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IDAHO PUBLIC
UTILITIES COMMISSION

April 7, 2011

Ms. Jean Jewell
Commission Secretary
Idaho Public Utilities Commission
472 W. Washington
Boise, ID 83702

RE: **IPC-E-11-01**

Dear Ms. Jewell:

We are enclosing for filing in the above-referenced docket an original and seven (7) copies of Western Desert Energy, LLC's **COMMENTS OF WESTERN DESERT ENERGY, LLC** and the **AFFIDAVIT OF ROWE SANDERSON**.

An additional copy is enclosed for you to stamp for our records.

Sincerely,

Gregory M. Adams
Richardson & O'Leary PLLC

encl.

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IDAHO PUBLIC
UTILITIES COMMISSION

Attorneys for Western Desert Energy, LLC

BEFORE THE IDAHO

PUBLIC UTILITIES COMMISSION

IN THE MATTER OF THE) **CASE NO. IPC-E-11-01**
APPLICATION OF IDAHO POWER)
COMPANY FOR A DETERMINATION)
REGARDING A FIRM ENERGY SALES) COMMENTS OF WESTERN DESERT
AGREEMENT WITH WESTERN DESERT) ENERGY, LLC IN SUPPORT OF
ENERGY, LLC FOR THE SALE AND) APPROVAL OF THE ENERGY
PURCHASE OF ELECTRIC ENERGY) SALES AGREEMENT
_____)
_____)

COMES NOW, Western Desert Energy, LLC, and pursuant to the Idaho Public Utilities Commission's ("Commission's") Notice of Modified Procedure and Order No. 32203, hereby files these Comments. For the reasons set forth below, Western Desert Energy (or "the Project") respectfully requests that the Commission approve the Firm Energy Sales Agreement ("FESA") with Idaho Power, containing the published avoided cost rates.

INTRODUCTION

Western Desert Energy has planned a 5 MW wind project that will use three 1.6 megawatt ("MW") turbines in Idaho Power's service territory in Owyhee County, and will sell its output to Idaho Power as a qualifying facility ("QF") under the Public Utilities Regulatory

Policies Act of 1978 (“PURPA”). The Project’s developers have a lease to develop the wind farm, and have obtained a conditional use permit from Owyhee County. The Project’s developers have been in touch with Idaho Power’s interconnection and PURPA contracts personnel regarding this 5 MW project since March 2010 to complete the necessary interconnection, transmission, and power sales contracting processes. They received a Feasibility Study stating that interconnection is feasible in August 2010, and proceeded to the final interconnection study stage – the Facility Study. The Project’s developers began requesting a PURPA power sales contract in August 2010, and requested that Idaho Power complete any necessary transmission studies. But the Project did not obtain a draft contract for several months. After Idaho Power eventually confirmed that transmission to the load center is available and no study was needed, provided the Project with a FESA in early January 2011. The Project’s developers promptly executed the FESA.

Thus far, the Project developers have spent approximately \$105,000 on the land lease, meteorological tower and equipment, interconnection studies, engineering work, and other development costs. Because Western Desert Energy had made substantial progress through the interconnection process and had requested and intended to execute a power sales contract well in advance of December 14, 2010, the Commission should approve the FESA containing the published avoided cost rates.¹

¹ Western Desert Energy notes that several parties to GNR-E-10-04 have disputed whether the effective date of Order No. 32176 could be retroactively effective on December 14, 2010. For purposes of these comments, Western Desert Energy will use December 14, 2010, as the effective date, without conceding that the Commission had the authority to make the reduction in the eligibility cap retroactively effective.

LEGAL BACKGROUND

A. The Public Utility Regulatory Policies Act of 1978's Mandatory Purchase Provisions

This case involves the Commission's implementation of the mandatory purchase obligation of PURPA, which requires electric utilities to purchase power produced by cogenerators or small power producers that obtain status as a QF. 16 U.S.C. § 824a-3(a)(2). Congress's intent "was to encourage the promotion and development of renewable energy technologies as alternatives to fossil fuels and the construction of new generating facilities by electric utilities." *Rosebud Enterprises, Inc. v. Idaho Pub. Util. Commn.*, 128 Idaho 609, 613, 917 P.2d 766, 780 (1996). "Traditional electric utilities were reluctant to purchase power from, and sell power to, the nontraditional facilities." *FERC v. Mississippi*, 456 U.S. 742, 750, 102 S.Ct. 2126, 2132-2133 (1982). To overcome this problem, "§ 210(a) [of PURPA] directs the [Federal Energy Regulatory Commission ("FERC")], in consultation with state regulatory authorities, to promulgate such rules as it determines necessary to encourage cogeneration and small power production, including rules requiring utilities to offer to sell electricity to, and purchase electricity from, qualifying cogeneration and small power production facilities." *Id.*, 456 U.S. at 750-51, 102 S.Ct. at 2133.

