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IDAHO PUBLIC
UTILITIES COMMISSION

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BEFORE THE

IDAHO PUBLIC UTILITIES COMMISSION

BOB LEWANDOWSKI AND MARK SCHROEDER, U.S. GEOTHERMAL, INC, AN IDAHO CORPORATION Complainants vs. IDAHO POWER COMPANY, an Idaho corporation, Respondent.	))))))))	CASE NO. IPC-E-04-08 CASE NO IPC-E-04-10 POST HEARING BRIEF OF BOB LEWANDOWSKI AND MARK SCHROEDER

COMES NOW Robert Lewandowski and Mark Schroeder ("Complainants") by and through their attorney of record and hereby lodges their post hearing brief in the above captioned matter.

BACKGROUND

At the conclusion of the hearing in this matter the Commission directed the parties to file post hearing briefs addressing the issue of firm vs. non-firm purchases under PURPA.[1] In addition, Commissioner Kjellander requested that the parties brief the issue of "intermittent power." These "issues" surfaced in Idaho Power and Staff's testimonies in support of the concept of a production band or bracket for production under a QF[2] contract. The concept being promoted by Staff and Idaho Power is that when a QF's production falls outside of the bracket, penalties are assessed against the QF. The penalties take the form of reduced rates (in the case production exceeds the bracket) or payments to the utility by the QF (in the case of production shortfalls). Witnesses for both the Staff and Idaho power use the word "non-firm" to describe projects whose production falls outside of the proposed bracket.

The case was initiated by the Complainants (and U.S. Geothermal) to seek guidance from the Commission relative to the unreasonable and illegal nature of the bracket. Idaho Power claims that this bracketing is necessary because of operational considerations in the future and historical performance of the CSPPs and to protect the ratepayers. However, Idaho Power has failed to provide any quantitative evidence that the CSPPs as a whole are not "firm", as Idaho Power alone chooses to define that term, in spite of the evidence in their own 2002 and 2004 Integrated Resource Plans, which show very detailed monthly projections of CSPP "firmness". Idaho Power has failed to provide any

[1] Public Utilities Regulatory Policy Act of 1978 16 U.S.C. § 824a-3.

quantitative or qualitative evidence that the ratepayer has ever been harmed by the supposed lack of firmness of the company's 70-plus QF contracts. Idaho Power has failed to provide any evidence that they have ever requested greater or more frequent updates on power plant output from individual CSPP operators other than on the day each CSPP contract was signed. Idaho Power has failed to demonstrate how these penalties will "encourage" the CSPPs to be more reliable in their predictions. Idaho Power has failed to demonstrate how there is any parity between the penalties Idaho Power wishes to impose on CSPPs and the costs to the Idaho Power shareholders when Idaho Power's own power plants fail to generate at expected levels. Idaho Power has failed to demonstrate how the value (and cost) of such brackets is in any way included in the SAR basis of the avoided cost rates. Idaho Power has failed to obtain Commission approval prior to unilaterally invoking what is effectively a change in the rates available under the IPUC-approved PURPA rates. The evidence is overwhelming that Idaho Power has failed to justify their unilateral imposition of these brackets, which are effectively a rate change. But, this brief will not re-visit all Idaho Power's failure to demonstrate the necessity for the brackets. As will be shown below, the legal case against brackets in QF contracts is even more compelling than the factual case against them.

The concepts of firm, non-firm, and intermittent are interchangeable in the ***legal context*** of determining what type of contract a QF is entitled to. They are also irrelevant. It is possible that, from an operations standpoint, a utility

[2] Qualifying Facility (QF). Under PURPA electric utilities are required to purchase electricity from QFs.

resource manager may find value in the use of these terms. However, from an avoided cost standpoint, the use of these terms only confuses the real issue – which is when are a utility's avoided cost rates determined for purposes of entering into a power sales agreement.

BRACKETS ARE ILLEGAL IN A LONG -TERM QF CONTRACT

All electric utilities – both regulated and self-regulated – are required by federal law and FERC regulations to purchase QF power at the purchasing utility's full avoided cost. The QF – not the purchasing utility – has the option to choose which FERC specified methodology is to be used in determining avoided costs. 18 C.F.R. § 292.304(d).

Some QFs may wish to avoid incurring contractual delivery obligations, choosing instead simply to make energy deliveries only "as available". For this subgroup of QFs, avoided cost is to be "calculated at the time of delivery." 18 C.F.R. § 292.304(D)(1).

On the other hand, QFs willing to assume delivery obligations pursuant to contract have their choice of either short-term pricing, described above, or long-term pricing established by contract "at the time the obligation is incurred." 18 C.F.R. § 292.304(d)(2). That is, the QF may demand that its long-term price be established at the time of contract execution. This long-term pricing option is the type being sought by both the Complainants and U.S. Geothermal.

