



IDAHO POWER COMPANY
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IDAHO PUBLIC UTILITIES COMMISSION
April 3, 2006

Jean D. Jewell, Secretary
Idaho Public Utilities Commission
472 West Washington Street
P. O. Box 83720
Boise, Idaho 83720-0074

Re: Case No. IPC-E-06-02
Reply Comments of Idaho Power Company

Dear Ms. Jewell:

Please find enclosed for filing an original and seven (7) copies of the Reply Comments of Idaho Power Company regarding the above-entitled case.

I would appreciate it if you would return a stamped copy of this transmittal letter in the enclosed self-addressed, stamped envelope.

Very truly yours,

Monica Moen

MM:jb
Enclosures

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IDAHO PUBLIC UTILITIES COMMISSION

Attorneys for Idaho Power Company

BEFORE THE IDAHO PUBLIC UTILITIES COMMISSION

IN THE MATTER OF THE APPLICATION OF)
IDAHO POWER COMPANY FOR APPROVAL)
OF AN ENERGY SALES AGREEMENT)
FOR THE SALE AND PURCHASE OF)
ELECTRIC ENERGY BETWEEN IDAHO)
POWER COMPANY AND CO-GEN CO, LLC)
_____)

CASE NO. IPC-E-06-02
REPLY COMMENTS OF
IDAHO POWER COMPANY

COMES NOW Idaho Power Company (“Idaho Power” or the “Company”) and, in accordance with the Notice of Application and Notice of Modified Procedure issued pursuant to Order No. 29970, dated February 8, 2006, and the scheduling agreement reached by counsel for the parties to this matter, hereby submits the following Reply Comments to the Comments of the Commission Staff dated March 1, 2006 (“Comments”).

**I.
BACKGROUND**

On January 26, 2006, Idaho Power submitted an Application to the Commission seeking confirmation that payments for energy purchased under an Energy Sales Agreement for the sale and purchase of electric energy between Idaho Power and

Co-Gen Co LLC ("Co-Gen") would be allowed for ratemaking purposes. Co-Gen owns a 10 MW nameplate capacity wood waste (biomass) generation unit that is located adjacent to the Prairie Wood Products Mill in Prairie City, Oregon, approximately 100 miles west of Ontario, Oregon ("Facility"). The Facility is located in the service area of the Oregon Trails Electric Cooperative ("OTEC") and in Idaho Power's electrical control area. Generation from the Facility is delivered to Idaho Power over the transmission lines of OTEC and the Bonneville Power Administration.

The Facility is a qualified small power production facility ("QF") under the applicable provisions of the Public Utility Regulatory Policy Act of 1978 ("PURPA"). The Public Utility Commission of Oregon ("OPUC") is the state regulatory agency with jurisdiction to implement PURPA in the state of Oregon. The OPUC has primary jurisdiction over the Energy Sales Agreement and determines Idaho Power's avoided costs in Oregon.

On December 29, 2005, Idaho Power and Co-Gen entered into an Energy Sales Agreement ("Agreement") in conformance with the terms and conditions established by the OPUC. Under the terms of that Agreement, Co-Gen elected to contract with Idaho Power for a one-year term, commencing on January 1, 2006. Co-Gen further elected to be paid using the Gas Market Method (Option 3) set out in Idaho Power's Oregon Tariff No. E-25, Schedule 85, dated August 11, 2005. In its Application, Idaho Power sought an Order from this Commission declaring that Idaho's jurisdictional share of costs for purchases of energy under the Agreement be allowed as prudently incurred expenses for ratemaking purposes.

OPUC Order No. 05-584 directed Idaho Power to file a “standard” QF purchase contract for review and approval by the OPUC. See Page 59 of Order No. 05-584 issued May 13, 2005 in OPUC Docket No. UM 1129. As noted in Staff’s Comments, unlike in Idaho, the OPUC does not approve PURPA contracts individually at or near the time of their execution. Instead, those contracts are held for consideration in the Company’s next Oregon general rate case. The Order emerging from that general rate case either approves or disproves cost recovery by the utility. Because the Agreement between Idaho Power and Co-Gen is based upon the OPUC-approved “standard” contract and because the rates in the Agreement are the rates required by the approved tariff in Oregon, it is extremely unlikely that the Agreement would not be approved for cost recovery in an Oregon general rate case.

