power's system that is in excess of the maximum amounts of other resources that Idaho Power is required to transfer under the Other Resource Transfer Service provision of the Restated Transmission Agreement. All of the East to West Transfer Service components are subject to the 1,600 MW transfer capability limit.

7. "Other Services" include "Dynamic Overlay Service" and "Wyoming-Utah Transmission Service." Dynamic Overlay Service allows PacifiCorp to schedule over Idaho Power's system up to plus or minus 100 MW of power and associated energy between PacifiCorp's western system and PacifiCorp's Wyoming system utilizing dynamic (i.e., real-time) transfers.¹⁰ Wyoming-Utah Transmission Service allows PacifiCorp to make bidirectional transfers over Idaho Power's system of up to 104 MW of power between PacifiCorp's Wyoming system and PacifiCorp's Utah system in addition to 1,600 MW transfer rights that PacifiCorp is entitled to under the Restated Transmission Agreement.¹¹ Under the terms of the Wyoming-Utah Transmission Service, Idaho Power provides 250 MW of transmission service in a northbound direction only. The Restated Transmission Agreement remains in effect for the life of the Jim Bridger plant.

8. Under the Facilities Agreement, PP&L built two 345 kV lines from Jim Bridger to Idaho Power's system and Idaho Power built one 345 kV line from Jim Bridger to UP&L's Goshen substation. UP&L built a 345 kV line between its Goshen substation to Idaho Power's Kinport substation and agreed to allow Idaho Power and PP&L to use capacity in the UP&L Goshen-Kinport 345 kV line for transmission of power between Bridger and Kinport to the same degree as would have been the case if the 345 kV line had been routed directly from Bridger to Kinport.¹² Under the Facilities Agreement, PacifiCorp can schedule 250 MW of power from the Brady 230 kV switchyard eastward to the 345 kV terminus of the Goshen-Kinport 345 kV line at Kinport.¹³ Under the agreement, Idaho Power charges PacifiCorp "use of facilities" fees. The Facilities

⁹ *See id.* P 187.

¹⁰ *Id.* P 79.

¹¹ *See id.* P 80-81.

¹² *See id.* P 76.

¹³ *Id.* P 77.

Agreement was executed in June 1974 with a 50-year term, subject to automatic renewals and a 5-year notice of termination.

9. Under the Interconnection Agreement, UP&L constructed a 345 kV transmission line running from Ogden, Utah to Idaho Power's system at Borah and Idaho Power built interconnection facilities at Borah. The Interconnection Agreement requires PacifiCorp to pay Idaho Power for the cost of the facilities constructed to establish the interconnection at Borah, as well as "use of facilities" charges for specific Idaho Power facilities along the contract path. The Interconnection Agreement was entered into on March 19, 1982 and continues until June 1, 2025.

10. In this proceeding, Idaho Power proposed to implement formula rates in place of the rates stated in its OATT. As discussed more fully below, the central issue addressed in the Initial Decision and in this order is the proper ratemaking treatment of the Legacy Agreements under Idaho Power's formula rates.

II. Procedural History

11. On March 24, 2006, pursuant to section 205 of the Federal Power Act (FPA),¹⁴ Idaho Power submitted revisions to its OATT proposing to implement formula rates in place of the rates stated in its OATT in Docket No. ER06-787-000. Intervenor filed motions to intervene and protests challenging various aspects of Idaho Power's filing.¹⁵ On May 31, 2006, the Commission issued an order accepting and suspending Idaho Power's filing, establishing hearing and settlement judge procedures, and directing Idaho Power to submit compliance filings.¹⁶ Subsequently, the parties engaged in settlement discussions but were initially unable to settle the disputed issues. On September 8, 2006, in Docket No. ER06-787-002, the settlement discussions were terminated and a Presiding Judge was designated. On September 28, 2006 Idaho Power submitted, in Docket No. ER06-787-003, a compliance filing detailing protocols for information exchange with its

¹⁴ 16 U.S.C. § 824d (2006).

¹⁵ The Intervenor are: Bonneville Power Administration, Pacific Northwest Generating Cooperative, Raft River Rural Electric Cooperative, Public Power Council, A&B Irrigation District, Burley Irrigation District, Falls Irrigation District, Black Canyon Irrigation District, Owyhee Irrigation District, and Idaho Energy Authority.

¹⁶ *Idaho Power Co.*, 115 FERC ¶ 61,281 (2006) (May 31, 2006 Order). On June 23, 2006 in Docket No. ER06-787-001, Idaho Power made its first compliance filing to correct its rate treatment of certain SFAS 109 deferred tax balances. This compliance filing was accepted in a letter order dated August 28, 2006. *See Idaho Power Co.*, Docket No. ER06-787-001 (Aug. 28, 2006) (unpublished letter order).

customers. On February 28, 2007, the Commission issued an order setting for hearing the information-exchange compliance filing and consolidating ER06-787-003 with ER06-787-002.¹⁷ New settlement discussions were initiated eventually resulting in an uncontested partial settlement file on June 15, 2007 that resolved all issues except the proper ratemaking treatment of the Legacy Agreements.¹⁸ As a result of the uncontested partial settlement, Idaho Power's formula rate structure went into effect as of June 1, 2006, subject to refund and subject to a hearing on the remaining issue—the ratemaking treatment of the Legacy Agreements. A hearing was held in June 2007, with briefs on exceptions and opposing exceptions due on October 1 and 22, 2007, respectively, after the August 31, 2007 issuance of the Initial Decision. The Initial Decision and the instant order address the following issues:

(1) Whether Idaho Power's proposal to credit the revenues received from the three Legacy Agreements to the transmission revenue requirement, rather than including the associated demands in the determination of the rate divisor, is just and reasonable and not unduly discriminatory or preferential?

(2) If it is determined, as a result of the resolution of Issue One, that the demands associated with any of the three Legacy Agreements should be included in the rate divisor rather than revenue-credited, what is the appropriate method for incorporating such demands into the formula rate?

(3) Whether the theories on incentive regulation described in the article entitled *Regulation of the Electricity Market: Incentive Regulation for Electricity Networks*, by Paul L. Joskow, are applicable to the issues in this proceeding?¹⁹

III. Discussion

12. As discussed below, we generally affirm the Presiding Judge's determination that the transmission service under the Legacy Agreements is firm service that must be accounted for in the Idaho Power formula rate by including the associated demands in the rate divisor. However, we find that the appropriate method for incorporating PacifiCorp's demand associated with the Legacy Agreements into the OATT formula rates is to include PacifiCorp's long-term firm contract demands under the Legacy

¹⁷ *Idaho Power Co.*, 118 FERC ¶ 61,156 (2007).

¹⁸ *See Idaho Power Co.*, 120 FERC ¶ 61,144, at P 2, 4 (2007) (approving uncontested partial settlement).

¹⁹ Briefing on Issue 3 was directed by the Presiding Judge, and did not arise from the Commission's orders in this proceeding.

Agreements in the divisor of the formula, and not merely the monthly coincident peak usages as the Initial Decision provides. Further, because the partial settlement in this proceeding provided that the revenues from OATT short-term firm point-to-point service should be revenue-credited rather than the associated load included in the rate divisor, we adjust the Initial Decision in that regard as well.

A. Issue 1: Revenue-Crediting versus Cost-Allocating

1. Burden of Proof

a. Initial Decision

13. The Presiding Judge finds that Idaho Power bears the burden of proof. He notes that pursuant to section 205 of the FPA, “[a]t any hearing involving a rate or charge sought to be increased, the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the public utility.”²⁰ The Presiding Judge notes that Idaho Power is using the same revenue-crediting technique in its formula rate calculation that it used in its 1996 stated rate filing, and that an uncontested, Commission-approved settlement implemented those stated rates, but did not establish any principle or precedent regarding any issue or ratemaking principle. According to the Presiding Judge, the fact that Idaho Power used this revenue-crediting methodology only once (i.e., in its 1996 rate filing) to set its long-standing stated rates does not turn that technique into a settled practice. The Presiding Judge finds that revenue-crediting as a ratemaking practice is not the *status quo*, and that Idaho Power’s plan to use revenue-crediting as a component of its proposed annually-updated formula rate structure is a new practice.²¹ Thus, the Presiding Judge concludes, Idaho Power bears the burden of proving the justness and reasonableness of the new formula-rate structure, including annually crediting revenues it receives under the Legacy Agreements.²²

b. Idaho Power’s Exceptions

14. On exceptions, Idaho Power argues that in *Winnfield* the D.C. Circuit held that a utility’s statutory obligation under section 205 of the FPA is not to prove “the continued reasonableness of unchanged rates or unchanged attributes of its rates structure” and that

²⁰ Initial Decision at P 98 (*citing* 16 U.S.C. 824d (e) (2000)).

²¹ *See id.* P 102 (*distinguishing Winnfield v. FERC*, 744 F.2d 871, 877 (D.C. Cir. 1984) (*Winnfield*)).

²² *Id.*

a settled practice can arise from a settlement agreement.²³ Idaho Power takes exception to the Presiding Judge's statement that Idaho Power's use of the revenue-crediting technique only once does not turn that technique into a settled practice. Idaho Power counters that it has revenue-credited the Legacy Agreements in its transmission rates for decades and that while the structure of its rate has changed (i.e., from a stated rate to formula rate), an attribute of its rate structure has not. Idaho Power states that in the most recent transmission rate filing it submitted in Docket No. ER96-350-000 it revenue-credited the Legacy Agreements and that those rates remained in place year after year until its filing in the instant proceeding. Idaho Power asserts that the fact the rates were not recalculated annually is irrelevant, and that this revenue-crediting practice was used in every prior rate case before the Commission in which transmission costs were included in the cost of service.²⁴

c. Opposing Exceptions

i. Intervenors

15. Intervenors argue that there was no approval of revenue-crediting of the Legacy Agreements in any of the prior proceedings. According to Intervenors, each of the orders addressing the "nine prior rate filings" were accepted by delegated authority each specifically indicating that acceptance of the filing did not constitute approval and is without prejudice to alternate and contradictory findings in future cases.²⁵ Additionally, Intervenors assert that the OATT rates established in Docket No. ER96-350-000 were established in a black box settlement that indicated that the settlement was "submitted on the express understanding that no party hereto shall be deemed to have approved, accepted, agreed to or consented to any principle or issue in this proceeding."²⁶ Intervenors note that the Commission's order approving the settlement included similar language.

ii. Staff

16. Staff agrees with the Presiding Judge that Idaho Power bears the burden of proving the justness and reasonableness of any new formula-rate structure, including one that incorporates annual revenue-crediting of the Legacy Agreements. Staff points out

²³ Idaho Power Brief on Exceptions at 87-88 (*citing Winnfield*, 744 F.2d at 877).

²⁴ *See id.* at 89.

²⁵ *See* Intervenors Brief Opposing Exceptions at 84-85.

²⁶ *Id.* at 85.

that this case started with Idaho Power's section 205 filing to change its rates from its over ten year old stated rate to a new formula rate. Thus, Staff asserts, Idaho Power changed the *status quo* and it is the new formula that is the rate under review.²⁷

17. Additionally, Staff states that the wording of the Joint Stipulation of Issues in this case includes "just and reasonable, and not unduly discriminatory or preferential" and that there was no indication that Idaho Power intended to raise burden of proof as an issue. Staff asserts that the Commission has rejected arguments on issues that were not set forth in the Joint Stipulation of Issues because they were untimely.²⁸

d. Commission Determination

18. The Commission denies Idaho Power's exception. Prior to its section 205 filing in this proceeding, Idaho Power's stated OATT rates had been in effect since the settlement of its 1996 rate filing in Docket No. ER96-350-000. As Intervenors correctly observe, these rates were established in a black box settlement accepted by the Commission. Accordingly, no principle or precedent regarding any issue or ratemaking principle was established by the Commission's approval of the settlement. The fact that Idaho Power only used this revenue-crediting methodology in its 1996 rate filing to set the rates and that they remained in place year after year until the instant proceeding, does not constitute a settled practice. When Idaho Power submitted its section 205 filing to change from stated rates to formula rates, Idaho Power changed the *status quo* and has the burden to demonstrate that its proposed formula rate is just and reasonable, and not unduly discriminatory or preferential. Accordingly, Idaho Power's exception is denied.

2. Order No. 888 Ratemaking Principles

a. Initial Decision

19. The Presiding Judge finds that in Order No. 888, the Commission did not abrogate existing transmission contracts (i.e., those executed on or before July 11, 1994) and that the unbundling and non-discriminatory provisions of Order No. 888 do not apply to the Legacy Agreements.²⁹ The Presiding Judge further finds that in considering whether discounted firm transactions should be counted as part of the load factor in the divisor of firm point-to-point rate ratios or credited against the transmission cost factor in the

²⁷ Staff Brief Opposing Exceptions at 7.

²⁸ *Id.* at 8 (citing *Boston Edison Co.*, 57 FERC ¶ 61,302, at 61,975 (1991)).

²⁹ See Initial Decision at P 107-108 (citing Order No. 888, FERC Stats. & Regs. ¶ 31,036 at 31,662, 64-65).

numerator, the Commission in Order No. 888-A held that such determinations are best resolved on a fact-specific, case-by-case basis.³⁰

20. The Presiding Judge addresses the relevance of two Commission cases in deciding whether the Legacy Agreements should be cost-allocated or revenue-credited.³¹ First, the Presiding Judge observes that in *American Electric Power Company*,³² Staff opposed AEP's proposal to revenue-credit certain transmission services, including some "firm" services, in the development of an OATT non-firm service rate. He states that the *AEP* Judge rejected AEP's argument that the revenue-credited transmission services were "not the type contemplated by AEP's tariff but are part of comprehensive integration agreements between AEP and its customers" and "involve terms, conditions and rates substantially different from those proposed here."³³ The Commission affirmed the *AEP* Judge stating that,

we resolved this issue in Order No. 888, where we concluded that it is appropriate for non-firm service to be priced using up-to rates with the ceiling rate set at the firm service rate.[footnote omitted] In addition, we agree with trial staff that AEP should include the demand for all firm transmission service in the demand divisor, and only credit revenues from non-firm transmission against the cost of service.³⁴

21. The Presiding Judge concludes that the salient facts of *AEP* are close to the facts in the instant case and finds that *AEP* stands as precedent for the proposition that "firm" commitments under grandfathered contracts are to be included in the divisor of the OATT formula rate.³⁵

³⁰ *Id.* P 110 (citing Order No. 888-A, FERC Stats. & Regs. ¶ 31,048 at 30,256).

³¹ *Id.* P 208. The Presiding Judge notes that in denying summary disposition of this issue he had distinguished these two cases; however, in view of the full record in this proceeding, the Presiding Judge finds them to be relevant. *Id.*

³² 80 FERC ¶ 63,006 (1997), *affirmed in relevant part*, Opinion No. 440, 88 FERC ¶ 61,141, at 61,449 (1999) (*AEP*).

³³ Initial Decision at P 210 (quoting *AEP*, 80 FERC ¶ 63,006 at 65,060).

³⁴ *Id.* P 211 (quoting *AEP*, 88 FERC ¶ 61,141 at 61,449).

³⁵ *Id.* P 212.

22. Second, the Presiding Judge observes that in *Boston Edison Company*,³⁶ it was uncertain whether some of Boston Edison's test period transactions with an off-system wholesale transmission customer, which were revenue-credited against the cost of service, fully compensated the utility for costs attributable to that customer.³⁷ The *Boston Edison* Judge found that some transactions were fully compensatory and some were not, and adjusted some of the revenues from those transactions that were credited against the cost of service in order to lower the tariff rate.³⁸ The Presiding Judge states that in reversing the finding in *Boston Edison*, the Commission held that "[t]he reasonableness of Edison's revenue credit method depends . . . on the reasonableness of the revenues in relation to fully allocated costs. Where information is readily available by which the proper allocation of costs can be made, it seems reasonable to do so and thereby to avoid the uncertainty as to whether the revenues may or may not be compensatory."³⁹

23. Accordingly, the Presiding Judge concludes that *Boston Edison* holds that it is appropriate to cost-allocate instead of revenue-credit when it is unclear whether the transactions in question over- or under-compensate for system-wide costs. Additionally, he states that *Boston Edison* also held that while some transactions may over-compensate while others under-compensate, it is nevertheless better to cost-allocate all system-wide costs instead of cost-allocating some and revenue-crediting others.

b. Idaho Power's Exceptions

24. Idaho Power argues that the primary test of whether demands should be included in the rate divisor is whether the services are comparable to the other services that are included in the rate divisor (i.e., firm OATT service and firm native load service).⁴⁰ Idaho Power contends that including non-comparable services in the rate divisor, particularly those provided at less than fully allocated cost, misallocates costs and prevents the utility from recovering its cost of service. Additionally, Idaho Power states that because Order No. 888 permits utilities to discount the rates for firm OATT service if such discount will increase the quantity of service provided, it would not make sense for the Commission to require a transmission provider to include the demands associated

³⁶ 8 FERC ¶ 61,077 (1979) (*Boston Edison*).

³⁷ *Boston Edison*, 8 FERC ¶ 61,077 at 61,283.

³⁸ Initial Decision at P 213.

³⁹ *Id.* P 213 (quoting *Boston Edison*, 8 FERC ¶ 61,077 at 61,283).

⁴⁰ See Idaho Power Brief on Exceptions at 16.

with such discounted firm rates in the rate divisor because this would eliminate any incentive to sell the service.⁴¹

25. Idaho Power also argues that policy considerations warrant revenue-crediting the Legacy Agreements. Idaho Power suggests that revenue-crediting may be appropriate where a transaction priced under an old regulatory regime would be priced differently under a new regulatory regime. Idaho Power states that Order No. 888 recognized that there would be transitional issues associated with pre-Order No. 888 contracts, and rejected proposals to abrogate those contracts, thereby ensuring that regulated entities that entered into an arrangement under the prior regulatory regime did not incur stranded costs under the new regime.⁴² Idaho Power states that these policy considerations exist with regard to the Legacy Agreements, arguing that services under the Legacy Agreements are inferior to the services included in the rate divisor because they include significant non-monetary compensation and related transmission benefits provided by the customer; as the transactions were entered into many years ago under a different regulatory regime, Idaho Power argues there is no justification for stranding prudently incurred costs by changing rate practices long after the agreements were entered into.⁴³

26. Additionally, Idaho Power argues that historically, the Commission's practice has been to include sales to retail native load and wholesale requirements customers in the rate divisor and to revenue-credit other transactions.⁴⁴ Further, Idaho Power states that wholesale requirements service is considered comparable to a service provider's native load, and is firm electric power service. The service provider has the obligation to plan for and meet such customer loads on a basis comparable to its retail native load. Idaho Power argues that the Commission has consistently held that revenue-crediting is proper for opportunity (or coordination) transactions that are provided at a rate below fully allocated cost, and that the use of revenue-crediting benefits other customers by

⁴¹ *Id.* at 16 (citing Order No. 888-A, FERC Stats. & Regs. ¶ 31,048 at 31,744 n.454; Order No. 888, FERC Stats. & Regs. ¶ 31,036 at 30,274).

⁴² *Id.* at 17-18.

⁴³ *Id.* at 18.

⁴⁴ *Id.* (citing *Public Serv. Co. of New Mexico*, 20 FERC ¶ 61,290, at 61,546-48, *reh'g denied*, 21 FERC ¶ 61,334 (1982), *aff'd* on other grounds, *Public Serv. Co. of New Mexico v. FERC*, 832 F.2d 1201 (10th Cir. 1987) (*Public Service Co. of NM*); *Tampa Electric Co.*, 71 FERC ¶ 61,245, at 61,942 (1995), *reh'g denied*, 83 FERC ¶ 61,262, at 62,092-93 (1998); *Public Serv. Co. of New Mexico*, 25 FERC ¶ 61,469, at 62,055 (1983); *Southern Cal. Edison Co.*, 20 FERC ¶ 61,301, at 61,592 (1982)).

providing a contribution to the fixed costs of the seller's system.⁴⁵ Idaho Power contends that the Legacy Agreements services here are of this type, and are different from firm OATT transmission service that would normally be cost-allocated, and not revenue-credited.

27. Idaho Power argues that *AEP* is predicated on the services being the same type of service (i.e., as firm OATT) but the Legacy Agreements services and OATT services are not of the same type. Idaho Power also argues that *Boston Edison* is inapposite because the result in that case was also predicated on the services being firm, two of the three contracts in question were for requirements service, and there was no discussion of the proper cost allocation for "inferior services or agreements involving other considerations such as the Legacy Agreements."⁴⁶

c. Opposing Exceptions

i. Intervenors

28. In opposing exceptions, Intervenors challenge Idaho Power's assertion that revenue-crediting of the Legacy Agreements is justified because these services are not comparable to OATT point-to-point service. Intervenors state that this argument means that the only pre-Order No. 888 contracts properly includable in the rate divisor would be those with terms identical to OATT contracts. Intervenors state that the Commission's statement in *AEP*, that "AEP should include the demand for all firm transmission service in the demand divisor, and only credit revenues from non-firm transmission against the cost of service,"⁴⁷ has been misinterpreted by Idaho Power. Intervenors contend that Idaho Power's reading of *AEP* is incorrect because the contracts at issue were pre-Order No. 888 and the crucial factor in the case was whether the service under the pre-Order No. 888 contracts were firm service that should be included in the divisor, not whether they were the same as OATT service. Intervenors add that, in *Consumers Energy Company*,⁴⁸ the Commission similarly affirmed the Judge's finding that although a pre-

⁴⁵ *Id.* at 18-19 (citing *Midwest Indep. Transmission System Operator, Inc.*, 116 FERC ¶ 63,030, at P 191 (2006); *Tampa Electric Co.*, 71 FERC ¶ 61,245, at 61,942 (1995), *reh'g denied*, 83 FERC ¶ 61,262 (1998)).

⁴⁶ *Id.* at 19 n.13.

⁴⁷ Intervenors Brief Opposing Exceptions at 19-20 (citing *AEP*, 88 FERC ¶ 61,141 at 61,449).

⁴⁸ 86 FERC ¶ 63,004 (1999), *corrected*, 86 FERC ¶ 63,005 (1999), *aff'd in relevant part*, Opinion No. 456, 98 FERC ¶ 61,333 (2002) (CECo).

Order No. 888 power pool arrangement had different terms from OATT service, was properly included in the rate divisor.⁴⁹ Intervenor state that the Commission also found cost-allocating pre-Order No. 888 contracts appropriate under similar circumstances in *Maine Public Service Company*.⁵⁰

29. Intervenor also challenge Idaho Power's suggestion that the Legacy Agreements service is inferior, discounted service and therefore revenue-crediting is justified. Intervenor argue that at the time the Legacy Agreements were executed, Idaho Power did not have an established embedded rate for service for its transmission system, and therefore, there could not have been a discount.⁵¹ Additionally, Intervenor contend that Idaho Power's implication that the Legacy Agreements should be subject to revenue-crediting as opportunity sales suggests that all pre-Order No. 888 contracts that provide wheeling are akin to opportunity sales and should not be included in the rate divisor. Intervenor assert that the Legacy Agreements services are not opportunity sales but are long-term firm obligations which require Idaho Power to provide service whenever requested.

ii. Staff

30. Staff asserts that Idaho Power first suggests that the Legacy Agreements service is discounted service, and as such, should be revenue-credited, but later claims that because Idaho Power paid the full cost of its share of the Bridger Project, there was no reason for Idaho Power to offer a discount on the service.⁵² Additionally, Staff maintains that under Idaho Power's theory, if a service is not firm OATT service, then any firm service existing prior to Order No. 888 should be revenue-credited.⁵³ With regard to *AEP*, Staff argues that Idaho Power cites to no aspect of the decision to support its contention that the services at issue in that case were exactly the same as OATT firm service with a priority equivalent to native load.

⁴⁹ See Intervenor Brief Opposing Exceptions at 22 (*citing CEC*, 86 FERC ¶ 63,004).

⁵⁰ 74 FERC ¶ 63,011 (1996), *aff'd in relevant part*, Opinion No. 434, 85 FERC ¶ 61,412 (1998).

⁵¹ *Id.* at 20.

⁵² See Staff Brief Opposing Exception at 15-16 (*citing* Idaho Power Brief on Exceptions at 37).

⁵³ *Id.* at 17.

31. Staff also questions Idaho Power's suggestion that the design of the Legacy Agreements services is similar to coordination service when Idaho Power does not define "coordination service" or offer any analysis supporting a finding that the Legacy Agreements services are coordination service or opportunity transactions.⁵⁴ Staff adds that the Commission approved the use of revenue-crediting for opportunity sales in *Public Service Co. of NM* but distinguished those sales from long-term transactions such as provided under the Legacy Agreements.⁵⁵ Moreover, in Order No. 888 the Commission indicated that if a discounted transmission rate is offered for the purposes of coordination transactions, the same discounted rate must be offered to others for trades with any party to the coordination agreement.⁵⁶ Staff asserts that nothing in the record shows that this is the case for the Legacy Agreements.

d. Commission Determination

32. The Commission rejects Idaho Power's exceptions. In Order No. 888, the Commission specifically addressed how discounted firm transactions were to be handled in the calculation of open-access transmission rates. The Commission stated:

We also are not convinced that we should require the calculation of load ratios using a particular method on a generic basis. Any such proposals, including those concerning the treatment of discounted firm transmission transactions in the load ratio calculation and revenue credits associated with such transactions, are best resolved on a fact-specific, case-by-case basis.⁵⁷

33. While agreeing that the decision whether the Legacy Agreements should be revenue-credited or cost-allocated is properly made on a case-by-case basis, Idaho Power insists that the primary test under such analysis is whether the services are comparable to firm OATT service and firm native load.⁵⁸ Idaho Power argues that it is the Commission's historical practice to include sales to retail native load and wholesale requirements customers in the rate divisor and to revenue-credit other transactions. Idaho Power asserts that were the Commission to require the inclusion of demands associated with discounted firm service in the rate divisor, doing so would eliminate any incentive to

⁵⁴ *Id.* at 21.

⁵⁵ *Id.* (citing *Public Serv. Co. of New Mexico*, 20 FERC ¶ 61,290 at 61,546).

⁵⁶ *Id.* at 21 (citing Order No. 888, FERC Stats. & Regs. ¶ 31,036 at 31,730).

⁵⁷ Order No. 888-A, FERC Stats. & Regs. ¶ 31,048 at 30,256.

