

Peter J. Richardson  
 ISB No. 3195  
 Richardson & O'Leary  
 515 N. 27<sup>th</sup> Street  
 P.O. Box 7218  
 Boise, Idaho 83702  
 Telephone: (208) 938-7901 Tel  
 Fax: (208) 938-7904 Fax  
 peter@richardsonandoleary.com  
 Attorneys for Exergy Development Group of Idaho, LLC

RECEIVED  
 2007 SEP 12 PM 3: 22  
 IDAHO PUBLIC  
 UTILITIES COMMISSION

BEFORE THE  
 IDAHO PUBLIC UTILITIES COMMISSION

EXERGY DEVELOPMENT GROUP OF IDAHO, LLC	)	
	)	CASE NO. IPC-E-07-13
	)	
Petitioner,	)	BRIEF IN SUPPORT OF
vs.	)	MOTION TO COMPEL RETENTION
	)	IN IDAHO POWER'S
IDAHO POWER COMPANY,	)	INTERCONNECTION QUEUE AND TO
	)	PROHIBIT IDAHO POWER FROM
Respondent.	)	ASSESSING EXTRA-LEGAL
	)	INTERCONNECTION STUDY DEPOSITS
	)	

COMES NOW, Exergy Development Group of Idaho, LLC ("Exergy,"), by and through its attorneys of record, Richardson & O'Leary, and pursuant to this Commission's Rules of Procedure, Rule 56 IDAPA 31.01.01.056 hereby files its legal brief in support of its Motion to Compel.

IDAHO POWER'S AUTHORITY TO  
 COLLECT THE COSTS OF INTERCONNECTING QFs  
 IS FOUND SOLELY IN THIS COMMISSION'S APPROVED TARIFF SCHEDULE 72

Exergy wants to be clear up front that it accepts full responsibility for paying Idaho Power Company ("Company") all prudently incurred interconnection costs. This case is not

about cost responsibility, but rather it is about the timing of those costs and Idaho Power's failure to consistently and faithfully follow the rules this Commission has adopted for assessing and collecting those costs.

Idaho Power's Schedule 72 governs the process for interconnecting non-utility generators to the Company's system. In 2002, in an order updating and revising Schedule 72, the Commission expressed concern that the Company might abuse its discretion in interconnection matters. It therefore invited complaints such as Exergy's in the event such abuses occurred. In its Order the Commission warned the Company:

Regarding interconnection cost responsibility, we find that it is important for the tariff to explicitly state that all interconnection costs will be borne by the customer-generator. If interconnection requires more than the customer-furnished standard equipment, it is the customer-generator's responsibility to bear those additional interconnection expenses. We appreciate the QF's desire for certainty. We put the Company on notice that should it abuse its discretion in interconnect matters and thwart the development of non-utility generation, the Commission will entertain a complaint and revisit the issue.

Order No. 29092, Case IPC-E-01-38 (August 27, 2002), at page 8. Emphasis provided.

While the discretion the Commission referred to in that Order was not necessarily related to interconnect study deposits, the overall concern is as apropos now as it was in 2002.

Schedule 72 provides:

Service under this schedule is available throughout the Company's service area within the State of Idaho to Sellers owning or operating Qualifying Facilities that sign a Uniform Interconnection Agreement or that qualify under Schedule 84.

Schedule 72 "Availability" Paragraph. First Revised Sheet No. 72-1.

It is undisputed that the QF projects that are the subject of Exergy's Complaint are Qualifying Facilities because its generators will be wind powered. Schedule 72 defines Qualifying Facility as:

Qualifying Facility is a cogeneration facility or a small power production facility which meets the PURPA criteria for qualification set forth in Subpart B of Part 292, Subchapter K, Chapter I, Title 18, of the Code of Federal Regulations.

Schedule 72 at First Revised Sheet No. 72-2. Emphasis in original.

The five wind park QFs at issue in this docket are:

- Golden Valley Wind Park; FERC Docket No. QF-05-89-000
- Milner Dam Wind Park; FERC Docket No. QF-06-7-000
- Notch Butte Wind Park; FERC Docket No. QF-06-9-000
- Lava Beds Wind Park; FERC Docket No. QF-06-11-000
- Salmon Falls Wind Park; FERC Docket No. QF-06-8-000

This Commission may take official notice as to the status of the five Qualifying Facilities pursuant to this Commission's Rules of Procedure, Rule 263. (IDAPA §31.01.01.263). Each of the five wind parks has a Commission approved power purchase agreement pursuant to which each is obligated to sell their entire electrical output to Idaho Power Company. Again, the Commission may take official notice of the fact that each is obligated to sell their electrical output to Idaho Power as the Commission has issued an order approving each project's power purchase agreement.

