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Attorney for the Commission Staff

**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. )**  
**)**  
**)**

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**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 Filing and Notice of Modified Procedure issued in Order No. 32573 on June 19, 2012, in Case No. IPC-E-10-22, submits the following comments.

**BACKGROUND**

On May 4, 2004, the Commission approved a Firm Energy Sales Agreement (FESA) between Idaho Power and Renewable Energy of Idaho, Inc. ("Renewable Energy") for a 17.5 megawatt (MW) biomass generating facility to be located at the old Boise Cascade Plant site near Emmett, Idaho. Order No. 29487. The FESA subsequently went into default and was terminated by Idaho Power after Renewable Energy failed to meet its scheduled operation date. Renewable Energy claimed its inability to meet the scheduled operation date was due to reasons beyond its control. Idaho Power determined that the project had incurred damages in the amount

of \$106,804 for Renewable Energy's non-performance. Renewable Energy was unable to pay the assessed damages.

On August 13, 2010, Idaho Power filed an Application with the Commission requesting approval of a 15-year FESA between Idaho Power and Yellowstone Power for an 11.7 MW biomass fueled combined heat and power generator located at the same site as the Renewable Energy project. Richard Vinson, a principal of Yellowstone Power, was also a principal of Renewable Energy. Mr. Vinson agreed, as part of the Yellowstone FESA negotiations, to pay the non-performance damages of the Renewable Energy FESA as an offset to the energy payments Yellowstone was to receive in its FESA. On November 2, 2010, the Commission approved the FESA between Idaho Power and Yellowstone, including the payment by Yellowstone of Renewable Energy's \$106,804 in non-performance damages. Order No. 32104. Yellowstone chose a scheduled operation date of December 31, 2011. In addition, the FESA required Yellowstone to post a delay liquidated damages deposit in the amount of \$450,000. Yellowstone timely posted this required deposit in the form of a Letter of Credit.

Yellowstone has failed to achieve its December 31, 2011, scheduled operation date. On May 3, 2012, Idaho Power sent Yellowstone a notice of material breach for failing to achieve its scheduled operation date and stating that it would collect on the Letter of Credit by May 10, 2012, if Yellowstone failed to cure the material breach. Yellowstone responded by alleging that a *force majeure* event had occurred. Settlement discussions between the parties ensued.

On May 31, 2012, Idaho Power Company and Yellowstone Power, Inc. filed a motion requesting that the Commission accept a Settlement Stipulation ("Settlement") entered into between the parties. The Settlement Stipulation provides for termination of the FESA between Idaho Power and Yellowstone Power and mutual release of any future claims or causes of action between the parties. Yellowstone agrees to pay Idaho Power \$200,000 for its material breach of the FESA, which amount includes Renewable Energy's pre-existing debt of \$106,804. If Yellowstone fails to make the \$200,000 payment then Yellowstone agrees to allow Idaho Power to draw on the current \$450,000 Letter of Credit. Idaho Power and Yellowstone state that the Settlement Stipulation is in the public interest and that all of its terms and conditions are fair, just, and reasonable.

## STAFF ANALYSIS

Staff believes that because the project has not achieved operation within 90 days of the scheduled operation date, the project is in material breach and Idaho Power is entitled to terminate the FESA. In addition, Article 5.3 of the FESA specifies that delay damages of \$45 per kilowatt maximum capacity ( $\$45 \times 10,000 \text{ kW} = \$450,000$ ) are due and payable to Idaho Power as delay liquidated damages. Idaho Power provided notice to the project of the material breach, and termination of the FESA, as well as the utility's request for payment of the \$450,000 delay liquidated damages. The project responded to the notification of material breach with a claim of *force majeure* regarding its non-performance in the contract, as well as a draft complaint for Idaho District Court challenging the legality of the liquidated damages in the contract.

Yellowstone, in its May 15, 2012 letter to Idaho Power alleges that conditions beyond its control have made it impossible to complete the project and achieve the scheduled operation date specified in the FESA. Yellowstone cites the following conditions that have prevented construction of the facility:

- **Availability of Financing** – Yellowstone created an extensive financing package, employed lending specialists, and marketed to a wide variety of local/national banks, venture capitalist, private equity, and hedge funds related to this project. Despite these efforts, the unpredictable change in lending protocols following the banking crisis and resulting extended national economic recession restricted the availability of financing funds for projects such as Yellowstone Power and funds became severely limited.
- **1603 Grant In-Lieu Credit** – The Section 1603 grant in lieu credit adversely impacted conventional lending for projects such as Yellowstone Power by attracting predatory investors to the market. Combined with the unpredictable change in conventional lending protocols, available financing was further reduced.
- **Renewable Energy Credits** – Due to the unexpected prolific installation of wind power experienced by many utilities, the value of renewable energy credits (RECs) decreased dramatically. The revenue contemplated by Yellowstone Power from the sale of RECs was adversely affected by the installation of wind generation.
- **Emerald Forest Sawmill** – Significant revenue and fuel sourcing was contemplated from the Emerald Forest Sawmill. This facility experienced significant operating problems during its start-up and eventually had to seek protection under Chapter 11 Bankruptcy. The loss of this revenue and fuel source had a significant impact on the ability of the project to attract financing due to its close proximity to the proposed Yellowstone Power project.

