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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 COMMENTS OF THE EXERGY DEVELOPMENT GROUP OF IDAHO LLC

COMES NOW, the Exergy Development Group of Idaho, LLC, hereinafter referred to as "Exergy," and pursuant to this Commission's Notice of Reply Comment Deadline and states as follows:

Exergy does not take a position on the question of whether or not Yellowstone Power is entitled to grandfather status. Exergy is very concerned, however, that the Staff and Rocky Mountain Power are misstating the standard this Commission has long used to evaluate grandfather petitions.

In its Comments, Staff makes the statement that there are two tests for determination of entitlement to grandfathered rates. The first standard is that the

developer should have executed a power sales agreement with the utility at the rate in question before a successor rate becomes effective. The second standard is that the developer must have filed a meritorious complaint alleging entitlement to the published rates BEFORE the new lower rates are made effective. *See* Staff Comments p. 3.

Rocky Mountain Power comments that it supports the Staff and it urges the Commission retain the current Staff position. Rocky Mountain Power Comments p. 2. Rocky Mountain Power goes on to state that, should the Commission deviate from the two standards in this case, that it should do so only if the utility and the developer can demonstrate that they have settled all material terms of the power purchase agreement prior to the rate change. *Id.* p. 3.

As discussed below, the standard for determining grandfather status is much broader than suggested by Staff and urged by Rocky Mountain Power. The broader standard has been applied consistently by the Commission in the past and is clearly set forth in FERC decisions.

When published avoided cost rates change, issues often arise as to whether QFs attempting to obtain a PPA prior the rate change are entitled to the new rates or to be "grandfathered" at the old rates. FERC regulations provide that QFs may select the "avoided costs calculated at the time the obligation [to provide energy or capacity] is incurred." 18 C.F.R. § 292.304(d)(2)(ii). In sum, "a QF, by committing itself to sell to an electric utility, *also commits the electric utility to buy from the QF*; these commitments result either in contracts or in non-contractual, but binding, legally enforceable obligations." *JD Wind 1, LLC*, "Notice of Intent Not to Act and Declaratory Order," 129 FERC ¶ 61,148, at p. 10-11 (November 19, 2009).

FERC, however, has generally left it up to the individual states to determine as a matter of state contract law when a QF has incurred its obligation to deliver energy and capacity, and thereby lock in the rates in effect on that date. *See West Penn Power Co.*, 71 FERC ¶ 61,153 (May 8, 1995) Nevertheless, the state's power is not limitless. *See JD Wind 1, LLC*, "Order Denying 'Request for Rehearing, Reconsideration or Clarification,'" 130 FERC ¶ 61,127, at p. 11 (February 19, 2010). *JD Wind 1, LLC* involved the Texas Commission's rule that no wind developers could incur a legally enforceable obligation on the asserted ground that they do not deliver firm power. FERC rejected that analysis, and on reconsideration further held that a state commission's prior implementation inconsistent with the plain language of the federal regulations "is not evidence as to the proper implementation of the regulation. Nor is the fact that the inconsistent implementation may have been long standing." *Id.* at p. 7 n.28. That FERC generally leaves to the states the issue of determining when a legally enforceable obligation is incurred "does not mean that a state commission is free to ignore the requirements of PURPA or the Commission's regulations." *Id.* at pp. 10-11; *see also Independent Energy Producers Ass'n v. California Pub. Utils. Comm'n,* 36 F.3d 848, 853-54 (9th Cir. 1994).

Here, Idaho PUC and Supreme Court case law requires that QFs engage in some negotiations and provide the utility with a binding offer containing the essential elements of the PUPRA PPA prior to the rate change to obtain grandfather status. *See Empire Lumber Co. v. Wash. Water Power Co.*, 114 Idaho 191 (1987); *Island Power Company v. Utah Power & Light Co.*, Case No. UPL-E-93-4, Order No. 25528 (1994). Under this test, the QF must prove that "but for" the utility's actions or inactions, the parties would

have entered into a PPA prior to the rate change. In one case for a non-levelized rate contract where the risk of overpayment liability was low, the Commission granted grandfather status to a QF who had posted no liability security and had not completed engineering certification prior to the rate change. *See Blind Canyon Aquaranch v. Idaho Power Company*, Case No. IPC-E-94-1, Order No. 25802 (November 1994). Requiring extensive negotiations after the QF has tendered the essential elements of the PPA would not be a faithful implementation of the federal regulations.

Staff cites (in a footnote) *A. W. Brown Co., Inc. v. Idaho Power Company,* 121 Idaho 812, 828 P. 2d 841(1992) and *Rosebud Enterprises, Inc. v. Idaho Power Company*, 128 Idaho 624, 917 P.2d 781 (1996), to assert that there are only two ways to perfect grandfather status – a fully executed contract or a complaint for grandfather status pre-filed before the rate change. As noted above, the Commission has historically used a much broader standard for determining grandfathering status. Furthermore, the two cited cases do not contradict this fact.

In *A.W. Brown* the Commission adopted an identical policy to the one urged by the Staff in this case. That is, in order to be entitled to grandfather status a developer must show there is a signed contract to sell at the old rate or have filed a meritorious complaint alleging that the project was mature and that the developer had attempted, and failed to negotiate a contract with the utility. *See* Order No. 24192. On appeal, the Supreme Court upheld the Commission's authority to adopt such a policy. However, the Court in *A.W. Brown* held only that the policy established by the Commission was within its authority; the Court did not hold that the policy was legally required or that it was the only possible policy that could be adopted.

The Commission is not constrained by Idaho Case law to adopt Staff's recommended policy. In fact, the Commission is free to adopt whatever policy, within the constraints of PURPA and FERC limitations, it deems reasonable. Indeed, this Commission made that fact abundantly clear in the docket in which it reduced the availablility of published rates for wind projects from 10 MW to 100 Kw. In that docket the Commission changed some grandfathering policies in light of the circumstances presented and declared:

> 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 anad capricious. We did so in this case. We are a regulatory agency that performs both legislative and quasi-judicial functions. Our change in the published rate availability for certain wind QFs was based on the need . . .

Order No. 29872 at p. 10

So, to the extent the Commission believes that its current policy is as stated by Staff, it is certainly not bound to limit the instances of grandfathered rates to only those situations where a signed contract at the old rates has been obtained or where a complaint has been filed prior to the new rates becoming effective. Indeed, such a policy seems absurd on its face, in this docket at least, for two reasons. First, if one has a signed contract at the old rates, then it seems one already has succeeded in getting a PPA with the old rates. Second, if the rates are changed without prior notice, as in this case, then no developer would be able to have the advance notice required to file a complaint before the rates change.

DATED this 18th day of October 2010.

Richardson & O'Leary, PLLC

By 

Peter J. Richardson
Exergy Development Group of Idaho

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 18th day of October, 2010, a true and correct copy of the within and foregoing **COMMENTS OF EXERGY DEVELOPMENT GROUP OF IDAHO'S** was served in the manner shown to:

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