The price PURPA section 210(b) requires the utilities to pay to QFs in exchange for a QF's electrical output is termed the avoided cost rate, which is the cost to the utility of producing the energy itself or purchasing it from an alternative source. 16 U.S.C. § 824a-3(b), (d). FERC promulgated regulations requiring utilities to compensate QFs for the utilities' *full* avoided cost. 18 C.F.R. § 292.304(a), (b); *Small Power Production and Cogeneration Facilities; Regulations*

Implementing Section 210 of the Public Utility Regulatory Policy Act of 1978, 45 Fed. Reg. 12,214, 12,222-12,223 (Feb. 25, 1980). The U.S. Supreme Court directly affirmed FERC's "full-avoided-cost rule," *American Paper Institute, Inc. v. FERC*, 461 U.S. 402, 417-18, 103 S.Ct. 1921, 1930 (1983), and that rule is still in effect today.

FERC's regulations entitle QFs to long term contract rates set at the utilities' full avoided costs at the time the QF commits itself to a legally enforceable obligation to deliver its project's output. 18 C.F.R. § 292.304(a), (b), (d)(2)(ii); *JD Wind 1, LLC*, "Order Denying 'Request for Rehearing, Reconsideration or Clarification,'" 130 FERC ¶ 61,127, ¶ 23 (February 19, 2010). Further, FERC's regulations require utilities to publish "standard rates" available for long term contracts available to QFs below a state-implemented maximum generating capacity. 18 C.F.R. § 292.304(c)(1)-(3). The Idaho Commission requires utilities in Idaho to make the rates in the published rate schedule available to QFs that generate less than 10 average monthly MW. *See U.S. Geothermal, Inc. v. Idaho Power Company*, Case No. IPC-E-04-8, Order No. 29632, p. 14 (2004). On February 7, 2011, however, the Commission reduced the eligibility cap to 100 kilowatts for wind and solar QFs and stated the effective date of this reduction would be December 14, 2010. *See Order No. 32176*, at pp. 11-12.

B. PURPA Grandfathering Criteria

When 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." *Earth Power Resources, Inc. v. Washington Water Power Company*, Case No. WWP-E-96-6, Order

No. 27231 (1997) (finding utility delayed negotiations and therefore QF was entitled to grandfathered rate); *see also Blind Canyon Aquaranch v. Idaho Power Company*, Case No. IPC-E-94-1, Order No. 25802 (1994); *Snow Mountain Pine v. Maudin*, 84 Or. App. 590, 600, 734 P.2d 1366, 1371 (1987).

The Commission has not applied a single test to determine eligibility to grandfathered rates throughout the years. Many factors can evidence a PURPA developer's intent to enter into a power sales contract prior to a change in the published rates. During the last reduction in the eligibility cap for wind projects, the Commission considered factors such as the large sums of money and time spent on developing the project and its stage of maturity as evidence of a developer's intent to obligate itself to the contract. *See In the Matter of Cassia Wind to Determine Exemption Status*, Case No. IPC-E-05-35, Order No. 29954, pp. 2-4 (2006) (finding wind QF entitled to grandfathered rates based on maturity of development of project when it had merely submitted a completed application for interconnection study, including the applicable fee, and had performed wind studies, commenced preliminary permitting and licensing activities, and made efforts to secure sites to place turbines). The Commission has also recently approved a PURPA contract with grandfathered rates where there was no written correspondence or exchange of a draft contract prior to the rate change. *See In the Matter of the Application of Idaho Power Company for Approval of a Firm Energy Sales Agreement with Yellowstone Power Company*, Case No. IPC-E-10-22, Order No. 32104, p. 12 (2010).²

² The most onerous test the Commission has ever used for determining grandfather eligibility is the pre-filed complaint test. This test requires, prior to the effective date of the rate change, the QF must have obtained an executed contract, or have filed a meritorious complaint at