⁵⁸ See Idaho Power Brief on Exceptions at 16.

sell discounted firm service. We disagree. Idaho Power has not indicated exactly what it means by “comparable” to firm OATT and firm native load service. It appears, however, that Idaho Power believes that only retail native load and wholesale requirements should be included in the rate divisor. Such a reading of Order No. 888 and the Commission’s precedents would render any case-by-case analysis unnecessary unless the service was for wholesale requirements or non-discounted firm service. Under Idaho Power’s test, a pre-Order No. 888 transmission service, which by definition cannot be OATT service and is not native load service, could only be cost-allocated if it is for wholesale requirements customers. However, as discussed above, Order No. 888-A specifically provided for case-by-case analysis of the treatment of discounted firm transmission transactions in the load ratio calculation.

34. Further, Idaho Power’s position is contrary to *AEP* in which Commission explained that the transmission provider should include the demand for all firm transmission service in the demand divisor and only credit revenues from non-firm transmission against the cost of service.⁵⁹ Idaho Power’s reading of *AEP* is wrong, and its suggestion that the ruling of *AEP* was limited to services equivalent in firmness to OATT or native load service is incorrect. Order No. 888-A did not establish such a bright-line test for determining whether a particular grandfathered service should be revenue-credited or cost-allocated; instead, such a determination is to be made on a fact-specific, case-by-case basis. Because the facts here, as discussed below, warrant placement of the subject demand in the rate divisor, we deny Idaho Power’s exceptions.

3. Firm vs. Non-Firm Service

35. The Presiding Judge states that Idaho Power asserts that its transmission service to PacifiCorp under the Legacy Agreements is not “firm,” but is something in between “firm” and “non-firm” service, and therefore the associated revenues should be revenue-credited in the numerator. He also states that Intervenors and Staff assert that the transmission service under the Legacy Agreements is “firm” service and therefore should be cost-allocated in the rate divisor. The Presiding Judge notes that the word “firm” is not expressly defined in the OATT. He further notes that only the services designated as “Firm Point-to-Point Transmission Service” and “Non-firm Point-to-Point Transmission Service” are specifically defined in the OATT.⁶⁰ The Presiding Judge observes that outside of the OATT, a common definition of “firm” service is “electricity sold pursuant to a contract that entitles the customer to receive service from the seller on demand.”⁶¹

⁵⁹ *AEP*, 88 FERC ¶ 61,141 at 61,449.

⁶⁰ Initial Decision at P 116 (*citing* Idaho Power OATT at sections 13 and 14).

⁶¹ *Id.* P 117 (*quoting* *La. PUC v. FERC*, 482 F.3d 510, 513 (D.C. Cir. 2007)).

He states that by contrast “non-firm” service is used to describe “interruptible” service, meaning “electricity sold pursuant to a contract that entitles the seller to curtail service when it does not have enough capacity to produce electricity in excess of the quantity demanded by customers with contracts for firm service.”⁶² The Presiding Judge finds that for pre-Order No. 888 contracts there is no bright-line test to determine when electric transmission services crosses over from being “firm” to being “non-firm.” He notes that the Commission has found that there are degrees of “firmness.”⁶³ The Presiding Judge states that the Commission has found non-firm a service that is subordinate to native load.⁶⁴ He also states that the Commission has required non-firm transmission service to be priced lower than firm transmission service to reflect the lower quality of the service.⁶⁵ The Presiding Judge considers several factors to determine whether the services under the Legacy Agreements are firm or non-firm for ratemaking treatment under the Idaho Power formula rates. Each of these factors is discussed below.

a. Curtailment/Interruption

i. Initial Decision

36. The Presiding Judge states that Idaho Power’s position that the transmission services under the Legacy Agreements are not firm service turns on its contention that curtailment priority is “at the heart of the definition of firm service under the OATT.”⁶⁶ He notes that the Restated Transmission Agreement has curtailment provisions but the Facilities Agreement and the Interconnection Agreement do not. The Presiding Judge discusses the difference between curtailment of transmission service and interruption of transmission service. He states that in testimony Idaho Power witness Park stated that

⁶² *Id.*

⁶³ *Id.* P 118 (citing *New England Power Co.*, Opinion No. 335, 49 FERC ¶ 61,129 at 61,554 (1989) (“Depending upon circumstances, a transmission constraint at a particular point of interconnection may render service less firm and even more susceptible to interruption than it would be if other transmission paths were available. . . . [We] find that under the curtailment provision, the service NEP provides is more akin to nonfirm service than firm service.”), *reh’g denied*, Opinion No. 335-A, 50 FERC ¶ 61,151 (1990)).

⁶⁴ *Id.*

⁶⁵ *Id.* (citing *Northeast Utilities Service Co.*, 84 FERC ¶ 61,159, at 61,867 (1998) (*NU*)).

⁶⁶ *Id.* P 119 (quoting Park Hg. Tr. 271:21-272:7).

curtailment constitutes “those procedures used when an event—such as an outage—reduces the amount of available transfer capability. In situations such as these, certain procedures need to be followed to determine whose electricity services should be reduced in order to deal with the reliability situation.”⁶⁷ He states that, by contrast an interruption is a broader term that encompasses reductions of capability for economic reasons as well as reliability reasons. The Presiding Judge notes that witness Park, who oversees the operations of the Idaho Power control center responsible for deciding when transmission service is to be curtailed or interrupted, explained that “In the interchange world, for us, curtailment is typically done for a reliability reason. An interruption is done because you have a higher priority product that comes in and interrupts a lower priority product.”⁶⁸ The Presiding Judge states that:

In a sense, there is no such thing as absolutely “firm” service—that is, service that is never stopped. All service is really “non-firm” to some degree, because no transmission system is perfect and all service is subject to cutoffs of one kind or another. All systems experience outages that occasionally require some or all levels of transmission service to be halted or cut back. Thus, it makes sense to think of “firm” service as being different from “non-firm” service only in the manner and degree to which it can be cut back.⁶⁹

37. The Presiding Judge concludes that it is consistent with industry practice to call service “firm” where it is curtailed only in abnormal system conditions—such as to preserve reliability in outage or crisis situations—and to call a service “non-firm” where it is not only curtailable for reliability reasons, but also interruptible for economic reasons during normal system conditions.⁷⁰

38. The Presiding Judge also finds that Idaho Power does not believe that it has the right to interrupt Restated Transmission Agreement and Facilities Agreement service in order to provide non-firm transmission service under the OATT to a third party.⁷¹ The Presiding Judge therefore concludes that Idaho Power treats Legacy Agreements service as a “firm” not as a “non-firm” service. Additionally, the Presiding Judge finds that PacifiCorp believes that, except for limited conditions specified in the Restated

⁶⁷ *Id.* (quoting Ex. No. IPC-32 (Park Reb. Test. 5:8-11)).

⁶⁸ *Id.* (quoting Park Hg. Tr. 290:9-20).

⁶⁹ *Id.* P 122.

⁷⁰ *Id.* P 123.

⁷¹ *Id.* P 122 (citing Ex. S-2 at 29, 31).

Transmission Agreement,⁷² Idaho Power does not have the right to curtail or interrupt PacifiCorp's schedules except in emergencies and in such cases, on a *pro rata* basis.⁷³ Additionally, he finds that because the transmission services under the Legacy Agreements are available to PacifiCorp on demand and are scheduled separately on Idaho Power's system, the Legacy Agreements services are akin to "firm" service.⁷⁴ He adds that, except for the Restated Transmission Agreement provisions that permit curtailment for specified reliability reasons, Idaho Power bears the risk of loss if it does not deliver the transmission services specifically demanded by PacifiCorp under the Legacy Agreements.

ii. Idaho Power's Exceptions

39. On exceptions, Idaho Power argues that the Presiding Judge incorrectly characterizes witness Park's statement as industry practice. Instead, Idaho Power states, witness Parks simply explained the difference between her use of the words "curtailment" and "interruption" but did not state or suggest that all services that are curtailable, but not interruptible are firm service.

40. Idaho Power also takes issue with the Presiding Judge's finding that Idaho Power does not believe that it has the right to interrupt Restated Transmission Agreement and Facilities Agreement service in order to provide OATT non-firm transmission service to a third-party. Idaho Power argues that this finding is a misreading of its response to a data request in which Idaho Power ultimately concludes that the Restated Transmission Agreement and Facilities Agreement are not firm service. Idaho Power also argues that Staff and Intervenors admitted that service to PacifiCorp has a lower curtailment priority than OATT and native load service and that service limitations under the Restated Transmission Agreement are unique to the Restated Transmission Agreement, not typical of those permitted for firm transmission service and are different from those applicable to Idaho Power's native load customers.⁷⁵

41. Additionally, Idaho Power states that the Presiding Judge misconstrues PacifiCorp witness Apperson's testimony. Idaho Power argues that witness Apperson only addressed the Restated Transmission Agreement, not the other Legacy Agreements, he did not state that Restated Transmission Agreement is firm and his testimony does not

⁷² These limited circumstances are discussed below.

⁷³ Initial Decision at P 135 (*citing* Ex. PAC-1 (Apperson Ans. Test. 3:20-23)).

⁷⁴ *Id.* P 136.

⁷⁵ Idaho Brief on Exceptions at 47.

support such a finding, and that he testified that Restated Transmission Agreement service cannot be compared to service under the *pro forma* OATT.⁷⁶

42. Idaho Power also argues that transmission service is not firm just because it is available on demand and is scheduled separately. According to Idaho Power, all transmission service, once reserved, is available to be scheduled by the customer on demand.⁷⁷ Idaho Power asserts that whether the service is firm depends on curtailment and interruption priorities that apply to the service. Idaho Power argues that the fact that the Legacy Agreements services are scheduled separately from other services is irrelevant. Further, Idaho Power insists that the fact that the transmission provider bears the risk of loss under the agreements if it does not provide the service in accordance with the agreements applies equally to all services but is irrelevant to the firmness of the service.⁷⁸

iii. Opposing Exceptions

(a) Intervenors

43. Intervenors argue that Idaho Power's analysis of curtailment for reliability purposes and interruption by a higher priority product is flawed, and not based on the record. Intervenors support the Presiding Judge's reasoning in determining that the Legacy Agreements service is firm as based on the totality of record evidence.⁷⁹ Additionally, Intervenors challenge Idaho Power's arguments that the terms of service under the Legacy Agreements are different from the OATT and therefore these services cannot be considered firm for ratemaking purposes.⁸⁰ Intervenors maintain that if this were true, no pre-Order 888 contract would have the same terms of OATT contracts. Accordingly, Intervenors argue that the Presiding Judge's distinction between reliability curtailment and interruption for a higher priority service is the correct analysis.⁸¹

⁷⁶ *Id.* at 68.

⁷⁷ *Id.* at 69 (*citing* Idaho Power OATT sections 13.8, 14.6).

⁷⁸ *See id.*

⁷⁹ Intervenors Brief Opposing Exceptions at 56.

⁸⁰ *Id.* (*citing* Idaho Power Brief on Exceptions at 46-47).

⁸¹ *Id.* at 57.

44. Additionally, Intervenor state that while PacifiCorp participated in this proceeding, it maintained a neutral position. Intervenor also state that on cross-examination, PacifiCorp's witness agreed that the Restated Transmission Agreement contains several terms that provided PacifiCorp with rights that are greater than those of OATT service.⁸²

(b) Staff

45. Staff also disagrees with Idaho Power's characterization of Idaho Power witness Park's testimony. Staff states that the Presiding Judge quoted witness Park's testimony "word for word" and that in her testimony Witness Parks recognized a difference between curtailment of service and interruptible service.⁸³ Additionally, Staff disputes Idaho Power's interpretation of PacifiCorp witness Apperson's testimony. Staff states that the Presiding Judge correctly found that the witness testified as to PacifiCorp's belief that Idaho Power does not have the right to curtail or interrupt PacifiCorp's schedules over and above the exceptions stated in the Restated Transmission Agreement, except during system emergencies.⁸⁴

iv. Commission Determination

46. The Commission finds the Presiding Judge's curtailment versus interruption analysis to be well-reasoned, and that analysis supports the determination that the services provided under the Legacy Agreements are more appropriately considered "firm" and thereby subject to cost allocation in Idaho Power's formula rate, rather than "non-firm," and subject to revenue-crediting. Idaho Power takes exception to the Presiding Judge's characterization of its witness's testimony as industry practice; however, whether her descriptions are appropriately characterized as industry practice or not, we find it useful to consider how the employee responsible for overseeing the operations of Idaho Power's control center understands these terms. Accordingly, we deny the exceptions.

⁸² *Id.* at 69.

⁸³ Staff Brief Opposing Exceptions at 28.

⁸⁴ *See id.* at 36.

b. East to West Transfer Service under the Restated Transmission Agreement

i. Initial Decision

47. Turning to whether or not the service provided under the Restated Transmission Agreement is firm or non-firm, the Presiding Judge finds that the language of the Restated Transmission Agreement supports a finding that the service provided to PacifiCorp under this agreement should be considered firm in the context of this proceeding. Specifically, he finds that the Restated Transmission Agreement specifies that “‘Idaho Power shall provide East to West Transfer Services *on a continuous, firm basis*’ except in certain specific circumstances that only have to do with curtailments to preserve system reliability.”⁸⁵ These specific circumstances are as follows: (1) for limitations on transfer capability as described in section 3.6; (2) for interruptions or reductions due to a *force majeure* as defined in section 8; (3) for interruptions or reductions due to temporary impairments of transfer capability as described in section 3.8; and (4) as provided in section 3.5.1 with respect to Additional East to West Transfer Service.⁸⁶

48. Regarding the first exception, the Presiding Judge states that Idaho Power and PacifiCorp acknowledge, through the language of section 3.6 of the Restated Transmission Agreement, that “capacity limitations exist on the Idaho Power system during normal system conditions with all facilities in service . . . which limit the capability of Idaho Power to deliver 1,600 MW for PacifiCorp from the Points of Receipt to the Points of Delivery simultaneous with Idaho Power’s full use of its reserved transmission capacity on its transmission system.”⁸⁷ Accordingly, he finds that section 3.6 of the Restated Transmission Agreement currently permits Idaho Power to limit PacifiCorp’s capacity under the Restated Transmission Agreement to 1,410 MW rather than 1,600 MW, as a result of the limited transfer capabilities of the Bridger system and the need to provide an allowance for Idaho Power to move its share of the Bridger plant generation to its system. However, the Presiding Judge states, PacifiCorp enjoys service on a “continuous, firm basis” up to the current 1,410 MW limit.⁸⁸ Additionally, he finds

⁸⁵ Initial Decisions at P 124 (*citing* Ex. INT-13 (Restated Transmission Agreement section 3.5) (emphasis supplied in Initial Decision)).

⁸⁶ *Id.* P 138 (*citing* Ex. INT-13 (Restated Transmission Agreement section 3.5)).

⁸⁷ *Id.* P 139 (*citing* Ex. INT-13 (Restated Transmission Agreement section 3.6)).

⁸⁸ *Id.* (*citing* Ex. INT-13 (Restated Transmission Agreement section 3.6); Durick Hg. Tr. 369:1-8.)

that section 3.6 only restricts PacifiCorp's use of its full 1,600 MW allotment of the East to West Transfer Service capacity.

49. The Presiding Judge finds that section 3.6.1 provides for the total interconnection from Idaho Power's system to the Pacific Northwest, consisting of Idaho Power's Western Interconnections plus PacifiCorp's Midpoint-Summer Lake 500 kV transmission line. He states that Idaho Power has "the unrestricted right, at all times *and regardless of system conditions*, to the use of not less than 570 MW of the westbound transfer capability in Idaho Power's Western Interconnections. When Idaho Power is not fully utilizing its reserved capacity, such capacity shall be made available to PacifiCorp for East to West Transfer Services" up to the contracted limit.⁸⁹ The Presiding Judge states that Idaho Power's witness Durick testified that if the capacity of Idaho Power's Western Interconnections with the Pacific Northwest were reduced below 1,980 MW (the level necessary to provide 1,410 MW of service to PacifiCorp and maintain Idaho Power's 570 MW share) during normal system conditions, and Idaho Power needed its full 570 MW share, subsection 3.6.1 of the Restated Transmission Agreement would allow Idaho Power to reduce service to PacifiCorp while maintaining Idaho Power's 570 MW share.⁹⁰

50. The Presiding Judge points out that the Western Interconnections are defined in the Restated Transmission Agreement as Idaho Power's 230 kV Divide, LaGrande, and Enterprise interconnections only. They do not include any other existing or future transmission interconnections on the Idaho Power system or PacifiCorp's Midpoint-Summer Lake 500 kV transmission line.⁹¹ Further, he states, as Intervenors point out and witnesses for Idaho Power and PacifiCorp agree, the Midpoint-Summer Lake 500 kV line has the most capacity of any of these four interconnections and PacifiCorp tends to schedule most of its East to West Transfer Service to that line rather than to the other three points of delivery.⁹² Thus, the Presiding Judge reasons, Idaho Power's 570 MW priority right on the Western Interconnections typically does not impact the bulk of PacifiCorp's East to West Transfer Service rights.⁹³ The Presiding Judge also notes that

⁸⁹ *Id.* P 114 (*citing* Ex. INT-13 (Restated Transmission Agreement section 3.6.1) (emphasis supplied in Initial Decision)).

⁹⁰ *Id.* P 142 (*citing* Ex. IPC-28 (Durick Reb. Test. 16:5-12)).

⁹¹ *Id.* P 143 (*citing* Ex. INT-13 (Restated Transmission Agreement section 1.3) Durick Hg. Tr. 383:5-19).

⁹² *Id.* P 142 (*citing* Intervenors Initial Brief 29; Park Hg. Tr. 242:10-20; 245:5-246:1; Durick Hg. Tr. 380:23-381:8; Apperson Hg. Tr. 613:22-614:1).

⁹³ *Id.* P 143.

Idaho Power's current Total Transfer Capability for the entire westbound Idaho to Northwest path, if all facilities are in service and there are no curtailment conditions, is only 324 MW, which is well below the 570 MW share to which Idaho Power is entitled under subsection 3.6.1 of the Restated Transmission Agreement.⁹⁴ Thus, he reasons, Idaho Power is unlikely to need its entire 570 MW share in the event of an interruption or curtailment, and the remainder of the capacity above Idaho Power's use is reserved to PacifiCorp under subsection 3.6.1.

51. The Presiding Judge goes on to state that it is very difficult to see how Idaho Power could schedule up to 570 MW of firm service on its Western Interconnections under *normal* system conditions in a way that would bring subsection 3.6.1 of the Restated Transmission Agreement into play to cause an economic interruption in PacifiCorp's usage of the westbound Idaho to Northwest path.⁹⁵ He reasons that this is because under normal conditions, full capacity is available for the firm needs of both Idaho Power and PacifiCorp. Noting that both Idaho Power and PacifiCorp have made clear that Idaho Power cannot interfere with PacifiCorp's rights in such circumstances,⁹⁶ he finds that Idaho Power is entitled to use and sell on the Northwest path up to its full 570 MW share and that Idaho Power's Total Transfer Capability on those interconnections is limited to well below 570 MW. He concludes that PacifiCorp's rights on the Midpoint to Summer Lake 500 kV westerly interconnection, combined with its right to all of the capacity on Idaho Power's Western Interconnections above Idaho Power's use, guarantee an uninterrupted pathway for PacifiCorp's power. In short, he finds that, PacifiCorp's use of the westbound Idaho to Northwest path, as governed by subsection 3.6.1 of the Restated Transmission Agreement, does not have the hallmark of "non-firm" service, which is economic interruptibility.

52. The Presiding Judge finds that for curtailments for reliability reasons such as a system outage, subsection 3.6.1 could and has had an effect on PacifiCorp.⁹⁷ He finds, however, that a curtailment of PacifiCorp's service for reliability reasons would be no different from a curtailment of any other "firm" service. Hence, he concludes, subsection 3.6.1 of the Restated Transmission Agreement does not serve to render PacifiCorp's service thereunder "non-firm" instead of "firm."⁹⁸ Additionally, he finds that under

⁹⁴ *Id.* (citing Park Hg. Tr. 245:5-14).

⁹⁵ *Id.* P 144.

⁹⁶ *Id.* (citing Ex. IPC-32 (Park Reb. Test. 17:16-18:11); PAC-1 (Apperson Ans. Test. 3:30-23)).

⁹⁷ *Id.* P 145 (citing Ex. IPC-32 (Park Reb. Test. 7:2-9:7); IPC-35; IPC-36).

⁹⁸ *Id.*

Restated Transmission Agreement subsection 3.6.2, 707 MW of reserved capacity of transfer capability provided through the existing 345 kV and 138 kV transmission lines west of the Borah and Kinport substations is allocated to Idaho Power for its own use, and 1,414 MW is allocated to Idaho Power to provide East to West Transfer Services to PacifiCorp.⁹⁹ He notes that subsection 3.6.2 also provides that “[i]f the normal system transfer capability of the path is determined to be less than 2,121 MW, Idaho Power’s reserved capacity for its own use and the capacity reserved for East to West Transfer Services shall be prorated accordingly.”¹⁰⁰

53. The Presiding Judge notes that Idaho Power contends that subsection 3.6.2 of the Restated Transmission Agreement is different from the OATT because, for example, if PacifiCorp had 1,410 MW of OATT service, other customers (including Idaho Power) had 200 MW, and the Borah West path were reduced to 1,500 MW, the customers would share the available 1,500 MW on a *pro rata* basis and no Available Transfer Capability would be posted.¹⁰¹ By contrast, Idaho Power contends, under subsection 3.6.2 of the Restated Transmission Agreement, PacifiCorp’s service would decline to 1,000 MW, the 200 MW of service to other parties (including Idaho Power) would continue, and 300 MW of service would be posted as Available Transfer Capability.¹⁰² The Presiding Judge states, however, that the terms of subsection 3.6.2 contradict Idaho Power’s view that PacifiCorp is entitled under that provision to less capacity in the event of a curtailment than it would be under the OATT. He states that subsection 3.6.2 provides that “[w]hen Idaho Power is not fully utilizing its reserved capacity, such capacity will be made available to PacifiCorp for East to West Transfer Services” up to the maximum contract limits.¹⁰³ Hence, the Presiding Judge states, the additional 300 MW would not be posted as Available Transfer Capability, but instead would first be made available to PacifiCorp. He concludes that like subsection 3.6.1, subsection 3.6.2 keeps PacifiCorp’s service “firm” in relation to all other Idaho Power customers.

54. With regard to the second exception to continuous, firm service under East to West Transfer Service, the Presiding Judge finds that section 8 of the Restated

⁹⁹ *Id.* P 146 (*citing* Ex. IPC-32 (Park Reb. Test. 7:2-9:7); IPC-35; IPC-36 (Restated Transmission Agreement section 3.6.2)).

¹⁰⁰ *Id.*

¹⁰¹ *Id.* P 147 (*citing* Idaho Power Initial Brief 27).

¹⁰² *Id.* (*citing* Park Hg. Tr. 284:10-285:9).

¹⁰³ *Id.* (*citing* Ex. INT-13 at 29-30 (Restated Transmission Agreement section 3.6.2)).

Transmission Agreement relieves both parties from default for *force majeure* reasons such as failure of facilities, flood, earthquake, storm, fire, lightning, epidemic, war, and riot.¹⁰⁴ The Presiding Judge states that the Restated Transmission Agreement *force majeure* clause is not significantly different from the *force majeure* clause of Idaho Power's OATT, which covers both firm point-to-point service and non-firm point-to-point service.¹⁰⁵ He concludes that as with the Idaho Power OATT, the presence of a *force majeure* clause in the Restated Transmission Agreement does not make the service non-firm instead of firm.

55. Next, the Presiding Judge addresses the third exception, under section 3.8 of the Restated Transmission Agreement, that addresses temporary impairments on the Idaho Power system "due to conditions such as, but not limited to, forced outages of facilities, maintenance work, loop flow, etc."¹⁰⁶ He states that this section, which provides for specific curtailments of PacifiCorp's service on Idaho Power's system for reasons related to system reliability, is not identical to the OATT, but is similar to the curtailment for reliability provisions of the OATT.¹⁰⁷ He also states that a "curtailment" is defined in the OATT as "[a] reduction in *firm or non-firm* transmission service in response to a transmission capacity shortage as a result of system reliability conditions."¹⁰⁸ He also states that the descriptions in the OATT of both firm OATT service and non-firm OATT service have explicit and relatively similar terms and conditions to deal with such curtailments.¹⁰⁹ He finds that of the two types of OATT services, only non-firm OATT service also provides for interruptions for the reasons other than reliability. Specifically, he notes that the Idaho Power OATT provides for interruption of non-firm service, "*for economic reasons* in order to accommodate (1) a request for Firm Transmission Service, (2) a request for Non-firm Point-To-Point Transmission Service of greater duration, (3) a request for Non-firm Point-To-Point Transmission Service of equal duration with a

¹⁰⁴ *Id.* P 149 (*citing* Ex. INT-13 (Restated Transmission Agreement section 8)).

¹⁰⁵ *Id.* (Ex. IPC-5 (Idaho Power OATT section 10)).

¹⁰⁶ *Id.* P 150 (*citing* Ex. INT-13 (Restated Transmission Agreement section 3.8)).

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* (*citing* Idaho Power OATT section 1.7 (emphasis added in Initial Decision)).

¹⁰⁹ *Id.* (*citing* Idaho Power OATT sections 13.6 and 14.7).

higher price, or (4) transmission service for Network Customers from non-designated resources.”¹¹⁰

56. He concludes that the mere possibility of curtailments of PacifiCorp’s Restated Transmission Agreement service for system reliability reasons is no different from the possibility of curtailments for system reliability reasons under the Idaho Power OATT for firm point-to-point service. Thus, the curtailment provisions of the Restated Transmission Agreement do not render service under the Restated Transmission Agreement less firm than OATT firm service. Moreover, he states, OATT non-firm point-to-point transmission service can be interrupted for economic reasons as well as reliability reasons but such restrictions are not identified in the Restated Transmission Agreement. Accordingly, he finds that the Restated Transmission Agreement resembles firm point-to-point OATT service more closely than non-firm point-to-point OATT service.¹¹¹

57. With regard to the fourth and final exception, the Presiding Judge finds that section 3.5.1 of the Restated Transmission Agreement provides that the “Additional East to West Transfer Service” component of East to West Transfer Service “shall have a higher priority than all other existing and future non-firm transmission services provided by Idaho Power for third parties under other agreements, but shall have a lower priority than all of Idaho Power’s other existing and future firm and non-firm uses of its transmission system, including electric service to Idaho Power’s customers, firm and non-firm wholesale purchases and sales, and other firm transmission services.”¹¹² In addition, he finds that PacifiCorp schedules Additional East to West Transfer Service only intermittently on Idaho Power’s system¹¹³ and that Idaho Power witness Durick characterized the priority of Additional East to West Service as a “secondary firm priority.”¹¹⁴ The Presiding Judge also notes that PacifiCorp pays Idaho Power a supplemental fee for this service in addition to its usual facilities charges for Restated

¹¹⁰ *Id.* P 150 (*citing* Idaho Power OATT section 14.7 (emphasis added in Initial Decision)).

