Office of the Secretary
Service Date
June 8, 2011

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 GROUSE CREEK WIND PARK, LLC	**CASE NO. IPC-E-10-61**
IN THE MATTER OF THE APPLICATION OF IDAHO POWER COMPANY FOR A DETERMINATION REGARDING A FIRM ENERGY SALES AGREEMENT BETWEEN IDAHO POWER AND GROUSE CREEK WIND PARK II, LLC	**CASE NO. IPC-E-10-62** **ORDER NO. 32257**

On December 29, 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 Grouse Creek Wind Park, LLC, and Grouse Creek Wind Park II, LLC (Facility; Project). Both projects are located near Lynn, Utah, and managed by Wasatch Wind Intermountain, 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 Application and Notice of Modified Procedure setting a March 24, 2011, comment deadline and a March 31, 2011, deadline for reply comments. Comments were filed by the Commission Staff, the Company and Wasatch Wind on behalf of each of the two projects.[1] On April 7, 2011, Wasatch Wind filed a Motion to Set Time for Oral Argument because "the records in these cases are lengthy and Idaho Power appears to interpret the evidence different than the Grouse Creek QFs. . . ." Motion at 5. Commission Staff and Idaho Power filed objections to the projects' motion. On April 27, 2011,

[1] The parties in these two cases have all filed consolidated comments because the "relevant facts for each of these projects are substantially similar." Comments of Wasatch Wind at n.1. 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.

the Commission issued an Order denying the projects' motion.[2] 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 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

[2] The Commission found that "the evidentiary record sufficiently reflects the positions of all parties. Moreover, the Projects have not alleged that their position is not adequately presented through written submissions." Order No. 32236 at 2.

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 28, 2010, Idaho Power and each of the two wind projects entered into their respective Agreements. Under the terms of the Agreements, each wind project agrees to sell electric energy to Idaho Power for a 20-year term using the 10 aMW non-levelized published avoided cost rates. Applications at 4. The nameplate rating of each Facility is 21 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 June 1, 2013, as its Scheduled First Energy Date and December 1, 2013, 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 1, 2013, Scheduled Operation Date.

The Applications state that each Facility "is currently in the beginning stages of the generator interconnection process. [Each] Facility is located outside of Idaho Power's service territory and thus must complete the interconnection process with a different host utility." *Id.* at

6. The Agreements require each Facility to acquire interconnection and continuous firm transmission capacity to a Point of Delivery on Idaho Power's system. 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.* 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.* at 7. The parties have each agreed to liquidated damage and security provisions of $45 per kW of nameplate capacity. Agreements, ¶¶ 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.

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. Agreements ¶ 21.1.

THE COMMENTS

A. Staff Comments

Staff observed that both of the Agreements are nearly identical. The two Facilities collectively are expected to generate 128,887 MWh annually. Under the non-levelized rates in the Agreements, the annual energy payments by Idaho Power for the expected generation will be approximately $8.3 million in 2014 increasing to approximately $15.9 million in 2033, or a cumulative total of $236.4 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 $83.8 million.

Both of the Agreements were signed by the Project developer on December 20, 2010, and signed by Idaho Power on December 28, 2010. The Agreements were filed with the Commission on December 29, 2010. The Agreements contain the published 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 the contract to be the date upon which both parties 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 each of the Agreements to be December 28, 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 the Agreements as submitted.

B. The Projects' Comments

The Projects assert that these wind projects began development in 2007, have possessed rights to use private lands for the Project sites since February 2008, and have over two years of wind data supporting its output projections. Comments at 2. The Projects claim that they have been in formal power sales contract negotiations with Idaho Power since February 2010. In April 2010, Idaho Power provided the Projects with PURPA contract pricing (calculated through the Aurora model) consistent with a project producing up to 65 MW. In June 2010, the Projects signed a letter of understanding provided by Idaho Power, "which stated Idaho Power would not execute a power sales contract prior to when the Project received confirmation that the results of the initial Idaho Power transmission capacity application for transmission to its load center are known and the Project accepts the results." *Id.* at 12. In a June 25, 2010, e-mail, the Projects indicated to Idaho Power that "due to federal permitting issues, [the Projects] intended to reduce [their] overall footprint and wished to discuss power sales contracts for two single 10 aMW projects, instead of the large 65 MW project." *Id.* at 13. On July 14, 2010, the Projects submitted a formal request for two 10 aMW PURPA contracts to Idaho Power. *Id.*

On October 1, 2010, the Projects sent a letter to Idaho Power expressing their intent to obligate themselves to two power sales agreements. *Id.* at 14. The letter "expressed [the Projects'] concern also with the legality of the high $45/kw delay liquidated damages security provision Idaho Power had begun requiring. . . ." *Id.* at 15. Idaho Power responded on November 1, 2010, by providing a draft standard FESA and indicating that the Projects must agree to the $45/kW delay security amount – which terms were contained in the draft agreement. *Id.*