Therefore Idaho Power's Schedule 72 applies to the interconnection of these projects to Idaho Power's electrical system. Schedule 72 provides:

Unless agreed otherwise in a written agreement between Seller and the Company, an initial cost estimate of Company-owned Interconnection Facilities will be provided to the Seller. Payment of the estimated cost will be required prior to the Company's ordering, installing, modifying, upgrading, or performing any other way work associated with the Interconnection Facilities.

*Id.*

Schedule 72 requires Idaho Power to provide the Seller with an “initial cost estimate of Company-owned Interconnection Facilities” the payment of which is a prerequisite to the company’s commencement of construction of said interconnection facilities. There is no provision in Schedule 72 for the pre-payment of interconnection costs, nor is there any reference in Schedule 72 to the imposition of deposits in advance of the provision of the “initial cost estimate.”

It is black letter law that a utility may only charge those rates and provide those services it is permitted to charge by the Commission. Idaho Code Section 61-313 provides that no public utility shall “collect or receive a greater or less or different compensation” for any service rendered to the public than the charges applicable to such services as specified in its tariffs on file with the Commission and in effect at the time. This concept, known as the “filed rate doctrine” was described by the United States Supreme Court as an obligation on the part of the utility to only collect the rates set out in its tariffs and schedules despite a quoted charge of a lesser or greater amount. Regardless of the utility’s motive or intent in quoting or charging a rate that is greater or lesser than the filed rate, no utility may charge anything other than what it is permitted to charge in its tariffs.

[d]eviation from [the filed rates] is not permitted upon any pretext. Shippers and travelers are charged with notice of it and they as well as the carrier must abide by it, unless it is found by the commission to be unreasonable. Ignorance or misquotation of rates is not an excuse for paying or charging either less or more than the rate filed. This rule is undeniably strict and it obviously may work hardship in some cases, but it embodies the policy which has been adopted by Congress in the regulation of interstate commerce in order to prevent unjust discrimination.

*AT&T v. Central Office Telephone*, 524 U.S. 214, 118 S.Ct. 1956, 1963 (1998) citing *Louisville and Nashville R.Co. v. Maxwell*, 237 U.S. 94, 97 (1915) (emphasis added).

This Commission has consistently adhered to and has strictly followed the strictures of the filed rate doctrine – even when it seemed that doing so appeared harsh. Typically such cases arise in the case of a mistaken quote or misread meter. See e.g. *Emereck v. Idaho Power* IPC-E-00-3. In short, when the Commission publishes a tariff for a service, it expects the utility to adhere to that tariff. Even if a utility attempts to deviate from its tariff for the alleged benefit of its ratepayers, the filed rate doctrine prohibits such unilateral unsupervised rate making.

Idaho Power’s answer, at its core, contains three separate arguments. First, it attempts to read something (a pre-study deposit requirement) into Schedule 72 that is simply not there. Second, it makes a broad public interest argument that it is entitled to ignore Schedule 72 and impose the complex and detailed interconnection procedures adopted by the Federal Energy Regulatory Commission. FERC’s rules apply only to generating projects that are interconnecting for the purpose of effecting a wholesale transaction utilizing Idaho Power’s system to ‘wheel’ its output to a third party purchaser. Third, the Company argues that it simply made a mistake when it posted the costs of interconnection study deposits on its interconnection procedure website and now wants this Commission to ratify a “do-over” in terms of the Company’s public offer of fixed interconnection study deposits. Each argument is fatally flawed and will be discussed in turn.

SCHEDULE 72 IS THE SOLE SOURCE OF AUTHORITY FOR IDAHO POWER’S  
INTERCONNECTION PROCESS FOR QFs

Idaho Power admits that it does not apply Schedule 72 to its Idaho QF interconnection customers.

To assure compliance with FERC regulations, Idaho Power applies FERC rules for processing all interconnection requests, including QF requests for interconnection. Applying FERC procedures to all interconnection requests, including QFs, establishes a uniform, consistent process for analyzing transmission interconnection requests. It provides QFs with certainty as to the processing times and the rules that will be followed in processing their requests for interconnection. Application of the FERC rules includes collecting deposits as a condition of performing interconnection studies.

