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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 COMMISSION STAFF**

COMES NOW the Staff of the Idaho Public Utilities Commission, by and through its Attorney of record, Kristine A. Sasser, Deputy Attorney General, and in response to the Notice of Application and Notice of Modified Procedure issued in Order No. 32065 on September 3, 2010, in Case No. IPC-E-10-22, submits the following comments.

BACKGROUND

On August 13, 2010, Idaho Power Company (Idaho Power) filed an Application with the Commission requesting approval of a 15-year Firm Energy Sales Agreement between Idaho Power and Yellowstone Power, Inc. (Yellowstone Power; Yellowstone) dated July 28, 2010 (Agreement).

The Application states that the Yellowstone Project (Project) is a biomass-fueled, combined heat and power project to be co-located in Emmett, Idaho, with the recently commissioned Emerald Forest Sawmill. Power will be generated using steam created from the controlled burning of the woody biomass fuel. Waste heat from the Project will be utilized to operate the dry kilns associated

with the sawmill. Application at 2. Idaho Power warrants that the Agreement comports with the terms and conditions of the various Commission Orders applicable to PURPA agreements (Order Nos. 30415, 30488, 30738, and 30744). Application at 2.

The Agreement is for a term of 15 years and contains the non-levelized published avoided cost rates established by the Commission in Order No. 30744 for energy deliveries of less than 10 average megawatts (aMW). The nameplate rating of the generator will be 11.7 MW; however, subtraction of estimated parasitic loads (energy consumption required to operate the generator) results in the Facility monthly energy deliveries being less than 10 aMW.

Yellowstone Power selected a Scheduled Operation Date of December 31, 2011, for the Project. Idaho Power asserts that Yellowstone Power is current in all of its interconnection study payments and, so long as it continues to provide requested information in a timely manner and pay invoices on time, it appears that the interconnection can be completed by the Scheduled Operation Date.

STAFF ANALYSIS

All of the terms and conditions in this Agreement are the same as those contained in other PURPA agreements recently approved by the Commission, including updated delay and liquidated damages, as well as updated security provisions. However, the primary issue in this case is whether the Project and July 28, 2010 Agreement should be grandfathered under the published avoided cost rates of Order No. 30744— rates superseded on March 16, 2010 by the lower rates of Order No. 31025.

The Application states that Yellowstone Power and Idaho Power had resolved and agreed to all material outstanding contract issues prior to March 16, 2010. Application at 7. The Application further asserts that Yellowstone Power represents that "if [it] had been made aware of any risk of the March 16, 2010, price change occurring, a written Firm Energy Sales Agreement would have been requested as all terms and conditions had already been agreed to. . . ." *Id.* Idaho Power believes that Yellowstone Power has satisfied the grandfathering criteria enumerated in the Application and should be entitled to the avoided cost rates established by Order No. 30744. Application at 5.

Grandfathering Criteria

In its Application, Idaho Power states that the Commission has recognized in prior orders that there are situations when PURPA Qualifying Facility (QF) rates are changed that it is appropriate to

include a prior vintage of rates in a current PURPA contract.[1] In several cases litigated in the early to mid-1990s, Idaho Power notes, the Commission determined and the Idaho Supreme Court affirmed, certain criteria that a QF developer must satisfy in order to establish an entitlement to sell energy at a rate other than the current published avoided cost rate.[2] The first criteria that would qualify a particular generating facility to receive a superseded rate requires that the developer have executed a power sales agreement with the utility at the rate in question before a successor rate becomes effective. If the QF cannot meet the first criteria, the second criteria requires that prior to the new rates' effective date, the QF developer must have filed a meritorious complaint alleging that the project was sufficiently mature and far enough along in the contracting process that but for the conduct of the utility company, the developer would have been able to sign a contract with the utility containing the superseded rates. Yellowstone had neither signed a contract with Idaho Power to purchase the Facility generation on or before March 16, 2010, nor had it filed a complaint alleging that Idaho Power acted unreasonably or in bad faith by not signing an agreement by March 16 when the rates changed.

Idaho Power deemed that the Yellowstone Project was entitled to the Order No. 30744 rates by satisfying the following criteria:

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.

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[1] The Idaho Supreme Court has confirmed that it is within the Commission's jurisdiction to determine which vintage of QF rates should apply to a PURPA contract. *See Empire Lumber v. Washington Water Power*, 114 Idaho 191, 755 P.2d 1229 (1988); *A.W. Brown Co., Inc., v. Idaho Power Company*, 121 Idaho 812,828 P.2d 841 (1992).

