BEFORE THE IDAHO PUBLIC UTILITIES COMMISSION

IN THE MATTER OF THE APPLICATION OF IDAHO POWER COMPANY FOR A DETERMINATION REGARDING A FIRM ENERGY SALES AGREEMENT BETWEEN IDAHO POWER AND RAINBOW RANCH WIND, LLC	**CASE NO. IPC-E-10-59**
IN THE MATTER OF THE APPLICATION OF IDAHO POWER COMPANY FOR A DETERMINATION REGARDING A FIRM ENERGY SALES AGREEMENT BETWEEN IDAHO POWER AND RAINBOW WEST WIND, LLC	**CASE NO. IPC-E-10-60** **ORDER NO. 32256**

On December 16, 2010, Idaho Power Company filed two Applications each requesting acceptance or rejection of a 20-year Firm Energy Sales Agreement ("Agreements") between Idaho Power and Rainbow Ranch Wind, LLC and Rainbow West Wind, LLC. Both projects (Facilities; Projects) are located near Declo, Idaho, and are managed by American Wind Group, LLC. The Projects have self-certified as "qualifying facilities" (QFs) under the applicable provisions of the federal Public Utility Regulatory Policies Act of 1978 (PURPA). Idaho Power requested that its Applications be processed by Modified Procedure.

On February 24, 2011, the Commission issued a Notice of Applications and Notice of Modified Procedure setting a March 17, 2011, comment deadline and a March 24, 2011, deadline for reply comments. Comments were filed by the Commission Staff, the Company and American Wind Group on behalf of the two projects.[1] Several public comments were also received. As set out in greater detail below, the Commission declines to approve the Firm Energy Sales Agreements.

BACKGROUND

On November 5, 2010, Idaho Power, Avista Corporation, and PacifiCorp dba Rocky Mountain Power filed a Joint Petition requesting that the Commission initiate an investigation to

[1] The parties in these two cases have all filed consolidated comments because the relevant facts for each of these two projects are substantially similar. Consequently, the Commission finds it reasonable and appropriate to consolidate these cases and issue this consolidated final Order. Rule 247, IDAPA 31.01.01.247.

address various avoided cost issues related to the Commission's implementation of PURPA. Section 210 of PURPA generally requires electric utilities to purchase power produced by QFs at "avoided cost" rates set by the Commission. "Avoided costs" are those costs which a public utility would otherwise incur for electric power, whether that power was purchased from another source or generated by the utility itself." 18 C.F.R. § 292.101(b)(6). Order No. 32176 at 1.

While the Commission pursues its investigation, the utilities also moved the Commission to "lower the published avoided cost rate eligibility cap from 10 aMW to 100 kW [to] be effective immediately. . . ." *Id. citing* Joint Petition at 7. Under PURPA regulations issued by the Federal Energy Regulatory Commission (FERC), the Commission must "publish" avoided cost rates for small QFs with a design capacity of 100 kW or less. Order No. 32176 at 1. However, the Commission has the discretion to set the published avoided cost rate at a higher capacity amount – commonly referred to as the "eligibility cap." 18 C.F.R. § 292.304(c)(1-2). When a QF project is larger than the published eligibility cap the avoided cost rate for the project must be individually negotiated by the QF and the utility using the Integrated Resource Plan (IRP) Methodology. Order No. 32176.

The purpose of utilizing the IRP Methodology for large QF projects is to more precisely value the energy being delivered. *Id.* at 10. The IRP Methodology recognizes the individual generation characteristics of each project by assessing when the QF is capable of delivering its resources against when the utility is most in need of such resources. The resultant pricing is reflective of the value of QF energy to the utility. Utilization of the IRP Methodology does not negate the requirement under PURPA that the utility purchase the QF energy.

On December 3, 2010, the Commission issued Order No. 32131 declining the utilities' motion to immediately reduce the published avoided cost rate eligibility cap from 10 aMW to 100 kW. Order No. 32131 at 5. However, the Order did notify parties that the Commission's decision regarding the motion to reduce the published avoided cost eligibility cap would become effective on December 14, 2010. *Id.* at 5-6, 9.

Based upon the record in the GNR-E-10-04 case, the Commission subsequently found that a "convincing case has been made to temporarily reduce the eligibility cap for published avoided cost rates from 10 aMW to 100 kW <u>for wind and solar only</u> while the Commission further investigates" other avoided cost issues. Order No. 32176 at 9 (emphasis original). On reconsideration, the Commission affirmed its decision to temporarily reduce the eligibility cap for published avoided cost rates from 10 aMW to 100 kW. Order No. 32212. Thus, the eligibility cap for the published avoided cost rate for wind and solar QF projects was set at 100 kW effective December 14, 2010.