Staff notes in its Comments that most of the terms and conditions of the Agreement are nearly identical to those typically contained in PURPA agreements submitted to this Commission by Idaho Power for approval. However, the Option 3, Gas Market Method ordered by the OPUC to determine the rates paid to Co-Gen differs considerably from the methodology used to set avoided costs in Idaho. Under Option 3, the rate to be paid to Co-Gen is based on the average monthly spot prices of natural gas at Sumas. As a result, there is a reasonable likelihood that purchase prices to be paid for energy under the Agreement will be higher than the purchase prices that would be paid if the Facility were situated in Idaho.

Perhaps in anticipation of that result, the Commission Staff recommended that, in Idaho, the jurisdictional amount approved for rate recovery by Idaho Power under the Agreement be equal to the actual amounts paid under the Agreement provided those

amounts do not to exceed 51.50 mills per kilowatt-hour, the avoided cost rate established by this Commission in Order No. 29646.

Idaho Power respectfully submits that the rate recovery limitations recommended by the Staff contravene the intent of the Federal scheme with respect to PURPA and may result in Idaho Power being unable to recover all of its expenses prudently incurred to comply with PURPA's mandatory QF purchase obligation. Such result would be manifestly unfair, would ignore the doctrine of comity between the states of Idaho and Oregon and would be in direct contradiction to Federal law and Federal Energy Regulatory Commission's ("FERC") regulations (1) obligating Idaho Power to purchase the electrical energy output of QFs at rates established by the public utilities commission of the state having jurisdiction over the qualified facilities located within the state; and (2) authorizing Idaho Power to recover all prudently incurred costs associated with QF purchases. The Company submits the following arguments in support of its position.

II. ARGUMENTS

A. **Federal Law Authorizes The Individual States To Determine Avoided Cost Rates For The Purchase Of Electrical Energy Produced By Qualified Facilities Located Within Their Jurisdictions.**

Congress passed PURPA as part of the National Energy Act in an effort to encourage the development of renewable energy technologies as alternatives to the construction of new fossil fuel-fired generating facilities by electric companies. *Rosebud Enter., Inc. v. Idaho Pub. Util. Comm'n*, 128 Idaho 624, 627, 917 P.2d 781, 784 (1996). Section 210 of PURPA requires that electric utilities offer to purchase power generated by qualified cogenerations or small power producers. 16 U.S.C.A. § 824(a)-3(a).

Section 210(f) of PURPA provides that “each State regulatory authority shall . . . implement such [FERC] rule . . . for each electric utility for which it has ratemaking authority.” 16 U.S.C.A. § 824(a)-3(f)(1). PURPA did not divest FERC of its exclusive jurisdiction to regulate wholesale utility transactions. It did, however, allow FERC to, in essence, delegate its authority to the states to set the “avoided cost” rates paid by an electric utility over which a state had ratemaking authority.

FERC regulations provide no precise formula for calculating the rate a utility is to be paid for purchasing QF-produced electric energy. The rules only prescribe that the rates paid by utilities for QF purchases shall not exceed “the incremental cost to the electric utility of alternative electric energy.” 16 U.S.C.A. § 824(a)-3(b).¹ This cost is generally referred to as the utility’s “avoided cost” rate.

In effect, “[t]he grant of authority to the states [by Congress] in implementing the regulation of sales and purchases between QFs and electric utilities and determining the avoided costs is broad.” *Rosebud Enter.*, 128 Idaho at 627, 917 P.2d at 784. The U.S. Supreme Court in *Federal Energy Regulatory Comm’n v. Mississippi*, 456 U.S. 742, 102 S.Ct. 2126 (1982), has determined that PURPA and the regulations promulgated thereunder do not run afoul of either the Tenth Amendment to the U.S. Constitution or to the Commerce Clause.