[2] *A.W. Brown Co., Inc., v. Idaho Power Company*, 121 Idaho 812,828 P.2d 841 (1992); *Rosebud v. Idaho Power Company*, 128 Idaho 624,917 P. 2d 781 (1996).

It is undisputed that Yellowstone met all of the interconnection and transmission criteria listed above. The critical question based on Idaho Power's criteria is whether the power purchase agreement was materially complete prior to March 16, 2010, except for routine Idaho Power final processing.

Idaho Power - Yellowstone Negotiations Prior to March 16, 2010

Clearly, the Agreement in this case was not executed before March 16, 2010, the date on which the avoided cost rates changed. Moreover, both parties acknowledge that there were not even any draft power sales agreements prepared and exchanged between the parties prior to March 16, 2010. Idaho Power admits that it did not begin exchanging written draft sales agreements with Yellowstone until approximately early June 2010.

Idaho Power notes, however, that throughout 2009 and continuing into 2010, Yellowstone was in contact with Idaho Power in regard to a proposed biomass generation facility. These discussions included potential siting of the project in Oregon and thorough discussion of Oregon PURPA rules, regulations, and specific discussions of contract details. Also during 2009 and into the spring of 2010, Idaho Power reports that Yellowstone expressed interest in siting this facility in Emmett, Idaho, adjacent to a sawmill the developer was constructing. In 2009 and early 2010, Yellowstone advised Idaho Power that it had multiple equipment sizes available, some of them greater than 10 MW. The parties agreed that prior to Idaho Power providing a power purchase agreement there was merit in evaluating this project as a larger than 10 aMW project. Beginning in early March 2010 and continuing through May 2010, Yellowstone provided Idaho Power the data (monthly estimated energy production) required to enable the development of energy pricing for a larger than 10 aMW facility. At the request of Yellowstone, Idaho Power prepared and supplied AURORA-based energy pricing for a project larger than 10 aMW. During this time period, Idaho Power maintains that extensive discussions were conducted between the parties regarding the complete details of a PURPA power purchase agreement.

Idaho Power - Yellowstone Negotiations after March 16, 2010

Promptly following the change in avoided cost rates on March 16, 2010, Idaho Power reports that it was contacted by Yellowstone, inquiring as to the impact the price change would have upon the ongoing power sales agreement discussions. Idaho Power states that it informed Yellowstone that it was continuing to work on the requested pricing for a larger than 10 aMW project. During the months of April and May 2010, Yellowstone provided additional information at Idaho Power's request and the

Company implemented the AURORA pricing model to establish an energy price for the project. Idaho Power relates that after evaluation of the larger equipment specifications and AURORA-based energy price, Yellowstone determined that the larger facility was not economically feasible.

During this same time period, Idaho Power was processing various grandfathering requests for other projects that arose surrounding the March 2010 change in the published avoided cost rate. In early June 2010, Yellowstone apparently made a request for grandfathering for a project smaller than 10 aMW. After review, Idaho Power concluded that the Yellowstone project may be eligible for a grandfathered rate and therefore, the parties began exchanging written draft agreements to that effect. Idaho Power contends that the only purpose for exchanging these draft agreements prior to a final agreement was to complete the "fill in" information and that no terms or conditions were debated or negotiated.

Since early June 2010, Idaho Power reports that it has been working through internal contract drafting and review processes. Any perceived delays from early June 2010 to an execution date of July 28, 2010, Idaho Power maintains, were due to change in personnel, internal review processes, and the efforts being expended on numerous other PURPA contracts and issues.

Staff Assessment

The issue, in a nutshell, is whether Idaho Power and Yellowstone were in substantial agreement on the terms, conditions, and rates for a new power sales agreement prior to the change in the rates on March 16, 2010. Idaho Power reports that Yellowstone, through a signed Affidavit of Richard Vinson, one of the principal members of Yellowstone Power, Inc., has represented that if it had been made aware of any risk of the March 16, 2010, price change occurring, a written Firm Energy Sales Agreement would have been requested and signed because it had already agreed to all of the terms and conditions that are contained in the final Agreement. In its Application, Idaho Power agrees that all terms and conditions identical to the terms and conditions of the final Agreement were agreed to with the Project prior to March 16, 2010. Idaho Power states that in the normal course of business, a written agreement was to follow. Indeed, by submitting the signed Agreement for Commission approval, Idaho Power believes that Yellowstone should be entitled to grandfathered rates.

Nevertheless, it is undisputed that there was no signed agreement prior to March 16, 2010, nor had there been any draft agreements exchanged between the parties prior to that date. In fact, there is nothing in writing to indicate that there was a meeting of the minds prior to March 16, 2010. There was no enforceable obligation to sell or purchase power. The Commission is left with only the word of

both parties that there were no outstanding contract issues or disagreements on any terms or conditions prior to March 16, 2010.