¹¹¹ *Id.*

¹¹² *Id.* P 152 (*citing* Ex. INT-13 (Restated Transmission Agreement section 3.5.1)).

¹¹³ *Id.* P 153 (*citing* Park Hg. Tr. 229:4-7, 15-18).

¹¹⁴ *Id.* (*citing* Ex. INT-5 (Daniel Ans. Test. 65:3-13)).

Transmission Agreement service, equal to Idaho Power's non-firm rate plus one-half mill per kWh.¹¹⁵

58. The Presiding Judge reasons that Additional East to West Transfer Service is a non-firm component of Restated Transmission Agreement service. However, he finds that there is no evidence in the record that breaks out from other Legacy Agreements service the load on Idaho Power's system or the revenues that PacifiCorp pays to Idaho Power for this component. He notes that witness Durick asserted on behalf of Idaho Power that Additional East to West Transfer Service is "embedded in" and "inseparable from" firm Restated Transmission Agreement East to West Transfer Service.¹¹⁶ Hence, he finds that the evidence does not support treating Additional East to West Service as something separate and apart from the whole package of firm Restated Transmission Agreement services. He also finds that although the Additional East to West Service component is non-firm that does not render the rest of Restated Transmission Agreement service non-firm. Accordingly, he finds that Additional East to West Transfer Service must be viewed as merely an intermittently-used, non-firm adjunct of firm East to West Transfer Service under the Restated Transmission Agreement.¹¹⁷

ii. Idaho Power's Exceptions

59. Idaho Power states that the "continuous, firm basis" language of section 3.5 does not mean that service that is curtailable to preserve system reliability is firm but indicates that the service will be provided on a firm basis except that it is curtailable to preserve system reliability.¹¹⁸ Idaho Power argues that this language is distinguishing between firm service, on the one hand and service that is curtailable to preserve system reliability on the other hand. Idaho Power insists that service under the Restated Transmission Agreement is not firm because it is curtailable before native load and OATT firm service to preserve system reliability.¹¹⁹

60. Idaho Power also states that the exceptions provided under section 3.5 of the Restated Transmission Agreement are the contractual basis for Idaho Power's giving the

¹¹⁵ *Id.* P 154 (*citing* Durick Hg. Tr. 365.6-9; Ex. INT-13 (Restated Transmission Agreement section 7.2)).

¹¹⁶ *Id.* P 155 (*citing* Ex. IPC-28 (Durick Reb. Test. 18:10-11)).

¹¹⁷ *Id.*

¹¹⁸ Idaho Power Brief on Exception at 46.

¹¹⁹ *Id.*

service a lower priority than OATT firm service.¹²⁰ According to Idaho Power, the fact that the agreement includes exceptions to continuous service means by itself that the service is not firm. Idaho Power observes that the Presiding Judge concluded that Restated Transmission Agreement section 3.6 limits East to West Transfer Service to 1,410 MW, but that below that limit, PacifiCorp enjoys service on a continuous, firm basis. Idaho Power argues that, to the contrary, service has in fact been curtailed on many occasions, while Idaho Power's priority rights to its reserved blocks of service were maintained.¹²¹

61. With regard to Restated Transmission Agreement section 3.6.1, Idaho Power insists that the Presiding Judge's conclusion disregards the limitations on East to West Transfer Service where, under normal system conditions with all facilities in service, transfer capability is reduced. Idaho Power notes that, for example, in 1996 the Brownlee East path was derated by 550 MW with all facilities in service.¹²² Idaho Power reiterates that if the capacity of Idaho Power's interconnection with the Pacific Northwest was reduced below 1,980 MW during normal system conditions, Idaho Power can curtail service to PacifiCorp while maintaining its own 570 MW share. Idaho Power maintains that, under normal system conditions, East to West Transfer Service can be curtailed for Idaho Power's other uses—including to provide firm and non-firm OATT service—within this 570 MW block.¹²³ Idaho Power maintains that service that is curtailable under normal system conditions to provide non-firm service is not firm service under any definition of the term.

62. Idaho Power also takes issue with the Presiding Judge's finding that Idaho Power's 570 MW priority right on the Western Interconnections typically does not impact the bulk of PacifiCorp's East to West Transfer Service rights. Idaho Power states that this conclusion reflects a misapprehension that Divide, LaGrande, Enterprise, and Midpoint-Summer Lake are part of a single rated path, and when that path is reduced below 1,980 MW, PacifiCorp must curtail its uses of East to West Transfer Service if Idaho Power is using its 570 MW. Idaho Power goes on to argue that even if the Presiding Judge is correct that such interruptions to PacifiCorp's service do not typically

¹²⁰ *Id.* at 76.

¹²¹ *Id.* (citing Ex. IPC-32 at 6:17-11:20).

¹²² *Id.* at 76-77 (citing *Arizona Pub. Serv. Co. v. Idaho Power Co.*, 87 FERC ¶ 61,303, at 62,223 (1999)).

¹²³ *Id.* (citing Ex. IPC-28 at 16:11-12).

occur or impact the bulk of PacifiCorp's schedules, PacifiCorp's service over this path still has lower priority than Idaho Power's use of the 570 MW block.¹²⁴

63. Additionally, Idaho Power takes exception to the Presiding Judge's conclusion that Idaho Power is unlikely to need its full 570 MW share for its own transactions. Idaho Power states that the 324 MW Total Transfer Capability number the Presiding Judge referred to was corrected to 2,304 MW in transcription corrections filed in the record.¹²⁵ Moreover, Idaho Power states, even if the path did have a rating of 324 MW PacifiCorp could never deliver more than 324 MW of power because Idaho Power's priority right to the first 570 MW of capacity would override PacifiCorp's rights. Further, Idaho Power argues, even if it did not use its 570 MW share, PacifiCorp could still only schedule 324 MW of the maximum 1,410 MW under the Restated Transmission Agreement.

64. Idaho Power also disagrees with the Presiding Judge's statement that it is difficult to see how Idaho Power could schedule up to 570 MW of firm service on its Western Interconnections under normal system conditions in a way that would bring subsection 3.6.1 of the Restated Transmission Agreement into play to cause an economic interruption in PacifiCorp's usage of the westbound Idaho to Northwest path. Idaho Power argues that the Presiding Judge does not recognize that the capacity of the path is periodically derated. Idaho Power reiterates that if under normal system conditions the capacity of the Idaho to Northwest path was reduced below 1,980 MW, under section 3.6 of the Restated Transmission Agreement PacifiCorp's usage would be curtailed if Idaho Power were using its 570 MW block.¹²⁶ Moreover, Idaho Power states, the Presiding Judge's analysis failed to recognize that in the case of an outage resulting in capacity being reduced below 1,980 MW, PacifiCorp would be subject to curtailments. Idaho Power asserts that such curtailments are frequent and demonstrate the service to PacifiCorp is not firm.¹²⁷

65. Idaho Power also takes issue with the Presiding Judge's findings regarding Restated Transmission Agreement section 3.8. Idaho Power states that this provision gives it the priority right to 570 MW of westbound capability in the Idaho to Northwest path and a one-third share of the capability of the Borah West path. Idaho Power states that section 3.8 provides that on other paths (i.e., Midpoint West), Idaho Power will use

¹²⁴ *Id.*

¹²⁵ *Id.* at 61.

¹²⁶ *Id.* at 64.

¹²⁷ *Id.* at 65 (*citing* Ex. IPC-32 at 7:12-8:19).

its “best efforts” to maximize transfer capability for PacifiCorp, “consistent with other obligations.”¹²⁸ Idaho Power argues that because of his own definition of firm transmission services, which ignores curtailment priorities, the Presiding Judge found it unnecessary to address these provisions. Idaho Power asserts that the Presiding Judge therefore incorrectly concluded that because the curtailments addressed in Restated Transmission Agreement section 3.8 were for reasons related to system reliability and because OATT service was subject to similar curtailments related to reliability, the Restated Transmission Agreement provisions “do not render service under the Restated Transmission Agreement less firm than OATT service.”¹²⁹

66. Idaho Power asserts that the Presiding Judge used faulty logic to conclude that, because East to West Transfer Service and firm OATT service are subject to curtailment in some of the same circumstances, East to West Transfer Service therefore has the same firmness as firm OATT service.¹³⁰ Idaho Power states that “[t]his reasoning fails to take into account that, even in a circumstance in which both services were potentially subject to curtailment, East to West Transfer Service would be curtailed *prior* to firm OATT service.”¹³¹

67. In addition, Idaho Power argues that the Presiding Judge did not analyze the curtailment priorities of the Facilities Agreement and Interconnection Agreement. Idaho Power states that the services provided under the Facilities Agreement and under the Interconnection Agreement are defined such that the relative priority of the services under those agreements and Idaho Power’s native load has never arisen as an operational matter.¹³² According to Idaho Power, the Facilities Agreement and the Interconnection Agreement are silent as to the firmness of the services; therefore, the unrebutted statements of its witnesses testifying that the services are not OATT firm should be considered. Additionally, Idaho Power states that its witness testified that even though these agreements do not contain a specific curtailment priority, he does not believe that the parties intended that Idaho Power would interrupt native load in order to maintain economic transfers under these services as would be required by the OATT.¹³³

¹²⁸ *Id.* at 78.

¹²⁹ *Id.* (quoting Initial Decision at P 151).

¹³⁰ *Id.* at 78-79 (citing Initial Decision at P 151).

¹³¹ *Id.* at 79.

¹³² *Id.* at 55.

¹³³ *Id.* at 55-56.

iii. Opposing Exceptions

(a) Intervenors

68. Intervenors disagree with Idaho Power's assertion that the Restated Transmission Agreement services are non-firm because section 3.5 of the Restated Transmission Agreement includes four exceptions to "continuous, firm" service. Intervenors assert that this is precisely the point the Presiding Judge makes—i.e., all firm service is subject to curtailment to preserve system reliability and nothing is universally, unequivocally firm. Intervenors also assert that Idaho Power is misconstruing the facts to suggest that with all facilities in service constraints occur on a frequent basis. Intervenors state that the only example of this kind of constraint Idaho Power provided occurred in 1996 on a path that does not affect PacifiCorp's rights under the Restated Transmission Agreement.¹³⁴ Instead, Intervenors argue all of the examples of curtailment provided by Idaho Power witness Park were for reliability purposes, for limited duration, and due to some contingency on Idaho Power's system, but were not due to long-term constraints with all facilities in service.¹³⁵ Intervenors state the Presiding Judge correctly identified the capacity limitations as specified in section 3.6 (i.e., reduction of PacifiCorp's available capacity from 1,600 MW to 1,410 MW) as the correct application of "limited transfer capabilities" under section 3.6.

69. Intervenors also challenge Idaho Power's characterization of the exceptions to the "continuous, firm" language of section 3.5. Intervenors argue that Idaho Power's priority right to 570 MW over its Western Interconnection only applies to Idaho Power's 230 kV Divide, LaGrande, and Enterprise interconnections (Western Interconnections). According to Intervenors, the Restated Transmission Agreement specifically excludes the Midpoint interconnection from the limits of sections 3.6 and 3.8.¹³⁶ Noting that the Midpoint interconnection has the most capacity and that PacifiCorp tends to schedule most East to West Transfer Service to Midpoint, Intervenors assert that is reasonable to conclude that the 570 MW priority right on the Western Interconnection would not affect the bulk of PacifiCorp's East to West Transfer Service rights. Further, Intervenors argue, even if the three Western Interconnections were reduced to 570 MW or below, PacifiCorp could avoid any curtailment impact by sending its entire schedule to Midpoint.¹³⁷ Intervenors add that under the Restated Transmission Agreement

¹³⁴ Intervenors Brief Opposing Exceptions at 75 (*citing* Idaho Power Brief on Exceptions at 76-77).

¹³⁵ *See Id.*

¹³⁶ *See Id.* at 46-47 (*citing* Tr. 383:5-19).

¹³⁷ *Id.* at 47 (*citing* Tr. 239:23-240:16).

PacifiCorp has the flexibility to move its scheduled point of delivery not only for the next hour, but also within the hour if an outage affects PacifiCorp's ability to provide reliable service.¹³⁸

70. Additionally, Intervenor argue that the curtailment provisions applicable to the Borah West path are more firm than OATT firm service. According to Intervenor, sections 3.62 and 3.82 provide for curtailment based on contract shares rather than schedules, and give PacifiCorp a first priority right to Idaho Power's share if Idaho Power is not using it.¹³⁹ In contrast, Intervenor state that OATT customers' schedules are curtailed *pro rata* and do not include priority rights for unused capacity. Intervenor add that although the Restated Transmission Agreement specifies curtailment rights for the Western Interconnections and Borah West, for the rest of Idaho Power's system (i.e., Midpoint to Summer Lake), section 3.8.3 of the Restated Transmission Agreement requires Idaho Power to use its best efforts to maximize the transfer capability to PacifiCorp.¹⁴⁰ Intervenor argue that using best efforts does not subordinate PacifiCorp's rights to use Idaho Power's system or cause PacifiCorp's rights to be less firm than OATT firm service.

71. Intervenor also argue that Idaho Power overstates the effect of the transcript error on the Presiding Judge's analysis. Intervenor agree with Idaho Power that, when the Presiding Judge referred to the 324 Total Transfer Capability figure, he mistakenly made reference to a portion of transcript later corrected. However, Intervenor argue, his primary finding about Idaho Power's curtailment priority and whether or not the Restated Transmission Agreement service is firm or not was not affected by this mistake. Intervenor state that the Presiding Judge made the distinction between curtailment for reliability purposes and interruption by a higher priority product prior to, and not in reliance on the 324 MW figure.¹⁴¹ Further, Intervenor state, prior to the transcript error reference, the Presiding Judge had already made his finding that because Idaho Power's 570 MW priority right only applies to the Western Interconnections and not to the line that supports most of PacifiCorp's Restated Transmission Agreement schedules (i.e., the PacifiCorp's Midpoint to Summer Lake 500 kV line), "Idaho Power's 570 MW priority right on the Western Interconnections typically does not impact the bulk of PacifiCorp's East to West Transfer Service rights."¹⁴² Thus, Intervenor conclude, the portion of the

¹³⁸ *Id.* (citing Ex. INT-13 at 46-47).

¹³⁹ *Id.* at 49 (citing Ex. INT-13 at 29-30, 34).

¹⁴⁰ *Id.* at 49 (citing Ex. INT-13 at 35).

¹⁴¹ *See Id.* at 65.

¹⁴² *Id.* at 65 (quoting Initial Decision at P 143).

discussion containing the transcript error was not the basis for the Presiding Judge's conclusion regarding the effect of Idaho Power's 570 MW priority right on the firmness of the Restated Transmission Agreement.

72. With regard to Idaho Power's argument regarding periodic derating of the westbound Idaho to Northwest path, Intervenor's argue that Idaho Power produced no evidence that that path had ever been derated. Intervenor's assert that the only example Idaho Power provides occurred in 1996 on another path (i.e., Brownlee East)¹⁴³ and if Idaho Power's paths are subject to periodic derating, Idaho Power should be able to provide examples. Intervenor's maintain that Restated Transmission Agreement section 3.6 is intended to recognize that the Idaho Power system has long-term physical constraints that may limit Idaho Power's ability to deliver the full 1,600 MW and, this is why the Restated Transmission Agreement East to West Transfer Service is currently limited to 1,410 MW. Intervenor's state that PacifiCorp's rights could be affected if a physical constraint arises in the future but assert that such a constraint would have similar effects on other firm service customers. Intervenor's conclude that the Presiding Judge's finding that section 3.61 does not provide for interruption of PacifiCorp's rights for economic reasons, and therefore does not affect the firmness of those rights, is correct.

(b) Staff

73. Staff states that the Presiding Judge correctly concluded that the exceptions under section 3.5 of the Restated Transmission Agreement relate to specific circumstance that only relate to curtailments to preserve system reliability. Specifically, Staff states, the record shows that the second (i.e., *force majeure*) and third (reductions in transfer capability) are similar to the types of limitations on the continuity of OATT firm transmission service.¹⁴⁴ Additionally, Staff states that the first exception does not constitute a restriction on the transfer services provided by Idaho Power to PacifiCorp such that those service should be deemed other than firm service.¹⁴⁵ Staff also states that the fourth exception addresses Additional East to West Transfer Service, not the East to West Transfer Service. Staff concludes that, taken as a whole, the exceptions do not impose such restrictions on the East to West Transfer Service as would warrant any conclusion other than that the service is firm in nature.

¹⁴³ *Id.* at 66 (*citing* Idaho Power Brief on Exception at 64).

¹⁴⁴ Staff Brief Opposing Exceptions at 29 (*citing* Idaho Power OATT at sections 1.7, 13.6, 30.8 and 33.1-33.7).

¹⁴⁵ *Id.* (*citing* Ex. INT-5 at 65-66).

iv. Commission Determination

74. The Commission affirms the Presiding Judge's determination that the East to West Transfer Service is firm service for the purpose of calculating Idaho Power's formula rates. Despite Idaho Power's assertion, the mere fact that the Restated Transmission Agreement identifies specific exceptions to "continuous, firm" service does not in and of itself render the services under the agreement of such a nature as to warrant rate-design treatment as non-firm service. Even the fourth exception, which relates to Additional East to West Transfer Service and operates as a non-firm adjunct component of East to West Transfer Service does not substantially degrade the essentially firm nature of the service. The exceptions under section 3.5 of the Restated Transmission Agreement relate in the main to curtailments to preserve system reliability and are sufficiently similar to provisions found in the Idaho Power OATT related to firm OATT service to warrant similar treatment.¹⁴⁶

75. For example, the second exception at section 8 of the Restated Transmission Agreement is similar to the *force majeure* provisions that apply to firm and non-firm OATT service. The other exception addressing temporary impairments due to conditions such as forced outages of facilities, maintenance and loop flow, also is similar to the reliability curtailment provisions of the OATT. We also find, as did the Presiding Judge, that Additional East to West Transfer Service, as a non-firm aspect of the general East to West Transfer Service, does not so impair East to West Transfer Service as to render that entire service non-firm.

76. Another exception governing limitations on transfer capability under section 3.6 is spelled out in the language of the Restated Transmission Agreement, which provides "capacity limitations exist on the Idaho Power system during normal system conditions with all facilities in service . . . which limit the capability of Idaho Power to deliver 1,600 MW for PacifiCorp from the Points of Receipt to the Points of Delivery simultaneous with Idaho Power's full use of its reserved transmission capacity on its transmission system."¹⁴⁷ We find that the Presiding Judge properly concluded Idaho Power currently limits PacifiCorp's capacity under the Restated Transmission Agreement to 1,410 MW rather than full 1,600 MW contracted-for amount, as a result of the limited transfer capabilities of the Bridger system and the need to provide an allowance for Idaho Power to move its share of Bridger over to its own system.¹⁴⁸ Thus, this reduction of PacifiCorp's rights under the Restated Transmission Agreement from 1,600 MW to 1,410

¹⁴⁶ Initial Decision at P 124.

¹⁴⁷ *Id.* P 139 (*citing* Ex. INT-13 (Restated Transmission Agreement section 3.6)).

¹⁴⁸ *Id.* (*citing* INT-13) (Restated Transmission Agreement section 3.6).

MW is a result of the capacity limitations that exist on Idaho Power's system "during normal system conditions with all facilities in service."

77. Although Idaho Power argues that under normal system conditions, East to West Transfer Service can be curtailed for Idaho Power's use, including to provide firm and non-firm OATT service within its 570 MW block, there are several problems with Idaho Power's assertion. First, as the Presiding Judge found, Idaho Power has "the unrestricted right, at all times *and regardless of system conditions*, to the use of not less than 570 MW of the westbound transfer capability in Idaho Power's Western Interconnections."¹⁴⁹ PacifiCorp enjoys service on a "continuous, firm basis" up to the current 1,410 MW limit. However, we find that nothing in sections 3.5 or 3.6 of the Restated Transmission Agreement allows Idaho Power to curtail PacifiCorp's service below 1,410 MW *under normal system conditions* (i.e., the total capacity is equal to 1,980 MW). Additionally, section 3.5 specifically provides that PacifiCorp has first rights to Idaho Power's 570 MW block on the Northwest path, up to its contract limits, if Idaho Power is not using it. Thus, under normal system conditions, PacifiCorp has full rights to 1,410 MW and the right to use the 570 MW block on the Northwest path if Idaho Power is not using it. We also find that the examples Idaho Power provided of curtailments involved reliability constraints or some other system contingency, and did not occur during normal system conditions with all facilities in service.¹⁵⁰

78. The evidence shows that Idaho Power's 570 MW right on the Western Interconnections typically does not affect the bulk of PacifiCorp's East to West Transfer Service rights such that the service should be considered non-firm. The Presiding Judge found that the record shows that the Midpoint-Summer Lake 500 kV line has the most capacity of any of the four interconnections and that PacifiCorp tends to schedule most East to West Transfer Service to that line.¹⁵¹ No one disputes these findings. However, section 3.6 of the Restated Transmission Agreement, which entitles Idaho Power to the first 570 MW of capacity over the Western Interconnections, and section 3.6.2, which addresses the Borah to Kinport path, do not apply to the Midpoint to Summer Lake path. Additionally, section 3.8, specifies how service is curtailed in the event of temporary impairment over the Western Interconnections and the Borah to Kinport path. However, for the Midpoint to Summer Lake path, the Restated Transmission Agreement provides no specific access allocation or priority for service to PacifiCorp, but instead requires Idaho Power to use its "best efforts to maximize the transfer capability to PacifiCorp for

¹⁴⁹ *Id.* P 114 (*citing* Ex. INT-13 (Restated Transmission Agreement section 3.6.1)).

¹⁵⁰ *Id.* P 62.

¹⁵¹ *See id.* P 142.

East to West Transfer Services consistent with other obligations.”¹⁵² Additionally, even in the event of a curtailment situation with PacifiCorp using the Northwestern path—which is the path to which Idaho Power’s rights to 570 MW of capacity applies—PacifiCorp has flexibility under the Restated Transmission Agreement to send its schedule to Midpoint, within the hour, in order to avoid disruption to service.¹⁵³

79. Accordingly, we deny Idaho Power’s exceptions and affirm the Presiding Judge’s determination that the East to West Transfer Service is firm service for the purpose of calculating Idaho Power’s formula rates.

c. Other Services under the Restated Transmission Agreement

i. Initial Decision

80. In examining “Other Services,” the second category of services under the Restated Transmission Agreement, the Presiding Judge notes that the first component, Dynamic Overlay Service, can be interrupted by Idaho Power pursuant to section 4.2.1 of the Restated Transmission Agreement if it “is causing Idaho Power to forego the opportunity to use its transmission system for transactions outside of this Agreement.”¹⁵⁴ He also notes that for the second component, Wyoming-Utah Transmission Service, Restated Transmission Agreement section 4.3.1, provides that this service is subject to “Idaho Power’s having sufficient firm transmission capacity available on its system, and on the Bridger transmission system, to provide such service, after taking into account Idaho Power’s rights to deliver its share of the Jim Bridger Project” power to its own system.¹⁵⁵ Accordingly, he concludes that Dynamic Overlay Service is fully interruptible by Idaho Power’s other firm and non-firm uses and Wyoming-Utah Transmission Service is subordinate to Idaho Power’s native load.¹⁵⁶ He finds that both component services, therefore, must be viewed as “non-firm.” However, he finds that, as is the case with Additional East to West Transfer Service, Idaho Power provides no breakout of the load

¹⁵² See *id.* P 58.

¹⁵³ See Restated Transmission Agreement, section 5.3.

¹⁵⁴ Initial Decision at P 156 (*citing* Ex. IPC-28 (Durick Reb. Test. 18:18-21); INT-13 (Restated Transmission Agreement section 4.2.1)).

¹⁵⁵ *Id.* (*citing* Ex. IPC-28 (Durick Reb. Test. 19:4-8); INT-13 (Restated Transmission Agreement section 4.3.1)).

¹⁵⁶ *Id.* P 157.

or revenue levels of these non-firm components from the other Restated Transmission Agreement levels. Therefore, he finds it is impossible on these facts to consider these “Other Services” as something separable from the essentially firm Restated Transmission Agreement service.¹⁵⁷

ii. Idaho Power’s Exceptions

81. Idaho Power state that it agrees with the Presiding Judge that the Other Services are non-firm but takes issue with the Presiding Judge’s finding that like Additional East to West Service the Other Services cannot be considered separate and apart from the rest of firm Restated Transmission Agreement service. Idaho Power asserts that revenue levels for the Other Services are specified in section 7.3 of the Restated Transmission Agreement,¹⁵⁸ and contends that revenue-crediting is warranted for the entire package of Restated Transmission Agreement services because of these non-firm components embedded in them.

iii. Opposing Exceptions

82. Intervenors contend that the status of these two “lesser” component services does not gainsay the fact that Idaho Power provides PacifiCorp with 1,410 MW of firm service under the Restated Transmission Agreement and deducts 1,410 MW from its Available Transfer Capability calculation.¹⁵⁹ Intervenors state that although the Presiding Judge chose to view the Restated Transmission Agreement as a whole, he could have viewed the services separately and found that the 1,410 MW of demand for the East to West Transfer Service should be added to the divisor and, since the Other Services have “non-firm aspects” to them, revenue-credit the \$1,000,000 the PacifiCorp pays annually for those services.¹⁶⁰

iv. Commission Determination

83. We deny Idaho Power’s exception. We find that service with a curtailment priority below native load is not necessarily more interruptible than firm for ratemaking purposes. The Commission eschews a bright-line test and applies a case-by-case basis analysis to ascertain the appropriate rate treatment for allocating costs of services that

¹⁵⁷ *Id.*

¹⁵⁸ Idaho Power Brief on Exceptions at *Id.* at 80 (*citing* Tr. 375:20-376:5).

¹⁵⁹ Intervenors Brief Opposing Exception at 78.

¹⁶⁰ *Id.* at 78-79.

may not clearly fall into either an interruptible or firm classification. We find the Presiding Judge's evaluation of curtailment for reliability purposes and interruption for economic purposes is a useful analysis under the circumstances of this case.¹⁶¹ How Idaho Power treats the Legacy Agreements services and the Presiding Judge's analysis of the OATT and the operation of the terms of the Restated Transmission Agreement as a whole, all support a determination that the services here are more firm than not, even if subordinate to native load.

