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2012 JUL 20 AM 11:01
IDAHO PUBLIC
UTILITIES COMMISSION

Chas. F. McDevitt
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July 20, 2012

Via Hand Delivery

Jean Jewell, Secretary
Idaho Public Utilities Commission
472 W. Washington St.
Boise, Idaho 83720

**Re: GNR-E-11-03
Ridgeline Energy LLC**

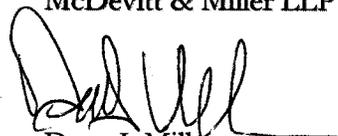
Dear Ms. Jewell:

Enclosed for filing in the above matter, please find an original and seven (7) copies of Ridgeline Energy LLC's Legal Brief, together with nine (9) copies of pre-filed exhibit 2201. In addition, a disk containing PDF version of the Exhibit 2201 is enclosed.

Kindly return a file stamped copy to me.

Very Truly Yours,

McDevitt & Miller LLP



Dean J. Miller

DJM/hh
Enclosures

ORIGINAL

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Attorneys for Ridgeline Energy LLC

BEFORE THE IDAHO PUBLIC UTILITIES COMMISSION

IN THE MATTER OF THE
COMMISSION'S REVIEW OF PURPA
QF CONTRACT PROVISIONS
INCLUDING THE SURROGATE
AVOIDED RESOURCE
(SAR) AND INTEGRATED RESOURCE
PLANNING (IRP) METHODOLOGIES
FOR CALCULATING PUBLISHED
AVOIDED COST RATES

Case No. GNR-E-11-03

**LEGAL BRIEF OF RIDGELINE
ENERGY LLC**

INTRODUCTION

Ridgeline Energy LLC (Ridgeline) is the part owner and operator, through its subsidiary, Rockland Wind Project, LLC, of an 80 MW wind generation project (the Project) located in Power County, Idaho. The Project is a Qualifying Facility under the applicable provisions of the Public Utility Regulatory Policies Act of 1978 (PURPA). The Project sells electric energy to Idaho Power Company (IPCo, Idaho Power) pursuant to a firm energy sales agreement (Rockland FESA), which was approved by the Commission in Case No. IPC-E-10-24, Order

ORIGINAL

No. 32125. A true copy of the Rockland FESA is being filed herewith as Ridgeline Pre-Filed Exhibit 2201.¹

Order No. 32557, issued May 25, 2012, granted Ridgeline Intervenor status in this proceeding. Ridgeline files this Legal Brief in accordance with the Procedural Schedule established by the Commission in Order No. 32388.

In this Legal Brief, Ridgeline demonstrates that Idaho Power's proposed Schedule 74 is not applicable to the Rockland FESA. Additionally, if Schedule 74 is applicable, Ridgeline is entitled to compensation during periods of curtailment for foregone energy sales revenues, and renewable energy credit revenue.

THE ROCKLAND FESA

The Rockland FESA is not a standard PURPA agreement; it has a number of unique features. In the Application for approval, filed in Case No. IPC-E-10-24, Idaho Power described the unique features as follows:

“The varying terms and conditions of this Agreement are more favorable to Idaho Power customers than the "standard" PURPA terms and conditions including: (1) provisions for partial completion damages; (2) simplified Mechanical Availability Guarantee ("MAG") calculation; (3) providing Renewable Energy Credits ("RECs") to the Company after year 2021; (4) better financial damage and security provisions for the benefit of customers; (5) more extensive wind forecasting data; (6) a 25-year contract term; and (7) an energy price that is lower than the published avoided cost rate. (Application, Pg. 3.)

¹ Subsequent to the approval of the Rockland FESA, the parties discovered it contained a clerical error. Rather than Rockland Wind Project LLC, the correct legal name is Rockland Wind Farm LLC. On January 10, 2012, the parties filed with the Commission a First Amendment which corrected the clerical error. In all other respects the agreement was ratified as first written.