Idaho Power Company's Answer, p. 5. Emphasis provided.

Idaho Power fails to point to any authority by which this Commission has authorized it to impose interconnection rules other than Schedule 72 upon QFs seeking to interconnect to Idaho Power's system.

There is no question that this Commission has exclusive jurisdiction over QF interconnections. Indeed, Idaho Power correctly observed in its Answer that this Commission has the exclusive jurisdiction over QF interconnections. Nevertheless, Idaho Power has taken it upon itself to impose FERC's interconnection rules on Idaho QFs – even in light of the fact that it concedes that FERC has no jurisdiction over such interconnections:

[T]he Idaho Public Utilities Commission (“IPUC”) and the Public Utility Commission of Oregon (“OPUC”) exercise their respective jurisdictions in Idaho and Oregon over interconnections of qualifying facilities (“QFs”) that qualify for the mandatory purchase requirements under the Public Utility Regulatory Policies Act of 1978 (“PURPA”). The Idaho and Oregon Commissions have exclusive jurisdiction over interconnections between Idaho Power and QFs situated in Idaho or Oregon respectively, so long as the QFs sell the output of their generation to Idaho Power.

Idaho Power Company's Answer, p. 3. Emphasis provided.

In short, and according to Idaho Power's own Answer, “Idaho Power applies FERC rules for processing all interconnection studies” despite the fact that “The Idaho ... Commission ha[s]..exclusive jurisdiction over interconnection between Idaho Power and QFs”. The fragrant and blatant disregard of this Commission's “exclusive jurisdiction” over interconnections in

favor of a foreign tribunal's rules threatens the very integrity of this Commission's orders and authority over its regulated utilities. Permitting Idaho Power to unilaterally disregard its Schedule 72 would set a dangerous precedent. This is precisely the type of self-serving deviation from published rates and schedules that the filed rate doctrine prohibits. Even if the result appears harsh, the filed rate doctrine does not permit a utility to simply ignore its tariffs.

FERC has made it clear in its Small Generator Interconnection order that states have exclusive jurisdiction over QF interconnection:

This Final Rule does not violate the FPA section 201(b)(1) provision that the Commission [FERC] does not have jurisdiction over local distribution facilities "except as specifically provided..." [citation omitted]. This is because the Final Rule applies only to interconnections to facilities that are already subject to a jurisdictional OATT at the time the interconnection request is made and that will be used for purposes of jurisdictional wholesale sales. Because of the limited applicability of this Final Rule, and because the majority of small generators interconnect with facilities that are not subject to an OATT, this Final Rule will not apply to most small generator interconnections. Nonetheless, our hope is that states may find this rule helpful in formulating their own interconnection rules.

FERC Docket No. RM02-12-000; Order No. 2006, p. 5. Emphasis provided.

FERC continues to leave it to the states to formulate their own interconnection rules for QFs.

Idaho has an interconnection rule in place (Schedule 72) that is unique and distinct from the FERC Final Rule. Without first implementing a rulemaking procedure or opening a docket to amend Schedule 72, both Idaho Power and its QF customers are limited to the four corners of Schedule 72 and nothing more.

#### IDAHO POWER READING OF SCHEDULE 72 STRAINS CREDIBILITY

Idaho Power incorrectly argues that Schedule 72 permits it to charge a deposit to cover anticipated interconnect study costs. In support of its assertion Idaho Power makes the following argument:

Schedule 72 goes on to say ‘Payment of the estimated cost will be required prior to the Company’s ordering, installing, modifying, upgrading or *performing in any other way, work associated with the interconnection facilities.*’ (Emphasis added). This language authorizes Idaho Power to require that generation developers who do not meet minimum credit requirements, provide a deposit for a portion of transmission study costs, to reduce the risk of financial loss (and ultimate upward pressure on customer rates) if the generation developer subsequently decides not to proceed with its project.

Idaho Power Company’s Answer, p. 6. Emphasis in original.