84. Accordingly, we deny Idaho Power's exception to the finding that the Restated Transmission Agreement services should be considered firm for ratemaking purposes because the loads and revenues for Other Services cannot be separated out from those of the East to West Transfer Service. Idaho Power points to section 7.3 of the Restated Transmission Agreement to support its claim that the Other Services can be identified and separated from the East to West Transfer Service. The Commission finds, however, that while section 7.3 of the Restated Transmission Agreement specifies the revenues (\$1.0 M per year) that PacifiCorp pays Idaho Power for the provision of the Other Services, it does not identify any load levels associated with those services such that the demands for the Other Services can be separated from the 1,410 MW of transmission service to PacifiCorp under the Restated Transmission Agreement.¹⁶² We find, with the Presiding Judge, on the totality of the evidence that characterizing the "Other Services" as non-firm does not render the rest of Restated Transmission Agreement service non-firm for ratemaking purposes. Accordingly, we reject Idaho Power's exceptions.

d. Curtailment Priority of Legacy Agreements Services vis-à-vis Native Load

i. Initial Decision

85. The Presiding Judge rejects Idaho Power's contention that transmission service with a curtailment priority below that of native load is not firm. According to the Presiding Judge, Idaho Power maintains that the Legacy Agreements services should be revenue-credited rather than cost-allocated because they fall below native load services in firmness.¹⁶³ However, the Presiding Judge finds inapposite the cases Idaho Power offers

¹⁶¹ See Initial Decision at P 116-123.

¹⁶² Section 7.3 specifies "[i]t is expressly understood that the annual \$1,000,000 charge for Other Service is a negotiated compromise amount that does not reflect either Party's position as to an appropriate level of compensation for Other Services." Restated Transmission Agreement section 7.3.

¹⁶³ Initial Decision at P 158 (*citing* Idaho Power Initial Br. at 16-17).

to support its position. He notes that Idaho Power argues that in *NU*, the Commission characterized a service that had a curtailment priority below native load as not constituting firm transmission service. The Presiding Judge acknowledges that in *NU* the Commission stated that NU's "preferred" service under a transmission service agreement was "a form of non-firm service due to the possibility of curtailment of service."¹⁶⁴ He explains, however, that the Commission affirmed the *NU* Judge's finding that the "preferred" TSA service was "non-firm" rather than "firm" because "*under normal as well as emergency conditions* the service to [the preferred TSA customer] is of a lower priority than service to *NU's* native load and [third party wheeling] customers."¹⁶⁵ Accordingly, the Presiding Judge reasons, *NU* stands for the proposition that service is "non-firm" when it is "interruptible" for economic reasons as well as "curtailable" for reliability reasons, whereas "firm" service is only "curtailable" for reliability reasons.

86. Next, the Presiding Judge analyzes *QST Energy Trading Inc. v. Central Ill. Pub. Serv. Co.*¹⁶⁶ He notes that QST Energy had complained to the Commission that Central Illinois Public Service Company denied QST Energy's request for firm monthly OATT service, even though Central Illinois' OASIS indicated that there was available transmission capacity. He states that QST Energy argued that Central Illinois should not have denied its request in order to preserve a margin of reliability on the system in case of an outage, but instead should have provided to QST Energy "firm transmission service until Central Illinois has such an outage. At that point, . . . Central Illinois should totally curtail QST's 'firm' transmission service (rather than curtail on a *pro rata* basis), *while maintaining service to Central Illinois' native load.*"¹⁶⁷ The Presiding Judge states that the Commission disagreed, holding that "[t]his scenario is not firm service—it is nonfirm service, the terms and conditions for which are already specified in the *pro forma* tariff. [footnote omitted]"¹⁶⁸ The Presiding Judge states that rather than proving Idaho Power's point, *QST* merely holds that a form of service having priority below native load is not entirely firm service because it can be curtailed for reliability reasons—which is true, but only half the story. He finds that whether that service can or cannot be interrupted for

¹⁶⁴ *Id.* P 160 (citing *NU*, 84 FERC ¶ 61,159 at 61,867-68).

¹⁶⁵ *Id.* (citing *Northeast Utilities*, 62 FERC ¶ 63,013, at 65,025 (1993) (emphasis added in Initial Decision)).

¹⁶⁶ 85 FERC ¶ 61,166 (1998) (*QST*).

¹⁶⁷ Initial Decision at P 161 (quoting *QST*, 85 FERC ¶ 61,166 at 61,666 (emphasis added in Initial Decision)).

¹⁶⁸ *Id.*

economic reasons as well—the unique quality of interruptible, non-firm service that really makes it different from “firm” service—is simply not discussed in *QST*.

87. The Presiding Judge also rejects Idaho Power’s reliance on *Cleveland Elec. Illum. Co. v. City of Cleveland, Ohio*.¹⁶⁹ He states that in *Cleveland* a scheduling of service that was contractually identified as “non-firm” was found to be interruptible because “[n]on-firm or interruptible service may be curtailed before any interruption of service to firm customers.[footnote omitted] This less firm and thus less expensive service simply does not have the same availability feature of firm service.”¹⁷⁰ He concludes that the holding in *Cleveland* is not at odds with his finding that transmission service with a curtailment priority below that of native load is not necessarily non-firm for rate design purposes.¹⁷¹

ii. Idaho Power’s Exceptions

88. On exceptions, Idaho Power argues that the Presiding Judge erred in finding that service that is curtailable before native load and firm OATT services is firm transmission service.¹⁷² Idaho Power states that in *NU*, the transmission service provider claimed that the “preferred” service in question was firm transmission service because it was not curtailable for economic reasons, but only in the event of reliability-related system conditions. According to Idaho Power, the *NU* Judge’s decision, which was affirmed by the Commission, rejected *NU*’s position, finding that service that was curtailable before native load was a form of non-firm transmission service.¹⁷³ Idaho Power states that in that case the Commission addressed the same characteristics as in the instant proceeding. Idaho Power states that, the Presiding Judge misunderstood the firmness of the service at issue in *NU*. Idaho Power states that nothing in *NU* provides that “preferred” service was interruptible for economic reasons and argues that the service was not interruptible for economic reasons and had a priority above the transmission service providers’ non-firm transmission service and transmission service to utilities purchasing power from *NU*.

89. Regarding *QST*, Idaho Power argues that the Commission found that transmission service that would be curtailable ahead of native load in the event of a particular system

¹⁶⁹ *Cleveland Elec. Illum. Co. v. City of Cleveland, Ohio*, 75 FERC ¶ 61,258 (1996) (*Cleveland*).

¹⁷⁰ Initial Decision at P 162 (*citing Cleveland*, 75 FERC ¶ 61,258 at 61,841).

¹⁷¹ *See id.*

¹⁷² *See* Idaho Power Brief on Exception at 40 (*citing* Initial Decision at P 123).

¹⁷³ *Id.* at 42 (*citing Northeast Utilities*, 62 FERC ¶ 63,013 at 65,025).

outage is not firm service.¹⁷⁴ Idaho Power claims that in *QST* the Commission analyzed the same circumstances present in the instant proceeding and that the Presiding Judge's finding is inconsistent with the Commission's determination in *QST*. According to Idaho Power, the Commission held in *QST* that if the service is interruptible before native load and firm OATT service for any reason that by itself is sufficient to render the service not firm.¹⁷⁵ Idaho Power adds that the service in *QST* was firmer than non-firm service and not interruptible for economic reasons.

90. With regard to *Cleveland*, Idaho Power argues that despite the Presiding Judge's finding, the Commission did not state that the service at issue in *Cleveland* was interruptible for economic or other reasons. Instead, Idaho Power argues, the Commission stated that the agreement in question "permits curtailment 'when during such period conditions arise that could not have been reasonably foreseen at the time of the reservation and cause the transmission to be burdensome to the supplying party's system.'" ¹⁷⁶ Idaho Power argues that this gave the service a priority below firm load and that such service is not a form of firm service. Idaho Power notes that the Presiding Judge's reliance on the Commission's reference to "interruptible" service in *Cleveland* is misplaced because the Commission did not use "interruption" the way that it has been defined in the instant proceeding and the Commission did not state that the service was interruptible.¹⁷⁷ Rather, Idaho Power states, the Commission referred to "interruption" of firm service which is the practice the Presiding Judge refers to as "curtailment."

91. Idaho Power insists that "firm" transmission service refers only to service with a curtailment priority and planning obligation equivalent to native load.¹⁷⁸ Idaho Power argues that this definition of firm service should be decisive in this case because, with a priority below native load, services under the Legacy Agreements are not comparable to OATT firm and native load services that are included in the divisor of the formula rate.

¹⁷⁴ *Id.* at 41 (citing *QST*, 85 FERC ¶ 61,166 at 61,166).

¹⁷⁵ *Id.* at 42.

¹⁷⁶ *Id.* at 43-44 (quoting *Cleveland*, 75 FERC ¶ 61,258 at 61,840 n.13).

¹⁷⁷ *Id.* at 44 n.21.

¹⁷⁸ *Id.* at 44 (citing Ex. IPC-23 at 7:16-17; Ex. IPC-28 at 31:16-17; *Louisville Gas and Elec. Co.*, 114 FERC ¶ 61,282, at P 120 (2006); *New York State Elec. & Gas Corp.*, 82 FERC ¶ 61,209 at 61,823 (1998); *Mid-Continent Area Power Pool*, 87 FERC ¶ 61,075 at 61,311-12 (1999); *Wisconsin Public Power Inc., SYSTEM v. Wisconsin Public Service Corp.*, 84 FERC ¶ 61,120, at 61,650 n.62 (1998)).

iii. Opposing Exceptions

92. Intervenors argue that Idaho Power's exception should be rejected. Intervenors maintain that the appropriate test of firmness is whether the service can be interrupted for economic reasons, and question Idaho Power's reading of *NU*. Intervenors point out that Idaho Power failed to mention that in *NU* the Commission found the "preferred" transmission service in question "is a type of transmission service which is between firm and non-firm service."¹⁷⁹ Intervenors argue that Idaho Power disregards the fact that the agreements in question were not only subordinate to NU's other wholesale sales and native load, but were also subject to curtailment if delivery of firm power to retail loads of other utilities served directly from the NU Companies transmission or distribution systems were to be impaired.¹⁸⁰ Here, the Intervenors state, the record demonstrates that the Restated Transmission Agreement obligations are firm and that when other transmission customers, including Arizona Public Service Company, have sought OATT firm point-to-point transmission service over the Borah West path, the Restated Transmission Agreement precluded providing that service whether normal or abnormal operating conditions exist.¹⁸¹

93. Intervenors also disagree with Idaho Power's reading of *QST*. Intervenors state that the Presiding Judge was correct in noting "[w]hether that service can or cannot be interrupted for economic reasons as well—the unique quality of non-firm service that really makes it different from 'firm' service—is simply not discussed in *QST*."¹⁸² Additionally, Intervenors argue that Idaho Power's interpretation of *Cleveland* is incorrect because in that case the service in question was definitionally relegated to a low priority status at a lower price, and thus determined to be non-firm in nature. Intervenors assert that none of the cases relied upon by Idaho Power address rate design treatment of pre-Order No. 888 transmission obligations in the establishment of OATT rates, and if those cases were controlling, they should have played prominent roles in the decisions (e.g., *AEP* and *CECo*) that followed the Order No. 888 and 888-A requirement that a case-by case evaluation be performed to determine whether grandfathered commitments warrant inclusion in the load divisor of OATT rates.

¹⁷⁹ Intervenors Brief on Exceptions at 53 (*quoting* NU, 84 FERC ¶ 61,159 at 61,868).

¹⁸⁰ *Id.* at 53 (*quoting* *Northeast Utilities Serv. Co.*, 62 FERC ¶ 63,013 at 65,025).

¹⁸¹ *Id.* at 53-54 (*citing* Tr. 449:2-11; Tr. 457:13-19; *Idaho Power Co.*, 90 FERC ¶ 61,009 (2000), Ex. INT-59 at 3, 6).

¹⁸² Initial Decision at P 161.

iv. Commission Determination

94. We deny Idaho Power's exception. Idaho Power is wrong to assert that transmission service with a curtailment priority below native load is always non-firm. This approach would prevent a case-by-case rate-design analysis based on particular facts. Priority vis-à-vis native load is but one factor that may be considered in a case-by-case analysis of whether a service is firm or non-firm for ratemaking purposes but is not alone the determinative factor.

95. In *NU*, the service at issue was non-firm because *under normal* as well as emergency conditions, the service had a lower priority than native load and third-party wheeling services. Unlike the services in *NU*, except for the limitations on Other Services and the Additional East to West Transfer Service, the Legacy Agreements services are not curtailable under normal conditions. Accordingly, *NU* does not stand for the premise that to be deemed "firm", a service must have priority equal or greater than native load.

96. Similarly, we disagree with Idaho Power's reading of *QST*. In *QST* the Commission stated:

In essence, QST argues that Central Illinois should provide QST "firm" transmission service until Central Illinois has such an outage. At that point, QST argues that Central Illinois should totally curtail QST's "firm" transmission service (rather than curtail on a pro rata basis), while maintaining service to Central Illinois' native load. In this scenario, the transmission service that QST requests is not firm service -- it is nonfirm service, the terms and conditions for which are already specified in the pro forma tariff.¹⁸³

97. Contrary to Idaho Power's assertions, the Commission did not find that if the service was interruptible before native load and firm OATT service for any reason, that fact by itself was sufficient to render the service not firm. Further, as the Presiding Judge properly finds, the Commission in *QST* did not discuss whether or not the service at issue could be interrupted for economic reasons as well as reliability reasons.

98. We also find that *Cleveland* does not support Idaho Power's position. First, whether the service in question was firm or non-firm was not at issue in *Cleveland*; the service was contractually identified as non-firm.¹⁸⁴ Second, the situation in *Cleveland*

¹⁸³ *QST*, 85 FERC ¶ 61,166 at 61,166.

¹⁸⁴ *Cleveland*, 75 FERC ¶ 61,258 at 61,840-41.

involved a curtailment of service that was acknowledged to be less than firm in a reliability situation. In *Cleveland* the Commission stated:

As Cleveland itself acknowledges, it contracted for services that "are less than fully firm and can be interrupted under specified conditions." [] Non-firm or interruptible service may be curtailed before any interruption of service to firm customers. [] This less firm and thus less expensive service simply does not have the same availability feature of firm service.¹⁸⁵

99. Accordingly, there was no need for the Commission to reach any determinations on whether a service with a priority below native load is non-firm because there the fact that the service was non-firm was not contested in that case. The Commission has, at least in one case, found a service with a lower curtailment priority than native load to be "more akin to nonfirm service than firm service."¹⁸⁶ However, that does not mean that by definition curtailment priority is the sole determinative factor for cost allocation and rate design. The case-by-case evaluation for the purpose of determining how pre-Order No. 888 transmission service agreements should be factored into an OATT formula rate requires that all relevant factors be considered.

e. Other Factors

i. Initial Decision

100. The Presiding Judge considers how Idaho Power treats the Legacy Agreements in connection with posting Available Transfer Capability on OASIS, transmission planning, and FERC Form 1 reporting. The Presiding Judge finds that the 1,410 MW of East to West Transfer Service that is set aside under the Restated Transmission Agreement for PacifiCorp's use is not posted on Idaho Power's OASIS for non-firm use unless PacifiCorp does not schedule energy for transmission on that capacity.¹⁸⁷ He reasons that PacifiCorp's rights to East to West Transfer Service on Idaho Power's system are paramount over any non-firm user of that capacity, which indicates that PacifiCorp's rights under the Legacy Agreements constitute firm service.

101. Next, the Presiding Judge examines how Idaho Power accounts for the Legacy Agreements in calculating Available Transfer Capability. He states that the Available Transfer Capability of Idaho Power's system, which is calculated separately for firm and

¹⁸⁵ *Id.* at 61,841 (internal citations omitted).

¹⁸⁶ *New England Power Co.*, 49 FERC ¶ 61,129 at 61,554.

¹⁸⁷ Initial Decision at P 125 (*citing* Ex. IPC-32 (Park Reb. Test. 17:16-18:11)).

non-firm services, is what remains of its Total Transfer Capability and is posted on Idaho Power's OASIS "after subtracting the contract rights, firm commitments, network usage, Capacity Benefit Margin and Transmission Reliability Margin."¹⁸⁸ Pointing out that the total 1,410 MW commitment to PacifiCorp under the Legacy Agreements is subtracted from firm Total Transfer Capability to reach firm Available Transfer Capability, the Presiding Judge finds that in making firm service available to other customers on its OASIS, Idaho Power does not interfere with PacifiCorp's Legacy Agreements rights.¹⁸⁹

102. With respect to planning, the Presiding Judge points out that in its 2004 Integrated Resource Plan Technical Appendix, which includes statistics on PacifiCorp's thermal units which are included as base resources for planning purposes, PacifiCorp included the Bridger plant and associated transmission as existing or planned resources. Additionally, he notes that Idaho Power included the Bridger units 1 through 4, of which Idaho Power owns a one-third share, in its 2006 resource plan. He concludes that both Idaho Power and PacifiCorp include the Bridger units in their resource plans and therefore consider the Bridger units as a firm source of power to service load.¹⁹⁰ He states that as Staff correctly points out, if the generation source is firm, the transmission for the source should also be firm.¹⁹¹

103. Additionally, the Presiding Judge rejects Idaho Power's argument that it has no obligation under the Legacy Agreements to plan for PacifiCorp's use of Idaho Power's system on the same basis as it plans for the use of its system by firm OATT and native load customers. The Presiding Judge notes that under Order No. 888-A, a transmission provider must build or expand its transmission system to accommodate an application for OATT firm point-to-point transmission service, as long as the transmission customer agrees to pay for that upgrade at either the higher of incremental expansion costs or a rolled-in embedded cost rate.¹⁹² Consistent with this obligation, Idaho Power usually adds capacity as needed to provide service to firm OATT customers and charges those customers a rolled-in rate rather than an incremental rate for the upgrade.¹⁹³ With regard

¹⁸⁸ *Id.* P 126 (*citing* Ex. IPC-32 (Park Reb. Test. 16:5-12)).

¹⁸⁹ *Id.* P 127 (*citing* Ex. IPC-32 (Park Reb. Test. 152:2-13; Staff Initial Brief 22; Ex. S-17 at 2 (IPCO Grid Operations & Planning Scheduling Business Practices))).

¹⁹⁰ *Id.* P 130.

¹⁹¹ *Id.*

¹⁹² *Id.* P. 131 (*citing* Order No. 888-A, FERC Stats. & Regs. ¶ 31,048 at 30,268).

¹⁹³ *Id.* (*citing* Durick Hg. Tr. 414:1-12).

to upgrades under the Legacy Agreements, he states that new investment on Idaho Power's transmission system for the benefit of PacifiCorp has to be paid for by PacifiCorp on an incremental basis. He also notes that the Interconnection and Facilities Agreements contain no planning and building obligation and that should an outage occur service under the Interconnection Agreement simply stops until the lines are replaced. The Presiding Judge concludes that there really is no difference between the way upgrades for OATT service or for the Legacy Agreements services are funded.

104. The Presiding Judge also finds that in determining what additional facilities are needed for new OATT transmission service requests, Idaho Power has taken its commitments under the Legacy Agreements into account and has refused to offer new firm service to others without receiving incremental reimbursement for upgrades.¹⁹⁴ For example, when performing a study in 1999 of the Borah West path for a service request from Arizona Public Service Company, Idaho Power maintained that it could not provide that service without new facility construction because it "had consistently considered 1,600 MW to be committed to PacifiCorp, and had denied its own merchant group's request for firm service across Borah West due to this commitment."¹⁹⁵

105. The Presiding Judge observes that Idaho Power has referred to the Legacy Agreements services in its FERC Form 1 filings for 2004 through 2006 as "other long-term firm service," (OLF)¹⁹⁶ but that Idaho Power witness Nichols testified that this "OLF" designation was erroneous and should have been "NF," the designation for "non-firm service."¹⁹⁷ The Presiding Judge states that, on the other hand, Idaho Power witness Schellberg testified that the correct designation should have been "OS," for "other services," which he stated was the designation used by Idaho Power in FERC Form 1 filings during the 1990s.¹⁹⁸ The Presiding Judge states that Idaho Power has never gone back to correct these entries on any of its FERC Form 1 filings. He states, however, regardless of Idaho Power management's disagreements on how the Legacy Agreements services should be characterized for regulatory reporting purposes, the Commission must look objectively at the nature and characteristics of these services to determine whether

¹⁹⁴ *Id.* P 134.

¹⁹⁵ *Id.* (citing Ex. INT-59 at 6).

¹⁹⁶ *Id.* P 164 (citing Nichols Hg. Tr. 50:4-14; Schellberg Hg. Tr. 521:6-522:1; Ex. INT-40 at 2 (Idaho Power FERC Form 1 at p. 328 lines 10-12); INT 41 at 3).

¹⁹⁷ *Id.* (citing Nichols Hg. Tr. 54:14-55:14, 66:22-67:7; Ex. INT-41 at 3).

¹⁹⁸ *Id.* (citing Schellberg Hg. Tr. 518:17-519:16; Tingle-Stewart Hg. Tr. 691:20-25; Ex. INT-41).

they are firm or non-firm for the purpose of deciding how they will be allocated for OATT pricing purposes. The Presiding Judge finds that how Idaho Power treats the Legacy Agreements service in its OASIS posting, calculation of ATC, planning and Form 1 reporting supports a finding that the service is firm, rather than non-firm.

ii. Idaho Power's Exceptions

106. On exceptions, Idaho Power argues that the 1,410 MW of East to West Transfer Service does not always have priority over non-firm OATT use. Idaho Power states that on the Northwest path, Idaho Power has first call on 570 MW of East to West Transfer service, giving PacifiCorp a lower priority than Idaho Power's other uses (i.e., firm and non-firm OATT service) within this reserved block.¹⁹⁹ By way of example, Idaho Power states that if the Northwest path were reduced to 980 MW and Idaho Power was using 200 MW of the path capacity for its own use on a non-firm basis, Idaho Power would reduce PacifiCorp's maximum use from 1,410 MW to 410 MW, and post 370 MW of Available Transfer Capability on its OASIS.²⁰⁰ Idaho Power concludes that East to West Transfer Service would have a lower priority than firm or non-firm OATT service using the 370 MW and using the 200 MW already in use by Idaho Power. Additionally, Idaho Power states that if the Borah West path were reduced to 1500 MW, East to West Transfer Service would be reduced to 1000 MW, and 500 MW would be available to Idaho Power and its firm and non-firm OATT customers. According to Idaho Power this means that non-firm OATT service within Idaho Power's 500 MW block would have a higher priority than East to West Transfer Service.

107. In addition, Idaho Power contends that, without any contrary evidence, the Presiding Judge dismissed Idaho Power's testimony about how it makes OASIS postings. Idaho Power states that its witness provided an example of a curtailment over the Borah West path in which PacifiCorp would be curtailed to 1000 MW, while 300 MW would be posted as Available Transfer Capability on Idaho Power's OASIS.²⁰¹ According to Idaho Power, the Presiding Judge rejected its assertion that it would post on its OASIS the 300 MW of Borah West transmission service, which is reserved for it under the Restated

¹⁹⁹ Idaho Power Brief on Exceptions at 58.

²⁰⁰ See *id.* Idaho Power arrives at these figures as follows: Total capacity (980 MW) minus Idaho Power's reserved block (570 MW) equals amount available for PacifiCorp's maximum use (410 MW); Idaho Power's reserved block (570 MW) minus amount being used by Idaho Power (200 MW) equals amount to post on OASIS (370 MW).

²⁰¹ *Id.* at 73.

Transmission Agreement.²⁰² Idaho Power claims that the Presiding Judge based his determination on a sentence in Restated Transmission Agreement section 3.6.2 that “provides that ‘[w]hen Idaho Power is not fully utilizing its reserved capacity, such capacity will be made available to PacifiCorp for East to West Transfer Services’ up to the maximum contract limits.”²⁰³ Idaho Power argues that the Presiding Judge incorrectly concluded that the capacity would not be posted on Idaho Power’s OASIS, but would instead be made available to PacifiCorp first. According to Idaho Power, the Presiding Judge apparently believed that Idaho Power’s utilization of its 707 MW of reserved capacity across Borah West is restricted to its provision of transmission service to itself, but not to others. Idaho Power argues that nothing in the language of the Restated Transmission Agreement suggests this limitation, and its witness refuted it.²⁰⁴ Idaho Power asserts that as the owner of the capacity, Idaho Power is required under its OATT to make the capacity available for sale on its OASIS²⁰⁵ and that Intervenor’s witness admitted that Idaho Power does so.

108. Idaho Power also asserts that even if Idaho Power’s use of such capacity was limited to use by Idaho Power, the only way for Idaho Power to access that capacity for wholesale transactions would be to reserve it on Idaho Power’s OASIS.²⁰⁶ Idaho Power states that if, for example, it wanted to use 100 MW across Borah West for a sale to BPA, Idaho Power would have to reserve the capacity on its OASIS, which it has done in the past. Thus, even under the Presiding Judge’s assumption regarding Idaho Power’s rights, the capacity would still have to be posted on Idaho Power’s OASIS and would be available to PacifiCorp only if Idaho Power did not utilize the reserved capacity to provide transmission service for itself, or to provide firm or non-firm transmission service to others. Idaho Power states that in contrast, a firm OATT customer would not have to wait behind potential non-firm OATT customers for the use of its 1,410 MW of reserved capacity in the event of a capacity reduction.²⁰⁷

²⁰² *Id.* (citing Initial Decision at P 148).

²⁰³ *Id.* at 74 (citing Initial Decision at P 148; Restated Transmission Agreement section 3.6.2).

²⁰⁴ *Id.* at 74 (citing Tr. 284:8-285:9).

²⁰⁵ *Id.* (citing Idaho Power OATT section 1.49 (currently section 1.54 of Idaho Power’s OATT)).

²⁰⁶ *Id.* (citing Idaho Power OATT sections 13.3, 17.1, 18.1.)

²⁰⁷ *Id.* at 75 (citing Tr. 284:8-285:9; Idaho Power OATT section 13.6.)