Idaho Power also explained that energy prices were not based on the Surrogate Avoided Cost Methodology but rather were derived from the AURORA dispatch model:

“As a basis for energy prices in this Agreement, Idaho Power executed the AURORA economic dispatch model for this Facility's estimated energy shape as specified by Commission requirements. This model provides strictly an energy price based upon the estimated generation from this Facility being available to meet Idaho Power's customers' energy needs. This AURORA energy price contains no value for RECs or other items of value identified within the Agreement. The energy price identified by the AURORA run, including a discount of \$6.50 per megawatt-hour ("MWh") for wind integration, was a levelized price of \$56.21. In comparison, the Published Avoided Cost levelized price for a 10 average MW or less PURPA wind project with a planned on-line year of 2011 is \$75.88 per MWh.” (Application, Pg. 6.)

Idaho Power also described the unique benefits of the FESA:

“Rockland made this unsolicited proposal of a large 80 MW PURPA project to Idaho Power and requested Idaho Power negotiate this Agreement as required by the applicable PURPA rules and regulations. Historically, many developers have avoided or attempted to avoid this large PURPA contracting process by dividing a large project into multiple, less than 10 average MW projects, thus invoking application of the Published Avoided Cost Rate and the more prescriptive contracting process applicable to those smaller QF projects. Idaho Power believes that the negotiations with Rockland, which resulted in the present Agreement, evidence the fact that the large PURPA negotiation process is viable and can result in a project that is both feasible for the developer and more favorable to Idaho Power customers as compared to FESAs for 10 average MW or smaller QF projects.” (Application, Pgs.7—8.)

The Rockland FESA contains another feature not found in most energy sales agreements executed by Idaho Power. If Idaho Power does not accept energy for any reason other than Force Majeure, Forced Outage or temporary disconnection, the seller is entitled to compensation, as discussed on more detail below.

In approving the Rockland FESA, the Commission expressed its appreciation to Ridgeline and Idaho Power for creating a workable agreement without resorting to litigation and contention. The Commission said, “We commend the parties for negotiating an Agreement that

we find sets forth a creative solution to resource issues that have heretofore often resulted only in impasse and the filing of complaints”. (Order No. 32125, Pgs. 9—10, Case No. IPC-E-10-24).

ARGUMENT

A. The Rockland FESA Does Not Permit Unilateral Modification.

As a prelude to discussion of specific legal issues, it is appropriate to keep in mind a fundamental principle of American Law: a party to a contract, freely entered into, is entitled to the benefit of the bargain reflected by the contract. The right to rely on the terms of a contract as written is of constitutional dimensions. The Idaho Constitution, Art. I, Sec 16, provides, “No...law impairing the obligation of contracts shall ever be passed”. Accordingly, an act of government that “...attempts to make material alterations in the character, terms or legal effect of existing contracts is clearly void.” *Fidelity State Bank v. North Fork Highway District*, 35 Idaho 797, 209 P. 448 (1922)². *See also, Steward v. Nelson*, 54 Idaho 437, 443, 32 P.2d 843 (1934): “...any law which in its operation amounts to a denial or obstruction of the rights accruing by a contract...is directly obnoxious to the prohibition of the Constitution.”

Just as the legislature may not alter existing contracts, neither may an administrative agency. In a case involving the Idaho Industrial Commission, the Supreme Court said, “The Commission’s procedural misconduct is compounded by constitutional transgressions...An attorney fee agreement constitutes a valid contract under Idaho law. It is clear that, in Idaho, parties to a contract have a property interest in the subject matter of the contract that is protectable both under the Contract Clause and the Due Process Clause of the United States

² In rare circumstances, not applicable here, contracts of public utilities may be subject to modification. *Agricultural Products Corp. v. Utah Power & Light*, 98 Idaho 23, 557 P.2d 617 (1976).