This presents some difficulty for the Commission Staff to recommend approval of the Agreement because it can reasonably be argued that Idaho Power's own criteria for judging grandfathering eligibility have not been satisfied. More specifically, it is questionable whether an agreement was materially complete prior to March 16, 2010, and whether the agreement only lacked routine Idaho Power final processing prior to March 16, 2010.

It cannot be overlooked that the Yellowstone Project is intended to be an integral part of the Emerald Forest Sawmill in Emmett. The sawmill began operating earlier this summer and is expected to employ up to 47 workers in Gem County, an economically depressed area. Staff cannot be certain whether the economic viability of the Emerald Forest Sawmill is dependent on the Yellowstone Power Facility, or if the viability of the Yellowstone Facility hinges on whether the Commission rules that it is entitled to grandfathered rates. Clearly, securing grandfathered rates will bolster the economic viability of the Yellowstone Project.

Unlike intermittent generation projects, the Yellowstone Project is expected to provide steady, predictable generation around the clock, with an extremely high capacity factor. This high capacity factor, renewable, cogeneration project would be a valuable addition to help diversify Idaho Power's resource portfolio. Despite not being convinced that a power sales agreement was materially complete prior to March 16, 2010, Staff believes that this case presents a unique set of facts that permit the Commission to look beyond the established criteria applied in other recent requests to grandfather the rates of Order No. 30744 and consider other aspects such as the strong public interest and impact of allowing a grandfathered rate.

As additional support for approval of the Agreement, Idaho Power states that Yellowstone represents that, prior to March 16, 2010, it already acquired from Boise Cascade, Inc., the property upon which the Project is to be located. In addition, Yellowstone represents that it completed required environmental remediation at the Project site, and the Idaho Department of Environmental Quality issued a final acceptance and permit to construct prior to March 16, 2010. Third, significant power plant equipment, including boiler, fuel conveyors, structural steel piping controls, and electrical equipment, was purchased prior to March 16, 2010 at a cost in excess of $6 million and is on the site or in storage ready for deployment.

Difference in Rates between Order No. 31025 and Order No. 30744

The published avoided cost rates adopted in Order No. 31025 on March 16, 2010 are approximately 13 percent lower than the superseded rates of Order No. 30744. By its terms, Order No. 31025 applies to new PURPA contracts executed on and after March 16, 2010.

Staff has applied both the rates from Order Nos. 31025 and 30744 to the Yellowstone Agreement to compare the difference in rates. The value of the Agreement over its 15-year term is greater by approximately $23.5 million under the higher rates of Order No. 30744.

Non-Performance Damages from a Prior Contract at the Same Site

A PURPA Firm Energy Sales Agreement between Idaho Power and Renewable Energy of Idaho LLC was previously executed for this same site. Richard Vinson, one of the principals of Yellowstone Power, was also a principal member of Renewable Energy. The sales agreement with Renewable Energy 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 it alleges 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 reports that it presented this default damage billing to Renewable Energy and was informed that Renewable Energy did not have the funds or assets to make payment. At that time, Idaho Power states, Mr. Vinson 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 attached Agreement, Mr. Vinson is moving forward with the generation facility.

Although the non-performance damage is the liability of the now defunct Renewable Energy, and not Yellowstone Power, Mr. Vinson has agreed to pay the non-performance damage in the full amount as an offset to the energy payments of the Yellowstone 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 Agreement. Consequently, approval of the Agreement would enable Idaho Power to recover, for the benefit of its customers, non-performance damages which it otherwise likely could not collect. Staff supports repayment of the non-performance damages by Yellowstone, and recognizes the payment as a good faith gesture by Mr. Vinson.

RECOMMENDATIONS

Staff believes that the Yellowstone Agreement falls short of satisfying grandfathering criteria developed and relied upon by Idaho Power in judging eligibility for the avoided cost rates contained in Order No. 30744 that were in effect prior to March 16, 2010. Because it fails to meet the established criteria, Staff is unable to recommend that the Commission approve the Idaho Power/Yellowstone Agreement based on the evidence provided by the parties.

Respectfully submitted this 1ST day of October 2010.

Kristine A. Sasser
Deputy Attorney General

Technical Staff: Rick Sterling

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY THAT I HAVE THIS 1ST DAY OF OCTOBER 2010, SERVED THE FOREGOING **COMMENTS OF THE COMMISSION STAFF,** IN CASE NO. IPC-E-10-22, BY MAILING A COPY THEREOF, POSTAGE PREPAID, TO THE FOLLOWING:

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