

Bruce C. Jones, ISB #3177
Joy M. Bingham, ISB #7887
JONES & SWARTZ PLLC
1673 W. Shoreline Drive, Suite 200 [83702]
Post Office Box 7808
Boise, Idaho 83707-7808
Telephone: (208) 489-8989
Facsimile: (208) 489-8988
E-mail: bruce@jonesandswartzlaw.com
joy@jonesandswartzlaw.com

RECEIVED
2009 JAN 12 PM 5:00
IDAHO PUBLIC
UTILITIES COMMISSION

Attorneys for Idaho Power Company

BEFORE THE

IDAHO PUBLIC UTILITIES COMMISSION

IDAHO POWER COMPANY,

Complainant,

vs.

GLENN'S FERRY COGENERATION
PARTNERS, LTD., a Colorado Limited
Partnership,

Respondent.

Case No. IPC-E-08-20

**IDAHO POWER COMPANY'S BRIEF
IN OPPOSITION TO RESPONDENT'S
MOTION TO DISMISS FOR LACK OF
SUBJECT MATTER JURISDICTION**

I.

INTRODUCTION

Complainant Idaho Power Company's ("Idaho Power") Petition for Declaratory Order and Formal Complaint for Breach of Contract is properly before the Idaho Public Utilities Commission ("Commission") because the Commission has the unique expertise needed to determine whether Respondent Glens Ferry Cogeneration Partners, Ltd. ("Glens Ferry Cogeneration") has permanently curtailed its deliveries of energy to Idaho Power as a result of

Glenns Ferry Cogeneration's loss of its thermal host. This narrow focus requires the Commission to look only at the facts and circumstances surrounding the operating status of Glenns Ferry Cogeneration since October of 2007. The issuance of a declaratory order regarding the existence of a permanent curtailment would be a proper utilization of the Commission's expertise in shaping, reviewing and approving contracts between cogeneration facilities and electric utilities.

II.

STATEMENT OF FACTS

A. **The Commission Controlled the Development of the Parties' Firm Energy Sales Agreement**

With the federal enactment of the Public Utility Regulatory Policies Act ("PURPA") in 1978, the Commission was charged with the authority and duty to require the utilities it regulated to purchase power generated by qualifying cogenerators or small power producers ("Qualifying Facilities" or "QFs") by means of fixed term contracts. Indeed, PURPA was designed so that utilities were mandated to purchase power from QFs, whether they wanted to or not. 16 U.S.C. § 824a-3(a). Glenns Ferry Cogeneration's facility is a natural gas fired turbine generator located at the Magic West potato processing facility in Glenns Ferry, Idaho ("Glenns Ferry Project" or "the Project"). The Glenns Ferry Project is a "cogeneration facility", which is one which sequentially produces electricity and other forms of useful thermal energy (such as heat or steam), for industrial, commercial, heating, or cooling purposes. 18 C.F.R. § 292.202(c). In order to obtain the necessary qualifying status, a cogeneration facility has to be certified as such by the Federal Energy Regulatory Commission ("FERC") which, in part, requires Glenns Ferry Cogeneration to maintain a minimum ratio of thermal energy output to be received by a thermal host and electric energy to be purchased by Idaho Power. 18 C.F.R. §§ 292.205, 292.207.

During the 1980's and early 1990's the Commission issued numerous orders which established the rates and many of the terms and conditions which Idaho Power is required to include in long-term contracts to purchase energy from QFs. Pursuant to these Commission orders and federal statutory requirements, Idaho Power and Glens Ferry Cogeneration entered into a Firm Energy Sales Agreement ("FESA" or "the Agreement") on December 9, 1992. Under the Agreement, Glens Ferry Cogeneration agreed to sell the energy generated by its electrical facility to Idaho Power for a term of 20 contract years.¹ The Project was the first of its kind to offer energy generated by natural gas to Idaho Power, and the Commission's final order approving the Agreement recognized several nonstandard and unique features. Ultimately, the Commission approved the Agreement on January 22, 1993, in Order No. 24674.²