Idaho Power puts the cart before the horse. The phrase “payment of the estimated costs” necessarily assumes that there IS an estimate of the costs. Schedule 72 clearly requires Idaho Power, prior to assessing any costs to the developer, to provide the developer with an estimate of the costs of “ordering, installing, modifying, upgrading or performing in any other way, work associated with the interconnection facilities”. Any other reading changes the plain meaning of Schedule 72, in which the word “deposit” never appears. If the Commission had contemplated the use of deposits it would surely have provided for a mechanism for collecting, refunding and accounting for such deposits. Schedule 72 simply does not contemplate nor does it permit the assessment of deposits.

The rationale relied upon by Idaho Power is that the quoted passage from Schedule 72 permits the imposition of a deposit requirement only upon those developers who “do not meet minimum credit requirements”. This assertion is taken from whole cloth. The question of the creditworthiness of a developer is not addressed in Schedule 72. In addition, elsewhere in its Answer Idaho Power unequivocally contradicts itself by correctly observing that it is illegal for Idaho Power, or any utility, to delve into the creditworthiness of a QF developer:

Under the Commission’s prior orders regarding Idaho Power’s ability to obtain security form QF developers for performance of FESAs<sup>1</sup>, Idaho Power cannot

---

<sup>1</sup> FESA; Firm Energy Sales Agreement

require disclosure of the identity and credit worthiness of the owners of a QF limited liability company entering into a FESA with Idaho Power.

Idaho Power Company's Answer, p. 7.

The catch-22 Idaho Power's reasoning places a QF in is apparent. Idaho Power asserts that because Exergy is not creditworthy it must post a deposit. However, at the same time, it correctly observes that it cannot make an inquiry into Exergy's creditworthiness. As a result, even the most creditworthy developer will be caught up in Idaho Power's catch-22.

AT A MINIMUM IDAHO POWER SHOULD BE REQUIRED TO HONOR ITS WEB BASED  
INTERCONNECTION OFFER WITH RESPECT TO DEPOSIT AMOUNTS

Despite the fact that Idaho Power has no legal authority to charge interconnection deposits it has already extracted significant study deposits from Exergy. Exergy has paid deposits based upon Idaho Power's incorrect assertion that it has the legal authority to assess them. According to the attached affidavit from Mr. Carkulis, Exergy has already paid the following study deposits:

- Golden Valley Wind Park, LLC has paid \$11,088 in deposits and an additional \$35,000 is being requested:
- Milner Dam Wind Park, LLC has paid \$11,088 in deposits and an additional \$100,000 is being requested.
- Notch Butte Wind Park, LLC has paid \$11,088 in deposits and an additional \$100,000 is being requested.
- Lava Beds Wind Park, LLC has paid \$500 in deposits and an additional \$10,000 is being requested.
- Salmon Falls Wind Park, LLC has paid \$8,324 in deposits and an additional \$10,000 is being requested.

As noted in Exergy's Complaint at Exhibits B and C, had Idaho Power complied with the terms of interconnection based on its web site it would be limited to charging no more than a total of \$29,000 in study deposits for each project. Idaho Power's web based interconnection process included a pro forma Facilities Study Agreement that required a study deposit in the amount of \$26,000. Complaint, Exhibit B. It also included a pro forma System Impact Study Agreement that required a study deposit in the amount of \$3,000. In response to Exergy's complaint that Idaho Power was charging amounts different from the amounts that it had published on its interconnection web site, Idaho Power claims it published rates were nothing more than a "clerical error". Answer at p. 6. Although as discussed above, Idaho Power has no authority to charge a deposit in the first place, its response to Exergy's complaint was to make the process even less certain:

Idaho Power has amended this oversight on its website and modified the Pro Forma study agreement to include a blank in paragraphs 6.0 and 10.0 respectively.

Answer at p. 6.

At a minimum Idaho Power should be held to the rates published on its website upon which Exergy had every right to rely upon. Regardless however, as noted above, Idaho Power has no authority to assess any study deposit absent this Commission's order requiring it to do so.

Idaho Power asserts that its deposit demands are to assure compliance with FERC's regulations. That assertion is suspect in light of the fact that it filed an application as recently as last year to amend Schedule 72 by adopting a uniform interconnection agreement for PURPA QF interconnection requests. In its application in that docket, IPC-E-06-18, Idaho made the following representation:

A Uniform Interconnection Agreement is also in keeping with utility industry efforts to standardize interconnection procedures and facilitate investment in needed utility infrastructure. Patterned after the FERC's standard Small

Generator Interconnection Agreement approved in FERC Order No. 2006, Idaho Power's proposed Uniform Interconnection Agreement addresses the terms and conditions of interconnection and integration to Idaho Power's transmission/distribution system and incorporates portions of the Company's template power purchase agreement.