After the utilities filed their Joint Petition in the GNR-E-10-04 case, the Projects each filed complaints with the Commission against Idaho Power on November 8, 2010. The Projects assert that, on November 19, 2010, they agreed with Idaho Power to stay the complaint proceedings and execute standard QF wind contracts "containing the $45/kw delay security but not containing the precondition of firm transmission rights prior to execution." *Id.* at 4. On December 2, 2010, the Projects provided Idaho Power with contracts containing the project specifics for each project and on December 9, 2010, the Projects clarified the online date to comply with the BPA transmission service request. On December 16, 2010, Idaho Power provided executable Agreements to the Projects. *Id.* at 19. On December 20, 2010, the Projects executed the Agreements and sent them back to Idaho Power by overnight delivery.[3] Idaho Power executed the Agreements on December 28, 2010, and filed them with the Commission the next day. *Id.*

The Projects argue that because they filed meritorious complaints on November 8, 2010, and because all project specifics and material terms of the contracts were finalized prior to December 14, 2010, the Commission should approve both FESAs containing the published avoided cost rates. The Projects maintain that, "[w]hen the published rates change, or become otherwise unavailable to a QF before the QF can obtain a contract, the QF is entitled to grandfathered rates if it can 'demonstrate that 'but for' the actions of [the utility, the QF] was otherwise entitled to a power purchase contract.'" *Id.* at 7. The Projects further allege that the large sums of money and time spent in developing the Projects and the advanced stage of their maturity evidences their intent to obligate themselves to a power purchase agreement. *Id.*

[3] Both Projects and Idaho Power represent that Grouse Creek Wind Park and Grouse Creek Wind Park II signed their respective Agreements on December 21, 2010. However, the date reflected in each Agreement filed with this Commission under the Project manager's signature is clearly December 20, 2010.

C. Idaho Power Reply

Idaho Power stated that it executed the two Agreements in good faith and will honor them if approved by the Commission. Reply at 10. 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 Commission-mandated IRP planning process and creates system reliability and operational issues, but it also increases the price its customers must pay for their energy needs above the Company's actual avoided costs." *Id.* at 11.

Idaho Power's reply comments explained its internal processing of PURPA power purchase agreements.[4] Idaho Power states that, once the proposed draft PPA is in final draft form, an internal 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. 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. *Id.* 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 it began communications with the Projects in February 2010. The initial project was a single 150 MW project spread across 4,000 acres of land. *Id.* at 7. Discussions on the 150 MW project continued until April 2010, when Idaho Power was informed that the Projects were now considering a single 65 MW project. *Id.* In July 2010, the Projects informed Idaho Power that it wished to discuss power sales contracts for two single 10 aMW projects, instead of the larger 65 MW single project. Idaho Power maintains that, during negotiations, the Projects objected to certain terms in the PPAs regarding Idaho Power's security deposit requirements. In addition, because the Projects were located off Idaho Power's system, the Company initially required commitments from the Projects regarding the Projects' ability to deliver energy to Idaho Power's system. Idaho Power later agreed to relax this precondition. In

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

its reply, Idaho Power notes that "the Projects have still not entered into a definitive transmission service agreement with Bonneville Power Administration ('BPA') to enable it to deliver energy to Idaho Power's system." *Id.* at 8.

Idaho Power maintains that on December 2, 2010, the Projects returned "marked-up versions of previously sent draft PPAs" to Idaho Power. *Id.* "These mark-ups were the first time Idaho Power was definitively informed of the Projects' size and configuration." *Id.* On December 9, 2010, the Projects provided Idaho Power with the Projects' proposed online dates. On December 14, 2010, Idaho Power sent an information request to the Projects seeking information necessary to finalize the PPAs and on December 15 Idaho Power sent an email to the Projects confirming the first energy and commercial operation dates. On December 16, 2010, Idaho Power states that it provided the Projects with executable copies of the Agreements. On December 20, 2010, the Projects executed the Agreements and returned them to Idaho Power by overnight mail. Idaho Power executed the Agreements on December 28, 2010, and filed them with the Commission the next day.

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 11 (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, and Wasatch Wind. 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 in excess of $230 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 ¶ 1.11. The opening paragraph is dated "this 28 day of December, 2010." Agreements at 1. It is clear that the Projects signed the Agreements on December 20, and Idaho Power signed on December 28, 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 Projects also argue that "[w]hen the published rates change, or become otherwise unavailable to a QF before the QF can obtain a contract, the QF is entitled to grandfathered rates if it can 'demonstrate that but for the actions of [the utility, the QF] was otherwise entitled to a power purchase contract.'" Comments at 7. However, 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. Because published avoided cost rates remain unchanged and only the eligibility size has changed, grandfathering criteria applied to rate changes are not applicable here. 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 28, 2010. The Agreements recite that each Project will have a maximum capacity amount of 21 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.

ORDER

IT IS HEREBY ORDERED that the December 28, 2010, Firm Energy Sales Agreements between Idaho Power and Grouse Creek Wind Park and Grouse Creek Wind Park II 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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