For the most part, agreements between QFs and Idaho Power follow an established template based on numerous prior Commission orders. However, the Commission has often permitted QFs and Idaho Power to negotiate unique provisions in FESAs and present them to the Commission for review and approval. In the FESA between Glens Ferry Cogeneration and Idaho Power, two areas were recognized by the Commission and the parties as being particularly unique. First, were the provisions of the FESA that recognized the integral role the Commission plays in QF contracts and the continuing jurisdiction of the Commission over the terms and conditions of the FESA. Paragraph 7.3 specified such continuing jurisdiction due to the fact that the FESA was a special contract and would accordingly be construed pursuant to Idaho law.³

¹ Ex. A to Affidavit of Counsel in Support of Idaho Power Company's Brief in Opposition to Respondent's Motion to Dismiss for Lack of Subject Matter Jurisdiction ("Aff. of Counsel"), Firm Energy Sales Agreement Between Idaho Power Company and Glens Ferry Cogeneration Partners, Ltd.

² Ex. B to Aff. of Counsel, IPUC Order No. 24674.

³ Ex. A to Aff. of Counsel, the Agreement, ¶ 7.3.

Also, in paragraph 21.1 of the FESA, the parties agreed that all disputes arising under the FESA would be submitted to the Commission for resolution.⁴

Prior to filing its Motion to Dismiss, Glens Ferry Cogeneration had taken the position that the Commission has continuing jurisdiction, not only in the Agreement, but also as recently as June 10, 2008, when it stated that “[w]e understand that our reading of the provisions of the FESA may differ with Idaho Power’s, and would be willing, under Section 21.1 of the FESA, to take any resulting difference of opinion to the Idaho Public Utilities Commission . . . for resolution.”⁵ In approving the Agreement, the Commission, in Order No. 24674, stated that it would determine jurisdiction as to the resolution of disputes on an individual case-by-case basis, notwithstanding paragraph 21.1 of the Agreement.⁶ While Idaho Power acknowledges that contracting parties may not confer jurisdiction on the Commission by contractual stipulation, the Commission has broad discretion to hear unique factual situations and recognizes that it does have jurisdiction to hear disputes on a case-by-case basis.⁷

The second unique area of the FESA, which arose out of the parties’ negotiations, was the necessity of a secure thermal host to receive the energy from the Project for the entire 20-year contract term. Commission Order No. 24674 discussed that the compensation to Idaho Power for the increased risk of loss of motive force attributable to the Project would be mitigated by the commitment of Glens Ferry Cogeneration to provide, among others, periodic assurances

⁴ Ex. A to Aff. of Counsel, the Agreement, ¶ 21.1.

⁵ Ex. C to Aff. of Counsel, Letter from Steven J. Helmers, Vice President, Glens Ferry Cogeneration Partners, Ltd., to M. Mark Stokes (June 10, 2008) (hereinafter “the Letter”).

⁶ Ex. B to Aff. of Counsel, IPUC Order No. 24674, p. 4.

⁷ See *Utah Power & Light Co. v. IPUC*, 112 Idaho 10, 14,730 P.2d 930, 934 (1986). The Idaho Supreme Court has often ruled that “the IPUC has every power, express or implied, necessary to enable it to exercise its powers and purposes.” *Id.* (citations omitted). “Although no express statute in the public utilities law provides authority to the IPUC in this instance, the broad general power of the IPUC (I.C. § 61-501), coupled with its powers of certification provide a basis for jurisdiction in this unique factual situation.” *Id.*

of ongoing performance of the thermal host for the full term of the Agreement.⁸ As such, the Order noted paragraph 4.1.11 of the Agreement, which provided that Glens Ferry Cogeneration would be liable to Idaho Power for any permanent curtailment of energy deliveries resulting from an uncured breach by the thermal host.⁹ Additionally, paragraph 21.3 of the Agreement imposed liability on Glens Ferry Cogeneration for a permanent curtailment, in whole or in part, of deliveries of energy to its thermal host.¹⁰ Consequently, the Commission authorized the Agreement with the understanding that Idaho Power was due some security within the Agreement, which was partially provided through compliance by the thermal host. The Commission's recognition of the importance of the performance of the thermal host to the continued operation of the QF necessarily carries with it the authority to declare whether a permanent curtailment on the part of that host and/or Glens Ferry Cogeneration has occurred.

