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2010 OCT 18 PM 3:51

Chas. F. McDevitt
Dean J. (Joe) Miller

October 18, 2010

IDAHO PUBLIC
UTILITIES COMMISSION

Via Hand Delivery

Jean Jewell, Secretary
Idaho Public Utilities Commission
472 W. Washington St.
Boise, Idaho 83720

RE: Yellowstone Power Inc.; Case No. IPC-E-10-22

Dear Ms. Jewell:

Enclosed for filing, please find an original and seven (7) copies of Reply to Staff Comments of Yellowstone Power Inc.

Kindly return file stamped copies to me.

Very truly yours,

McDEVITT & MILLER LLP



Dean J. Miller

DJM/hh
Enclosures

ORIGINAL

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Attorney for Yellowstone Power Inc.

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IDAHO PUBLIC
UTILITIES COMMISSION

BEFORE THE IDAHO PUBLIC UTILITIES COMMISSION

IN THE MATTER OF THE APPLICATION
OF IDAHO POWER COMPANY FOR
APPROVAL OF A FIRM ENERGY SALES
AGREEMENT WITH YELLOWSTONE
POWER, INC., FOR THE SALE AND
PURCHASE OF ELECTRIC ENERGY.

CASE NO. IPC-E-10-22

**REPLY TO STAFF COMMENTS OF
YELLOWSTONE POWER INC.**

COMES NOW Yellowstone Power Inc., (Yellowstone) and submits the following Reply Comments to the Comments of the Commission Staff, dated October 1, 2010 (Staff Comments).

Introduction and Summary of Staff Comments

In this case, Idaho Power Company (Company or Idaho Power), seeks approval of a Firm Energy Sales Agreement (FESA) between Idaho Power and Yellowstone containing published avoided cost rates in existence prior to March 16, 2010.

Yellowstone supports the Company's Application and in these Reply Comments urges the Commission to approve it.

With minor exceptions, noted below, Yellowstone believes the Staff Comments accurately describe the factual background associated with this Application. In short, the

Staff Comments state there are very good reasons, also discussed below, to approve the FESA as presented. In the Staff analysis, however, the facts of this case do not fit neatly into previously approved criteria for evaluating applications for approval of pre-existing rates. Recognizing a dilemma—strong reasons for approval on the one hand, and lack of clear fit with criteria on the other—Staff Comments do not recommend disapproval. Rather, Staff Comments conclude with a neutral recommendation by stating, Staff is “unable to recommend approval”. (Staff Comments, pg. 8). From this, Yellowstone infers that Staff does not oppose approval. This interpretation is confirmed by Staff’s observation that, “Staff believes this case presents a unique set of facts that permit the Commission to look beyond the established criteria...and consider other aspects such as strong public interest and impact of allowing a grandfathered rate.” (Staff Comments, Pg. 6). For the reasons set forth below, Yellowstone believes the Commission should accept Staff’s invitation and approve the FESA as filed.

There are Strong Reasons for Approval

There are many good reasons why the FESA should be approved. The Staff Comments identify some of these reasons, and Yellowstone elaborates on them as follows:

The Yellowstone Power Project (Project) is intended to be an integral part of a sawmill facility constructed by Yellowstone’s sister company, Emerald Forest Inc. The sawmill is located on property previously owned by Boise Cascade Corporations and revives the now dormant sawmill industry in Emmett, Idaho. It will employ approximately 50 workers in an economically depressed area. Yellowstone estimates that on an annual basis it will pay in excess of \$200,000 in property taxes to Gem County.

For these reasons, the Project enjoys the support of local elected officials, the Idaho Department of Commerce and the Executive Branch of the State of Idaho.

Without pre-March 16 power purchase rates, the viability of the project is impaired. The financial strength of the project is underpinned by the power purchase agreement that has been executed by Idaho Power. Without pre-March 16 power purchase rates the revenue stream of the project will be significantly reduced without the ability to offset with cost savings in other areas. In addition, project financing has proceeded based upon the executed IPCO Power Purchase Agreement and as a result bond money has been allocated by the Idaho Housing & Finance Agency for the Yellowstone project. If the current IPCO Power Purchase Agreement were not to be endorsed, the ability to meet bonding timelines would be eliminated and the financial proforma would be negatively impacted.

