



RICHARDSON & O'LEARY, PLLC
ATTORNEYS AT LAW

Peter Richardson

Tel: 208-938-7901 Fax: 208-938-7904
peter@richardsonandoleary.com
P.O. Box 7218 Boise, ID 83707 - 515 N. 27th St. Boise, ID 83702

RECEIVED
2009 JAN 26 PM 3: 54
IDAHO PUBLIC
UTILITIES COMMISSION

26 January 2009

Ms. Jean Jewell
Commission Secretary
Idaho Public Utilities Commission
472 W. Washington
Boise, ID 83702

Hand Delivered

RE: IPC-E-08-20

Dear Ms. Jewell:

We are enclosing an original and seven (7) copies of **GLENN'S FERRY COGENERATION PARTNERS, L.T.S.'S REPLY TO BRIEF IN OPPOSITION TO MOTION TO DISMISS** in the above-cited case.

An additional copy is included for stamping and returning to our office.

Sincerely,

Nina Curtis
Richardson & O'Leary PLLC

Enclosure

RECEIVED

2009 JAN 26 PM 3: 54

IDAHO PUBLIC UTILITIES COMMISSION

PETER J. RICAHRDSON (ISB # 3195)
MOLLY O'LEARY (ISB # 4996)
Richardson & O'Leary PLLC
515 North 27th Street
P.O. Box 7218
Boise, Idaho 83707
Telephone: (208) 938-7900
Fax: (208) 938-7904

Attorneys for Glenns Ferry Cogeneration Partners, Ltd.

BEFORE THE
IDAHO PUBLIC UTILITIES COMMISSION

IDAHO POWER COMPANY,

Complainant

vs.

GLENN'S FERRY COGENERATION
PARTNERS, LTD., a Colorado limited
partnership

CASE NO. IPC-E-08-20

GLENN'S FERRY COGENERATION
PARTNERS, LTD.'S REPLY TO
IDAHO POWER'S BRIEF IN
OPPOSITION TO MOTION TO
DISMISS

COMES NOW, Glenns Ferry Cogeneration Partners, Ltd. ("Respondent"/"Glenns Ferry Cogeneration"), by and through undersigned counsel, and files this Reply to Idaho Power's Brief in Opposition pursuant to the procedural schedule established by this Commission.

**IDAHO POWER FUNDAMENTALLY MISCONSTRUES THIS COMMISSION'S ROLE
IN THE PURPA CONTRACT CONTEXT**

Idaho Power wrongly asserts that PURPA requires utilities regulated by this Commission to purchase power generated by QFs by "means of fixed term contracts".

GLENN'S FERRY COGENERATION
MOTION TO DISMISS

Brief at 2. The Company cites Section 210 of PURPA for authority supporting its contention that it is required to offer “fixed term contracts.”¹ While that Section requires utilities to “purchase electric energy from such facilities [QFs]” it does not specify that said purchases be made by “means of fixed term contracts.” The Commission’s role in PURPA implementation is not as contract administrator, but rather it sets the terms and conditions under which the utilities it regulates purchase the electric energy from QFs. Indeed, the Commission in Idaho approves the contracts only as a courtesy to its regulated utilities in order for them to have some comfort that the costs incurred in making those purchases will be recovered from the ratepayers. The Commission has no legally mandated role in approving the PURPA contracts entered into by Idaho Power let alone in interpreting and implementing the terms of those contracts. Indeed, in some states, like Oregon, the PUC refuses to even approve the PURPA contracts for ratemaking purposes.

Idaho Power cited the Commission to McNeal v. IPUC 142 Idaho 685, 132 P.3rd 442 (2006) suggesting that it is an analogous case. McNeal actually supports Glenns Ferry’s position that this Commission has no jurisdiction over interpretation of PURPA contracts. In McNeal the Commission was asked to interpret an interconnection agreement between two telecommunications carriers. Interconnection agreements between telecommunication carriers are, indeed, interpreted and administered by state commissions by operation of federal law. The McNeal Court relies on Southwestern Bell Telephone Co. v. Public Utility Commission of Texas 208 F. 3rd 475 (5th Cir. 2000) for the proposition that:

¹ 16 U.S.C. § 824a-3(a).

[T] Act's grant to the state commissions of plenary authority to approve or disapprove these interconnection agreements necessarily carries with it the authority to interpret and enforce the provisions of agreements that state commissions have approved

Id. at 479.

The Court in Southwestern Bell expanded on its findings in some detail explaining why it is not just the fact that the PUC approved the contract that confers ongoing jurisdiction:

We believe that the FCC plainly expects state commissions to decide intermediation and enforcement disputes that arise after the approval procedures are complete. See, e.g., Reciprocal Compensation Ruling P 22 (noting that parties are bound by their interconnection agreements “as interpreted and enforced by the state commissions”) (emphasis ours); *id.* P21 (referring to state commission “findings” as to whether reciprocal compensation provisions of interconnection agreements apply to ISP-bound traffic); *id.* P 24.

Id. at 480.

Idaho Power does not refer this Commission to any similar expectation by FERC that state commissions decide intermediation and enforcement disputes under PURPA – because there are none. If there were, then one would expect to find a case law similar to the wealth of case law on telecommunication interconnection agreements. Another important distinction is that in the telecommunications arena, both parties to the contract are providing utility-type service which makes ongoing jurisdiction of the Commission reasonable. Here only Idaho Power is providing utility service.