B. The Commission Provided Specific Security for Idaho Power in the FESA

Perhaps the best example of the Commission's intimate involvement in the determination of rates, terms and conditions for PURPA contracts is the Commission's limitations on security in agreements between Idaho Power and QFs like Glens Ferry Cogeneration. In 1987 and 1988, in Case No. U-1006-292, the Commission conducted an extensive investigation into issues raised by Idaho Power and the predecessors to Avista and Rocky Mountain Energy regarding provisions that could be included in QF contracts to provide performance security if QFs chose to be paid levelized rates. The utilities were concerned that if economic conditions changed, QFs might simply walk away from their contracts, leaving customers without adequate remedies to recover the overpayments associated with levelized rates. The three utilities argued that the

⁸ Ex. B to Aff. of Counsel, IPUC Order No. 24674, pp. 1-3.

⁹ Ex. A to Aff. of Counsel, the Agreement, ¶ 4.1.11; Ex. B to Aff. of Counsel, IPUC Order No. 24674, p. 2, ¶¶ (c-d).

¹⁰ Ex. A to Aff. of Counsel, the Agreement, ¶ 21.3.

contracts should provide liquid security that the utilities could look to if QFs failed to perform for the full term of their agreements and such failure resulted in financial injury to customers.

The outcome of that proceeding, set out in Order No. 21690,¹¹ was that the Commission prescribed very specific security provisions which could be included in QF contracts that would allow the QFs to avoid having to post liquid security. Idaho Power believes that the situation with Glens Ferry Cogeneration provides exactly the type of scenario that Idaho Power was concerned about. For its own business reasons, Glens Ferry Cogeneration's thermal host, Idaho Fresh-Pak, Inc. ("Idaho Fresh-Pak"), has decided to cease operations at Glens Ferry, thereby rendering Glens Ferry Cogeneration unable to perform its contract with Idaho Power. Whether Glens Ferry Cogeneration will have sufficient resources to repay Idaho Power is yet to be determined. The situation clearly demonstrates the need for the Commission to be involved in the initial determination of whether or not Glens Ferry Cogeneration has defaulted on its FESA with Idaho Power.

C. The Parties Cooperated Under the Terms of the FESA Until 2007 When Glens Ferry Cogeneration Permanently Curtailed its Energy Deliveries

Before electric energy deliveries commenced, the Agreement was twice amended to accommodate difficulties experienced by the Project. In the Agreement, Glens Ferry Cogeneration selected its initial Scheduled Operation Date as January 1, 1995, with December 1, 1994, being the First Energy Date.¹² On April 12, 1994, Idaho Power and Glens Ferry Cogeneration entered into a First Amendment to the Agreement.¹³ The primary modification of the Agreement was to delay the Scheduled Operation Date from January 1, 1995 to January 1, 1996, and the First Energy Date from December 1, 1994 to December 1, 1995. The Commission

¹¹ Ex. D to Aff. of Counsel, IPUC Order No. 21690.

¹² Ex. A to Aff. of Counsel, the Agreement, Appendix B, ¶ B-3.

¹³ Ex. E to Aff. of Counsel, the First Amendment to the Agreement.

approved the First Amendment to the Agreement on May 18, 1994, in Order No. 25505.¹⁴ Those same terms of the Agreement were modified a second time when Idaho Power and Glenns Ferry Cogeneration entered into a Second Amendment to the Agreement on December 30, 1995.¹⁵ Among other things, the Scheduled Operation Date was suspended until March 7, 1996, and the First Energy Date to February 5, 1996. The Commission approved the Second Amendment in a Minute Entry dated January 8, 1996.¹⁶

Thereafter, the parties proceeded according to the terms of the Agreement until October 24, 2007, when Glenns Ferry Cogeneration was last able to deliver steam to its thermal host and halted deliveries of electricity to Idaho Power. In order to maintain its status as a QF under federal law, Glenns Ferry Cogeneration was required to sell thermal energy (steam) generated by the Project to a “thermal host,” an entity that uses the steam in its own manufacturing or production facility. Idaho Fresh-Pak was a potato processing facility that was the most recent thermal host to the Project. In February 2008, Idaho Fresh-Pak permanently shut down its Glenns Ferry operations. As a result of Glenns Ferry Cogeneration losing Idaho Fresh-Pak as its sole thermal host, Glenns Ferry Cogeneration has permanently curtailed all of its deliveries of energy to Idaho Power.

III.