Yellowstone alleges that the combination of changed conditions are beyond its control and constitute an event of *force majeure*.

For reference, the terms of the FESA relating to *force majeure* are repeated below.

#### ARTICLE XIV: FORCE MAJEURE

- 14.1 As used in this Agreement, "Force Majeure" or "an event of Force Majeure" means any cause beyond the control of the Seller or of Idaho Power which, despite the exercise of due diligence, such Party is unable to prevent or overcome. Force Majeure includes, but is not limited to, acts of God, fire, flood, storms, wars, hostilities, civil strife, strikes and other labor disturbances, earthquakes, fires, lightning, epidemics, sabotage, or changes in law or regulation occurring after the effective date, which, by the exercise of reasonable foresight such party could not reasonably have been expected to avoid and by the exercise of due diligence, it shall be unable to overcome. If either Party is rendered wholly or in part unable to perform its obligations under this Agreement because of an event of Force Majeure, both Parties shall be excused from whatever performance is affected by the event of Force Majeure, provided that:
- (1) The non-performing Party shall, as soon as is reasonably possible after the occurrence of the Force Majeure, give the other Party written notice describing the particulars of the occurrence.
  - (2) The suspension of performance shall be of no greater scope and of no longer duration than is required by the event of Force Majeure.
  - (3) No obligations of either Party which arose before the occurrence causing the suspension of performance and which could and should have been fully performed before such occurrence shall be excused as a result of such occurrence.

In response to production requests, Idaho Power states that it does not believe that Yellowstone has provided evidence that a *force majeure* event has occurred that would provide the project relief from performance as required by the contract. Staff agrees. The inability of Yellowstone to obtain financing, the decrease in value of RECs, and the bankruptcy of the associated Emerald Forest Sawmill are not the types of things Staff believes are envisioned by the *force majeure* provisions of the FESA.

Staff believes that Idaho Power is entitled to collection of the full amount of the Delay Liquidated Damages (\$450,000), in addition to the pre-existing debt of \$106,804. Under the terms of section 5.6 of the contract, the parties have agreed that the damages Idaho Power would incur due to delay in the facility achieving the scheduled operation date would be difficult or impossible to predict with certainty, and that the delay liquidated damages are an appropriate approximation of such damages.

However, Idaho Power believes that the actual collection of those damages could require additional legal proceedings prior to the Company being able to secure full payment for the damages. As noted earlier, Yellowstone has threatened to file a complaint in Idaho District Court challenging the legality of the liquidated damages in the contract. Yellowstone might argue that the actual damages incurred by Idaho Power could be quantified at less than the \$450,000 delay liquidated damages amount specified in the contract.

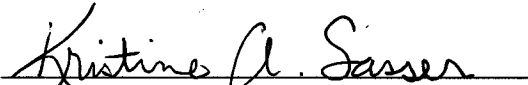
The proposed Settlement collects \$106,804 of previously uncollectable damages from a defaulted agreement and provides approximately \$93,196 in damages for default of the current agreement. Consequently, the proposed settlement amount falls \$356,804 short of the \$556,804 amount Staff believes is rightfully owed by Yellowstone to Idaho Power pursuant to the terms of the FESA.

Nonetheless, the proposed Settlement eliminates the uncertainty and additional cost and resources necessary to litigate the termination of the agreement and validity of the delay liquidated damages. While Staff would normally be reluctant to recommend approval of a settlement that appears inconsistent with the express terms of the contract, Staff recognizes that the current circumstances may support acceptance of the proposed Settlement. Currently, electric market prices are far below the avoided cost rates specified in the contract. Consequently, the actual damages to Idaho Power as a result of contract default are likely minimal, and in fact, Idaho Power could arguably be better off because Yellowstone has defaulted. The terms of the proposed Settlement acknowledge some liability for Yellowstone's default while also acknowledging some uncertainty about the actual amount of damages to Idaho Power. Approval of the proposed Settlement will also avoid litigation. Consequently, Staff believes that the proposed Settlement is in the public interest.

## **RECOMMENDATIONS**

Staff recommends approval of the Settlement Stipulation between Idaho Power and Yellowstone Power.

Respectfully submitted this 10<sup>TH</sup> day of July 2012.

  
Kristine A. Sasser  
Deputy Attorney General

Technical Staff: Rick Sterling

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## CERTIFICATE OF SERVICE

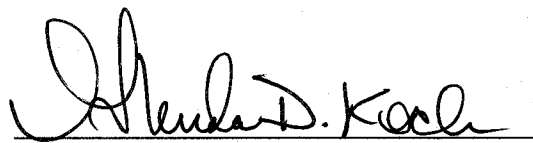
I HEREBY CERTIFY THAT I HAVE THIS 10TH DAY OF JULY 2012, SERVED THE FOREGOING **COMMENTS OF THE COMMISSION STAFF**, IN CASE NO. IPC-E-10-22, BY E-MAILING AND MAILING A COPY THEREOF, POSTAGE PREPAID, TO THE FOLLOWING:

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