The QF has the option to determine whether it will receive payments based on "as available" sales or based on a long-term price pursuant to a legally enforceable obligation. Understanding this concept is critical if we are to clear the fog generated by the "intermittent, firm, and non-firm" discussion. Fortunately this is a concept clearly established in federal law. 40 C.F.R. § 292.304(d) provides:

> Each qualifying facility **shall have the option** either:
>
> (1) To provide energy as the qualifying facility determines such energy to be available for such purchases, in which case the rates for such purchases shall be based on the purchasing utility's avoided costs calculated at the time of delivery; or
>
> (2) To provide energy or capacity pursuant to a legally enforceable obligation for the delivery of energy or capacity over a specified term, in which case **the rates for such purchases shall, at the option of the qualifying facility exercised prior to the beginning of the specified term**, be based on either:
>
> (i) The avoided costs calculated at the time of delivery; or
>
> (ii) The avoided costs **calculated at the time the obligation is incurred.**[3]

It is a simple and easily understood concept. A QF may, at its option, decide to sell power at rates set either at the time of delivery (as available) or at rates set at the time the obligation is incurred (long-term contract). Pursuant to Federal law, it is the QF that gets to make this call – not the utility and not the Commission's staff. There is nothing in PURPA, its implementing regulations or this Commission's orders making any other distinction relative to how the obligation to purchase is both initiated and implemented. The concept of firm and non-firm power deliveries is a legal myth that has absolutely no bearing on what type of contract a QF is legally entitled to demand from the utility.

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[3] Emphasis provided.

An informal way to describe the first option, that is setting avoided cost rates at the time of delivery, would be to call it non-firm power. Similarly one might describe the second option as "firm" power. But the concept of firmness does not exist for purposes of determining when the QF exercises its option relative to what type of a contract it is entitled to demand from the utility.

Idaho Power's witness and the Staff witness agreed, during cross-examination, that the bracket has the effect of changing the rate the QF is paid over the life of the contract. Of course, it is clear just looking at the bracket that its very purpose is to change the rate paid to the QF whenever production is either above or below the bracket. However, **at the option of the QF,** the developer may choose to receive the avoided costs calculated at the time of delivery or at the time the contract is signed. Complainants have chosen to take Idaho Power's avoided cost rates that are calculated at the time the contract is signed – not at the time of delivery. The bracket illegally forces them to accept avoided cost rates determined at the time of delivery whenever production is outside of the bracket and not at the time the contract is signed.

BRACKETS VIOLATE THE LEGAL BARRIER AGAINST RETROACTIVE CHANGES TO CONTRACT PRICE

As noted above, the very purpose of the brackets is to change the rate paid to the QF whenever its production exceeds or falls below a predetermined level. However, once a QF has selected its choice of avoided cost methodologies, it may be denied its full avoided cost rate only if FERC later revokes its qualified status under PURPA. <u>See American Paper Institute v.</u>

American Electric Power Service Corp. 461 U.S. 402, 412-18 (1983). Decertification is a determination strictly reserved to FERC.

No provision of the FERC regulations authorizes state commissions or regulated utilities to change contract prices based on a redetermination of avoided cost. The preamble to FERC's PURPA regulations clearly states otherwise:

> The Commission [FERC] does not believe that the reference in the statute to incremental cost of alternative energy was intended to require a minute-by-minute evaluation of costs which would be checked against rates established in long-term contracts between qualifying facilities and electric utilities . . . The import of this section is to ensure that a qualifying facility which has obtained the certainty of an arrangement is not deprived of the benefits of its commitment as a result of changed circumstances.

45 Fed Reg. at 12,224. This stands to reason. Redetermination of long-term contract prices would nullify the second pricing option granted to those QFs willing to assume delivery obligations. See 18 C.F.R. § 292.304(d)(2), described above. If contract prices were subjected to later redetermination, all QF pricing would collapse into the first pricing option: calculation of prices at the time of delivery. 18 C.F.R. § 292.304(d)(1).

FERC specifically anticipated the type of attack against QF rates being launched by Idaho Power in this case. Its regulations address the possibility that rates set by contract might differ from a purchasing utility's avoided cost sometime during the life of that contract:

> In the case in which the rates for purchases are based upon estimates of avoided costs over the specific term of the contract or other legally enforceable obligation, the rates for such purchases do not violate this subpart if the rates for such purchases differ from avoided cost at the time of delivery. [18 C.F.R. § 292.304(b)(4).]

Quite frankly, we have been down this road before. The Idaho Supreme Court explicitly rejected an early attempt by Idaho Power to insist on a contract clause that allowed the avoided cost rates in long-term QF contracts to be changed. The Idaho Supreme Court was clear – once a long-term contract is signed, the rates are fixed for the term of the agreement:

> Thus we reject Idaho Power's argument that the Commission does not have any authority to establish an avoided cost rate which is fixed for the duration of the contract and which is not subject to the Commission's continuing jurisdiction. It is clear that both Congress and FERC, through its implementing regulations, intended that CSPPs [QFs] should not be subjected to the pervasive utility-type regulation, which would result if the contract language[4] proposed by Idaho Power were approved by the Commission.