The Project is also beneficial to the Idaho Power electrical system. Unlike intermittent wind projects, the Project will generate electric power continuously with an estimated annual average capacity of approximately 87,600,00 Kw with anticipated availability of close to 95% . As noted by Staff Comments, “This high capacity factor, renewable, cogeneration project would be a valuable addition to help diversify Idaho Power’s resource portfolio.” (Staff Comments, pg. 6).

Further, approval of the FESA would reward honesty in business dealings and benefit the Company’s ratepayers. As set forth in paragraph 13 of the Company’s Application, Yellowstone’s facility had previously executed a PURPA Firm Energy Sales Agreement with Idaho Power under a different company for this same site. That company was Renewable Energy of Idaho LLC and the Firm Energy Sales Agreement was

approved in Case No. IPC-E-04-05, Order No. 29437. That Agreement went into default and was ultimately terminated when Renewable Energy, for reasons that were beyond its control, was unable to meet the operation date of the Agreement. Thereafter, Idaho Power determined it had incurred damages for non-performance in the amount of \$106,804. Idaho Power presented this damage billing to Renewable Energy and was informed that Renewable Energy did not have the funds or assets to make payment. At that time, Mr. Richard Vinson¹ committed that he was still pursuing development of both a sawmill and a generation facility at this site and upon completion of a generation facility at a future date he would honor this \$106,804 obligation. At this time, the sawmill has been constructed and is operating and as evidenced by the FESA.

Although it may be arguable that the non-performance damage is the liability only of the now defunct Renewable Energy of Idaho LLC, and likely unrecoverable, Mr. Vinson has agreed to pay the non-performance damage in the full amount as an offset to the energy payments of the Yellowstone Power Agreement. Payment will be accomplished in 24 monthly installments as a debit against monthly amounts Idaho Power will owe Yellowstone for monthly energy purchases under the Firm Energy Sales Agreement subject to this Application. By approval of the Agreement, the Commission will enable Idaho Power to recover, for the benefit of its customers, non-performance damages which it otherwise likely could not collect.

Additionally, the Project is substantially mature, as evidenced by these facts, all occurring prior to March 16, 2010:

- a. The real property upon which the Project is to be located was purchased from Boise Cascade, Inc., and Yellowstone is the fee owner;

¹ Mr. Vinson is the principal member of both Renewable Energy of Idaho LLC and Yellowstone Power Inc.

- b. Required environmental remediation has been completed and the Idaho Department of Environmental Quality has issued a final acceptance and permit to construct; and
- c. Significant power plant equipment, including boiler, fuel conveyors, structural steel piping controls, and electrical equipment, was purchased at a cost in excess of \$6,000,000 and is on the site or in storage ready for deployment.

A Materially Complete Agreement Existed Prior to March 16, 2010

Following the change in published avoided cost rates contained in Order No. 30744, issued on March 16, 2010, Idaho Power developed certain criteria (Pre-March 16 Criteria) for evaluating requests for pre-March 16 rates, and these criteria have been utilized by the Commission in previous cases (*See* Order No. 32068, Case No. IPC-E-10-10). The criteria are:

a. Interconnection and Transmission

- i. Filed an interconnection application; and
- ii. Received and accepted an interconnection feasibility study report for the project and paid any requested study deposits (or established credit) for the next phase of the interconnection process in accordance with Schedule 72; and
- iii. Received confirmation from Idaho Power that transmission capacity is available for the project and/or received and accepted transmission capacity study results and cost estimates; and

b. Purchase Power Agreement

- i. An agreement was materially complete prior to March 16, 2010, and except for routine Idaho Power final processing, an agreement would have been executed by both parties prior to March 16, 2010.

In this case it is undisputed that Yellowstone met all of the criteria with respect to transmission and interconnection. (Staff Comments, pg. 4).

The only question that is subject to debate is whether an agreement was “materially complete” prior to March 16, 2010. As Staff Comments note, and Yellowstone acknowledges, there does not exist any written document evidencing a meeting of the minds prior to March 16, 2010. (Staff Comments, pg. 5). It is the absence of a written document that leads Staff to the conclusion that Staff is unable to recommend approval, and this is where Yellowstone, respectfully, disagrees with Staff.