Failure to receive a fully executed FESA prior to the date of the rate change is not necessarily fatal to the PURPA developer's right to the grandfathered published rates. Indeed, Idaho Power's Reply Comments in the Yellowstone Power case noted that the Commission had approved contracts under such circumstances after the rate change in Order No. 31025 in the following five cases: IPC-E-10-15, Cargill, Inc., Battencourt B6 Dairy, a 2.25 MW Anaerobic Digester; (2) IPC-E-10-16, New Energy One, LLC, Rock Creek Dairy, a 4 MW Anaerobic Digester; (3) IPC-E-10-17, New Energy Two, LLC, Swagger Farms Dairy, a 2 MW Anaerobic Digester; (4) IPC-E-10-18, New Energy Three, LLC, Double B Dairy, a 2 MW Anaerobic Digester; and (5) IPC-E-10-19, Grandview Solar PV One LLC, a 20 MW Photo Voltaic Solar. In those cases, Idaho Power had supported the developers' entitlement to a grandfathered contract because, prior to the rate change, they had received and accepted an interconnection feasibility study, received and accepted a determination regarding transmission capacity and, except for Idaho Power's routine processing, a power purchase agreement was materially complete.

PROCEDURAL AND FACTUAL BACKGROUND

Western Desert Energy has been involved in the development of the 5 MW Project since the fall of 2009. In late 2009, the Project's developers secured a lease to develop a wind farm,

the Commission alleging it is entitled to a contract. *See A.W. Brown Co., Inc. v. Idaho Power Co.*, 121 Idaho 812, 816-18, 828 P.2d 841, 845-47 (1992). The Idaho Supreme Court has never mandated this test as the Commission's only available way to test whether a QF had effected a legally enforceable obligation, and the Commission has not applied this onerous pre-filed complaint test consistently. *See, e.g., Blind Canyon Aquaranch*, Order No. 25802; *Earth Power Resources, Inc.*, Order No. 27231.

and approached Idaho Power regarding the size of a project that the nearby 69 kilovolt line could accommodate. *See Affidavit of Rowe Sanderson*, at ¶¶ 5-7.³ From contact with Idaho Power and other research, the Project developers determined they should develop a 5 MW project. *Id.* at ¶¶ 6-7. Subsequently they have obtained a conditional use permit from Owyhee County, erected meteorological towers and conducted engineering work to plan for the development. *Id.* at ¶¶ 8, 9. The Project developers have been in touch with Idaho Power's interconnection and PURPA contracts personnel regarding this 5 MW project since March 2010. *Id.* at ¶¶ 10, 20-23. They received a Feasibility Study stating that interconnection was feasible in August 2010, and proceeded to the final interconnection study stage – the Facility Study. *Id.* at ¶¶ 13, 15-18. Western Desert Energy executed the Facility Study Agreement and provided the \$30,000 deposit on September 21, 2010. *Id.* at ¶13-16.

The Project's developers also had been in touch with Idaho Power's PURPA contracts administrators throughout 2010. *Id.* at ¶¶ 23-38. These communications included a request from the Project on March 8, 2010, for information to determine how much transmission was available at that time, and regarding any necessary upgrades. *Id.* at ¶ 24. Idaho Power's PURPA administrators were provided with the applicable interconnection applications and studies. *Id.* at ¶¶ 25, 27, 30.

After completion of the Feasibility Study, the Project began requesting a PURPA power sales contract in August 2010, but did not obtain a draft contract for several months. *Id.* at ¶¶ 26, 40. Idaho Power instead provided a letter of understanding on September 28, 2010, which stated

³ Western Desert Energy has attached the *Affidavit of Rowe Sanderson* to these Comments, and that affidavit provides a more complete description of the underlying development efforts.

that before Idaho Power would execute a FESA, Western Desert Energy must have received an Interconnection Feasibility Study with acceptable results, must have provided Idaho Power with the necessary information to request transmission capacity on its own system, and must receive acceptable results from initial transmission study. *Id.* at ¶ 29. But the Project had already completed the Interconnection Feasibility Study and provided it to Idaho Power's PURPA contracts administrators on August 15, 2010. *Id.* at ¶¶ 27, 30. The Project had also already requested that Idaho Power's PURPA contracts administrators begin the transmission study process on March 8, 2010, and on August 15, 2010, and assumed that the Feasibility Study and other documents in Idaho Power's possession included the information necessary to begin the transmission study. *Id.* at ¶¶ 24, 26, 31.⁴ Through the fall of 2010, the Project's developers were in contact with Idaho Power's PURPA contracts administrators regarding the Project and its efforts to secure a FESA. *Id.* at ¶ 32.