109. Idaho Power also argues that it does not always subtract the total capacity commitment under the Restated Transmission Agreement from Total Transfer Capability to reach firm Available Transfer Capability. The subtraction referred to by the Presiding Judge only occurs under the Restated Transmission Agreement but not under the Facilities or Interconnection Agreements because the paths involved in providing service under those agreements are not paths for which Available Transfer Capability is calculated. Idaho Power states Available Transfer Capability is also not calculated for the Midpoint West path. Idaho Power states that when there is reduction in path capacity, a lesser amount is subtracted from Total Transfer Capability. Additionally, Idaho Power argues that the Presiding Judge failed to recognize that Idaho Power's treatment of the Restated Transmission Agreement in the calculation of Available Transfer Capability is a "transitional issue facing all utilities with grandfathered pre-Order 888 transmission agreements, even though those agreements do not provide firm service as the Commission defines the term today."²⁰⁸ Idaho Power maintains that "[j]ust because the service provided under a pre-Order 888 agreement is not OATT firm, a service provider cannot simply sell the capacity out from under the agreement without breaching it. That practice, however, does not bootstrap the agreement into the firm category."²⁰⁹

110. With regard to the planning, Idaho Power argues that statements in PacifiCorp's resource plan cannot outweigh PacifiCorp's admission that Idaho Power has priority usage over PacifiCorp within the reserved blocks over the Borah West and Northwest paths. Idaho Power maintains that inclusion of its share of the Jim Bridger units in its resource plan is a completely different issue from the firmness of Idaho Power's transmission of PacifiCorp's share of that same unit. Idaho Power asserts that a resource may be firm from a generation perspective but that does not mean the transmission for that unit is firm.

111. Idaho Power reiterates that it plans for the long-term needs of its firm OATT and retail service customers and builds new facilities to support these services as needed, but unless PacifiCorp agrees to pay its share for these upgrades under the Restated Transmission Agreement, such upgrades do not get built and PacifiCorp suffers whatever degradation of service results. Idaho Power asserts that the Presiding Judge incorrectly concluded that there is no difference between OATT and Legacy Agreements services with respect to the pricing for upgrades, and therefore, there is no distinction between these services in terms of firmness. According to Idaho Power, the Presiding Judge conceded that OATT customers only pay for upgrades when they exceed rolled-in costs. Idaho Power goes on to argue that, in contrast, an upgrade must be identified in the

²⁰⁸ *Id.* at 59-60.

²⁰⁹ *Id.* at 60.

service agreement (i.e., the Restated Transmission Agreement) for payments to occur for such upgrades.

112. In addition, Idaho Power states that Form 1 entries that the Presiding Judge discusses were a small portion of the Legacy Agreements services recorded in Account 456. Idaho Power states that these Form 1 entries do not represent Bridger Integration Services or the other services the firmness of which is in dispute in the instant proceeding. Idaho Power adds that all of the services described in the Form 1s were charged at the hourly non-firm rate (plus one-half mill/kWh in some cases).²¹⁰ Idaho Power asserts that its witness testified that the “other long-term firm” classifications were simply an error resulting from a personnel change, which Idaho Power discovered in preparing a response to a data request in the instant proceeding. Idaho Power states that after it discovered the error it made a correction in its August 24, 2007 Form 1 filing.²¹¹

iii. Opposing Exceptions

(a) Intervenors

113. Intervenors rebut Idaho Power’s assertion that PacifiCorp’s right to the 1,410 MW of East to West Transfer Service is not always paramount over non-firm uses. Intervenors state that Idaho Power cannot post its unused capacity on the OASIS if PacifiCorp has requested that capacity without violating the specific terms of the Restated Transmission Agreement. Additionally, PacifiCorp’s Restated Transmission Agreement rights are not posted on Idaho Power’s OASIS until after pre-scheduling and only that portion of those 1,410 MW of rights that PacifiCorp has not scheduled can be posted as non-firm on the OASIS.²¹² Further, Intervenors argue that this posting practice is the same as used for OATT firm point-to-point service and, more importantly, for purposes of short-term and long-term firm Available Transfer Capability analysis, Idaho Power does not release the 1,410 MW reserved for the Restated Transmission Agreement.

114. Further, Intervenors argue that the terms of the Restated Transmission Agreement contradict Idaho Power’s assertion that during a curtailment situation, PacifiCorp’s rights would be reduced and any unused portion of Idaho Power’s share of the capacity would be posted on Idaho Power’s OASIS. Intervenors point out that sections 3.6.1, 3.6.2, and 3.8 of the Restated Transmission Agreement each provide “[w]hen Idaho Power is not fully utilizing its reserved capacity, such capacity will be made available to PacifiCorp

²¹⁰ *Id.* at 72 (citing Ex. INT-41 at 3).

²¹¹ *Id.* at 73.

²¹² Intervenors Brief Opposing Exceptions at 64 (citing Initial Decision at P 125).

for East to West Transfer Services” up to the maximum contract limits.²¹³ Additionally, Intervenor state that the exceptions to “continuous, firm” service for curtailment listed under section 3.5 of the Restated Transmission Agreement provide “[w]hen Idaho Power is not fully utilizing its reserved capacity, such capacity will be made available to PacifiCorp for East to West Transfer Services” up to the maximum contract limits.²¹⁴ Additionally, Intervenor refute Idaho Power’s claim that its witness testified that Idaho Power in fact posts its unused capacity under the Restated Transmission Agreement on its OASIS. According to Intervenor, that witness stated that after pre-scheduling Idaho Power posts unused capacity, but, according to Intervenor, this does not support Idaho Power’s claim that in a curtailment situation it can cut PacifiCorp’s schedule and continue to leave its unused capacity posted on its OASIS.²¹⁵ Intervenor maintain that this contradicts the terms of the Restated Transmission Agreement.

115. Additionally, Intervenor argue that Idaho Power’s arguments are an attempt to downplay the importance of how it treats the Legacy Agreements in its Available Transfer Capability calculation. Intervenor argue that Idaho Power’s claim that in a curtailment situation it does not deduct the full 1,410 MW from its Total Transfer Capability makes no sense. Intervenor state that for any firm contract that is cut *pro rata* in a curtailment situation, the amount of capacity available will be reduced as the Total Transfer Capability is lowered.²¹⁶ Additionally, Intervenor note that in Order No. 890,²¹⁷ the Commission stressed the importance of accurate calculations of Available Transfer Capability and “directed implementation of principles for [Available Transfer Capability] calculations such that the ‘transmission provider shall account only for firm commitments.’”²¹⁸

²¹³ *Id.* at 73 (*citing* Ex. INT-13 at 28-30, 33)

²¹⁴ *Id.* at 74 (*citing* Ex. INT-13 at 26).

²¹⁵ *Id.* (*citing* Ex. INT-2 at 7:9-17).

²¹⁶ *Id.* at 64.

²¹⁷ *Preventing Undue Discrimination and Preference in Transmission Service*, Order No. 890, 72 Fed. Reg. 12,266 (Mar. 15, 2007), FERC Stats. & Regs. ¶ 31,241, *order on reh’g*, Order No. 890-A, 73 Fed. Reg. 2984 (Jan. 16, 2008), FERC Stats. & Regs. ¶ 31,261 (2007), *order on reh’g*, Order No. 890-B, 73 Fed. Reg. 39,092 (July 8, 2008), 123 FERC ¶ 61,299 (2008).

²¹⁸ Intervenor Brief on Exceptions at 42 (*citing* Order No. 890, FERC Stats & Regs. ¶ 31,241 at P 212).

116. Intervenors also take issue with Idaho Power's statement that under the Restated Transmission Agreement if an upgrade is needed and PacifiCorp does not agree to pay its share, the facilities do not get built. Intervenors assert that, since 1980 when the original Bridger-related agreement was signed, PacifiCorp's rights have not been diminished or reduced because upgrades were not built. Further, Intervenors contend that while Idaho Power plans and operates its facilities as an integrated system with the costs of facilities rolled into Idaho Power's revenue requirement for OATT rates, the only facilities included in the Restated Transmission Agreement use-of-facilities charges are a portion of the upgrades on the path between Borah/Kinport and Midpoint. Intervenors further contend that since 1980, Idaho Power has built up its entire system, including several substantial improvements, but the use-of facilities charges under the Restated Transmission Agreement have gone down. Intervenors argue the record shows that PacifiCorp's rights under the Restated Transmission Agreement provide for service across Idaho Power's entire system and not just on the path between Borah/Kinport and Midpoint.²¹⁹ Intervenors state that while Idaho Power's charges to PacifiCorp have decreased over time, the rolled-in system cost paid by OATT customers has grown significantly. Intervenors conclude that if Idaho Power is allowed to revenue-credit the Legacy Agreements in its formula rate, this cross-subsidization problem will continue to grow, and Idaho Power will have no incentive to include any additional facilities under the Restated Transmission Agreement.

117. Concerning Form 1 reporting, Intervenors asserts that Idaho Power cannot dispute that for several years it listed the Legacy Agreements services as "OLF" or "other long-term firm" commitments. Intervenors state that the FERC Form 1 definition of "OLF" provides that "firm" means "that service cannot be interrupted for economic reasons and is intended to remain reliable even under adverse conditions."²²⁰ Intervenors note that FERC Form 1 must be verified by a corporate official, audited by a certified public accountant, and is subject to the Commission's expanded civil penalty authority. Accordingly, Intervenors reason, Idaho Power's characterization of obligations under the "OLF" classification at least with respect to certain services, is an admission against interest, and contradicts Idaho Power's characterization of the Legacy Agreements for ratemaking purposes. Additionally, Intervenors argue that, despite Idaho Power's denials, the record demonstrates that Idaho Power's management disagreed about how the Legacy Agreements should be reported in FERC Form 1. Intervenors state that the Presiding Judge properly took note of the company's past actions with respect to the accounting treatment of the Legacy Agreements in the FERC Form 1.

²¹⁹ *Id.* at 68 (citing Tr. 421:5-423:12).

²²⁰ *Id.* 72 (quoting FERC Form 1 Instructions at page v).

(b) Staff

118. Staff disagrees with Idaho Power's statement that it does not always subtract the total capacity commitment under the Restated Transmission Agreement from Total Transfer Capability to reach firm Available Transfer Capability. Staff points out that Idaho Power's Available Transfer Capability methodology, as posted on Idaho Power's OASIS, indicates that "existing transmission contracts," which are subtracted from Total Transfer Capability, include the Legacy Agreements.²²¹ According to Staff, the Legacy Agreements are defined in Idaho Power's OATT as "[c]ontractual obligations and commitments prior to FERC Order 888."²²²

119. Additionally, Staff disagrees with Idaho Power's argument that its treatment of the Legacy Agreements in its Available Transfer Capability calculation reflects a contractual commitment under which it cannot sell the same capacity to other parties but does not mean that the service is firm.²²³ Staff states that the Presiding Judge properly concludes "that fact is *precisely* why the service under the Legacy Agreements is 'firm' rather than 'non-firm.' If it were not so, then Legacy Agreements service would be 'non-firm,' because Idaho Power would be able to sell the same capacity to other parties on a firm basis without breaching its contract to PacifiCorp."²²⁴

120. Staff also makes the point that Idaho Power has denied requests for firm service across the Borah to Kinport path due to its commitment to PacifiCorp under the Legacy Agreements, which is further evidence of the firm nature of Idaho Power's commitment to PacifiCorp under the Legacy Agreements.

121. Additionally, Staff states that the Presiding Judge correctly found that both Idaho Power's and PacifiCorp's treatment of the loads associated with the Legacy Agreements in their respective resource plans demonstrates the firmness of the service. Staff also states that, in a case involving interpretation of certain pre-Order No. 888 contracts, the Commission held that the most persuasive evidence of what those contracts meant is the actual operating procedures, and that the parties' course of conduct over many years

²²¹ Staff Brief Opposing Exceptions at 31 (*citing* Ex. S-17 at 2).

²²² *Id.* (*citing* Ex. S-17 at 2).

²²³ *See id.* at 33.

²²⁴ *Id.* (*quoting* Initial Decision at P 128).

should be given substantial weight.²²⁵ Staff argues that the record shows that in actual practice Idaho Power treats the 1,410 MW of transfer rights available to PacifiCorp as a firm obligation and does not sell OATT service that will interfere with the contract.²²⁶

122. Further, Staff asserts that the record demonstrates that there was disagreement among Idaho Power management as to how to classify the Legacy Agreements service in the Form 1 filings. Staff agrees with the Presiding Judge that Idaho Power has not corrected these entries and that, in any event, the Commission must look objectively at the nature of the services to determine if they are firm or non-firm for the purposes of this case.

iv. Commission Determination

123. The Commission denies Idaho Power's exceptions. In attempting to dispute the Presiding Judge's finding that it does not post the 1,410 MW of East to West Transfer Service capacity on its OASIS for non-firm uses unless PacifiCorp does not schedule energy on that capacity, Idaho Power states that "[o]n the Idaho to Northwest path, Idaho Power has first call on 570 MW of East to West Transfer Service, giving PacifiCorp a lower priority than Idaho Power's other uses *within this reserved block*, including Idaho Power's provision of firm and non-firm OATT service."²²⁷ Idaho Power then turns to examples of curtailment situations under which its use of the 570 MW reserved block on the Northwest Path and the 707 MW reserved block on the Borah Kinport path may serve to reduce PacifiCorp's rights to use its total contract capacity.²²⁸ Idaho Power essentially argues that in these curtailment situations PacifiCorp's service would not have priority over other OATT firm and non-firm uses, because in such situations, PacifiCorp's service would be curtailed if Idaho Power were using its reserved block. Further, Idaho Power argues that it would post on OASIS any of the portions of its reserved blocks that it does not use. Idaho Power misses the point. The Presiding Judge's finding did not address whether or not Idaho Power posts any of the reserved capacity to which Idaho Power is entitled; rather the Presiding Judge found PacifiCorp's 1,410 MW reserved capacity is not posted on Idaho Power's OASIS for non-firm use unless PacifiCorp does not

²²⁵ See *id.* at 30 (citing *Consolidated Edison Co. of New York, Inc. v. Public Serv. Elec. and Gas Co., PJM Interconnection, L.L.C. and New York Indep. System Oper. Inc.*, 101 FERC ¶ 61,282, at P 33, 35 (2002)).

²²⁶ *Id.* at 30-31 (citing Ex. INT-5 at 66:25-67:29, INT-17 at 6-7; Ex. IPC-32 at 17:10-11).

²²⁷ Idaho Power Brief on Exceptions at 58 (emphasis added).

²²⁸ See *id.* at 58-59, 73.

schedule energy for transmission on that capacity.²²⁹ Even in the curtailment examples Idaho Power provided, under the terms of the Restated Transmission Agreement Idaho Power could not post any unused portion of capacity within its reserved block on its OASIS for use by third-party OATT customers unless PacifiCorp declined that capacity.²³⁰ Accordingly, the Commission finds that the Presiding Judge properly found that the 1,410 MW reserved exclusively for PacifiCorp's use under the Restated Transmission Agreement is not posted unless PacifiCorp does not use it.

124. Idaho Power excepts to the Presiding Judge's finding that the way Idaho Power accounts for the Legacy Agreements in its Available Transfer Capability means that the Legacy Agreements service is firm. Idaho Power argues that it does not always perform this subtraction. However, as Idaho Power admits, the paths for which it does not perform this subtraction are paths for which it does not calculate Available Transfer Capability. In addition, for the path for which Available Transfer Capability is calculated (i.e., the Northwest path) Idaho Power implies that it removes the Legacy Agreements demands from that calculation because of its contractual obligations under the Legacy Agreements. The Commission finds that by subtracting the 1,410 MW of Legacy Agreements demands from its firm Total Transfer Capability Available before posting firm Available Transfer Capability on its OASIS, Idaho Power holds out the entire contracted capacity under the Restated Agreement for PacifiCorp's use, which supports a finding that the Legacy Agreements service is firm. Further, Idaho Power cannot sell the amount of capacity associated with the Legacy Agreements without breaching its agreements with PacifiCorp. This fact, which Idaho Power acknowledges, further supports finding that the services under the Legacy Agreements should be considered firm.

125. With regard to planning, Idaho Power argues that PacifiCorp is required to pay incrementally for any needed facilities upgrades while the costs of upgrades requested by OATT customers is generally rolled-in. Intervenors counter that the only facilities included in the Restated Transmission Agreement's use-of-facilities charges are a portion of the upgrades on the path between Borah/Kinport and Midpoint, and that over the years the use-of-facilities charges have decreased while Idaho Power's rolled-in system costs paid by OATT customers have increased significantly. Additionally, there is disagreement over the significance of Idaho Power's and PacifiCorp's treatment of the Legacy Agreements demands in their respective resource plans. However, the Commission finds, as did the Presiding Judge, that the firm nature of Idaho Power's commitment to PacifiCorp's Legacy Agreements service is evidenced by its refusal to

²²⁹ See Initial Decision at P 125.

²³⁰ See Restated Transmission Agreement, sections 3.5, 3.61, 3.6.2, 3.8.

offer new firm service to others without receiving incremental reimbursement for upgrades.²³¹ Specifically, in *Idaho Power Company*, the Commission observed:

Idaho Power responded to Arizona Public Service's protest stating that prior to the facility study, it did not know how much of Arizona Public Service's request it could accommodate without facility upgrades. Idaho Power states that it *consistently considered the capacity committed to PacifiCorp* and as a result denied third parties' requests for firm service, including requests by its own merchant function. After performing the facility study, it determined that it could accommodate Arizona Public Service's request, subject to *PacifiCorp exercising its preexisting rights to 150 MW of capacity*.²³²

126. Further, with regard to FERC Form 1 reporting, Idaho Power states that there was no disagreement among its management on how to classify the Legacy Agreements services and that it revised how it reports the services in its August 2007 Form 1 filing. However, we find it reasonable to consider Idaho Power's historical treatment of the services in its Form 1 reporting, as a factor in evaluating the firm nature of the services, despite Idaho Power's recent effort to revise that historical treatment. An objective look at the nature and characteristics of these services is needed to determine whether they are firm or non-firm for the purpose of deciding how they will be allocated for OATT pricing purposes. Based on Idaho Power's treatment of the Legacy Agreements services in its calculation and posting of Available Transfer Capability on its OASIS, on its practice of refusing to offer OATT services if doing so would affect PacifiCorp's rights, and inconsistent treatment of the Legacy Agreements in its FERC Form 1, we affirm the Presiding Judge's determination that these "other considerations" support a finding that the Legacy Agreements service is firm.

4. Revenue-crediting vs. Cost-allocating

a. Initial Decision

127. Having found that the services Idaho Power provides to PacifiCorp under the Legacy Agreements are "firm" services, the Presiding Judge turns to whether these services should be revenue-credited in the numerator of the OATT formula rate or cost-allocated in the divisor. He observes that the Commission has found that this determination should be made on a fact-specific, case-by-case basis and that the Commission has not established a bright line test.²³³ He observes that the principle of

²³¹ See Initial Decision at P 134.

²³² *Idaho Power Co.*, 90 FERC ¶ 61,009 at 61,019 (emphasis added).

²³³ Initial Decision at P 167-68.

cost causation and the principle against cross-subsidization should be considered. The Presiding Judge finds that Idaho Power's charges to PacifiCorp for its firm service under the Legacy Agreements are significantly lower than charges for firm point-to-point transmission service under the OATT formula rate. He states that what was at one point a three-to-one disparity between the Legacy Agreements charges and OATT rates has grown to an almost five-to-one disparity in 2004.²³⁴ Accordingly, he finds that PacifiCorp does not bear a share of transmission costs that is proportional to its firm load share. Additionally, he finds that if the transmission costs attributable to Idaho Power's and PacifiCorp's loads are not borne wholly by Idaho Power and PacifiCorp, then they must be borne by third-party OATT customers. He finds that under Idaho Power's revenue-crediting approach, third-party OATT customers bear a share of the cost that is disproportionately high for their level of use of Idaho Power's system. He notes that Idaho Power maintains an integrated system for planning and operating purposes and that Idaho Power's witness Durick testified means that "the entire transmission system performs as more as a single entity, and that you don't take out pieces and parts and treat them as if they were somehow standalone systems."²³⁵ The Presiding Judge finds that in such a system the cost causation rule and the rule against cross-subsidization dictate that equally-weighted costs must be allocated among all users according to their respective load shares.

128. Further, the Presiding Judge observes that PacifiCorp's total Period I (2004) contract load on the Idaho Power system was 2,014 MW, while the total Period I contract load for all other firm and network customers on Idaho Power's system, including Idaho Power's own 2,210 MW load, was 2,942 MW.²³⁶ Thus, PacifiCorp's firm load accounts for roughly 40 percent of the total firm contract load on the Idaho Power system, Idaho Power's loads account 45 percent, and the load of third-party OATT firm customers on Idaho Power's system account only for 15 percent of the total firm load on the system.²³⁷

129. The Presiding Judge concludes that it is reasonable under the principle of cost causation that the overwhelming majority of Idaho Power's integrated transmission costs should be borne by Idaho Power's and PacifiCorp's loads. He also finds it reasonable under the Commission's rule against cross-subsidization that Idaho Power and PacifiCorp should pay those integrated costs according to their *pro rata* load shares. He finds that Idaho Power cannot require its OATT transmission customers to pay more than their *pro*

²³⁴ *Id.* P 171 (citing Ex. INT-5 (Daniel Ans. Test. 87:6-88:22)).

²³⁵ *Id.* P 173 (citing Ex. INT-17 at 1-5 (Durick Dep.)).

²³⁶ *See id.* P 174-75 (citing S-1, INT-5, INT-19).

²³⁷ *Id.*

rata load shares of Idaho Power's total transmission revenue requirement or recover its under-compensation from PacifiCorp by collecting the difference from OATT transmission customers through revenue-crediting in the OATT formula rate.²³⁸ He finds that Idaho Power must bear that under-recovery on its own.

130. The Presiding Judge rejects Idaho Power argument that cost-allocating the Legacy Agreements would result in discriminatory treatment of its retail customers. The Presiding Judge finds that transmission costs borne by third-party OATT customers are to be borne equally, on a *pro rata* basis according to load, by transmission providers like Idaho Power and, in turn, by their native load customers.²³⁹ Further, the Presiding Judge finds that it is not necessarily true that Idaho Power's retail customers bear a share of transmission costs that is strictly proportional to the cost share borne by third-party OATT customers. He states that because there are no facts in the record to show that Idaho Power's retail customers and OATT customers are charged comparably for transmission service, only that OATT transmission revenue requirements are developed differently from retail revenue requirements, it cannot be shown whether a change in the OATT methodology of accounting for the Legacy Agreements would result in a discriminatory and preferential difference in treatment between these two customer classes.²⁴⁰ He concludes that applying the fact-specific, case-by-case approach mandated by the Commission, the basic principles of cost causation and against cross-subsidization militate against revenue-crediting the firm service that Idaho Power offers PacifiCorp under the Legacy Agreements and for cost-allocating that service.

b. Idaho Power's Exceptions

131. Idaho Power reiterates its argument that placing the Legacy Agreements demands in the divisor produces a significant transmission rate disparity between OATT and retail rates because the Legacy Agreements are revenue-credited in setting retail rates.²⁴¹ Idaho

²³⁸ *Id.* P 177 (citing *Minnesota Municipal Power Agency v. Southern Minnesota Municipal Power Agency*, 68 FERC ¶ 61,060, at 61,203 n.3 (1994) ("If the utility excludes a firm customer from the cost allocation and simply credits the firm service revenues to the cost-of-service, other customers will subsidize the transaction if the revenues credited are less than the cost responsibility that should be allocated to that service.")).

²³⁹ *Id.* P 180 (citing Order No. 888, FERC Stats. & Regs. ¶ 31,036 at 31,654).

²⁴⁰ *Id.* P 181 (citing Nichols Hg. Tr. 164:19-166:5).

²⁴¹ Idaho Power Brief on Exceptions at 84-85. Idaho Power notes that it has no bundled wholesale customers. *Id.* at 84 n.47.

Power argues that the Commission has designed OATT network services to be comparable to the service that transmission owners provide to retail customers, and for this reason has stated that the rates to these two customer classes should be designed using the same load-based rate calculation.²⁴² Idaho Power asserts that the rates produced by the Initial Decision are unduly discriminatory because they give OATT network customers the same rights to use the Idaho Power system as retail customers at rates that are hugely discounted below the average system cost rate charged to the retail class. Idaho Power argues that under the FPA, undue discrimination exists when a utility charges different rates for the same service, and there is no justification for the differing treatment.²⁴³ Finally, Idaho Power argues that in setting a utility's FERC-jurisdictional wholesale rates, the Commission must consider whether such rates are unduly discriminatory or preferential in relation to the utility's non-FERC jurisdictional retail rates, citing *FPC v. Conway Corp.*²⁴⁴

c. Opposing Exceptions

132. Intervenor dispute Idaho Power's assertion that in *FPC v. Conway Corp.* the Court held that the Commission has the authority to consider whether wholesale rates are unduly discriminatory in relation to a utility's retail rates. Instead, Intervenor argue, the Court instructed the Commission to evaluate retail rates to ensure that wholesale rates were not being set too high, causing a price squeeze on wholesale customers.²⁴⁵ Additionally, Intervenor argue that in *Cities of Newark v. FERC*, the court stated that differences in rates are justified where they are predicated upon factual differences between customers and that these factual differences may arise from differing cost of service or otherwise.²⁴⁶ Intervenor argue that, because Idaho Power's retail customers and PacifiCorp directly benefit from the bargain underlying the Legacy Agreements (i.e.,

²⁴² See *id.* at 85 (citing Order No. 888, FERC Stats. & Regs. ¶ 31,036 at 31,736; Tr. 671:5-9).

²⁴³ *Id.* (citing *PacifiCorp Electric Operations*, 54 FERC ¶ 61,296, at 61,855 (1991); *Cities of Newark v. FERC*, 763 F.2d 533, 546 (3d Cir.1985) (*Cities of Newark v. FERC*); *Public Serv. Co. of Indiana v. FERC*, 575 F.2d 1204, 1211 (7th Cir. 1978); *Towns of Alexandria v. FPC*, 555 F.2d 1020, 1027-28 (D.C. Cir. 1977); *St. Michaels Utilities Comm'n v. FPC*, 377 F.2d 912, 915 (4th Cir. 1967)).

²⁴⁴ 426 U.S. 271, 278 (1976).

²⁴⁵ Intervenor Brief Opposing Exceptions at 83 (citing *FPC v. Conway Corp.*, 426 U.S. at 278-80).

²⁴⁶ *Id.* (citing *Cities of Newark v. FERC*, 763 F.2d at 546).

long-term access to a low-cost base load resource) allocating costs to the Legacy Agreements does not produce unduly discriminatory rates.

d. Commission Determination

133. The Commission denies exception. PacifiCorp's and Idaho Power's use of the Idaho Power network accounts for approximately 85 percent of the available firm capacity on Idaho Power's network while third-party OATT customers account for only 15 percent of the firm load. We agree with the Presiding Judge that revenue-crediting the Legacy Agreements would require third-party OATT customers to bear a disproportionate share of the costs of Idaho Power's system, contrary to the cost-causation principle.²⁴⁷ Further, the principle against cross-subsidization requires that third-party transmission customers should not be made to subsidize existing customers.²⁴⁸ Idaho Power invokes *FPC v. Conway Corp* for the principle that in setting wholesale rates, the Commission must consider whether such rates are unduly discriminatory or preferential in relation to the utility's retail rates. Idaho Power has not established that its retail and OATT customers are charged comparably. To the contrary, Idaho Power's use of its network to serve its retail customers accounts for approximately 45 percent of the load on the Idaho Power system while its firm OATT customer's use accounts for only 15 percent. Idaho Power's proposed rate design would impose an undue rate burden on its OATT customers.

