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 WESTERN DESERT ENERGY, LLC	))))))	**CASE NO. IPC-E-11-01** **ORDER NO. 32258**

On February 2, 2011, Idaho Power Company filed an Application requesting acceptance or rejection of a 20-year Firm Energy Sales Agreement (Agreement) between Idaho Power and Western Desert Energy, LLC. The project (Facility, Project) is located near Oreana, Idaho. The Project is 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 Application be processed by Modified Procedure.

On March 10, 2011, the Commission issued a Notice of Application and Notice of Modified Procedure setting an April 7, 2011, comment deadline and an April 14, 2011, deadline for reply comments. Comments were filed by the Commission Staff, the Company and Western Desert Energy. 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 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 for wind and solar only 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 AGREEMENT

On January 28, 2011, Idaho Power and Western Desert Energy entered into an Agreement wherein Western Desert Energy proposes to design, construct, install, own, operate, and maintain a 5 MW (maximum capacity) wind generating Facility. Under the terms of the Agreement, the Facility agrees 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. Application at 4. Under normal and/or average conditions, the Facility will

not exceed 10 aMW on a monthly basis. Idaho Power warrants that the Agreement comports with the terms and conditions of the various Commission Orders applicable to PURPA agreements for wind resources. Order Nos. 30415, 30488, 30738 and 31025.

The Facility has selected September 1, 2012, as its Scheduled First Energy Date and December 1, 2012, as its Scheduled Operation Date. Applications at 5. Idaho Power asserts that various requirements have been placed upon the Facility in order for Idaho Power to accept the Facility's energy deliveries. Idaho Power states that it will monitor the Facility's compliance with initial and ongoing requirements through the term of the Agreement. Idaho Power asserts that the Facility has been advised that delays in the interconnection or transmission process do not constitute excusable delays and if the Facility fails to achieve its Scheduled Operation Date delay damages will be assessed. *Id.* at 6. The parties have agreed to liquidated damage and security provisions of $45 per kW of nameplate capacity. Agreement, ¶¶ 5.3.2, 5.8.1.

By its own terms, the Agreement 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 Facility for purchases of energy will be allowed as prudently incurred expenses for ratemaking purposes. Agreement ¶ 21.1.

THE COMMENTS

A. Staff Comments

Staff calculated that the Facility is expected to generate 12,930 MWh annually. Under the non-levelized rates in the Agreement, the annual energy payments by Idaho Power for the expected generation will be approximately $0.8 million in 2013 increasing to approximately $1.5 million in 2031, or a cumulative total of $23.3 million over the 20-year term of the Agreement. The net present value of the energy payments over the life of the Agreement will be approximately $8.7 million.

The Agreement was signed by the Project developer on January 22, 2011, and signed by Idaho Power on January 28, 2011. The Agreement was filed with the Commission on February 2, 2011. The Agreement contains 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 this Agreement to be January 28, 2011.

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

B. The Project's Comments

Western Desert Energy asserts that it began requesting a power purchase agreement from Idaho Power in August 2010. Comments at 2. Idaho Power provided a letter of understanding on September 28, 2010. Western Desert Energy executed Idaho Power's letter of understanding on November 9, 2010. Around mid-December 2010, the Project learned of the Joint Petition filed by the utilities requesting that the Commission reduce the eligibility cap for published avoided cost rates. "Nobody from Idaho Power had informed the Project of this filing during communications throughout the fall." *Id.* at 9. On January 3, 2011, Idaho Power provided a draft Firm Energy Sales Agreement (FESA) "for the very first time since Western Desert Energy had first contacted it almost a year previously." *Id.* at 9. Western Desert Energy signed the Agreement on January 22, 2011. Idaho Power signed the Agreement on January 28, 2011.

Western Desert argues that its failure to fully execute an Agreement prior to the implementation of the Commission's reduced eligibility cap for published rates "is not necessarily fatal to the PURPA developer's right to the grandfathered published rates." *Id.* at 6. The Project asserts entitlement to published avoided cost rates "because it attempted to entitle itself to a long-term contract before December 14, 2010." *Id.* at 10. The Project asserts that, except for Idaho Power's routine processing, an Agreement was materially complete. *Id.* at 6. Western Desert Energy also claims that, although it was unable to execute an agreement prior to December 14, 2010, it should not be precluded from obtaining published avoided cost rates because Idaho Power did not make the Project aware of the proceeding that it initiated with the Commission to reduce the eligibility cap for published rates. *Id.* at 10. The Project argues that equities weigh in favor of approval of the contract. *Id.* at 11.

C. Idaho Power Reply

Idaho Power stated that it executed the Agreement diligently and in good faith and will honor it if approved by the Commission. 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 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 9.

Idaho Power's reply comments explained its internal processing of PURPA power purchase agreements.[1] 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 5. "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.* at 6.

Idaho Power states that contact with Western Desert Energy and Idaho Power's Delivery unit began in March 2010. Idaho Power asserts that the Project was sent a PPA, an Interconnection and Transmission Process letter, a Transmission Capacity Application Questionnaire, and a draft Network Resource Integration Agreement on September 28, 2010. *Id.* The Project delivered the Transmission Capacity Questionnaire to Idaho Power on December 13, 2010. Idaho Power states that, on January 3, 2011, the Company sent the Project a draft PPA for review and comment. On January 6, 2011, the Company initiated its internal SOX review. The Project was notified by Idaho Power on January 19, 2011, that a final executable Agreement was ready to be picked up. The Project signed the Agreement on January 22, 2011. Idaho Power

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

received the signed contract back from the Project on January 24 and, after review, signed the Agreement on January 28, 2011.

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 10 (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 Application, the Firm Energy Sales Agreement, and the comments of Commission Staff, Idaho Power, and Western Desert Energy. 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 an Agreement that obligates ratepayers to payments in excess of $23 million over the 20-year term of this Agreement. 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 this case is whether the Agreement – which utilizes the published avoided cost rate – was 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 Agreement was not

fully executed (signed by both parties) prior to December 14, 2010. More specifically, the 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." Agreement ¶ 1.10. The opening paragraph is dated "this 28th day of January 2011." Agreement at 1. It is not disputed that the Project signed the Agreement on January 22, and Idaho Power signed on January 28, 2011. *Id.* at 29. Thus, on the date the Agreement 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 Project also argues 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 4. 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 Agreement between Idaho Power and Western Desert Energy was executed on January 28, 2011. The Agreement recites that the Project will have a maximum capacity amount of 5 MW. Because the size of the wind project exceeds 100 kW, it is not eligible to receive a published rate contract. Simply put, the rates contained in the Agreement do not comply with Order No. 32176. Therefore, we disapprove the Firm Energy Sales Agreement.

ORDER

IT IS HEREBY ORDERED that the January 28, 2011, Firm Energy Sales Agreement between Idaho Power and Western Desert Energy is 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.

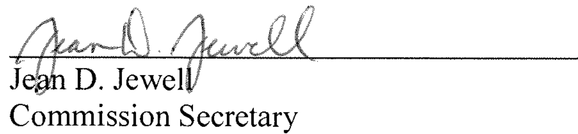
DONE by Order of the Idaho Public Utilities Commission at Boise, Idaho this 8th day of June 2011.

PAUL KJELLANDER, PRESIDENT

MACK A. REDFORD, COMMISSIONER

MARSHA H. SMITH, COMMISSIONER

ATTEST:



Jean D. Jewell
Commission Secretary

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