The U.S. Supreme Court stated that “it is difficult to conceive of a more basic element of interstate commerce than electric energy, a product used in virtually every home and every commercial or manufacturing facility. No State relies solely on its own resources

¹ “Incremental cost of energy” is defined as “the cost to the electric utility of the electric energy which, but for the purchase from such cogenerator or small power producer, such utility would generate or purchase from another source.” 16 U.S.C.A. § 824(a)-3(d).

in this respect.” *FERC v. Mississippi*, 456 U.S. at 757, 102 S.Ct. at 2136. In *FERC v. Mississippi*, the utilities involved in that case sold their retail customers power that was generated in part beyond Mississippi’s borders and offered reciprocal services to utilities in other states. The Court stated that “[t]he intrastate activities of these utilities, although regulated by the Mississippi Public Service commission, bring them within the reach of Congress’ power over interstate commerce.” *Id.*

Consistent with the provisions of Section 210(f) of PURPA that “each State regulatory authority shall . . . implement such [FERC] rule . . . for each electric utility for which it has ratemaking authority,” the Public Utility Commission of Oregon established avoided cost rates that the regulated electric utility companies doing business within its jurisdiction, like Idaho Power, are required to pay QFs who generate electricity within the state of Oregon and who choose to sell their output to those utilities. 16 U.S.C.A. § 824(a)-3(f)(1). Those rates are deemed to be “just and reasonable to the electric consumers of the electric utility and in the public interest.” 16 U.S.C.A. § 824(a)-3(b)(1). Idaho Power has accepted its PURPA-imposed obligation to purchase power generated by Co-Gen in conformance with the avoided cost rates approved by the OPUC.

The IPUC Staff recommends that expenses recoverable by Idaho Power in Idaho as a result of the Company’s Federally-mandated obligation to purchase electric generation offered by a QF located in Oregon, under the jurisdiction of the OPUC and at rates set by the OPUC, be limited by “the amount that would be paid if this were an Agreement within the jurisdiction of the Idaho Commission and subject to the avoided cost rates [set by the Idaho Commission].” Comments at 2. Commission acceptance of this proposal would frustrate accomplishment of the Congressional purposes expressed in

PURPA and FERC's implementing rules. "[W]hen regulations promulgated by the sovereigns conflict, federal law necessarily controls." *FERC v. Mississippi*, 456 U.S. at 767, 102 S.Ct at 2141.

The Agreement under consideration is between Idaho Power and a QF facility generating electricity in the state of Oregon. It is uncontested that the "OPUC is the state regulatory agency with jurisdiction to implement PURPA in the state and to determine Idaho Power's avoided costs in Oregon." Comments at 2. The OPUC Staff agrees that Idaho Power is obligated to pay QF purchase prices in accordance with the tariffs required by the OPUC.

Should this Commission limit Idaho Power's ability to recover all of Idaho's allocated share of the costs the Company is required to pay QF developers under the Oregon tariff, it is ignoring Federal law and the regulations set out by FERC that each state regulatory authority implement the rules necessary for each electric utility for which it has ratemaking authority in order to satisfy the requirements of PURPA. *See also*, 16 U.S.C.A. § 824(a)-3(f)(1). FERC's rules permit each state to set the purchase price for QF power generated within a state at the maximum level approved by PURPA – the full avoided costs.

The tariffs established by the OPUC for QF-generated electric power in the state of Oregon are presumed to be "just and reasonable to the electric consumers of the electric utility and in the public interest" and consistent with the mandates set by Congress in PURPA. 16 U.S.C.A. § 824(a)-3(b)(1). Should this Commission limit Idaho Power's ability to recover the full amount of the avoided costs determined to be in the public interest in Oregon, it would, in effect, be repudiating the validity of the rates set by the state of Oregon for an electric utility for which Oregon has ratemaking authority.

B. The Doctrine Of Comity Dictates That Idaho Should Respect Oregon's Implementation Of PURPA.

In reaching its decision in this case, this Commission should consider the doctrine of comity. Comity is not mandatory like "full faith and credit." Comity has been described as "that courtesy on the part of one state, by which within her territory the laws of another state are recognized and enforced, or another state is assisted in the execution of her laws." *Pettibone v. Nichols*, 203 U.S. 192, 211, 27 S.Ct. 111, 117 (1906).

States may differ in the manner in which they implement PURPA. Federal law directs Oregon to establish the QF purchase rates to be paid by electrical utilities within its jurisdiction. The OPUC permits Idaho Power to recover Oregon's jurisdictional share of the expenses Idaho Power incurs by purchasing energy produced by QFs located within the state of Idaho. Numerous Commission orders explain how Idaho customers benefit by Idaho Power's required purchase of energy produced from QFs. The doctrine of comity may not be a binding obligation such as "full faith and credit" but it should be duly considered when this Commission makes its determination in this case.