Western Desert Energy executed Idaho Power's letter of understanding on November 9, 2010, and returned it to Idaho Power. *Id.* at ¶ 33. The Project's developers learned that, prior to Idaho Power beginning the transmission study, Idaho Power would required completion of a form titled "Transmission Capacity Application Questionnaire," in addition to the information already provided. *Id.* ¶ 34. The Project's developers completed the Transmission Capacity Application Questionnaire and Idaho Power received it on December 13, 2010. *Id.* at ¶ 35. Around this time, the Project's developers learned that Idaho Power had filed a petition on

⁴ The *Affidavit of Rowe Sanderson* contains a typo in ¶ 31, stating that Western Desert Energy requested Idaho Power's PURPA contracts administrators begin the transmission request process on March 2, 2010. This request was made through an email sent on March 8, 2010, as stated correctly in ¶ 24.

November 5, 2010, to lower the eligibility cap for published avoided cost rates to 100 kilowatts. *Id.* at ¶ 36. Nobody from Idaho Power had informed the Project of this filing during communications throughout the fall. *Id.*

The Project developers decided to retain a law firm in mid-December 2010 to assist in securing the power sales contract. *Id.* at ¶ 38. On January 3, 2011, Idaho Power sent a letter, confirming that adequate transmission capacity was already available to deliver the Project's output to Idaho Power's load center, and that no transmission studies were necessary. *Id.* at ¶ 39. With the January 3, 2011 letter, Idaho Power provided a draft FESA for the very first time since Western Desert Energy had first contacted it almost a year previously, regarding the 5 MW project.⁵ *Id.* at ¶ 40. The Project developers completed the project-specific information in the standard PURPA FESA provided by Idaho Power, and requested that Idaho Power provide execution ready copies. *Id.* at ¶ 42. After receiving execution-ready copies of the FESA, a managing member of Western Desert Energy executed final copies of the FESA on January 22, 2011, and delivered them to Idaho Power. *Id.* at ¶ 43. Idaho Power executed the FESA on January 28, 2010, and filed it for Commission determination on February 2, 2011. *Id.* at ¶ 44.

Meanwhile, the Project received a draft Facility Study Agreement on January 24, 2011, and is now awaiting the Commission's determination on the approval of the FESA containing the published avoided cost rates before it commits further resources to the interconnection process. *Id.* at ¶ 19.

⁵ In this January 3, 2011 letter, Idaho Power also notified Western Desert Energy for the first time that it had filed a joint petition to lower the eligibility cap for published avoided cost rates on November 5, 2010, and that this filing may impact the Project's right to published rates. *Id.* at ¶ 41.

COMMENTS

A. The Commission should find that Western Desert Energy, LLC is entitled to the FESA with published avoided cost rates.

Western Desert Energy should be entitled to a FESA with published avoided cost rates because it attempted to entitle itself to a long-term contract before December 14, 2010. The large sums of money and time spent on developing the Project and the advanced stage of its maturity evidence the developers' intent to obligate themselves to the FESA. *See In the Matter of Cassia Wind to Determine Exemption Status*, Case No. IPC-E-05-35, Order No. 29954, at pp. 2-4. Prior to the rate change date, Western Desert Energy had received a completed Feasibility Study for interconnection, and had proceeded to the Facility Study stage. It had also secured real property rights necessary to develop the project, obtained a County permit, and commenced wind studies. As expected from the initial contacts with Idaho Power in 2009, transmission capacity has proved not to be an issue.

Although the Project was unable to obtain a fully executed FESA prior to December 14, 2010, that factor should not preclude entitlement to grandfathered rates in this case because Idaho Power did not make the Project's developers aware of the proceeding to reduce the eligibility cap. The swiftness with which the Project received a final executed FESA once made aware of the proceeding to reduce the eligibility cap evidences that the Project would have obtained an executed FESA prior to the reduction in the eligibility cap. The Project's developers learned of the proceeding to reduce the cap in mid-December and obtained a fully executed FESA approximately a month and a half later on January 28, 2010. Had they been adequately made aware of the proceeding in early November, they would have secured an executed FESA

prior to December 14, 2010. Whether by intention or neglect due to other more pressing matters, Idaho Power did not make the Project developers aware of the proceeding to reduce the cap, despite knowing that the Project was seeking a published rate contract.

In this case, the equities weigh in favor of approval of the contract. The Project developers spent substantial sums developing the project in reliance on the availability of the published rates, and were not timely made aware that the rates may become unavailable. There is Commission precedent for approval of a grandfathered rate contract, for a project in the advanced stages of the interconnection process, even where no written contracts were exchanged prior to the rate change. *See In the Matter of the Application of Idaho Power Company for Approval of a Firm Energy Sales Agreement with Yellowstone Power Company*, Case No. IPC-E-10-22, Order 32104, at p. 12.