Constitution”. *Curr v. Curr*, 124 Idaho 686, 864 P.2d 132 (1993). *See also, Deonier v. Public Employee Retirement Bd.* 114 Idaho 721, 760 P.2d 1137 (1988).

The Rockland FESA is very specific as to the means by which it may be modified. Section 23.1 provides, “No modification to the Agreement shall be valid unless it is in writing and signed by both Parties...”.

Ridgeline has not agreed, in writing or otherwise, to IPCo’s attempt to modify the Rockland FESA by engrafting the terms of proposed Schedule 74 into the Rockland FESA.

B. 18 C.F.R. 292.304(f) is Not Applicable to Fixed Rate Contracts

Impliedly conceding that as a matter of contract law, it lacks the authority to unilaterally modify the Rockland FESA, Idaho Power turns to 18 C.F.R. 292.304(f) (Section 304(f)) as a source of authority to impose proposed Schedule 74 curtailment rights. (*See, Direct Testimony of Tessia Park, Pg. 14—15.*)

Section 304(f) provides:

“Periods during which purchases not required. (1) Any electric utility which gives notice pursuant to paragraph (f) (2) of this section will not be required to purchase electric energy or capacity during any period during which, due to operational circumstances, purchases from qualifying facilities will result in costs greater than those which the utility would incur if it did not make such purchases, but instead generated an equivalent amount of energy itself.”

There are strong arguments to support the view that Section 304(f) is not applicable to projects that have chosen the option to sell energy under a contract with fixed rates as opposed to the option of selling at prices prevailing at the time of delivery. (*See, Direct Testimony of Richard Guy on behalf of Idaho Wind Partners, and Direct Testimony of Donald W. Schoenbeck on behalf of North Side Canal Company.*)

And, as the Commission is aware, Idaho Wind Partners, an Intervenor in this proceeding, has filed with the Federal Energy Regulatory Commission a Petition for Declaratory Ruling seeking a determination that Section 304(f) is applicable only to projects that sell energy priced at the time of delivery. In Ridgeline's view the arguments contained in the IWP Petition are compelling, and Ridgeline adopts them, without repeating them in full in this Legal Brief.

C. Under Staff's Analysis, Section 304(f) Curtailment Rights Are Not Available with Respect to the Rockland FESA.

One reason for believing that Section 304(f) is not applicable to fixed rate contracts is a passage from FERC Order No. 69, which implemented the PURPA regulations. That section provides:

“The Commission does not intend that this paragraph [Section 304(f)] override contractual or other legally enforceable obligations incurred by the electric utility to purchase from a qualifying facility. In such arrangements, the established rate is based on the recognition that the value of the purchase will vary with the changes in the utility's operating costs. These variations ordinarily are taken into account, and the resulting rate represents the average value of the purchase over the duration of the obligation. The occurrence of such periods may similarly be taken into account in determining rates for purchases.”

In Rebuttal Testimony, Staff Witness Sterling argues that the Surrogate Avoided Cost Methodology (SAR) does not reflect variations in value during low load scenarios to which section 304(f) was intended to apply. (*See*, Sterling Rebuttal, Pg. 5). Witness Sterling asserts that the SAR only attempts to estimate the cost of building and operating an avoided resource and it does not model load low-load scenarios, or any other scenarios. Based on this, Witness Sterling concludes SAR rates are not of the type described in the paragraph quoted above and that Section 304(f) curtailment rights are available to fixed rate contracts with SAR rates. (*See*, Sterling Rebuttal, Pgs. 5—6).

Assuming, without admitting, this analysis is correct, it does not apply to the Rockland FESA because the rates contained in the Rockland FESA were not derived from the SAR methodology. Rather, the Rockland FESA rates were derived from the AURORA economic dispatch model. As Idaho Power explained in its Application for approval of the Rockland FESA, “As a basis for energy prices in this Agreement, Idaho Power executed the AURORA economic dispatch model for this Facility’s estimated energy shape, as specified by Commission requirements.” (Application, Case No. IPC-E-10-24, Pg. 6).