Afton Energy, Inc. v. Idaho Power Co. 107 Idaho 781, 788.

Other states, when faced with similar attacks on PURPA have responded much like our own Supreme Court. In all such cases, the state commission authorized to establish avoided cost rates were held to lack authority to tamper with rates included in long term contracts.

In Smith Cogeneration Management v. Corporation Commission 863 P.2d 1227 (Okla. 1993), the Oklahoma Supreme Court rejected similar language that the Oklahoma Commission was insisting be inserted into QF contracts. The clause at issue in Smith would have allowed the Commission to recalculate the estimated avoided costs during the life of the contract. The court found this provision unlawful as a violation of PURPA:

> Such a requirement makes it impossible to comply with PURPA and FERC regulations requiring **established rate certainty for the duration**

[4] Idaho Power's proposed language provide that: "The rates, terms and conditions set forth in this agreement are subject to the continuing jurisdiction of the Idaho Public Utilities Commission. Id. at 786.

> of long-term contracts for qualifying facilities that have incurred an obligation to deliver power . . . Once avoided costs are set, the Corporation Commission cannot later review the contract to reconsider the avoided costs.

Id. at 1240-41, emphasis provided. Note the legal significance of "rate certainty" for QFs, like Mr. Lewandowski and Mr. Schroeder. "PURPA and FERC regulations seek to prevent reconsideration of long term contracts once estimated avoided costs are agreed upon." Id. at 1242 (emphasis provided). State commission rules requiring such clauses were pre-empted by federal law. This finding of federal pre-emption was based on the preamble to FERC's regulations implementing PURPA, quoted above. The court left no doubt that it was preserving a QF's right to hold the purchasing utility to the estimated avoided costs specified by the contract:

> [T] he Corporation Commission is required to set avoided costs for the duration of the proposed contract – even if the avoided costs are estimated. Once avoided costs are set, the Corporation Commission cannot later review the contract to reconsider the avoided costs. [Id. at 1241].

Similarly, the Texas Supreme Court has ruled, "the federal [PURPA] regulations do not authorize the [Texas Public Utility] Commission to alter the terms of a purchased power contract between a utility and a QF." Public Utility Commission v. Gulf States Utilities, 809 S.W.2d 201, 208 (Tex. 1991).

Thus, regardless of one's view of "firmness", this Commission cannot order Complainants to sign a long-term contract with a provision allowing Idaho Power to change the rates after the agreement has been executed. FERC regulations and state case law clearly demonstrate that the Commission has no legal authority to order such a clause be inserted into long term avoided cost contracts.

THE IDAHO COMMISSION HAS ALREADY RESOLVED THE ISSUE OF "FIRMNESS" IN ITS INAUGRUAL PURPA ORDER

This Commission settled the issue of firmness of rates early on in Idaho. In Order No. 15746 the Commission declared that:

> This Commission endorses the policy of having each utility pay its full avoided cost when purchasing from cogenerators and small power producers. Such a price will bring about the equilibrium solution typical of a competitive market where the marginal cost of all firms producing a like product is equal. Anything less will fail to bring about the condition of a free, competitive market and will leave the utility, as the sole buyer, in a position to dictate price as it sees fit.

Case No. P-300-12, June 13, 1980 at p 5, emphasis provided.

Specifically addressing the issue of the firm versus non-firm power deliveries, the Commission cited the relevant portions of 18 C.F.R. § 292.304 discussed extensively above:

> Section 292.304(d) of the FERC rules provides that qualifying facilities have the option of selling power to the utility either on an "as available" basis or pursuant to a "legally enforceable obligation" to deliver. This terminology corresponds to the familiar distinction between non-firm power sales and firm power sales. In non-firm power sales ("as available") it is the seller, not the buyer, who decides whether or not the power is to be made available.

Id. at p. 14, emphasis provided. It seems that in the time that has lapsed since the Commission issued its inaugural PURPA order, that Idaho Power has lost sight of the structure and purpose of PURPA. It is the seller and not the buyer who decides if a project will be sold either as non-firm ("as available") or firm (pursuant to a "legally enforceable obligation"). Idaho Power's proposed bracket that adjusts rates during the life of the legally enforceable obligation turns PURPA on its head. It is unequivocally prohibited by PURPA and this Commission's prior orders.

Respectfully submitted this 17th day of September 2004.

By______________________________

Peter Richardson, Counsel for
Robert Lewandowski and Mark Schroeder

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 17th day of September, 2004, I caused a true and correct copy of the foregoing **POST HEARING BRIEF ON BEHALF OF MARK SCHROEDER AND BOB LEWANDOWSKI** to be served by the method indicated below, and addressed to the following:

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Signed Peter J Richardson
Peter Richardson