C. Purchasing Energy Produced By A QF Is Mandated By Federal Law And FERC Regulations And Limiting Idaho Power's Ability To Recover Its Expenses For QF Energy Purchased In Oregon Would Be Contrary to Federal Law.

PURPA, in effect, removes discretion from both regulators and utilities. PURPA requires that electric utilities purchase power produced by cogenerators or small power producers that obtain qualifying status under FERC regulations. 16 U.S.C.A. § 824(a)-3(a). In exchange, PURPA requires regulators to ensure that utilities recover all prudently incurred costs associated with those required purchases. PURPA states as follows,

[FERC] shall issue and enforce such regulations as are necessary to ensure that an electric utility that purchases electric energy or capacity from a qualifying cogeneration facility or qualifying small power production facility in accordance with any legally enforceable obligation entered into or imposed under [16 U.S.C.A. § 824(a)-3] recovers all prudently incurred costs associated with the purchase.

(16 U.S.C.A. § 824(a)-3(m)(7)(A))(emphasis added).

In 18 C.F.R. § 292.401, FERC requires each state regulatory authority to establish rules for the electric utilities for which it has ratemaking authority that implement the purposes and intentions of PURPA. FERC “recognizes that economic and regulatory circumstances vary from State to State and utility to utility.” 45 Fed. Reg. 12231 (1980). Thus, the means by which the states implement PURPA and the programs to encourage small power production and cogeneration may vary from state to state. FERC maintains, however, that a rate for QF purchases established by a state “meets the statutory requirements if it equals avoided costs.” *Id.* at 12222.

Idaho Power has a legally enforceable obligation to purchase energy offered by a qualified small power producer. 16 U.S.C.A. § 824(a)-3(m)(7)(A) ensures that, as a result of that Federally-mandated obligation, Idaho Power can recover “all prudently incurred costs associated with the purchase.” The costs associated with Idaho Power’s purchase of energy produced by Co-Gen are determined by the OPUC. Co-Gen has elected to contract with the Company using the Gas Market Method (Option 3) set out in Idaho Power’s Oregon Tariff No. E-25, Schedule 85.

The OPUC has determined that this tariff is an electric utility’s avoided cost to purchase QF-produced generation in the state of Oregon. By definition, since the tariff represents a utility’s avoided costs, the tariff meets the statutory requirements imposed by PURPA and are presumed valid. Because this tariff meets the statutory requirements and

because Idaho Power will not pay rates to Co-Gen above the approved Oregon tariff, the rates paid by Idaho Power to that QF are “prudently incurred costs associated with the purchase.” 16 U.S.C.A. § 824(a)-3(m)(7)(A). Furthermore, since Go-Gen entered into an OPUC-approved standard agreement with Idaho Power and will receive the standard rates permitted thereunder, it cannot be said that Idaho Power is incurring costs imprudently.

Should this Commission limit the ability of Idaho Power to recover 100% of the state of Idaho’s allocated share of costs prudently incurred as a result of the Company’s Federally-mandated purchase of energy from an Oregon-sited qualified facility, the Commission would, in effect, confiscate the assets of the Company without just compensation in violation of the U.S. Constitution.

D. Equity Dictates That Idaho Power Be Permitted To Recover The Full Amount Of Its Prudently Incurred Costs To Purchase Energy Produced By A Qualified Facility In Oregon.

Until the OPUC elects to amend the avoided cost rates electric utilities such as Idaho Power are obligated to pay for QF power generated within the jurisdiction of the OPUC, Idaho Power is required, under Federal and state law, to pay those rates. The Company has no discretion to either refuse to purchase that electricity from QFs or to pay rates inconsistent with the OPUC-mandated tariffs.

It is only equitable that Idaho utility customers pay their share of the cost of energy produced by Oregon QFs. Oregon customers within Idaho Power’s service territory are expected to do the same. The harsh effects of limiting Idaho Power’s ability to recover the full amount of its prudently incurred costs to acquire energy produced from QFs is at odds with the purpose and intent of PURPA and inconsistent with the principals of fundamental fairness.

Respectfully submitted this 3rd day of April 2006.

A handwritten signature in cursive script that reads "Monica B. Moen".

MONICA B. MOEN
Attorney for Idaho Power Company

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on the 3rd day of April 2006, I served a true and correct copy of the within and foregoing REPLY COMMENTS OF IDAHO POWER COMPANY upon the following named parties by the method indicated below, and addressed to the following:

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