134. As the Presiding Judge properly found a subsidy arises under Idaho Power's proposal because

²⁴⁷ See *Midwest ISO Transmission Owners v. FERC*, 373 F.3d 1361, 1368 (D.C. Cir. 2004) (the court determines compliance with the principle of cost causation "by comparing the costs assessed against a party to the burdens imposed or benefits drawn by that party"); *California Power Exchange Corp.*, 106 FERC ¶ 61,196, at P 17 (2004) ("[t]he well-established principle of cost causation" requires allocation of costs, "where possible, to customers based on customer benefits and cost incurrence"); *California Indep. Sys. Operator Corp.*, 106 FERC ¶ 61,032, at P 10 (2004) ("while the fundamental idea of matching costs with customers is often referred to in terms of cost causation, it has also been described in terms of the costs which should be borne by those who benefit from them") (internal quotations omitted).

²⁴⁸ See *Pricing Policy Statement*, FERC Stats. & Regs. ¶ 31,005 (1994) ("[W]e do not believe that third-party transmission customers should subsidize existing customers."); *Minnesota Municipal Power Agency v. Southern Minnesota Municipal Power Agency*, 68 FERC ¶ 61,060, at 61,205 n.3 (1994) (*MMPA*).

the discounted revenue from the Legacy Agreements is credited against Idaho Power's total transmission costs in the numerator of the formula in lieu of including the demand load from the Legacy Agreements in the divisor. If it were [cost-allocated], then the subsidy would fall on Idaho Power alone, the entity that made the discounted arrangements with PacifiCorp and its predecessors in the first place.²⁴⁹

135. Thus, Idaho Power, not its third-party OATT customers, must bear a greater portion of the costs.

5. Benefits and Burdens

a. Initial Decision

136. The Presiding Judge finds unpersuasive Idaho Power's argument that the benefits that PacifiCorp's service impart on Idaho Power's system and the burdens that PacifiCorp incurs from the limitations on that service justify revenue-crediting the Legacy Agreements service instead of cost-allocating it. He finds that at the time that the Legacy Agreements were conceived as well as now, it has been Commission policy that a transmission provider is obligated to build or expand its transmission system to accommodate a customer's application for firm transmission service, provided that the transmission customer agrees to compensate the transmission provider for such an upgrade based on the higher of incremental expansion costs or a rolled-in embedded cost rate, i.e., "or" pricing.²⁵⁰ The Presiding Judge also finds that the net incremental revenue that Idaho Power received from PacifiCorp in the early 1980s would have been about equal to what it would have been under the estimated rolled-in rate charge.²⁵¹ Accordingly, he finds that although the Legacy Agreements service fees that Idaho Power receives from PacifiCorp *currently* raise less revenue than a fully rolled-in rate charge would, they did not do so when the Legacy Agreements originally were conceived.²⁵² He also determines that no discount for "inferior service" was necessary, nor is there any

²⁴⁹ Initial Decision at P 112.

²⁵⁰ Initial Decision at P 197 (*citing Northeast Utilities Service Company (Re: Public Service Company of New Hampshire), Opinion No. 364-A, 58 FERC ¶ 61,070, reh'g denied, 59 FERC ¶ 61,042 and 59 FERC ¶ 61,089 (1992), affirmed in part and remanded in part sub nom. Northeast Utilities Service Co. v. FERC, 993 F.2d 937 (1st Cir. 1993); Pricing Policy Statement, FERC Stats. & Regs. ¶ 31,005, at 31,137-38 (1994); Order No. 888-A, FERC Stats. & Regs. ¶ 31,048 at 30,268*).

²⁵¹ *Id.* P 198 (*citing* Ex. IPC-57).

²⁵² *Id.* P 199.

evidence that any such discount was agreed to. He states that presumably, the Legacy Agreements made economic sense to the parties at the time at the agreed-upon rates.²⁵³ Further, he states that

[n]o one can know for sure, because as Idaho Power observes, none of the individuals that negotiated the Legacy Agreements were present in this case and most of them are not even alive. All we know is that the Legacy Agreements brought to these entities the benefits of accessing generation from the Jim Bridger plant and upgrading Idaho Power's then-existing transmission system, making it possible to transfer PacifiCorp's share of Bridger generation to its Washington and Oregon load centers and Idaho Power's share to its Idaho load center.²⁵⁴

137. He also finds that the Legacy Agreements introduced counter-flows into Idaho Power's system that increased its capacity to wheel power for third parties and reduce losses, and at the same time, restrictions were placed on PacifiCorp's use of the system to assure that this use would not overtax Idaho Power's system during periods of abnormal conditions. However, he finds it unnecessary to quantify these benefits and burdens in order to determine whether the parties bargained for them or not. The Presiding Judge finds that "the Legacy Agreements did not violate Commission pricing policy at the time that they were entered into; they were approved "as is" by the Commission at that time."²⁵⁵

138. Further he determines that the fact that the Legacy Agreements' incremental pricing structure did not raise more or less revenue than rolled-in rates would have at the time suggests that the current disparity between the Legacy Agreements rates and OATT rates "bears no relation to, and probably is an unintended consequence of, the original deal."²⁵⁶ He also finds that even if the Legacy Agreements' incremental rates made economic sense when they were developed because they left the parties no better or worse than under a rolled-in rate structure, the Legacy Agreements rates do not make sense now. He finds "no nexus between the benefits and burdens of the Legacy Agreements that were originally bargained for and the gap that has developed over time

²⁵³ *Id.* (citing Idaho Power Initial Brief 42).

²⁵⁴ *Id.* P 199-200 (citing Idaho Power Reply Brief 25).

²⁵⁵ *Id.* P 200.

²⁵⁶ *Id.* P 201.

that suggests that the gap was really a bargained-for ‘discount.’”²⁵⁷ He finds that the gap does not justify revenue-crediting instead of cost-allocating.

139. Next, the Presiding Judge rejects Idaho Power’s reliance on *IES Utilities, Inc.*²⁵⁸ to support its position that the fees PacifiCorp pays under the Legacy Agreements represent an appropriate discount when inferior services are provided or when reciprocal services are received in lieu of paying a charge for a service.²⁵⁹ He notes that in *IES*, which involved the merger of three utilities into a holding company and the formation of an ISO, an intervening customer proposed that the merger applicants increase their transmission rate divisor by 625 MW for output from generating plants jointly owned by the applicant and other owners and delivered by the applicant without charge to the other owners.²⁶⁰ He notes that in *IES* the applicant argued that the delivery obligation was not long-term firm delivery service, and therefore, if anything, only revenue-crediting was necessary.²⁶¹ The *IES* Judge excluded the 625 MW adjustment from the rate divisor, and found it unnecessary to consider the revenue-crediting proposal.²⁶² The Presiding Judge notes that in affirming this portion of the *IES* Initial Decision, the Commission determined that “this single adjustment cannot be made in isolation, *i.e.*, without considering offsetting adjustments that quantify the benefits to IEC transmission customers of reciprocal facilities paid for by the other plant owners.”²⁶³ He states that the Commission also found that

the proper treatment of this issue is problematic in individual, company-specific rate proceedings. We further note that intervenors’ concern regarding evaluation of reciprocal benefits necessarily involves a regional solution. We believe that a

²⁵⁷ *Id.* P 202.

²⁵⁸ *IES Utilities, Inc.*, 80 FERC ¶ 63,001 (1997), *aff’d in relevant part*, 81 FERC ¶ 61,187 (1997), *reh’g denied*, 82 FERC ¶ 61,089 (1998) (*IES*).

²⁵⁹ *Id.* P 203 (*citing* Idaho Power Initial Brief 17-18, 36-43).

²⁶⁰ *Id.* P 204 (*citing* *IES*, 80 FERC ¶ 63,001 at 65,007).

²⁶¹ *Id.* (*citing* *IES*, 80 FERC ¶ 63,001 at 65,007).

²⁶² *Id.* (*citing* *IES*, 80 FERC ¶ 63,001 at 65,008).

²⁶³ *Id.* P 205 (*citing* *IES*, 81 FERC ¶ 61,187 at 61,832).

regional institution such as an RTG or an ISO will provide the most appropriate means of resolving this concern.²⁶⁴

140. The Presiding Judge concludes that *IES* is inapposite because in that case the Commission gave no consideration to whether a revenue credit was an appropriate substitute for a cost allocation and the Commission left the resolution of this issue to a future ISO to develop a regional solution that would take into account an evaluation of reciprocal benefits.²⁶⁵

141. The Presiding Judge concludes that Idaho Power and PacifiCorp did not bargain for any discount under the Legacy Agreements. He states that the compensation under the Legacy Agreements was determined in an arms-length transaction that would have been the same if it been rolled-in or incremental in rate design, and that transaction took the benefits and burdens of the agreements into account at that time.²⁶⁶

b. Idaho Power's Exceptions

142. Idaho Power states that the Presiding Judge improperly disregarded the additional consideration that Idaho Power received under the Legacy Agreements that was central to the agreements and was taken into account pricing the agreements. In restating the benefits and burdens identified by the Presiding Judge, Idaho Power acknowledges that he properly identified the service restrictions²⁶⁷ but argues that he cursorily disregarded

²⁶⁴ *Id.* (citing *IES*, 81 FERC ¶ 61,187 at 61,833).

²⁶⁵ *Id.* P 206.

²⁶⁶ *Id.* P 207.

²⁶⁷ Briefly, the claimed burdens include (1) PacifiCorp's deliveries from the Bridger plant are restricted to certain delivery points; (2) PacifiCorp's deliveries must be made from the Bridger plant except for an average of 124 MW per year; (3) PacifiCorp cannot assign or resell or provide third-party wheeling of its service under the Legacy Agreements; (4) the Legacy Agreements are subject to certain loss provision to encourage PacifiCorp to avoid reducing its westbound transfers; and (5) PacifiCorp pays for needed new facilities. The claimed benefits include (1) increased east to west transfer capability as a result of expansion of Idaho Power's system and PacifiCorp's construction of a 500 kV line paralleling Idaho Power's system; (2) reduction in transmission congestion as a result of the counterflows created by PacifiCorp's use of Idaho Power's system; (3) increased transmission capacity for Idaho Power and its OATT customers resulting from the restrictions on PacifiCorp's ability to resell the Legacy Agreements services or use the contracted service for purposes other than those specified in the Legacy Agreements; and (4) Idaho Power has right of first refusal to purchase the portion
(continued...)

these restrictions by finding no nexus between the proposed revenue credit and the asserted benefits and burdens.²⁶⁸ Idaho Power further argues that the Presiding Judge disregarded Order 888-A, which holds that all of the relevant factual circumstances should be taken into account in determining whether revenue-crediting is appropriate.²⁶⁹

143. Additionally, Idaho Power states that the Presiding Judge did not discuss the reciprocal transmission service under the Facilities Agreement and argues that the Facilities Agreement transaction is similar to the one in *IES*, except that here Idaho Power charges PacifiCorp for the cost of the facilities constructed.²⁷⁰

144. Idaho Power also argues in *Arizona Public Service Company*,²⁷¹ the Commission rejected the allocation of average system costs to the service at issue and approved the company's revenue-crediting proposal, noting the additional consideration provided by the customer in exchange for discounted rates.²⁷² Additionally, Idaho Power states that in *IES* the Commission affirmed the Presiding Judge's determination that the rate applicant not be required to add 625 MW of service to its transmission rate divisor because the service involved reciprocal services provided by the customer.²⁷³ Idaho Power argues that the Commission's reasoning in *IES* and *APS* is applicable to the treatment of the Legacy Agreements.

145. According to Idaho Power, in *IES*, the Commission approved the exclusion of the demands from the rate divisor even though there were no revenues to substitute for the cost allocation.²⁷⁴ Idaho Power argues that the fact that the revenue credits were zero in *IES* further supports its argument that the Legacy Agreements revenues should be

of the Midpoint to Summer Lake line in the Idaho Power service area if PacifiCorp elects to sell it. *See* Idaho Power Brief on Exceptions at 26-32.

²⁶⁸ *Id.* at 37-38.

²⁶⁹ *Id.* at 38 (*citing* Order No. 888-A, FERC Stats. & Regs. ¶ 31,048 at 30,256).

²⁷⁰ *Id.* at 31.

²⁷¹ 18 FERC ¶ 61,197 (1982) (*APS*).

²⁷² *See* Idaho Power Brief on Exceptions at 23 (*citing APS*, 18 FERC ¶ 61,197 (1982)).

²⁷³ *Id.* (*citing IES*, 81 FERC ¶ 61,187, at 61,832-33).

²⁷⁴ *Id.* at 24.

revenue-credited. Further, Idaho Power states that in *IES* the Commission's determination did not turn on the issue of regional negotiations, rather the concern that the Commission was addressing in discussing a regional solution (i.e., the evaluation of the reciprocal benefits identified by *IES*) was only one facet of the cost allocation issue.²⁷⁵ Idaho Power states that in that case, in the absence of a regional solution for that concern, the Commission had to make a decision whether, given the presence of the reciprocal benefits, including the demands in the divisor was just and reasonable.²⁷⁶

146. In addition, Idaho Power argues that the Presiding Judge's reasons for dismissing the benefits Idaho Power identified are arbitrary and inconsistent with the record. Idaho Power argues that its testimony and the language of the Restated Transmission Agreement demonstrate that the pricing under the Restated Transmission Agreement took into account the benefits that PacifiCorp provided to Idaho Power. According to Idaho Power, no one testified to the contrary. Idaho Power also contends that, the Presiding Judge's analysis is based on testimony that applied to the Restated Transmission Agreement but not to the Interconnection Agreement and the Facilities Agreement. Additionally, Idaho Power argues that whether or not the other benefits were a bargained-for exchange for a discounted rate, the benefits exist and are part of the compensation Idaho Power received. Idaho Power adds that under current Commission policy, Idaho Power is allowed to charge the higher of embedded or incremental cost at the time of the transaction, which is similar to what Idaho Power charges under the Legacy Agreements.²⁷⁷

c. Opposing Exceptions

i. Intervenors

147. Intervenors support the Presiding Judge's analysis of Idaho Power's benefits and burdens arguments. Intervenors state that, after fully discussing Idaho Power's arguments, he properly found that there was no bargained-for discount underlying the Legacy Agreements and no nexus between the benefits and the price gap. Intervenors state that the Presiding Judge correctly found *IES* unpersuasive, because the facts in that case are distinguishable from the facts surrounding the Legacy Agreements. Intervenors state that in *IES*, evidence indicated that there was enough capacity on the interconnected system that the transmission obligation under the power pooling arrangement at issue should be viewed as non-firm and that the power did not always flow on the transmission

²⁷⁵ *See id.*

²⁷⁶ *See id.*

²⁷⁷ *See id.* at 34 (*citing* Order No. 888, FERC Stats. & Regs. ¶ 31,036 at 31,741).

system.²⁷⁸ In contrast, Intervenor argue, the Legacy Agreements are long-term firm obligations with specific contract demands on Idaho Power's system, which have resulted in denials of service to other transmission customers. Additionally, Intervenor argue that *IES* involved multiple systems and complex reciprocal benefits that led the Commission to find that a regional solution developed in the context of an ISO was needed to address the reciprocal benefits.²⁷⁹

148. Intervenor point out that here Idaho Power and PacifiCorp are the only beneficiaries of the Legacy Agreements. Little or none of the additional capacity created under the Legacy Agreements is available for long-term firm OATT service from east to west across Idaho Power's system because the rights are committed to PacifiCorp or dedicated to move Idaho Power's share of the Bridger Plant. Intervenor state the PacifiCorp's Midpoint Summer Lake 500 Kv line is the largest interconnection on Idaho Power's system but Midpoint is not listed as an available Point of Receipt on Idaho Power's OASIS.²⁸⁰ Intervenor state that if a transmission customer purchases east-bound transmission from PacifiCorp on the Midpoint to Summer Lake line to the interconnection on Idaho Power's system at Midpoint, the customer cannot continue the transaction into Idaho Power's system because Idaho Power will not accept the schedule.²⁸¹

149. With regard to counter-flows, Intervenor point to Idaho Power's witness Park's testimony that counter-flows cannot be used to increase Total Transfer Capability because they cannot be counted on to be available at any given time—i.e., there is no guarantee that PacifiCorp will schedule its Restated Transmission Agreement rights westbound when flows are the highest going eastbound on Idaho Power's system.²⁸² Concerning losses, Intervenor contend that none of the power associated with the loss provisions under the Restated Transmission Agreement is credited or passed on to OATT customers and Idaho Power has not produced any studies to demonstrate how such losses affect the system losses charged to OATT customers.

²⁷⁸ Intervenor Brief Opposing Exceptions at 25 (*citing IES*, 80 FERC ¶ 63,001 at 65,007).

²⁷⁹ *Id.* (*citing IES*, 81 FERC ¶ 61,187 at 61,833)

²⁸⁰ *See id.* at 27.

²⁸¹ *See id.*

²⁸² *See id.* at 27-28 (*citing Tr.* 244:25-245-11).

150. Regarding Idaho Power's allegation that the Presiding Judge did not address benefits of the Facilities Agreement and Interconnection Agreement, Intervenor assert that Idaho Power proffered no evidence regarding benefits from those agreements besides its claim that under the Facilities Agreement Idaho Power received capacity rights on PacifiCorp's system. Intervenor argue that the rights granted to Idaho Power under the Facilities Agreement are for moving Idaho Power's and PacifiCorp's share of the Bridger generation, and Idaho Power has never provided firm rights over this segment to any OATT customers.²⁸³

151. Additionally, Intervenor state that the Presiding Judge correctly recognized that Idaho Power did not have system average pricing at the time the Legacy Agreements were entered into and that he showed that the Restated Transmission Agreement pricing was not discounted as compared to what Idaho Power's rolled-in system cost would have been at the time. Further, Intervenor rebut Idaho Power's argument that its participation in the Jim Bridger Project is not material to the consideration of the rate treatment for the Legacy Agreements.²⁸⁴ However, Intervenor show that Idaho Power's argument is contradicted by section 2.5 of the Restated Transmission Agreement, which provides:

It is expressly understood and agreed that Idaho Power's agreement to provide East to West Transfer Service hereunder has been undertaken in consideration of the benefits that Idaho Power receives from participation in the Jim Bridger Project and that certain benefits on its system, including a reduction in losses, are and have been a significant component of the consideration that Idaho Power receives for providing such service.

ii. Staff

152. Staff rejects Idaho Power's analysis of *IES*, and argues that in *IES* the Commission gave no consideration to whether a revenue credit was an appropriate substitute for cost allocation, but only noted that this issue is best addressed by a future ISO as a regional solution.²⁸⁵ Additionally, Staff argues that the facts in *APS* are distinguishable from the facts present here. According to Staff, there the Commission found that the service provided for under the contract in question was essentially the same as a unit sales contract in which the purchaser buys a specific portion of a generating plant's output at the plant's bus bar.²⁸⁶ Staff states that in that case the Commission determined that the

²⁸³ See *id.* at 30.

²⁸⁴ *Id.* at 32 (*citing* Idaho Power Brief on Exceptions at 35-37).

²⁸⁵ Staff Brief Opposing Exceptions at 38-39.

²⁸⁶ See *id.* at 40 (*citing* *APS*, 18 FERC ¶ 61,167, at 61,395).

demand and energy cost should be based on costs related to the specified output, not on average costs. Staff argues that Idaho Power has not demonstrated any similarity in the facts of that case and the facts of the instant proceeding.

d. Commission Determination

153. The Commission denies Idaho Power's exception. The Presiding Judge discussed in detail the benefits and burdens Idaho Power asserts were part of the bargained-for transaction underlying the Legacy Agreements.²⁸⁷ We agree with the Presiding Judge that the facts and circumstances surrounding the development of the Legacy Agreements do not support that the services under the agreements were inferior services for which a discount was negotiated.

154. First, as the Presiding Judge notes, at the time the Legacy Agreements were first conceived, the rates negotiated were the same as they would have been using rolled-in pricing.²⁸⁸ Further, as these agreements were originally negotiated many years before the Commission issued the unbundling and non-discriminatory provisions of open access under Order No. 888, there were no specific OATT rates against which Idaho Power could have discounted the Legacy Agreements.

155. Second, we find inapposite the cases Idaho Power relies on to support its position that the asserted benefits and burdens were bargained-for in exchange for a discounted rate and, therefore, the Legacy Agreements should therefore be revenue-credited. In *IES* the Commission did not determine whether the asserted benefits in that case should be considered because the Commission found that, under the circumstances of that case, such a determination could not be made without considering offsetting adjustments, which in that case were best made under a regional solution.²⁸⁹ *IES* does not foreclose the Commission from considering, on an individual company basis, whether additional consideration in exchange for discounted rates should be factored into determining how a grandfathered transmission service agreement is accounted for in an OATT formula rate. However, such a premise begins with a finding that a discounted rate was a part of the bargain. As discussed above, no bargained-for discount is evident here.

156. In *APS*, the transmission provider and a customer entered into negotiations for the construction and operation of a generating plant.²⁹⁰ The Commission there found that the

²⁸⁷ See Initial Decision at P 184-93.

²⁸⁸ Initial Decision at P 199.

²⁸⁹ See *IES*, 81 FERC ¶ 61,187 at 61,832-33.

²⁹⁰ *APS*, 18 FERC ¶ 61,197 at 61,394.

customer agreed to this arrangement primarily in exchange for a wholesale power supply agreement guaranteeing “wholesale bus bar rates” based on the costs of plant for power supplied to the customer.²⁹¹ Additionally, the Commission found that the service provided for under the agreement was “essentially the same as a unit sales contract in which the purchaser buys a specific portion of a generating plant's power output at the plant’s bus bar.”²⁹² In reversing the *APS* Judge’s finding that revenue-crediting was inappropriate because APS had not demonstrated that the benefits derived from the transaction outweigh the costs of the revenue credit, the Commission found that the agreement in question specifically provided the customer with a wholesale bus bar rate based on the costs of the generating plant and that the demand and energy cost for the customer should be based on costs related to the plant, not costs based on average system costs.²⁹³ Here, Idaho Power has not demonstrated that the agreements specifically identified a bargained-for exchange of the asserted benefits and burdens in exchange for discounted rates.

6. Financial Impact

a. Initial Decision

157. The Presiding Judge finds that in accordance with Order No. 888-A, cost-allocating Idaho Power’s total transmission revenue requirement over PacifiCorp’s firm loads from the Legacy Agreements as well as all other firm loads does not change the price that PacifiCorp pays to Idaho Power under the Legacy Agreement.²⁹⁴ Accordingly, he finds that Idaho Power will bear the brunt of this revision in the structure of its OATT formula rate.²⁹⁵

158. Additionally, the Presiding Judge finds that revising the proposed OATT formula rate to cost-allocate the Legacy Agreements instead of revenue-crediting them will reduce Idaho Power’s proposed firm point-to-point OATT rate by 33.2 percent, which would result in a reduction of Idaho Power’s revenue by approximately \$11.4 million per

²⁹¹ *Id.*

²⁹² *Id.* at 61,395.

²⁹³ *Id.*

²⁹⁴ Initial Decision at P 216 (*citing* Order No. 888-A, FERC Stats. & Regs. ¶ 31,048 at 30,199).

²⁹⁵ *Id.* P 216.

year.²⁹⁶ He finds that Idaho Power can lessen any financial impact through appropriate rate changes at the retail level or through renegotiation of its agreements with PacifiCorp.

159. The Presiding Judge concludes that Idaho Power has failed to meet its burden of proving that its proposal to revenue-credit the Legacy Agreements, and finds that cost-allocating the agreements is just and reasonable, and not unduly discriminatory or preferential. He finds that the Legacy Agreements service must be accounted for in the rate formula by allocating the total transmission revenue requirement over the firm demands of the entire Idaho Power system, including PacifiCorp's firm demand under the Legacy Agreements.²⁹⁷

b. Idaho Power's Exceptions

160. Idaho Power states that if the Initial Decision is affirmed, either its shareholders will have to bear the results of a disallowance or the costs not recovered in the OATT rates will have to be reallocated to retail customers. Idaho contends that neither result is consistent with the FPA.²⁹⁸ Idaho Power argues that the Presiding Judge's suggestion that Idaho Power can renegotiate the Legacy Agreements violates Order No. 888, which Idaho Power states, holds that pre-Order 888 agreements are not unjust and unreasonable. Additionally, Idaho Power states that it has FPA section 205 filing rights under the Interconnection Agreement but argues that the Restated Transmission Agreement and the Facilities Agreement either do not permit or do not provide for unilateral changes. Idaho Power states that it has no reason to believe that PacifiCorp would agree voluntarily to a renegotiation that increases its rates.

161. Additionally, citing *FPC v. Hope Natural Gas Company*,²⁹⁹ Idaho Power states that the primary objective of utility ratemaking is to set rates so that the utility can recover its cost of service, including a fair return on its investment.³⁰⁰ Idaho Power argues that placing a service in the rate divisor "imputes" to that service an average system cost rate and if that service is provided at a rate below the average cost rate, and the service is included in the rate divisor, the utility will be prevented from recovering its

²⁹⁶ *Id.* P 217 (citing Ex. INT-27; Tingle-Stewart Hg. Tr. 666:18-667:5; Morgans Hg. Tr. 99:4-25).

²⁹⁷ *Id.* P 219.

²⁹⁸ Idaho Power Brief on Exceptions at 82.

²⁹⁹ 320 U.S. 591 (1944) (*Hope*).

³⁰⁰ Idaho Power Brief on Exceptions at 82 (citing *Hope*, 320 U.S. at 603).

costs and earning a fair return on invested capital. Conversely, Idaho Power states, if the service is provided at a rate above the average cost rate, and the service is included in the rate divisor, the utility will over-recover its costs. Idaho Power argues that if the revenues from such a service are revenue-credited, there would be neither an under-recovery nor an over-recovery of costs.