THE AGREEMENTS

On December 14, 2010, Idaho Power and each of the two wind projects entered into their respective Agreements. Brian Jackson, Manager of American Wind Group, LLC, signed each Agreement as the authorized manager of each QF project. Applications at 2. Under the terms of the Agreements, the wind projects each agree to sell electric energy to Idaho Power for a 20-year term using the current non-levelized published avoided cost rates as currently established by the Commission in Order No. 31025. Applications at 4. The nameplate rating of each Facility is 23 MW. Under normal and/or average conditions, each Facility will not exceed 10 aMW on a monthly basis. Idaho Power warrants that the Agreements comport with the terms and conditions of the various Commission Orders applicable to PURPA agreements for wind resources. Order Nos. 30415, 30488, 30738 and 31025.

Each Facility has selected December 31, 2011, as its Scheduled First Energy Date and December 31, 2012, as its Scheduled Operation Date. Applications at 5. Idaho Power asserts that various requirements have been placed upon the Facilities in order for Idaho Power to accept the Facilities' energy deliveries. Idaho Power states that it will monitor the Facilities' compliance with initial and ongoing requirements through the term of the Agreements. Idaho Power asserts that it has advised each Facility of the Facility's responsibility to work with Idaho Power's delivery business unit to ensure that sufficient time and resources will be available for delivery to construct the interconnection facilities, and transmission upgrades if required, in time to allow each Facility to achieve its December 31, 2012, Scheduled Operation Date.

Idaho Power asserts that each Facility has been advised that delays in the interconnection or transmission process do not constitute excusable delays and if a Facility fails to achieve its Scheduled Operation Date delay damages will be assessed. *Id.* at 7. The Applications further maintain that each Facility has acknowledged and accepted the risk inherent in proceeding with its Agreement without knowledge of the requirements of interconnection and possible transmission upgrades. *Id.* The parties have each agreed to liquidated damage and security provisions of $45 per kW of nameplate capacity. Agreement, ¶¶ 5.3.2, 5.8.1.

Idaho Power states that each Facility has also been made aware of and accepted the provisions in each Agreement and Idaho Power's approved Schedule 72 regarding non-compensated curtailment or disconnection of its Facility should certain operating conditions develop on Idaho Power's system. The Applications note that the parties' intent and understanding is that "non-compensated curtailment would be exercised when the generation being provided by the Facility in certain operating conditions exceeds or approaches the minimum load levels of [Idaho Power's] system such that it may have a detrimental effect upon [Idaho Power's] ability to manage its thermal, hydro, and other resources in order to meet its obligation to reliably serve loads on its system." Applications at 7-8.

By their own terms, the Agreements will not become effective until the Commission has approved all of the terms and conditions and declares that all payments made by Idaho Power to the Facilities for purchases of energy will be allowed as prudently incurred expenses for ratemaking purposes. Agreement ¶ 21.1.

THE COMMENTS

A. Staff Comments

Staff observed that the two Agreements are nearly identical. Both of the projects are proposed to be built in the same general vicinity. Staff calculated that the two facilities collectively are expected to generate 117,077 MWh annually. Under the non-levelized rates in the Agreements, the annual energy payments by Idaho Power for the expected generation will be approximately $7.2 million in 2013 increasing to approximately $14.1 million in 2032, or a cumulative total of $208.8 million over the 20-year term of the Agreements. The collective net present value of the energy payments over the life of the Agreements will be approximately $80.0 million.

The two Agreements were signed by the project developer on December 13, 2010, and signed by Idaho Power on December 14, 2010. The Agreements were filed with the Commission on December 16, 2010. The Agreements contain avoided cost rates from Order No. 31025. However, Staff observed that Order No. 32176 lowered the availability of published avoided cost rates for wind and solar QF projects to 100 kW, effective December 14, 2010. As a matter of law, Staff considers the effective date of a contract to be that date upon which both parties have signed the agreement. A signature by only one party, Staff believes, does not create an enforceable contract nor establish the effective date of the Agreement. Consequently, Staff considers the effective date for the two Agreements to be December 14, 2010.

Because the Agreements were executed after the date upon which the 100 kW eligibility cap became effective for wind and solar projects and because the size of each proposed wind project clearly exceeds 100 kW, Staff maintains that approval of the Agreements is prohibited by Order No. 32176. Staff believes that the avoided cost rate for these Agreements must be negotiated using the IRP methodology. Consequently, Staff recommended denial of both Agreements as submitted.