In fact, if Idaho Power's claim that this Commission has jurisdiction over a complaint for damages for violation of a PURPA contract is upheld, then this Commission would have jurisdiction over the QF itself – a result that has been thoroughly repudiated by the Idaho Supreme Court in the Afton decisions. In Afton

Energy v. Idaho Power Company 107 Idaho 781, 693 P.2d 427 (1984),² Idaho Power sought to amend a PURPA contract by adding the following language:

The rates, terms and conditions set forth in this agreement are subject to the continuing jurisdiction of the Idaho Public Utilities Commission. The rates, terms and conditions under this agreement are subject to change and revision by order of the Commission upon a finding, supported by substantial competent evidence, that such rates, terms or conditions, change or revision is just, fair, reasonable, sufficient, non-preferential and non-discriminatory.

Id. at 786.

The Court's resounding rebuke to Idaho Power's proposal may be instructive to Idaho Power in assisting it to understand that it still cannot confer jurisdiction over PURPA contracts on the PUC:

[W]e 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 proposed by Idaho Power were approved by the Commission. In fact, one of Congress' main objectives in enacting PURPA was to encourage cogeneration and small power production by exempting CSPPs from pervasive state regulation. Congress was aware that such regulation presented a strong disincentive for CSPPs to engage in power production where the financial risks were great and the returns were not guaranteed to be recoverable. The Commission, in refusing to adopt Idaho Power's proffered language was merely carrying out the directives imposed by PURPA and the implementing FERC regulations.

Id at 788. (Emphasis provided.)

Jurisdiction to interpret the terms of a PURPA contract and to award damages is exactly the type of regulation the Idaho Supreme Court rejected in *Afton*.

In *Afton II* Idaho Power again sought PUC interpretation of a PURPA contract – which the Court again rejected. The Court in *Afton II* identified the issue thusly:

² The 1984 *Afton* case is referenced by the Court (and others) as *Afton I/III*

The present proceeding was initiated by Idaho Power when it moved the Commission to modify Orders Nos. 17478, 17495 and 17609 to conform to the Afton I/III and declare the second payment option of the contract in effect... The Commission, reading the motion as a contract interpretation request, dismissed it, holding that the district court is the proper forum to interpret contracts.

Afton Energy v. Idaho Power 111 Idaho 925, 928; 729 P.2d 400 (1986),

The Court unambiguously affirmed the Commission's finding that PURPA contract disputes belong in district court:

It [Idaho Power] has simply asked the Commission, through a motion to modify a previous order, to declare that one of two freely negotiated payments options is in effect as selected by a legal determination of this Court. In other words, Idaho Power has asked for an interpretation of its contract. The district court is the proper forum for this action. We hold the Commission acted properly when it dismissed Idaho Power's motion to modify previous orders.

Id. at 930.

The Court in Afton II explained in some detail the exceptions to its general rule that contract disputes do not belong at the PUC:

The Court has recognized exceptions to this rule. In *Bunker Hill Co. v. Washington Water Power, supra*, we allowed the Commission to interpret an unprecise contract because "the parties agreed to let the PUC settle this dispute and since there is substantial evidence in the record to support the Commission's decision . . . Additionally, the Commission can use its expertise and supply a reasonable contract rate where the parties have an existing contract but are unable to agree to the specific rate ... Here however, the contract between Afton and Idaho Power does not fall within any of these exceptions. Idaho Power and Afton have not agreed to allow the Commission to interpret the contract. The contract, while being complex, does not require any particular expertise in the ratemaking area to interpret the disputed provision

Id. at 929. (Emphasis provided.)

While the instant parties do have language in their agreement to the effect that disputes would be submitted to the Commission for resolution, the Commission has already disavowed the ability of the parties to unilaterally confer jurisdiction on it. None of the

other criteria used by the Afton II Court are applicable. And as that Court noted, these contracts while complex, do not require any particular ratemaking expertise to interpret.

WHEREFORE, Respondent respectfully prays that the Commission dismiss Idaho Power's Complaint for lack of subject matter jurisdiction. Respondent stands ready for oral argument on its Motion if the Commission so desires.

DATED this 26th day of January, 2009.

By 
Peter Richardson and Molly O'Leary
Attorneys for Respondent
Glenns Ferry Cogeneration Partners, Ltd.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 26th day of January, 2009, I caused a true and correct copy of the REPLY TO IDAHO POWER'S BRIEF IN OPPOSITION TO MOTION TO DISMISS to be served by the method indicated below, and addressed to the following:

Jean Jewell
Secretary
Idaho Public Utilities Commission
472 W Washington Street
Boise ID 83702

U.S. Mail, Postage Prepaid
 Hand Delivered
 Overnight Mail
 Facsimile
 Electronic Mail

Bruce C Jones
Jones & Schwartz PLLC
1673 N Shoreline Dr Ste 200 (83702)
PO Box 7808
Boise ID 83707-7808
bruce@jonesandschwartzlaw.com

U.S. Mail, Postage Prepaid
 Hand Delivered
 Overnight Mail
 Facsimile
 Electronic Mail

Signed 
Nina Curtis