162. Further, Idaho Power states, that the Presiding Judge acknowledged that Idaho Power would not recover its costs if the demands are cost-allocated.³⁰¹ Idaho Power adds that no one contended that any of its costs should be disallowed because they were imprudently incurred and that the issue of imprudence was not set for hearing nor was any evidence adduced suggesting that Idaho Power engaged in any conduct that would justify a disallowance on prudence or related grounds.³⁰²

c. Opposing Exceptions

i. Intervenors

163. In opposing exceptions, Intervenors argue that there are more than two possible outcomes should the Initial Decision be affirmed. Intervenors state that the Legacy Agreements have provisions for rate change, including section 9.1 of the Interconnection Agreement and section 7.1.1 of the Restated Transmission Agreement, which Intervenors argue allows facilities listed on Exhibit A of the Restated Transmission Agreement to be expanded to reflect capital additions or facilities installations.³⁰³ Intervenors state that when specifically questioned Idaho Power witness Durick admitted that there have been investments west of Midpoint (i.e., Exhibit A facilities) that have not been included in the Restated Transmission Agreement calculation.³⁰⁴ Intervenors contend that this demonstrates that Idaho Power has had long-standing rights that it has not exercised under which Idaho Power can partially recover additional revenues from PacifiCorp and reduce the effect of this proceeding on its shareholders or its retail customers.

164. Intervenors state that Idaho Power is correct that this proceeding is not a prudence review. Rather, Intervenors argue, this proceeding addresses cost shifts. Intervenors challenge Idaho Power's reliance on *Hope* arguing that there the Court recognized that "the fixing of 'just and reasonable' rates, involves a balancing of the investor and the

³⁰¹ See *id.* at 84 (*citing* Initial Decision at P 216-218).

³⁰² See *id.*

³⁰³ Intervenors Brief Opposing Exceptions at 82.

³⁰⁴ *Id.* (*citing* Tr. 423:4-12).

consumer interests.”³⁰⁵ Additionally, Intervenor’s argue that Idaho Power’s claim that *Hope* guarantees its full cost recovery is refuted by Commission decisions.³⁰⁶ Here, Intervenor’s assert, appropriate balancing must consider the OATT customers’ interest in not subsidizing the revenue deficiencies of the Legacy Agreements and the long-term generation benefits Idaho Power receives through its participation in the Jim Bridger plant that do not flow to any OATT customers.

ii. Staff

165. Staff states that the Presiding Judge properly found that third-party transmission customers should not be required to subsidize existing customers as would be the case if Legacy Agreements were revenue-credited.³⁰⁷ Additionally, Staff disagrees with Idaho Power’s arguments regarding rate disparity between OATT rates and retail rates, stating that the Commission and state commissions may apply different rate treatments.³⁰⁸

d. Commission Determination

166. The Commission denies Idaho Power’s exceptions. Idaho Power points out that the Commission in Order No. 888 did not abrogate grandfathered transmission agreements such as the Legacy Agreements. Here, however the issue is not the justness and reasonableness of those agreements, but whether Idaho Power’s proposal to credit the revenues generated from these grandfathered agreements in the numerator of its formula rate, rather than including the loads associated with these agreements in the denominator, is just and reasonable. This is most directly a question of rate design and cost allocation, not contract modification. The Commission finds that Idaho Power has not demonstrated that its proposal is just and reasonable and not unduly discriminatory.

167. In Order No. 888 the Commission established that the question of how a particular pre-Order No. 888 transmission contract should be accounted for in a transmission provider’s OATT rates is to be determined on a case-by-case basis.³⁰⁹ Also, as discussed

³⁰⁵ *Id.* at 80 (citing *Hope*, 320 U.S. at 603).

³⁰⁶ *Id.* at 81-82 (citing *CECo*, 86 FERC ¶ 63,004, at 65,031-32 (1999); *AEP*, 80 FERC ¶ 63,006 at 65,060, *Utah Power and Light Co.*, 33 FERC ¶ 63,001, at 65,008 (1985), *aff’d*, 41 FERC ¶ 61,308 (1987)).

³⁰⁷ Staff Brief Opposing Exceptions at 43.

³⁰⁸ *Id.* at 43-44 (citing *Public Systems v. FERC*, 709 F.2d 73, 84 (D.C. Cir. 1983); *Central Vermont Public Service Corp.*, 120 FERC ¶ 61,143, at P 7 (2007)).

³⁰⁹ Order No. 888-A, FERC Stats. & Regs. ¶ 31,048 at 30,256.

above, the Commission has found cost-allocating such grandfathered agreements appropriate where the services provided under grandfathered contracts are firm in nature, rather than non-firm.³¹⁰ Here, the Presiding Judge analyzed the services provided under the Legacy Agreements and found them to provide PacifiCorp, effectively, firm service for the purpose of accounting for those agreements in the denominator of Idaho Power's formula rate.

168. Idaho Power attempts to characterize the Presiding Judge's determination that the Legacy Agreements should be cost-allocated as a "disallowance" of costs that have not been shown to be imprudent.³¹¹ The prudence of Idaho Power's costs (i.e., the total transmission revenue requirement used in the numerator of Idaho Power's formula rate) is not an issue currently before the Commission in this proceeding. That issue was resolved by the partial settlement in this proceeding. Nor are the questions of whether or not Idaho Power may be able to utilize certain provisions of the Legacy Agreements or renegotiate terms to recover additional revenues from PacifiCorp before the Commission. While a primary objective of utility ratemaking may be to set rates so that a utility has a reasonable opportunity to recover its costs of service, including a fair return on investment, cost-based rate-making does not guarantee full recovery of the utility's revenue requirement.³¹² Another fundamental rate-making principle is that costs should be recovered from those who use the facilities and cause the costs to be incurred.

169. For the reasons discussed above, the Commission denies the exceptions and affirms that just and reasonable rate design here requires that the transmission service under the Legacy Agreements be accounted for in the Idaho Power formula rate by including the associated demands in the rate divisor.

B. Issue 2: Appropriate Measure of Demand

1. Initial Decision

170. Idaho Power argues that the 12 coincident peak demands for the Legacy Agreements³¹³ should be included in the rate divisor, while Intervenors and Staff argue

³¹⁰ See *AEP*, 88 FERC ¶ 61,141 at 61,449.

³¹¹ See Idaho Power Brief on Exceptions at 84.

³¹² See *Midwest Indep. Transmission Operator, Inc., et al.*, 116 FERC ¶ 63,030, at P 138 (2006) (citing *Hope*, 320 U.S. 591).

³¹³ "Coincident peak demand" is the customer's usage of the transmission system at the time of the transmission provider's maximum (i.e., "peak") demand, while a transmission customer's "usage" is its scheduled demands. Coincident peak demands are
(continued...)

that the Legacy Agreements contract demands should be used. The Presiding Judge notes that if the total demand under the Legacy Agreements is used, the divisor would be increased by PacifiCorp's full contract right to schedule up to 2,014 MW on Idaho Power's system. Alternatively, if PacifiCorp's 12 coincident peak demand for 2004 is used, then the divisor increases by only 774 MW resulting in a reduction of \$3,466,806 per year in revenues for Idaho Power.³¹⁴ However, using 2,014 MW in contract demand results in a reduction of \$11,374,236 in revenues per year.³¹⁵ The Presiding Judge also notes that Intervenor's estimate that eliminating the revenue credit and increasing the rate divisor by 2,014 MW results in a reduction of \$5,651,040 per year in revenues for Idaho Power, only about half of what Idaho Power contends.³¹⁶

171. The Presiding Judge finds that the appropriate demand measure is 12 coincident peak demand. In reaching his determination, the Presiding Judge finds that in Order No. 888, the Commission stated that OATT transmission rates were to be priced as follows:

[W]e will allow all firm transmission rates, including those for flexible point-to-point service, to be based on adjusted system monthly peak loads. The adjusted system monthly peak loads consist of the transmission provider's total monthly firm peak load minus the monthly coincident peaks associated with *all* firm point-to-point service customers plus the monthly contract demand reservations for *all* firm point-to-point service.³¹⁷

172. He states that this language means that "firm transmission" service is to be represented in the divisor of the rate formula by its "total monthly firm peak load," but the "flexible point-to-point service" portion of that overall firm service, which according to the Presiding Judge means the firm service offered to OATT customers, is to be represented in the divisor by "monthly contract demand reservations." He states that "[t]he fact that the word 'all' is italicized twice in this portion of Order No. 888 in

calculated monthly, and their average over the course of a 12-month period is known as the transmission customer's "12 coincident peak demands." *See* Initial Decision at P 222.

³¹⁴ *Id.* P 226 (*citing* Joint Stipulation of Issues at 6; Morgans Hg. Tr. 99:4-25).

³¹⁵ *Id.* (*citing* Ex. INT-5 (Daniel Ans. Test. 86:8-18); INT-19; Joint Stipulation of Issues at 3; Morgans Hg. Tr. 99:4-25).

³¹⁶ *Id.* P 230 (*citing* Intervenor's Initial Brief 44-45; Ex. INT-5; INT-19; IPC 5 at Statement BB).

³¹⁷ *Id.* P 233 (*citing* Order No. 888, FERC Stats. & Regs. ¶ 31,036 at 31,738).

connection with ‘firm point-to-point service’ does not bring all firm service into the contract demand factor—‘all’ still points only to OATT firm service, not any non-OATT firm service.”³¹⁸

173. Additionally, the Presiding Judge points to section 34.3 of Idaho Power’s OATT, which he states conforms to the Order No. 888 *pro forma* OATT provides:

34.3 Determination of Transmission Provider’s Monthly Transmission System Load: The Transmission Provider’s monthly Transmission System load is *the Transmission Provider’s Monthly Transmission System Peak minus the coincident peak usage of all Firm Point-To-Point Transmission Service customers pursuant to Part II of this Tariff plus the Reserved Capacity of all Firm Point-To-Point Transmission Service customers.*³¹⁹

174. He also notes that the *pro forma* OATT and section 1.47 of Idaho Power’s OATT define Idaho Power’s “Monthly Transmission System Peak” as “The maximum *firm* usage of the Transmission Provider’s Transmission System in a calendar month.”³²⁰ He also notes that “Reserved Capacity” is defined in section 1.39 of Idaho Power’s OATT, consistent with the *pro forma* OATT, as follows:

1.39 Reserved Capacity: The maximum amount of capacity and energy that the Transmission Provider agrees to transmit for the Transmission Customer over the Transmission Provider’s Transmission System between the Point(s) of Receipt and the Point(s) of Delivery *under Part II of the Tariff*. Reserved Capacity shall be expressed in terms of whole megawatts on a sixty (60) minute interval (commencing on the clock hour) basis.³²¹

175. The Presiding Judge reasons that, based on the emphasized terms in Idaho Power’s OATT and his reading of the Order No. 888 *pro forma* OATT, by not capitalizing the word “firm” in the phrase “monthly maximum firm usage” in the definition of “Monthly Transmission System Peak,” the OATT uses that term in its generic sense rather than in terms of any defined service in the OATT. He states, therefore, the Commission

³¹⁸ *Id.* P 234.

³¹⁹ *Id.* P 235 (*citing* Idaho Power OATT, section 34.3 (emphasis added in Initial Decision)).

³²⁰ *Id.* P 236 (*citing* Idaho Power OATT, section 1.47 (emphasis added)).

³²¹ *Id.* P 237 (*citing* Idaho Power OATT, section 1.39 (emphasis added)).

intentionally includes in that maximum the monthly peak usages of *all* firm customers, including the usages of both firm OATT customers (like Intervenors) *and* firm non-OATT customers (like PacifiCorp).³²² Additionally, he reasons that the definition of “Transmission Provider’s Monthly Transmission System Load” (under section 34.3) subtracts from “monthly maximum firm usage” only the coincident peak usage of OATT Firm Point-To-Point Transmission Service customers because the OATT expressly identifies these services as “pursuant to Part II of this Tariff.”³²³ Likewise, he adds, contract demands of the same OATT Firm Point-To-Point Transmission Service customers are added back in, because the OATT defines “Reserved Capacity” as being the contract demands “under Part II of the Tariff.”³²⁴ He concludes that what results in the divisor is the sum of the monthly coincident peak usages of firm non-OATT customers (like PacifiCorp) and the monthly contract demands of OATT Firm Point-To-Point Transmission Service customers (like Intervenors).

176. Noting that “[W]here the terms of a statute are unambiguous, further judicial inquiry into the intent of the drafters is generally unnecessary,”³²⁵ the Presiding Judge finds that the proper way to read Order No. 888, the Order No. 888 *pro forma* OATT and the Idaho Power OATT, is that monthly coincident peak usages of firm non-OATT customers, like PacifiCorp’s monthly coincident peak firm usage under the Legacy Agreements, should be included in the divisor of the formula rate. He also finds that only the contract demands of Idaho Power’s OATT Firm Point-To-Point Transmission Service customers should be substituted for their monthly coincident peak usages in the divisor of the OATT rate formula.

177. In reaching this determination, the Presiding Judge rejects Staff’s argument that the Commission has found that, if the contract between the company and the customer specifies a contract demand where the company is obligated to stand ready to provide that amount of contract demand, then the transmission unit rate should be developed using contract demands, not coincident peaks.³²⁶ He dismisses the precedents cited by Staff as

³²² *Id.* P 238.

³²³ *See id.*

³²⁴ *Id.* P 238.

³²⁵ *Id.* P 239 (quoting *Natural Resources Defense Council v. Browner*, 57 F.3d 1122, 1127 (D.C. Cir. 1995)).

³²⁶ *Id.* P 241 (citing Staff Initial Brief 28).

unpersuasive either because they pre-date Order No. 888,³²⁷ or address interpretation of a transmission agreement, not interpretation of the OATT.³²⁸ Additionally, he finds that of the cases cited by Intervenors and Staff, only *CECo* is on point. The Presiding Judge explains that *CECo* involved the treatment in Consumer Energy's OATT rate calculation of demand associated with non-OATT customer Detroit Edison's use of CECo's network to wheel output from the Ludington power plant in western Michigan to loads in eastern Michigan.³²⁹ He states that OATT customer Michigan Systems proposed that Detroit Edison's full share of the plant's output (917 MW) should be used in the divisor on the theory that CECo must be prepared to meet that level of demand if called upon to do so.³³⁰ He also states that the Staff in *CECo* favored Detroit Edison's actual usage based upon the relevant test year data (443 MW) while CECo favored using only 36 MW.³³¹

178. The Presiding Judge states that in determining that Detroit Edison's full share of the Ludington plant had to be included in the divisor of the rate formula, the *CECo* Judge observed that Order No. 888 made "clear that the Commission requires cost allocation of firm services" and that "[t]he commitment here is akin to firm, point-to-point service. The Commission's Order No. 888 similarly includes in the denominator for point-to-point service and network service the contract demands of all firm customers."³³² The Presiding Judge states that it is important to note that in *CECo*, the transmission provider itself characterized the service as "akin to firm, point-to-point service"³³³ By contrast, he states although the Legacy Agreements services are firm services, no one has contended that they are akin to point-to-point service and it is accepted by all of the parties that the Legacy Agreements service is *not* "OATT firm" or "point-to-point" in nature.³³⁴ He

³²⁷ *Id.* (referencing *Illinois Power Co.*, 62 FERC ¶ 61,147, at 62,062 (1993); *Northeast Utilities Serv. Co.*, 62 FERC ¶ 61,294, at 62,906 (1993)).

³²⁸ *Id.* (referencing *PacifiCorp*, 84 FERC ¶ 61,303, at 62,390 (1998) (*PacifiCorp*)).

³²⁹ *Id.* (citing *CECo*, 86 FERC ¶ 63,004 at 65,031).

³³⁰ *Id.* (citing *CECo*, 86 FERC ¶ 63,004 at 65,032).

³³¹ *Id.*

³³² *Id.*

³³³ *Id.* P 245 (citing *CECo*, 86 FERC ¶ 63,004 at 65,032).

³³⁴ *Id.* (citing Ex. IPC-28).

concludes that the consideration relied upon by the *CECo* Presiding Judge is not present in the instant proceeding and does not command the same result.³³⁵

179. Additionally, the Presiding Judge states that Intervenor and Staff argue that 88 MW of OATT short-term firm point-to-point transmission service that Idaho Power has included in the rate divisor, should be revenue-credited in the numerator of the formula instead. The Presiding Judge holds, however, that the plain language of the *pro forma* OATT in Order No. 888, as adopted by Idaho Power in its OATT, precludes the treatment of OATT short-term firm transactions as a revenue credit.³³⁶

2. Briefs on Exceptions

Intervenors

180. On exceptions, Intervenor take issue with the Presiding Judge's determination that the Legacy Agreement's 12 coincident peak demand, rather than contract demand, should be used in the rate divisor to determine Idaho Power's formula rate. Intervenor argue that in Order No. 888, the Commission found that a case-by-case evaluation should be used to determine how pre-Order No. 888 transmission obligations are to be incorporated into system-wide open access rates but offered no predetermined remedy if such evaluation found that cost allocation, not revenue-crediting, was the appropriate ratemaking outcome.³³⁷ Additionally, Intervenor assert that the Presiding Judge's interpretation of section 34.3 of the *pro forma* OATT denies the remedy the Commission reserved for itself in Order Nos. 888 and 888-A. Intervenor question why the Commission would allow for a case-by-case determination of whether a pre-Order No. 888 contract should be included in the rate divisor, but then deny itself the right to determine the appropriate demand values to be included in the divisor.³³⁸

181. Intervenor also argue that even before the advent of open access to determine how to properly apportion a revenue requirement to firm contract commitments, the Commission historically focused on whether the utility must be capable of providing a contracted amount of service.³³⁹ Intervenor state that in Order No. 888 the Commission

³³⁵ See *id.*

³³⁶ *Id.* P 240.

³³⁷ Intervenor Brief on Exceptions at 14 (*citing* Order No. 888-A, FERC Stats. & Regs. ¶ 31,048 at 30,256).

³³⁸ See *id.*

³³⁹ See *id.* at 12.

held that firm transmission rates should be calculated by taking “the transmission provider’s total monthly firm peak load minus the monthly coincident peaks associated with *all* firm point-to-point service customers plus the monthly contract demand reservations for *all* firm point-to-point service.”³⁴⁰ Intervenor assert that “contract demand reservations” was used rather than actual demands of point-to-point uses because, the Commission stated, “the transmission provider [must] hold the firm contract capacity available regardless of the customer’s own load characteristics or its actual use.”³⁴¹ Moreover, Intervenor contend, the term “point-to-point” was not capitalized as it would have been if the Commission had intended to refer only to OATT service. Intervenor assert that the Commission found that for cost allocation and planning purposes, it is appropriate to consider a firm reservation as the equivalent to a load because a transmission provider’s obligation to plan for, and its ability to use a transmission customer’s reserved capacity is defined by that customer’s contract reservation.³⁴² Additionally, Intervenor insist there is no requirement that the service in question be OATT firm service for the associated firm contract demands to be incorporated into the rate divisor. Instead, Intervenor argue, for non-OATT service the test is whether the service imposes the burden of, and the necessity to plan for, a firm contract demand on the provider’s transmission system.³⁴³

182. With regard to Commission precedents, Intervenor state that in *AEP* the transmission provider sought to include some long-term firm commitments, including third-party wheeling revenue credits while including other long-term demand in the demand divisor. Intervenor assert that Idaho Power’s arguments are similar to those made by *AEP*. Intervenor point out that while the contracts at issue in that case were pre-Order No. 888, the *AEP* Judge found that “[t]he argument that the concerned transmission services were not contemplated at the time agreements were made cannot negate the clear instructions of Order 888” and that he agreed with Staff in that case that “[a]ll customers of the same type of service should bear their proportionate share of the costs of providing the service.”³⁴⁴ Further, Intervenor argue, as in the instant case, once the *AEP* Judge found that the services should be cost-allocated, *AEP* sought to include a lesser amount than the contract demands in the rate divisor.³⁴⁵ Intervenor state that

³⁴⁰ *Id.* (quoting Order No. 888, FERC Stats. & Regs. ¶ 31,036 at 31,738).

³⁴¹ *Id.*

³⁴² *Id.* at 13-14 (citing Order No. 888, FERC Stats. & Regs. ¶ 31,036 at 31,738).

³⁴³ *Id.*

³⁴⁴ *Id.* (quoting 80 FERC ¶ 63,006 at 65,060-61).

³⁴⁵ *See id.*

ultimately, the Commission found “that AEP Power should include the demand for *all firm transmission service in the demand divisor*, and only credit revenues from non-firm transmission against the cost of service.”³⁴⁶ Intervenor state the contracts were pre-Order No. 888 contracts and the rates being calculated were OATT firm and non-firm point-to-point rates, but the Commission held, in substantive part, that deducting the actual loads from the coincident peak divisor and adding in the contract demands of customers taking point-to-point-type service was appropriate.³⁴⁷

183. Further, Intervenor take issue with the Presiding Judge’s distinguishing *CECo*. Intervenor assert that the agreement for the service in *CECo* was different from OATT point-to-point service and that the finding that the service was “akin to firm, point-to-point service” was not dispositive.³⁴⁸ Intervenor assert the Legacy Agreements here are similarly long-term firm contracts that, while not matching the exact terms of OATT point-to-point service, impose a significant firm demand on Idaho Power’s system. Intervenor argue that this is the point the Presiding Judge relied on in finding that the Legacy Agreements services should be cost-allocated rather than revenue-credited. Intervenor argue that the Presiding Judge distinguishes the instant case from *CECo* on the basis that unlike Consumers, Idaho Power has not characterized the Legacy Agreements as point-to-point type services. Intervenor assert that if Idaho Power’s characterization of the service was the key factor and the end of the inquiry, then the Presiding Judge would have concluded that the services under the Legacy Agreements should not have been cost-allocated in the first place.

184. Intervenor also point to *Maine Public Service Company*³⁴⁹ to support their position that contract demands, rather than coincident peak demands should be used. Intervenor state that in *Maine*, the Judge rejected revenue-crediting for three “legacy-type” contracts in an open access rate and directed that the contract demand for those services be reflected in the rate divisor. Intervenor emphasize the *Maine* Judge’s finding that “the services provided to these three non-tariff customers is functionally indistinguishable from the transmission service now proposed by MPS to all customers. Therefore, MPS’s existing firm transmission demands should be added to MPS’s overall

³⁴⁶ *Id.* (quoting *AEP*, 88 FERC ¶ 61,141, at 61,449 (1999) (emphasis supplied by Intervenor)).

³⁴⁷ *See id.* at 16.

³⁴⁸ *See id.*

³⁴⁹ 74 FERC ¶ 63,011 (1996), *aff’d in relevant part*, Opinion No. 434, 85 FERC ¶ 61,412 (1998) (*Maine*).

demand as opposed to using this amount as a revenue credit.”³⁵⁰ Intervenor note that in summarily affirming the *Maine* Judge’s determination, the Commission found the Judge’s determination to be in accord with Commission precedent.³⁵¹ Thus, Intervenor state, the Commission has expressly rejected the use of coincident peaks and other methodologies in favor of its long-standing practice of using contract demands to reflect that the transmission provider must be capable of providing a contracted amount of service. Intervenor argue that the Presiding Judge did not cite any cases justifying the use of coincident peak demands.³⁵² Further, Intervenor question how the Commission could have reached its determinations in *AEP*, *CECo*, and *Maine* if the language of the *pro forma* OATT prohibited the Commission from doing so.

185. Intervenor also take issue with the Presiding Judge’s dismissal of the argument that contract demands should be used because Idaho Power must “stand ready” to supply the contract demand to PacifiCorp at any given time. Intervenor summarize the factual findings the Presiding Judge made in concluding that the services under the Legacy Agreements are firm service and therefore should be subject to cost allocation rather than revenue-crediting.³⁵³ Intervenor argue that the common theme among these findings is that Idaho Power holds out the contract demand values of the Legacy Agreements, rather than PacifiCorp’s coincident peak uses, in administering its transmission system. Intervenor assert that allocating costs based on anything other than the availability of service to PacifiCorp, Idaho Power or others is unreasonable.

186. Additionally, Intervenor assert that for twenty-one months during the 2002-2006 period PacifiCorp’s usage under the Restated Transmission Agreement at the coincident peak was well in excess of 656 MW, the amount Idaho Power states is the highest 12 coincident peak average for the Restated Transmission Agreement. Intervenor contend that nothing prohibits PacifiCorp from using more at any time up to contractual limitations, and Idaho Power must plan for the maximum capacity provided under the Legacy Agreements. Intervenor also claim that PacifiCorp’s Restated Transmission

³⁵⁰ See *id.* at 18 (citing 74 FERC ¶ 63,011 at 65,018).

³⁵¹ *Id.* at 19 (citing *Maine*, 85 FERC ¶ 61,412 at 62,562).

³⁵² See *id.*

³⁵³ *Id.* at 19-22.

Agreement monthly peak is regularly in excess of 1,000 MW and has been as high as 1,261 MW.³⁵⁴

187. Further, Intervenor argues, the record demonstrates that Idaho Power gave PacifiCorp rights to more than the stated contract demand of the Facilities Agreement and the Interconnection Agreement. Specifically, Intervenor states that PacifiCorp scheduled energy and associated capacity well in excess (as high as 665 MW) of its aggregate 500 MW contract rights, even on the Idaho Power system peak in at least five months between 2002 through 2006.³⁵⁵ While acknowledging that Idaho Power stated that this excess scheduling was a result of errors, Intervenor asserts that acceptance of a monthly average peak would reward Idaho Power for granting excessive rights in non-monthly peak hours because revenue associated with such transactions would neither be included in the rate divisor nor revenue-credited.

188. Intervenor also argues that using monthly coincident peak demand rather than contract demands will cause confusion in future updates of Idaho Power's formula rate. Intervenor states that the Presiding Judge relied on Idaho Power's assertion that the coincident peak usage of the Legacy Agreements was only 774 MW for the 2004 test year. However, Intervenor argues, it was never established in the record which services were included in this calculation and the Presiding Judge does not specify which services should be included in a coincident peak calculation. Intervenor argues that the Restated Transmission Agreement provides that PacifiCorp must schedule the five services provided under that agreement under separate schedules but it is not clear from the record which Restated Transmission Agreement services were included in the 774 MW coincident peak amount for 2004. Intervenor asserts that if the Commission does not specify that all the Restated Transmission Agreement services must be counted toward the coincident peak calculation, the parties will have an ongoing dispute over the appropriate amount for each in annual updates of the formula rate.

189. Intervenor states that even assuming *arguendo* that the *pro forma* OATT requires the use of coincident peak demand associated with the Legacy Agreements, *Boston Edison* requires that services under the Facilities Agreement and Interconnection Agreement and all five Restated Transmission Agreement services must be accounted for in the coincident peak calculation. Intervenor argues the record does not demonstrate that

³⁵⁴ See *id.* at 22-23 (*citing* INT-45 (Jan. 2004 – 1,170 MW); INT-46 (Jan. 2002 – 1,261 MW, Jan. 2003 – 1,076 MW, and Nov. 2003 – 1,033 MW); INT-48 (sampling of January, February, March, July, and August 2006)).