B. The Projects' Comments

Brian Jackson, Manager of American Wind Group, submitted consolidated comments on behalf of the two projects. American Wind maintains that the two Agreements were standard contracts "that were simply filled out and not really negotiated or disputed by the projects themselves." Comments at 1. American Wind insists that the PPAs were finalized and executed prior to the change in eligibility cap for published avoided cost rates. American Wind states that the federal government and Department of Energy have "created special incentives for wind projects" in order to stimulate jobs and support the national manufacturing industry. *Id.* at 2. American Wind also contends that this type of economic development provides an additional source of revenue for America's farms and "guarantees that land will stay rural agricultural land for the next few decades." *Id.*

American Wind maintains that wind projects provide meaningful jobs and significant tax benefits to the areas within which they are located. American Wind contends that these two projects "are good for the future energy mix of the ratepayers of Idaho and they are good for the local economy and energy security of Idaho and the nation." *Id.* at 4.

C. Public Comments

Approximately 25 public comments were received. Several of the comments were written by people associated with American Wind Group and the Rainbow Ranch/Rainbow West projects. All of the comments supported approval of the two wind projects. The commenters believe that the projects would stimulate the local economy and provide economic growth at a time when people are struggling. Several commenters also cited the economic benefit to the local farmers who are providing the land for the wind projects.

D. Idaho Power Reply

Idaho Power asserted that they processed the requests of the projects diligently and in good faith. Reply at 8. However, Idaho Power argued that "the continuing and unchecked requirement for the Company to acquire additional intermittent and other QF generation regardless of its need for additional energy or capacity on its system not only circumvents the Integrated Resource Planning process and creates system reliability and operational issues, but it also increases the price its customers must pay for their energy needs." Applications at 4.

Idaho Power's reply comments explained its internal processing of PURPA power purchase agreements.[2] Idaho Power states that, once the proposed draft PPA is in final draft form, an internal Idaho Power Sarbanes Oxley ('SOX') review is required. This review takes approximately 10 business days and provides confirmation from all necessary divisions within the Company that the contract meets all SOX requirements and thus enables Idaho Power to execute the PPA. Following the SOX review, three executable copies of the PPA are prepared and sent to the project for signature and execution. When signed contracts are returned to Idaho Power by the project, Idaho Power schedules a time for the appropriate Idaho Power executive to sign and execute the agreement. Reply at 6. "Generally this is accomplished within one to two business days of when the executed agreement is received back from the project, but is dependent on the limited availability of the required Company executive with the requisite authority to execute contracts containing such large monetary obligations as those contained in the typical 20-year PURPA PPA." *Id.*

Idaho Power maintains that initial contracting information requests were sent to the projects in early November 2010. First draft contracts were provided to the projects on November 23, 2010. "Idaho Power continued to receive e-mail and communications from the Projects as late as December 9, 2010, that the Projects were still attempting to determine the project sizes and finalize the agreements." *Id.* at 6. Idaho Power states that unsigned executable draft agreements were hand-delivered to the projects on December 13, 2010, and returned by the Projects to Idaho Power that same afternoon. Idaho Power signed the Agreements on December 14 and filed them with the Commission for review on December 16, 2010.

Idaho Power maintains that it "had no opportunity to execute the contracts prior to the December 14, 2010, effective date of Order No. 32176 because the contracts were not returned to

[2] The Firm Energy Sales Agreements are also known as Power Purchase Agreements, or "PPAs."

Idaho Power by the Projects until late in the afternoon on December 13, 2010. Idaho Power did sign the agreements the next day at the first opportunity it had with the appropriate Company executive." *Id.* at 7.

Idaho Power equates the public interest implications of these contracts with those contemplated by the Court in *Sierra-Mobile* cases, including *Agricultural Products*, and its progeny. Idaho Power maintains that the Commission, "may annul, supersede, or reform the contracts of the public utilities it regulates in the public interest." Reply at 9 (internal citations omitted).

DISCUSSION AND FINDINGS

The Commission has jurisdiction over Idaho Power, an electric utility, and the issues raised in this matter pursuant to the authority and power granted it under Title 61 of the Idaho Code and the Public Utility Regulatory Policies Act of 1978 (PURPA). The Commission has authority under PURPA and the implementing regulations of the Federal Energy Regulatory Commission (FERC) to set avoided cost rates, to order electric utilities to enter into fixed-term obligations for the purchase of energy from qualified facilities (QFs) and to implement FERC rules. *Rosebud Enterprises, Inc., v. Idaho Public Utilities Commission*, 128 Idaho 609, 612, 917 P.2d 766, 769 (1996).