Rates determined from the AURORA dispatch model are of the type referenced in the above passage from Order No. 69—the rates are based on the recognition that the value of the purchase will vary depending on the utility’s operating costs under various operating conditions at various hours.

The AURORA dispatch model has been approved by the Commission in various contexts. In general, the AUROA model provides detailed estimates of pricing, and resource values under various market conditons. It applies economic principles and dispatch simulation to model the relationships of supply, transmission and electricity demand to forecast market prices. (See, Idaho Power 2009 Integrated Resource Plan, Pg. 95, Case No. IPC-E-9-33). When used to set rates for PURPA purchases, the AURORA model simulates the project’s cost during each hour of the QF’s proposed contract term. (See, Direct Testimony of Karl Bokenkamp Pg. 11).

To further support his opinion, Staff Witness Sterling refers to the recent FERC Order, *Entergy Services*, 137 FERC 61199, paragraph 56 where FERC states:

“Many avoided cost rates are calculated on an average or composite basis, and already reflect the variations in the value of the purchase in the lower overall rate. In such circumstances, the utility is already compensated, through the lower rate it generally pays for unscheduled QF energy, for any periods during which it purchases unscheduled QF energy even though that energy’s value is lower than the true avoided cost. On the other hand, for avoided cost rates that are

determined in real-time, such avoided costs adjust to reflect the low (or zero or negative) value of the unscheduled QF energy, allowing the QF to make its own curtailment decisions. In neither case is the utility authorized to curtail the QF purchase unilaterally.”

Witness Sterling opines that SAR based rates are not of the type described by FERC in *Entergy*. But, AURORA based rates are precisely of the type described by FERC—the utility is already compensated for any period during which it purchases Rockland energy even though that energy’s value is lower than the true avoided cost, in which case the utility is not authorized to curtail the QF purchase unilaterally.

And, while the focus of discussion in this case is hours when the real-time avoided cost may be less than contract rates, it is important to bear in mind that the QF does not receive any additional compensation in hours when the real-time avoided cost is higher than the contract rate. This illustrates the fundamental unfairness of Idaho Power’s proposal— contrary to the bargain contained the Rockland FESA, it shifts the financial risk in some hours to the Ridgeline while Idaho Power retains the benefit in other hours.

In short, Staff rejects the broad proposition that Section 304(f) curtailment rights are not available with respect to all fixed rate contracts. Rather, Staff suggests Section 304(f) curtailment is precluded only if contract rates are based on a methodology described in Order No. 69 and in *Entergy*. The rates in the Rockland FESA are based on such a methodology. The inescapable conclusion is that under the Staff analysis, even if it is correct, Section 304(f) curtailment rights are not available to Idaho Power with respect to the Rockland FESA.

D. In the Event Curtailment is Permitted Under Proposed Schedule 74, Ridgeline is Entitled to Compensation.

As noted above, the Rockland FESA contains several features not found in most energy sales agreements executed by Idaho Power Company. For the purpose of this section of Ridgeline's Legal Brief, the relevant unique features are wind forecasting and energy acceptance

In addition to Rockland being required to contribute to the Idaho Power wind forecasting cost as specified for all new PURPA wind forecasting costs, the Rockland Agreement also requires Rockland to install, maintain and provide wind measurement data from state of the art monitoring equipment to Idaho Power for the full term of the agreement. (Application, Case No. IPC-E-24, Pg. 5). Paragraph 9.3 provides:

“9.3.1 Historical wind data- Within 60 days after Commission approval of this Agreement, the Seller shall provide Idaho Power with seven years of historical wind data from the meteorological towers at the Rockland site. This data will be provided in an electronic format reasonably acceptable to Idaho Power.