In Yellowstone’s view, “material completeness” can be proven in other ways, both by oral evidence and circumstantial evidence, which Yellowstone describes as follows:

Attached hereto as Exhibit A, is the sworn Affidavit of Mr. Richard Vinson. This Affidavit was prepared by Yellowstone and provided to Idaho Power to be included in the Company’s Response to Production Requests issued by the Staff in this case. The Staff Comments make a reference to the Affidavit (Staff Comments, pg. 5), but, regrettably, the Affidavit was not attached to the Staff Comments for consideration by the Commission.

As established in the Affidavit, Mr. Vinson has substantial experience in the business of electric power generation and is familiar with terms customarily included in Power Sales Agreements.

More specifically, he was previously the principal member of a company known as Renewable Energy of Idaho, Inc (REI). In 2004, REI negotiated a Firm Energy Sales Agreement with Idaho Power Company for the sale of electric power intended to be produced by a biomass generation project. As explained in the Application in this case, that contract went into default and Yellowstone Power has agreed to pay, on behalf of

REI, damages incurred by Idaho Power, in the event this Application is approved. As a consequence of negotiations that lead up to execution of the REI Firm Energy Sales Agreement, Mr. Vinson was familiar with the terms and conditions contained in Idaho Power's standard form of Firm Energy Sales Agreements.

Prior to March 16, 2010, Mr. Randy Allphin explained to him changes that had occurred within Idaho Power's standard form Firm Energy Sales Agreement, primarily related to damages and security for delay in performance. Mr. Vinson understood those additional terms and agreed to them. Prior to March 16, 2010, he believed all the terms of the Firm Energy Sales Agreement filed in this case were agreed upon. If a written Firm Energy Sales Agreement had been presented to me prior to March 16, 2010, Yellowstone Power would have signed the Agreement.

Oral evidence might carry less weight than written evidence when there is a dispute between parties about the substance or existence of an agreement. Here, however, there is no dispute. Idaho Power agrees there was a meeting of the minds and a materially complete agreement prior to March 16, 2010. In response to Staff Production Requests in this case, Idaho Power states, "Extensive discussions were conducted with Yellowstone prior to March 16, 2010, and both parties were in agreement with all terms and conditions of the power sales agreement." This confirms the Company's representation in the Application that "Yellowstone and Idaho Power had resolved and agreed to all material outstanding contract issues prior to March 16, 2010". (Application, pg 6).

Idaho Power's representation that an agreement was materially complete is entitled to significant weight. In the undersigned's experience, the Company takes

seriously its obligation to insure that its retail customers, through their rates, are not paying for PURPA rates higher than avoided cost. In the recent *Grandview Solar* case the Commission acknowledged this role and accepted the Company's representations:

"We accept the representations of Idaho Power as to the contract negotiations of the parties. The Company's role regarding appropriate rates is one of gatekeeper, assuring that its customers are not being asked to pay more than the Company's avoided cost. We find no reason to doubt the Company's representations". (Order No. 32068, Case No, IPC-E-10-10).

Similarly, in this case, there is nothing in the record that casts doubt on the Company's representations.

Mr. Vinson's sworn testimony is also consistent with observable facts. When, as in this case, a project sponsor is willing to accept, without negotiation, all of the terms in Idaho Power's standard form FESA, there is very little additional information required to complete a written agreement and most of it is not material to whether there was a meeting of the minds on essential terms. The only additional information required is:

- Name of project owner (FESA pg.1);
- Address for notices (FESA paragraph 28);
- Sellers contact information (FESA Exhibit A);
- Short description of facility (FESA Exhibit B);
- Legal description of project location (FESA Exhibit B);
- Requested operation date (FESA Exhibit B); and
- Point of delivery (FESA Exhibit B).

The above described items are in the nature of technical details, unrelated to whether there was a meeting of minds on essential terms. In consequence, there is no

good reason for requiring that a fully complete FESA be in existence prior to March 16, 2010, as proof of a meeting of the minds.

A Commission has Flexibility to Regulate in the Public Interest

As noted above, the Commission has previously utilized the Pre-March 16 Criteria identified above to determine whether a FESA containing Pre-March 16 rates should be approved.² It is axiomatic, however, that the Commission is not a court of law, bound to rigidly follow prior precedent. As the Commission explained in Order No. 29872, pg. 10, “This Commission is not rigidly bound by principles of stare decisis to follow prior precedent so long as a record is developed and sufficient findings supported by the evidence show that our action is not arbitrary and capricious”. (*Application of Idaho Power Company to Suspend PURPA Obligations*, Case No. IPC-E-05-22,). Staff Comments also recognize the Commission’s flexibility to depart from established criteria. (*Supra*, pg.2).