The Commission has reviewed the record in this case, including the Applications, the Firm Energy Sales Agreements, and the comments of Commission Staff, Idaho Power, the wind projects, and the public. It is clear from the record that extensive review of PPAs is conducted by both parties prior to signing an agreement. From the Commission's perspective, a thorough review is appropriate and necessary prior to signing agreements that obligate ratepayers to payments of more than $200 million over the 20-year term of these agreements. Indeed, the Commission has directed the utilities to assist the Commission in its gatekeeper role when reviewing QF contracts.

The primary issue to be determined in these cases is whether the Agreements – which utilize the published avoided cost rate – were executed before the eligibility cap for published rates was lowered to 100 kW on December 14, 2010, for wind and solar projects. "According to the FERC, 'it is up to the States, not [FERC] to determine the specific parameters of individual QF power purchase agreements, including the date at which a legally enforceable obligation is incurred under State law.'" *Rosebud Enterprises,* 128 Idaho at 780-781, 917 P.2d at 623-624, *citing West Penn Power Co.*, 71 FERC ¶ 61, 153 (1995). We find that the Agreements were not fully executed (signed by both parties) prior to December 14, 2010. More specifically, each Firm Energy Sales Agreement states that the "Effective Date" of the Agreement is "The date stated in the opening paragraph of this . . . Agreement representing the date upon which this [Agreement] was fully executed by both Parties." Agreements ¶ 1.10. The opening paragraph is dated "this 14th day of December 2010." Agreements at 1. It is not disputed that the projects signed the Agreements on December 13, and Idaho Power signed on December 14, 2010. *Id.* at 29. Thus, on the date the two Agreements became effective, published avoided cost rates were available only to wind and solar projects with a design capacity of 100 kW or less.

The proposed change in the eligibility cap was clearly noticed in our Order No. 32131 issued on December 3, 2010. As we observed in Order No. 32176: "One need look no further than the abundance of firm energy sales agreements filed with the Commission [between the notice and December 14] to realize that the parties took the Commission's notice of its effective date seriously." Order No. 32176 at 11. The Commission does not consider a utility and its ratepayers obligated until both parties have completed their final reviews and signed the agreement. In other words, in order for the 10 aMW eligibility cap to be available to wind and solar QFs, the agreement must have been effective prior to December 14, 2010. The Idaho Supreme Court has recognized that "a balance must be struck between the local public interest of a utility's electric consumers and the national public interest in development of alternative energy sources." *Rosebud Enterprises*, 128 Idaho at 613, 917 P.2d at 770. We find that it is not in the public interest to allow parties with contracts executed on or after December 14, 2010, to avail themselves of an eligibility cap that is no longer applicable.

The published avoided cost rates established in Order No. 31025 have not changed. What has changed is the size at which wind and solar projects can avail themselves of the published avoided cost rates. Consistent with FERC regulations, and as set out in Order No. 32176, published rates are available to wind and solar QFs with a design capacity of 100 kW or less. 18 C.F.R. § 292.304(c)(1-2). Wind and solar projects larger than 100 kW are still entitled to PURPA contracts at avoided cost rates calculated using the IRP Methodology. Regarding the application of a change in the eligibility cap, we adopt a bright line rule: a Firm Energy Sales Agreement/Power Purchase Agreement must be executed, i.e., signed by both parties to the agreement, prior to the effective date of the change in eligibility criteria.

The Firm Energy Sales Agreements between Idaho Power and the two projects were executed on December 14, 2010. The Agreements recite that each project will have a maximum capacity amount of 23 MW. Under normal and/or average conditions, each project will not exceed 10 aMW on a monthly basis. Because the size of each of these wind projects exceeds 100 kW, they are not eligible to receive published rate contracts. Simply put, the rates contained in the Agreements do not comply with Order No. 32176. Therefore, we disapprove the two Firm Energy Sales Agreements.

O R D E R

IT IS HEREBY ORDERED that the December 14, 2010, Firm Energy Sales Agreements between Idaho Power and Rainbow Ranch Wind and Rainbow West Wind are disapproved.

THIS IS A FINAL ORDER. Any person interested in this Order may petition for reconsideration within twenty-one (21) days of the service date of this Order. Within seven (7) days after any person has petitioned for reconsideration, any other person may cross-petition for reconsideration. See *Idaho Code* § 61-626.

DONE by Order of the Idaho Public Utilities Commission at Boise, Idaho this 8th day of June 2011.

PAUL KJELLANDER, PRESIDENT

MACK A. REDFORD, COMMISSIONER

MARSHA H. SMITH, COMMISSIONER

ATTEST:

Jean D. Jewell
Commission Secretary

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