STANDARD OF REVIEW

The nature of a motion to dismiss for lack of subject matter jurisdiction pursuant to Idaho Rule of Civil Procedure 12(b)(1) or IPUC Rule of Procedure 56 is to determine whether the plaintiff has the right to be before a particular tribunal. Since the jurisdictional question is

¹⁴ Ex. F to Aff. of Counsel, IPUC Order No. 25505.

¹⁵ Ex. G to Aff. of Counsel, the Second Amendment to the Agreement.

¹⁶ Ex. H to Aff. of Counsel, IPUC Minute Entry, January 8, 1996.

unique to the Commission, as it would be the district court, there exists a “broader power to decide its own right to hear the case than it has when the merits of the case are reached.” *Osborn v. United States*, 918 F.2d 724, 729 (8th Cir. 1990) (citations omitted). In deciding on a motion to dismiss, the standard of review is the same as that used in summary judgment. *Gibson v. Ada County*, 142 Idaho 746, 751, 133 P.3d 1211, 1216 (2006). Therefore, the Commission must “liberally construe all disputed facts in favor of the nonmoving party, and all reasonable inferences that can be drawn from the record will be drawn in favor of the nonmoving party.” *Porter v. Bassett*, 146 Idaho 399, 195 P.3d 1212, 1215 (2008).

IV.

ARGUMENT

A. The Commission has the Jurisdiction to Resolve this Dispute

PURPA contracts are unique. They require the Commission to balance the interests of customers and QF developers within an intertwined body of both Federal and Idaho law. Since the Commission has been intimately involved in development of QF contracts and has administered the requirements of PURPA in Idaho for many years, citation to the FESA, the federal statutes and precedent set forth therein sufficiently referenced controlling law as required by IPUC Rules of Procedure 54 and 101. Moreover, this dispute is one of first impression before the Commission, as it would be before the district court. Consequently, binding precedent is not available for citation and the most pertinent controlling law is that produced by the Commission itself. “The nature and extent of the Commission jurisdiction to resolve actual disputes will be determined by the Commission on an individual case-by-case basis” *IPUC Order No. 24674*, p. 4 (emphasis added). The Commission must look to the technical nature of the Agreement and the circumstances under which the Agreement was produced, which render it a

special contract. The parties have always looked to the Commission for guidance regarding the unique provisions of the Agreement and PURPA compliance;¹⁷ and until faced with an actual dispute, Glens Ferry Cogeneration advocated for resolving any dispute before the Commission.¹⁸ Since the Agreement anticipates Commission jurisdiction, the Commission itself determined it has discretion to resolve disputes, and the Commission is knowledgeable about the unique aspects of PURPA law and PURPA contracts, this dispute is properly before the Commission.

B. The Commission has the Authority to Exercise Discretion and Accept Jurisdiction Over this Matter because the Agreement is a Special Contract Falling Outside the District Court's General Jurisdiction over Contract Disputes

Typically wholesale contracts for the purchase and sale of power are within the sole jurisdiction of the FERC. PURPA changed that for QFs. Federal law delegated to the Commission the obligation to oversee creation of the wholesale PURPA contracts, including the FESA between Idaho Power and Glens Ferry Cogeneration, and that duty should remain as to dispute resolution. Due to federal law, the mandatory purchase requirement, and the Commission's extensive involvement with creation of the terms and conditions of the Agreement, the Agreement cannot be viewed as a normal contract which a district court would expect to see on a routine basis. Moreover, just as Idaho Power "cannot divorce itself from the contractual responsibility attendant to implementation of a federally mandated requirement of purchase,"¹⁹ the Commission should not withhold its special expertise in supervising its federal

¹⁷ See Exs. A, E and H to Aff. of Counsel.

¹⁸ Ex. C to Aff. of Counsel, the Letter, p. 2. The Letter states: "We understand that our reading of the provisions of the FESA may differ with Idaho Power's, and would be willing under Section 21.1 of the FESA, to take any resulting difference of opinion to the Idaho Public Utilities Commission ("PUC") for resolution." *Id.*

¹⁹ Ex. I to Aff. of Counsel, IPUC Order No. 21800, ¶ 1, p. 3.

charge to implement FERC rules and regulations.²⁰ Consistently, while Idaho law indicates that contract interpretation is generally for the courts, not the Commission, it has not been determined that interpretation and enforcement of PURPA contracts are solely for the courts.