Application, Docket No. IPC-E-06-18 at pages 4-5.

The Uniform Interconnection Agreement Idaho Power filed and this Commission approved does not require interconnection study deposits. Indeed, the word "deposit" does not even appear in the agreement. This Commission approved Idaho Power's application under the impression that it was accommodating Idaho Power's desire to pattern its interconnection process after FERC's interconnection procedures. If that was, indeed, the goal it was not accomplished. The end result is that Idaho Power's interconnection Tariff Schedule 72 still stands as the only legal authority governing the interconnection process and it simply does not permit Idaho Power to assess a deposit to conduct an interconnect study.

Idaho Power represented to the Commission that its most recent change to Schedule 72 was based on model interconnection agreements published by FERC and NARUC. The Commission even observed, in its order approving the Uniform Interconnection Agreement, that:

The Company's proposed Uniform Interconnection Agreement is based upon its review of model agreements from both NARUC and FERC.

Order No. 30179, Docket IPC-E-06-18 at p. 4.

Idaho Power obviously had the opportunity to raise the possibility of assessing study deposits in its most recent Schedule 72 docket. The FERC order on small generator interconnection processes was issued before that case was filed. It did not seek any Commission treatment of the study deposit issue in Docket No. IPC-E-06-18 even though one of the stated reasons for its application was to more closely align its interconnect process with the interconnect process used by FERC.

POWER PURCHASE AGREEMENTS APPROVED BY THE COMMISSION  
CONTEMPLATE REIMBURSEMENT OF IDAHO POWER'S COSTS NOT PREPAYMENT

The Power Purchase Agreements for each of the five projects that is the subject of this complaint all have been approved by the Commission. Each of those agreements contains language that clearly indicates that all of the costs incurred by Idaho Power are to be “reimbursed” by the developer and do not contemplate or require the posting of interconnect study deposits:

The entire Generation Interconnection process, including but not limited to the equipment specifications and requirements will become an integral part of this Agreement. Idaho Power owned equipment will be maintained by Idaho Power, with total cost of purchase, installation, operation, and maintenance, including administrative cost to be reimbursed to Idaho Power by Seller.

Appendix B, ¶ B-10, Idaho Power Firm Energy Sales Agreement. Emphasis provided.

There can be no doubt that “administrative costs” include such administrative acts as estimating costs prior to commencement of the interconnection work. Those costs are to be “reimbursed” to Idaho Power by the developer. Use of the term “reimburse” is consistent with the Schedule 72 interconnection process which clearly requires Idaho Power to provide an upfront cost estimate, the expense of which will be reimbursed by the developer.

This Commission has the authority to order reparations of utility overcharges pursuant to Idaho Code § 61-642 which provides:

When complaint has been made to the commission concerning any rate, fare, toll, rental or charge for any product, or commodity, furnished or service performed by any public utility, and the commission has found, after investigation, that the public utility has charged an excessive or discriminatory amount for such product, commodity or service, the commission may order that the public utility make due reparation to the complainant therefore

As shown above, Idaho Power has charged an excessive and discriminatory amount for interconnect study service contrary to the published tariff. Exergy respectfully requests that it be

duly refunded the amounts overpaid with interest and that Idaho Power be ordered to complete the interconnect studies pursuant to Schedule 72 and provide an estimate of the cost of said interconnects.

For the foregoing reasons it is respectfully requested that this Commission grant Exergy's motion, with prejudice, and order Idaho Power to cease collecting interconnect study deposits and immediately refund those deposits it has heretofore illegally assessed.

DATED this 12<sup>th</sup> day of September 2007.

Richardson & O'Leary, LLP

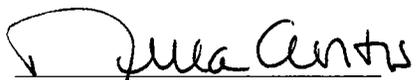
By   
Peter J. Richardson  
Industrial Customers of Idaho Power

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 12th day of September, 2007, a true and correct copy of the within and foregoing BRIEF IN SUPPORT OF MOTION TO COMPEL, was served by personal service to:

Barton Kline  
Monica Moen  
Idaho Power Company  
PO Box 70  
Boise, Idaho 83707-0070

Jean Jewell  
Commission Secretary  
Idaho Public Utilities Commission  
472 West Washington  
Boise, Idaho 83702



Nina Curtis  
Administrative Assistant