9.3.2 No later than 30 days prior to the First Energy Date the Seller shall have erected at the site two (2) high quality, hub-height, permanent, meteorological wind measurement towers at locations on the site equipped with:

- (i) Two (2) heated anemometers per tower;
- (ii) Two (2) air temperature sensors per tower;
- (iii) One (1) barometric pressure sensor (with DCP sensor); and
- (iv) Two (2) heated wind vanes per tower.

9.3.3 The wind sensors and air temperature sensors shall be set at two (2) height locations from ground level. All equipment shall provide reasonably accurate measurement of wind data. The Seller will install the necessary equipment to be able to electronically transmit this wind data and wind turbine availability status real-time to Idaho Power or a designee of Idaho Power in a method and form reasonably acceptable to Idaho Power and in accordance with Prudent Electrical Practices. Turbine availability status shall be transmitted beginning 45 days after First Energy Date. Failure by the Seller to operate and maintain this equipment in a manner to provide reasonably accurate and dependable data for the full term of this Agreement shall be an event of default.

9.3.4 Seller shall submit to Idaho Power Seller's technical specifications for the meteorological towers along with a site plan showing the location of the towers, project layout with turbine locations and the wind rose for the Site, as applicable.”

As a companion to this higher level of predictability of generation, the Rockland FESA carefully limits circumstances in which energy non-acceptance is permitted and requires compensation for non-excused curtailment. Paragraph 12.2.4 provides:

“If Idaho Power is unable to accept the energy from this Facility and is not excused from accepting the Facility's energy, Idaho Power shall pay Seller the sum of the applicable energy price in paragraph 7.1 or 7.2, plus the Environmental Attribute Replacement Value (if such curtailment occurs prior to January 1, 2022), plus the PTC Value for each MWh of the estimated energy that Idaho Power was unable to accept, which shall be estimated to have been delivered at a rate equivalent to the pro rata average of the amounts specified for the applicable month in paragraph 6.4.”

Paragraph 12.2.1 specifies the circumstances in which Idaho Power is excused from accepting energy, and limits permitted non-acceptance to three carefully defined circumstances. Those circumstances are (1) Force Majeure, (2) Idaho Power Forced Outage or (3) temporary disconnection of the facility in accordance with Seller's interconnection agreement. Non-acceptance due to low-load contingencies is not a circumstance that relieves Idaho Power of the obligation of compensation under Paragraph 12.2.4.

As discussed in Section A, *supra*, a party to a contract is entitled to the benefit of the contract as written. The right of contract reliance arises not a just from a general sense of fairness. It is so fundamental that it is constitutionally protected in the First Article of the Idaho Constitution entitled Declaration of Rights. As such, the right of contract reliance is on a par with other fundamental rights enumerated in the Declaration of Rights, such as the right to religious freedom (Sec.4), the right to vote (Sec. 19), the right of free speech (Sec. 9); the right to keep and bear arms (Sec. 11); the right to be free from unreasonable searches and seizures (Sec. 17).

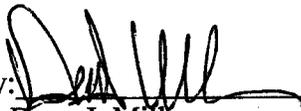
The Rockland FESA is unambiguous in its definition of excused non-acceptance. Neither Idaho Power nor the Commission have the legal ability to rewrite the Rockland FESA to include a new excuse for non-acceptance.

CONCLUSION

Based on the reasons and authorities cited herein, the Commission should hold that (1) the Rockland FESA is not subject to unilateral modification; (2) that the Rockland FESA is not subject to curtailment under Section 304(f); (3) if Section 304(f) curtailment is permissible, Ridgeline is entitled to compensation under section 12.2.4.

DATED this 27 day of July, 2012.

MCDEVITT & MILLER, LLP

By: 
Dean J. Miller
Attorney for Ridgeline Energy LLC

CERTIFICATE OF SERVICE

I hereby certify that on the 20th day of July, 2012, I caused to be served, via the method(s) indicated below, true and correct copies of the foregoing document, upon:

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BY: Heather Houle
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