B. The Contract terms and Idaho Power's most-current wind integration study allay the concerns raised in Idaho Power's Application regarding system reliability and cost.

Idaho Power asserted in its Application that "the request in this Application. . . is made with the specific reservation of rights and incorporation of the averments set forth in the Joint Petition and the Company's comments regarding the possible negative effects to the [sic] both the utility and its customers of additional and unfettered PURPA QF generation on system reliability, utility operations, and costs of incorporating and integrating such a large penetration level of PURPA QF generation into the utility's system." *Application*, at p. 3. Because the terms of the FESA in this case and the current wind integration charge protect ratepayers, and because the Project attempted to obligate itself prior to the effective date of the eligibility cap reduction,

Idaho Power's concerns should not preclude Commission approval of the FESA.

First, the Commission should consider the system reliability and wind integration discussion in the Northwest and Intermountain Power Producers Coalition's ("NIPPC") Comments in GNR-E-10-04. *See NIPPC Opening Comments*, Case No. GNR-E-10-04, pp. 13-16 (Dec. 22, 2010). In those Comments, NIPPC pointed out that, despite Idaho Power's statements in the Joint Motion regarding 1100 MW being near Idaho Power's minimum loads, Idaho Power's own wind integration study concluded that even at 1200 MW of wind capacity on the Company's system, wind would reach only 80% of its loads and it would do so only for a few hours per year. *See Enernex's Idaho Power 2007 Wind Study*, Case No. IPC-E-07-03, p. 34 (February 6, 2007). The settlement that resulted after conclusion of that wind integration study made the avoided cost rates available to wind developers at a rate reduced by \$6.50/MWh for projects coming online when Idaho Power's cumulative wind power is "501 MW and above." *See Order No. 30488*, at p. 8. There is no upper cap contained in the order, and Idaho Power has not availed itself of the opportunity since to update its wind integration study. Further, Idaho Power's wind integration study did not consider the firming ability of any of the Company's 744 MW of gas combustion turbine capacity that will be online by the time the Project here is online in December 2012. *See NIPPC Opening Comments*, Case No. GNR-E-10-04, at p. 15.

The Commission should also consider that the rates in this PURPA agreement are lower than those in contracts and self-built projects recently approved for Idaho Power. *See NIPPC Reply Comments*, Case No. GNR-E-10-04, pp. 15-20 (Jan. 21, 2011). Further, the FESA contains extensive protections for ratepayers which address the concerns raised by Idaho Power's

application. Idaho Power warrants that the Agreement comports with the terms and conditions of the various Commission Orders applicable to PURPA agreements for a wind resource. *See Application*, at p. 4 (citing Order Nos. 30415, 30488, 30738 and 31025). According to those orders, the rate in the FESA is reduced by Idaho Power's wind integration charge. Order No. 30488, at pp. 8-9. The FESA also contains a Mechanical Availability Guarantee, which requires reduced payment to the QF if its turbines are unavailable for inexcusable reasons. *Id.* The FESA requires that the QF share in the costs of wind forecasting. *Id.* The FESA also provides for a reduced rate at times of the day and months of the year when the energy is worth less to Idaho Power due to demand and regional market conditions. *See* Order No. 30415.

Western Desert Energy has selected December 1, 2012, as its Scheduled Operation Date, and sections 5.3.2 and 5.8.1 of the FESA contain a liquidated damage and security provision of \$45 per kw of nameplate capacity for failure to achieve that date. That will require the Project to post \$225,000 as delay default security after Commission approval of the contract. Finally, the Project in this case is only a single 5 MW facility and there appears to be no allegation by Idaho Power that this Project could impose unmanageable difficulties on Idaho Power's system.

CONCLUSION

For the reasons set forth above, Western Desert Energy, LLC, respectfully requests that the Commission approve the Firm Energy Sales Agreement.

Respectfully submitted this 7th day of April 2011,

RICHARDSON & O'LEARY, PLLC

A handwritten signature in black ink, appearing to read "Peter J. Richardson", written over a horizontal line.

Peter J. Richardson

Gregory M. Adams

Attorneys for Western Desert Energy, LLC

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 7th day of April, 2011, a true and correct copy of the within and foregoing **COMMENTS OF WESTERN DESERT ENERGY, LLC** and the **AFFIDAVIT OF ROWE SANDERSON** was served as shown to the following parties:

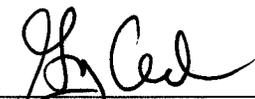
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Signed



Gregory Adams