To the extent the Commission believes the facts of this case do not fit squarely within the criteria, for the lack of a pre-March 16, 2010 writing, it may depart from them. As demonstrated in these Reply Comments the public interest benefits of the Project are great, and the required departure, if any, from established criteria is small. Approval of the FESA would be neither arbitrary nor capricious, and the record support a conclusion that approval would be in the public interest.

² In Comments dated October 15, 2010 Rocky Mountain Power characterizes the Pre-March 16 Criteria as a “clear and easily understood bright line test”. (Comments of Rocky Mountain Power, pg 2). It is also possible to characterize the criteria as guidelines that inform the Commission’s discretion to regulate in the public interest. Regardless of how the criteria are characterized, the record in this case supports approval of the Application. And, a key distinction is that in the case Rocky Mountain Power is currently defending, Case No. PAC-E-10-08, the utility does not agree that an agreement was materially complete prior to March 16, 2010, whereas in this case Idaho Power does agree the agreement was materially complete.

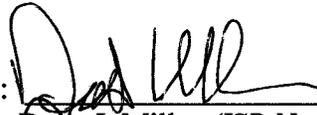
Conclusion

Yellowstone appreciates the opportunity to file these Reply Comments, and for the reasons herein contained, respectfully requests that the Commission approve Idaho Power's Application as filed.

Respectfully Submitted 15 day of October, 2010.

MCDEVITT & MILLER LLP

By:



Dean J. Miller (ISB No. 1968)

Attorneys for Yellowstone Power Inc.

CERTIFICATE OF SERVICE

I hereby certify that on the 18th day of October, 2010, I caused to be served, via the method(s) indicated below, true and correct copies of the foregoing document, upon:

Jean Jewell, Secretary
Idaho Public Utilities Commission
472 West Washington Street
P.O. Box 83720
Boise, ID 83720-0074
jjewel@puc.state.id.us

Hand Delivered
U.S. Mail
Fax
Fed. Express
Email

X
☐
☐
☐
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Email

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☐
☐
X

BY: Heather Houle
MCDEVITT & MILLER LLP

4. More specifically, I was previously the principal member of a company known as Renewable Energy of Idaho, Inc (REI). In 2004, REI negotiated a firm energy sales agreement with Idaho Power Company for the sale of electric power intended to be produced by a biomass generation project. As explained in the Application in this case, that contract went into default and Yellowstone Power has agreed to pay, on behalf of REI, damages incurred by Idaho Power, in the event this Application is approved. As a consequence of negotiations that lead up to execution of the REI firm energy sales agreement, I was familiar with the terms and conditions contained in Idaho Power's standard form of firm energy sales agreements.

Prior to March 16, 2010, Mr. Randy Allphin explained to me changes that had occurred within Idaho Power's standard form firm energy sales agreement, primarily related to damages and security for delay in performance. I understood those additional terms and agreed to them. Prior to March 16, 2010, I believe all the terms of the firm energy sales agreement filed in this case were agreed upon. If a written firm energy sales agreement had been presented to me prior to March 16, 2010, Yellowstone Power would have signed the agreement.

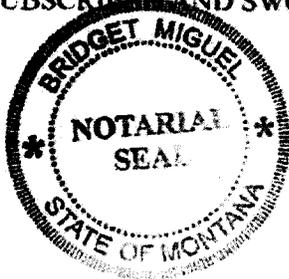
5. Prior to March 16, 2010, Yellowstone Power was not represented by regulatory counsel and I was unaware of any risk that published avoided costs might suddenly change. Had I been aware of such risk, I would have requested that Idaho Power prepare for signature a written firm energy sales agreement, containing the terms included in the firm energy sales agreement that has been submitted in this case.

DATED this 9 day of September, 2010.

Richard Vinson
Richard Vinson
Yellowstone Power Inc.

Montana
STATE OF ~~IDAHO~~)
County of Sanders) SS

SUBSCRIBED AND SWORN before me this 9 day of September, 2010



Bridget Miguel
Name: Bridget Miguel
Notary Public for ~~Idaho~~ Montana
Residing at Thompson Falls
My commission expires April 14, 2012