³⁵⁵ *Id.* at 23 (*citing* Ex. INT-45 at 2; Ex. INT-46 at 2; Tr. 272:8-21; Tr. 209:7-210:4; Tr. 211:11-15).

Idaho Power has the ability to account for each of these services in the coincident peak calculation and this calculation is more complex and subject to error and manipulation than simply using the contract demands. Intervenors contend that *Boston Edison* requires the use of readily available information to avoid uncertainty as to whether the revenues may or may not be compensatory.³⁵⁶ Intervenors assert that the 2,014 MW contract demands under the Legacy Agreements is such readily available information.

190. Intervenors also contend that the use of the monthly coincident peak demand will result in an inequitable shifting of system costs in contravention of sound public policy. Intervenors argue that in addition to finding that the facts of *AEP* are similar to those at issue here, the Presiding Judge found that “the principles of cost causation and non-subsidization apply equally” in the instant proceeding.³⁵⁷ Intervenors argue that despite this determination, the Presiding Judge departs from *AEP* by only permitting inclusion of the monthly coincident peaks of the Legacy Agreements in the Idaho Power formula transmission rate. Intervenors argue that, having found that the obligations under the Legacy Agreements are firm and should be cost-allocated, the Presiding Judge should have apportioned responsibility on an equitable basis by requiring the use of contract demands. Intervenors contend that not only would the use of monthly coincident peaks increase the costs attributable to other OATT customers, but because Idaho Power holds out the contract demand capacity from its Available Transfer Capability calculations and denies transmission service over Legacy Agreements paths to other customers,³⁵⁸ Idaho Power is denied the opportunity to sell that capacity via its OATT, and thereby gain additional point-to-point transmission revenues. Intervenors argue that if Idaho Power’s obligations under the Legacy Agreements did not cause Idaho Power to forego such revenues, Idaho Power’s formula rate would be reduced because either those revenues would be revenue-credited (i.e., for short-term firm or non-firm OATT point-to-point service) or the associated contract demands included in the rate divisor (i.e., for long-term firm OATT point-to-point service). Intervenors conclude that Idaho Power’s OATT customers should not be required to bear the costs caused by the Legacy Agreements.

191. Intervenors also take exception to the Presiding Judge’s determination that short-term point-to-point transmission service revenues should not be revenue-credited.

³⁵⁶ *Id.* at 25-26 (citing *Boston Edison*, 8 FERC ¶ 61,077 at 61,283).

³⁵⁷ *Id.* at 26 (citing Initial Decision at P 212).

³⁵⁸ *Id.* (citing Initial Decision at P 134).

Intervenors argues that the partial settlement in this proceeding, approved by the Commission, expressly addresses this issue.³⁵⁹

3. Staff Exceptions

192. On exceptions, Staff argues that the Presiding Judge misinterpreted Order No. 888 and chose to disregard Commission precedent on this issue. According to Staff, the Commission has found that, if the contract between the transmission provider and a customer specifies a contract demand where the company is obligated to stand ready to provide a specified amount of contract demand, then the transmission unit rate should be developed using contract demands, not coincident peak demand.³⁶⁰ Staff asserts that the Presiding Judge erred in rejecting *Illinois Power, NU*, and *PacifiCorp*. Staff argues that these cases demonstrate that the key question in determining the measure of demand to be used is whether or not the transmission provider is obligated to stand ready to provide the amount of contract demand specified in the agreement. Staff asserts that this question is the same before and after Order No. 888.

193. Staff also takes issue with the Presiding Judge's finding that because no one contended that the Legacy Agreements are "akin" to point-to-point service, the result in *CECo* is not required here. Staff argues that this reasoning fails to recognize the underlying basis of the decision in *CECo*—i.e., that the denominator should include the full demand level that *CECo* must be prepared to meet if called upon to do so. Staff notes that in *CECo*, the Presiding Judge stated, "[t]o allocate a lesser amount, would not give full recognition of the burden of Consumers Energy's network caused by this transmission commitment."³⁶¹ Here, Staff argues, including the lower actual usage amount would not adequately reflect the full responsibility that Idaho Power has to provide this firm service and would transfer to other ratepayers some of the cost burden associated with the Legacy Agreements.³⁶²

194. Additionally, Staff states that the fact the company represented that the service at issue in *CECo* was "akin to point-to-point service" was only one aspect of that decision.

³⁵⁹ *Id.* at 28 (citing Partial Settlement Agreement, Docket No. ER06-787-002 and -003 (filed June 15, 2007)).

³⁶⁰ Staff's Brief on Exceptions at 8 (citing *Illinois Power Co.*, 62 FERC ¶ 61,147, at 62,062 (1993) (*Illinois Power*); *Northeast Utilities Services Co.*, 62 FERC ¶ 61,294, at 62, 906 (1993); and *PacifiCorp*, 84 FERC ¶ 61,303, at 62,391 (1998)).

³⁶¹ *Id.* at 7 (citing *CECo*, 86 FERC ¶ 63,004 at 65,032).

³⁶² *See id.*

Staff asserts that contract demands of OATT long-term point-to-point customers are included in the rate divisor because the company must plan and operate its system to meet the contract demand, even if at the time of the monthly system peak, a long-term point-to-point customer is not using any of its reservation. Similarly, Staff contends Idaho Power is obligated to stand ready to provide the full amount of contract demand specified in the Legacy Agreements (2,014 MW) and it plans and operates its system to meet this demand. Staff asserts the Presiding Judge's conclusion only to include PacifiCorp's monthly coincident peak usage ignores the basic principle of cost allocation requiring that costs be allocated to the customers for which Idaho Power plans and operates its system. Staff maintains that this principle has held true both pre- and post-Order No. 888.

195. Given that the Presiding Judge correctly found Idaho Power treats service under the Legacy Agreements as firm and that Idaho Power does not interfere with PacifiCorp's rights under these agreements,³⁶³ Staff argues that it is inconsistent for the Presiding Judge to recognize that Idaho Power treats its PacifiCorp obligations as firm for planning purposes, but then fail to recognize that Idaho Power must stand ready to provide the total demand of 2,014 MW in its rate divisor. Staff asserts that the possibility that PacifiCorp could use none of its demand is not relevant, because Idaho Power is obligated to plan for its maximum demand.

196. Staff also takes exception to the Presiding Judge's finding that the demands for OATT short-term firm point-to-point transmission service should be cost-allocated in the rate divisor. Staff states that this issue was resolved in the partial uncontested settlement in this proceeding and, thus it was not an issue to be determined.³⁶⁴

4. Opposing Exceptions

197. In opposing exceptions, Idaho Power asserts that Staff and Intervenor do not address the Presiding Judge's finding that section 34.3 of Idaho Power's OATT requires the use of coincident peak demands. Idaho Power also argues that neither Intervenor nor Staff offers any substantive rebuttal to the Presiding Judge's interpretation of the tariff language. Idaho Power states that the Presiding Judge found the tariff language to be unambiguous and that the language of the tariff must prevail in the absence of ambiguity.³⁶⁵ Idaho Power insists that because Intervenor and Staff have not offered a

³⁶³ *Id.* at 9 (*citing* Initial Decision at P 124-166).

³⁶⁴ *Id.*

³⁶⁵ Idaho Power Brief Opposing Exceptions at 8 (*citing* *National Fuel Gas Supply Corp. v. FERC*, 811 F.2d 1563, 1572 (D.C. Cir. 1987); *Idaho Power Co. v. FERC*, 312 F.3d 454, 461 (D.C. Cir 2002); *Koch Gateway Pipeline Co. v. FERC*, 136 F.3d 810, 814 (continued...))

rebuttal to the Presiding Judge's interpretation of the tariff language, they are prohibited from challenging the decision that rests on that language.³⁶⁶

198. Additionally, Idaho Power contends that Intervenor's reading of Order No. 888 is flawed because they fail to recognize that it was the flexibility and reassignability of OATT point-to-point service that caused the Commission to find that the transmission provider is required to hold the firm contract capacity available regardless of the customer's own load characteristics or its actual use.³⁶⁷ Idaho Power also disagrees with Intervenor's contention that if the Commission meant to refer only to OATT point-to-point service in the Order No. 888 language Intervenor quoted, then the Commission would have capitalized the term "point-to-point." Idaho Power argues that the absence of capitalization is insignificant because the Commission did not always capitalize "point-to-point" and other tariff terms throughout Order No. 888.

199. Idaho Power also disagrees with Intervenor's argument that Order No. 888-A requires a case-by-case evaluation of the appropriate measure of demand to include in the rate divisor. Idaho Power argues that this issue is addressed by the language of Order No. 888 and the *pro forma* OATT requiring the use of coincident peak demands. Idaho Power also asserts that Intervenor's and Staff's positions violate the filed rate doctrine because section 34.3 of Idaho Power's OATT is the filed rate on this issue. Idaho Power insists that the Commission must apply the filed rate, and to adopt Intervenor's and Staff's position would require a change to section 34.3 of Idaho Power's OATT, which would require a section 206 complaint filing.

200. Idaho Power also argues the Commission has long held that, absent delivery point flexibility and reassignability, costs should be allocated based on the customer's respective contributions to the service provider's coincident peak demands.³⁶⁸ Idaho Power states that in Order No. 888, the Commission changed its historical policy with respect to firm point-to-point OATT transmission service because OATT service has assignability and receipt and delivery point flexibility, which the Legacy Agreements lack. Idaho Power adds that the amount of service used under the Legacy Agreements

(D.C. Cir. 1998); *Southwest Power Pool*, 90 FERC ¶ 61,038, at 61,186 (2000); *Cinergy Services, Inc.*, 94 FERC ¶ 61,146, at 61,555 (2001); *Mid-Continent Area Power Pool*, 92 FERC ¶ 61,229, at 61,755 (2000).

³⁶⁶ *Id.* at 9 (citing 18 C.F.R. §§ 385.77 (d)(2)-(3)(2007); *Consolidated Edison of NY Inc. v. Pub. Serv. Elec. & Gas*, 119 FERC ¶ 61,071, at P 38 (2007)).

³⁶⁷ *Id.* at 11 (citing Order No. 888, FERC Stats. & Regs., ¶ 31,036 at 31,738).

³⁶⁸ *Id.* at 15.

during the Idaho Power system peak is substantially below the contractually maximums for that service.³⁶⁹

201. In addition, Idaho Power challenges the argument that if the contract between the company and the customer specifies a contract demand that the company is obligated to stand ready to provide, then contract demands should be used. Idaho Power argues that under this standard, any service with a contract demand that can be called upon by the buyer would satisfy the test, regardless of the contractual restrictions on use or the curtailment priority that limit the seller's obligations.³⁷⁰ Further, Idaho Power argues, even if the relevant standard was whether Idaho Power was "obligated to stand ready" to serve PacifiCorp, Staff's analysis of the evidence on this question is flawed. Idaho Power argues that any obligation for it to "stand ready" to serve PacifiCorp, already limited by PacifiCorp's lack of flexibility and reassignability, is further limited by Idaho Power's right to curtail the service.

202. Idaho Power also challenges Staff's statement that the use of maximum contract demands is justified because Idaho Power must plan for its maximum demands. Idaho Power states that as the Commission's treatment of network service demands demonstrates, even though a transmission provider is obligated to stand ready to meet its customers' maximum potential demands at all times, the customers' 12 coincident peak, not their maximum potential demands are used in the rate divisor because the subject network integration service lacks reassignment and flexibility.³⁷¹ Idaho Power argues that the record shows that it does not plan and operate its system in the same manner for OATT and Legacy Agreements services. Additionally, Idaho Power argues that the Restated Transmission Agreement provides "up to 1,600 MW" but that this is not a specified contract demand.

203. Idaho Power takes issue with Intervenor's argument that the use of contract demand is justified by the Presiding Judge's finding that Idaho Power holds out the contract values of the Legacy Agreements in administering its transmission system. Idaho Power states that the facts Intervenor's cite do not establish that Idaho Power plans for the Legacy Agreements on the same basis as it does for OATT service and the only planning-related finding Intervenor's list (i.e., that Idaho Power includes the Legacy Agreements in its resource plan) is factually incorrect. Idaho Power argues, contrary to Intervenor's assertions, in certain circumstances it uses values below the Legacy Agreements contract demands in calculating Available Transfer Capability.

³⁶⁹ *Id.* at 18.

³⁷⁰ *Id.* at 21.

³⁷¹ *Id.* at 23-24.

204. Idaho Power states that the Presiding Judge properly rejected the cases offered by Intervenor and Staff. With regard to *AEP*, Idaho Power argues that the services at issue in that case were different from the services in the instant proceeding. Idaho Power argues that nothing in that case held that the service for which the Commission rejected revenue-crediting had to be included in the rate divisor based on contract demands or that such contract demands existed. Idaho Power also asserts that nothing in *AEP* suggests that those agreements lacked flexibility like the Legacy Agreements or were otherwise comparable for ratemaking purposes.

205. Similarly, Idaho Power argues the services at issue in *CECo* are different from the Legacy Agreements services. Idaho Power states that it was the nature of the burden—i.e., one associated with firm point-to-point OATT service with a burden that exceeds the burden associated with the Legacy Agreements—that formed the basis of the *CECo* Presiding Judge’s decision.

206. Concerning *Maine*, Idaho Power argues that the services at issue in that case were “functionally indistinguishable” from OATT service.³⁷² Idaho Power argues that Intervenor have over-stated the ruling in that case by suggesting that the Judge there ordered that contract demands be included in the divisor. Rather, Idaho Power argues, the *Maine* Judge ordered that that “firm transmission demands” associated with the contracts be added to the tariff rate divisor. Because this was a pre-Order 888 tariff, the rate divisor was not necessarily the same as the OATT rate divisor and the Judge there stated that it was load-based.

207. With regard to Intervenor’s analysis of the coincident peak data, Idaho Power argues that because the 12 coincident peak is an average, it is not surprising that for 21 months during the 2002 to 2006 period PacifiCorp’s usage under the Restated Transmission Agreement at the coincident peak was greater than the 656 MW coincident peak average. Idaho Power asserts that none of the schedules Intervenor referenced showed levels as high as 1,410 MW.³⁷³ In response to Intervenor’s arguments regarding the Facilities Agreement and Interconnection Agreement, Idaho Power argues that the values in excess of 500 MW were due to a scheduling error, which Idaho Power corrected, and are irrelevant because the actual coincident peak amounts based on written records will be used.

208. Idaho Power also rebuts Intervenor’s argument that the use of 12 coincident peak would cause confusion in the annual formula rate update. Idaho Power argues that actual

³⁷² *Id.* at 31 (citing Intervenor Brief on Exceptions at 18, citing *Maine*, 74 FERC ¶ 63,011 at 65,018).

³⁷³ *Id.* at 37 (citing Tr. 217:1-4).

coincident peak usage, kept in its records, will be used to calculate the average. Further, Idaho Power asserts, the Commission has used coincident peak data to set rates for many decades, has never entertained an argument that coincident peak data is not reliable, and already requires the calculation of coincident peak demands as part of the OATT.³⁷⁴ Idaho Power states that if there is any dispute about actual data in the future, the formula rate information protocols in the Idaho Power tariff, which includes discovery procedures and informational filings, can be used to resolve any issues.

209. Additionally, Idaho Power disputes Intervenor's argument Idaho Power foregoes revenues because of its obligation to PacifiCorp to hold out the contracted-for amounts under the Legacy Agreements. Idaho Power asserts that the contracted-for capacity is made available on a non-firm basis to its OATT customers and the revenues from those services are credited to all OATT customers.³⁷⁵ Idaho Power states that, in addition, network customers can access this capacity using their rights for secondary service under the OATT and that this capacity is frequently available due to the contractual restrictions on PacifiCorp's use of the Idaho Power system.

210. Finally, Idaho Power states that it does not oppose the exceptions to the Presiding Judge's finding that short-term point to point transmission services must be cost-allocated. Idaho Power states that this matter was resolved in the partial settlement in this proceeding.³⁷⁶

5. Commission Determination

211. The Commission finds that the appropriate measure for including the demands associated with the Legacy Agreements into the divisor of the Idaho Power formula rate is the total contract demand specified in the Legacy Agreements. Additionally, the Commission finds that the ratemaking treatment of Idaho Power's short-term service has been fully addressed in the partial settlement in this proceeding. Accordingly, the Commission grants the exceptions and reverses the Presiding Judge on these two issues.

212. In Order No. 888 the Commission stated that the treatment of discounted firm transactions should be addressed on a case-by-case basis.³⁷⁷ We have held consistently that transmission service rates must reflect the costs actually caused by the customers

³⁷⁴ *Id.* at 38 (citing OATT sections 1.47, 34.3).

³⁷⁵ *Id.* at 41.

³⁷⁶ *Id.* at 6.

³⁷⁷ Order No. 888-A, FERC Stats. & Regs. ¶ 31,048 at 30,256.

who must pay them.³⁷⁸ In other words, costs associated with transmission service providers' obligations under pre-Order No. 888 grandfathered agreements should not result in costs shifts to OATT transmission service customers. Accordingly, the case-by-case inquiry prescribed under Order No. 888 does not stop with a determination that the service at issue should be cost-allocated, but includes the measure of demand to use.

213. The Legacy Agreements contract load of 2,014 MW accounts for approximately 40 percent of the total contract load for all firm and network customers on Idaho Power's system.³⁷⁹ Additionally, while Idaho Power's own network, firm and non-firm loads account for at least 2,210 MW, or 45 percent of the total, the loads of OATT firm customers on Idaho Power's system account only for 15 percent of the total firm load on the system.³⁸⁰ Thus, it is appropriate to recognize the significant cost burden that PacifiCorp's and Idaho Power's use places on the Idaho Power transmission system (i.e., 85 percent) vis-à-vis the use by other customers (i.e., 15 percent). Under the Legacy Agreements, Idaho Power is required to stand ready to make the contracted-for amount of capacity available for PacifiCorp's use, except under narrow circumstances related to reliability. Further, Idaho Power has recognized this obligation and has on occasion not made reserved transmission service available to OATT customers and its merchant group because of its commitments under the Legacy Agreements.³⁸¹ Additionally, this obligation to be prepared to provide PacifiCorp with the level of service up to the contracted-for amount whenever PacifiCorp requests such service is a long-term commitment. The Restated Transmission Agreement provides that the agreement will remain in effect for the life of the Jim Bridger plant. The Facilities Agreement has a 50-year term starting in 1974 and the Interconnection Agreement is not set to expire until 2025. Under these circumstances, it would be unreasonable to use the lesser measure of 12 coincident peak demand because doing so would require Idaho Power's OATT customers to bear, for many years in the future, most of the burden of Idaho Power's system although they only use 15 percent of the capacity.

214. While we agree with the Presiding Judge that there are few precedents on this issue, we find that contrary to the Presiding Judge's statement the circumstances in *CECo*

³⁷⁸ See *Western Area Power Admin. v. FERC*, 525 F.3d 40, 57-58 (D.C. Cir. 2008) (“[W]e evaluate compliance with this unremarkable [cost causation] principle by comparing the costs assessed against a party to the burdens imposed or benefits drawn by that party.”).

³⁷⁹ *Id.* P 174 (citing S-1, INT-5, INT-19).

³⁸⁰ *Id.* P 175 (citing S-1, INT-5, INT-19).

³⁸¹ See *Idaho Power Co.*, 90 FERC ¶ 61,009 at 61,019.

are analogous to the circumstances in the instant proceeding. As in the instant case, *CECo* involved the treatment of demand in a transmission provider's OATT rate calculation associated with a non-OATT customer's use of the transmission provider's network to wheel output from a power plant on one side of a state to loads in the other side of the state.³⁸² Additionally, while the OATT customer proposed that the full share of the plant's output should be used in the divisor because the transmission provider must be prepared to meet that level of demand if called upon to do so, the transmission provider favored a lesser amount.³⁸³ The Presiding Judge concludes that *CECo* is inapposite because the transmission provider itself characterized the service as "akin to firm, point-to-point service".³⁸⁴ He states that in the instant proceeding although the Legacy Agreements services are firm services, no one has contended that they are akin to point-to-point service and it is accepted by all of the parties that the Legacy Agreements services is *not* "OATT firm" or "point-to-point" in nature.³⁸⁵ He concludes that

the consideration that persuaded the Administrative Law Judge and the Commission in *CECo* to allocate transmission costs to Detroit Edison's firm point-to-point service in virtually the same way as OATT firm point-to-point service, notwithstanding the different treatment that the contract language of the *pro forma* OATT expressly requires, is not present here and does not command the same result here.³⁸⁶

215. We find however, that whether or not the parties all agree that the Legacy Agreements are not "OATT firm" or "point-to-point" misses the point. Nothing in *CECo* requires that the parties must agree that the service is "point-to-point" in nature. Here, as in *CECo* the transmission provider is obligated under a contract for non-OATT firm service, to deliver the output of a generating facility across the state to the customer's loads. Further, as in *CECo*, the non-OATT customer's contract provides it with a significant amount of firm transmission service. In *CECo*, as here, the non-OATT customer's contract places a significant burden on the transmission provider's network. As the *CECo* Judge stating in determining that the contracted-for demand should be used in the formula rate divisor:

³⁸² See *CECO*, 86 FERC ¶ 63,004 at 65,031.

³⁸³ *Id.* at 65,032.

³⁸⁴ Initial Decision at P 245.

³⁸⁵ *Id.*

³⁸⁶ *Id.*

The intervenor is correct that CEC's transmission network must be capable of transmitting Detroit Edison's full 49 percent ownership share of Ludington. To allocate a lesser amount would not give full recognition to the burden on CEC's network caused by this transmission commitment. Inclusion in the denominator of the lower actual usage of the system in the test year, as proposed by Staff, would not adequately reflect this firm service responsibility and would transfer to other ratepayers some of the cost burden associated with this arrangement. CEC's analysis is even less reliable and would result in practically no recognition of the burden of this large commitment.³⁸⁷

216. Hence, regardless of how much of the Idaho Power system PacifiCorp decides to use on a given day to transport power from the Jim Bridger power plant across the state of Idaho to serve its loads, Idaho Power must be ready to provide PacifiCorp up to the total 2,014 MW provided under the Legacy Agreements. To include the lesser 12 coincident peak total of 774 MW similarly “would not adequately reflect this firm service responsibility and would transfer to other ratepayers some of the cost burden associated with this arrangement.”³⁸⁸

217. The Commission is guided by long-standing transmission pricing principles linking rates to cost causation and barring cross-subsidization. As the Presiding Judge appropriately noted, third-party transmission customers should not be required to subsidize existing customers.³⁸⁹ Accordingly, the Commission finds that because Idaho Power must, except in limited circumstances related to curtailment for reliability reasons, hold the 2,014 MW of firm capacity available for PacifiCorp, it is unreasonable here to use coincident peak loads instead of the contract demand amounts to develop the OATT formula rate. To do so would shift to third-party OATT customers much of the burden associated with Idaho Power's responsibility to hold out that level of capacity for PacifiCorp's use. Accordingly, we grant the exceptions on this issue and reverse the Presiding Judge's finding that 12 coincident peak demand rather than the contract demand under the Legacy Agreements, should be used in the Idaho Power rate divisor.

218. Additionally, as Intervenors, Staff, and Idaho Power all acknowledge the treatment of OATT short-term firm point-to-point service was expressly addressed by the partial

³⁸⁷ CEC, 86 FERC ¶ 63,004 at 65,032.

³⁸⁸ *Id.*

³⁸⁹ *Id.* P 113 (citing *Pricing Policy Statement*, FERC Stats. & Regs. ¶ 31,005 (1994) (“[W]e do not believe that third-party transmission customers should subsidize existing customers.”)).

settlement approved by the Commission in this proceeding.³⁹⁰ Accordingly, we grant the exception on this issue and reverse the Presiding Judge's finding that OATT short-term firm point-to-point service must be cost-allocated rather than revenue-credited.

C. Issue 3: Applicability of Theories on Incentive Regulation

1. Initial Decision

219. The Presiding Judge directed the parties to submit testimony and briefs on whether the theories on incentive regulation described in the article entitled *Regulation of the Electricity Market: Incentive Regulation for Electricity Networks*, by Paul L. Joskow,³⁹¹ are applicable to the issues in this proceeding. In certifying the partial settlement to the Commission on July 11, 2007, and in light of the Joskow article, he proposed revising the settlement agreement to limit the circumstances under which the filing and notice requirements of section 205 of the FPA would be waived in this case. In the August 8, 2007 Order approving the partial settlement the Commission accepted section 6.3 of the settlement agreement, which states that “[i]n approving this Settlement Agreement, the Commission is granting the necessary waivers of the notice and filing requirements of Section 205 associated with the operation of the OATT formula rate as filed and modified by this Settlement Agreement.”³⁹² The Presiding Judge notes that the Commission found that the issues concerning filing and notice requirements were negotiated and agreed upon in the settlement agreement and that interested parties and the Commission retain the right to challenge any annual formula recalculation.³⁹³ The Presiding Judge concludes that because parties have chosen through settlement to foreclose any such analysis and the Commission has accepted that choice, there is no need to discuss further the applicability of the theories in the article the Presiding Judge asked the parties to examine.

³⁹⁰ Partial Settlement Agreement, Docket No. ER06-787-002 and -003 (filed June 15, 2007).

³⁹¹ Initial Decision at P 251 (*citing* Ex. J-1 (Paul L. Joskow, “Regulation of the Electricity Market; Incentive Regulation for Electricity Networks,” *CESifo DICE Report* 3 (February 2006))).

³⁹² *See id.* P 255 (*citing Idaho Power Co.*, 120 FERC ¶ 61,144 at P 2-3 and P 2 n.3).

³⁹³ *Id.*

2. Commission Determination

220. The Commission agrees with the Presiding Judge that no further discussion on this issue is warranted in light of the acceptance of the partial settlement agreement, which made moot any application of the Joskow theories to impose on Idaho Power a filing requirement under section 205 associated with formula rate increases above a certain level.

The Commission orders:

(A) The Initial Decision is affirmed in part and reversed in part, as discussed in the body of this order.

(B) Idaho Power is directed to file, within 30 days of the date of this order, revisions to its rate schedule reflecting the Commission's findings herein.

(C) Within 45 days of the date of this order, Idaho Power is hereby directed to make refunds from the refund effective date, June 1, 2006, with interest calculated in accordance with 18 C.F.R. § 35.19(a) (2008), and to file a refund report with the Commission within 15 days of the date refunds are made. If no refunds are due, Idaho Power is directed to file a report so stating with the Commission within 45 days of the date of this order.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

Appendix: Idaho Power Transmission System Exhibit No. IPC-29