As Glens Ferry Cogeneration notes, *Lemhi Telephone Co. v. Mountain States Telephone & Telegraph Co.* stands for the general proposition that normal contractual disputes should be heard by the courts. 98 Idaho 692, 696, 571 P.2d 753, 757 (1977). However, a normal contract dispute is not representative of the dispute currently before the Commission. The present matter is analogous to *McNeal v. IPUC*, where the Idaho Supreme Court held that the Commission has the authority to interpret and enforce special, federally directed, contracts. 142 Idaho 685, 689, 132 P.3d 442, 446 (2006). The contracting parties in *McNeal*, PageData and Qwest, entered into an interconnection agreement that was negotiated according to federal requirements determined by the Federal Communications Commission, but approved by the Idaho Public Utilities Commission. *McNeal v. IPUC*, 142 Idaho 685, 687, 132 P.3d 442, 444 (2006). When a dispute arose, PageData filed a complaint with the Commission alleging noncompliance by Qwest. *McNeal*, 142 Idaho at 444, 132 P.3d at 687. Qwest responsively requested the Commission to dismiss the complaint because PageData had not exhausted arbitration procedures as required per the agreement. *Id.* The Commission dismissed the complaint because the parties had not complied with the mandatory arbitration provisions of the contract, and upon reconsideration further found that “the interpretation of contracts generally lies with the courts and not the Commission.” *Id.* The Supreme Court upheld the Commission’s order with regard to the mandatory arbitration of the parties’ dispute, but disagreed with its contention that the contract dispute should be handled by the courts. *McNeal*, 142 Idaho at 446, 132 P.3d at 689.

²⁰ Ex. B to Aff. of Counsel, IPUC Order No. 24674, ¶ 2, p. 4; Ex. I to Aff. of Counsel, IPUC Order No. 21800, ¶ 2, p. 7.

The Court held that while general contract interpretation is traditionally the province of the courts, interpretation and enforcement of special contracts, mandated by federal law onto utilities, falls outside the norm. The federal law's "grant to the state commissions of plenary authority to approve or disapprove these interconnection agreements necessarily carries with it the authority to interpret the provisions of agreements that state commissions have approved." *McNeal*, 142 Idaho at 446, 132 P.3d at 689 (citations omitted). The Court clearly accepted that "because of federal law interconnection agreements fall outside of the norm." *Id.* Akin is the federal governance of PURPA contracts that are then administered at the state level by the Commission. As such, the Commission should accept jurisdiction of this dispute arising under a special PURPA contract for the purpose of determining whether a permanent curtailment of energy deliveries has occurred.

V.

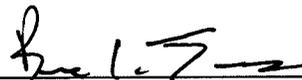
CONCLUSION

For the foregoing reasons, Idaho Power respectfully requests that the Commission deny Glens Ferry Cogeneration's Motion to Dismiss for Lack of Subject Matter Jurisdiction.

DATED this 12th day of January, 2009.

JONES & SWARTZ PLLC

By



BRUCE C. JONES
JOY M. BINGHAM

CERTIFICATE OF SERVICE

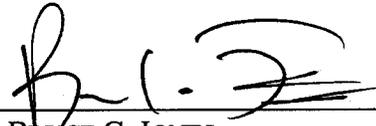
I HEREBY CERTIFY that I have this 12th day of January, 2009, served the foregoing IDAHO POWER COMPANY'S BRIEF IN OPPOSITION TO RESPONDENT'S MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION upon all parties of record in this proceeding, by the method indicated, addressed as follows:

Glenns Ferry Cogeneration Partners, Ltd.
c/o Power Plant Management Services, LLC
7001 Boulevard 26, Suite 310
North Richland Hills, TX 76180
Attn: Fred Barber/Scott Gross

U.S. Mail
 Fax: (817) 616-0754
 Overnight Delivery
 Messenger Delivery
 Email: fbarber@ppmsllc.com
sgrossppms@suddenlink.net

National Corporate Research LT
921 S. Orchard Street, Suite G
Boise, ID 83706

U.S. Mail
 Fax:
 Overnight Delivery
 Messenger Delivery
 Email:



BRUCE C. JONES