

**BEFORE THE IDAHO PUBLIC UTILITIES COMMISSION**

**IN THE MATTER OF THE APPLICATION )**  
**OF IDAHO POWER COMPANY FOR A )** **CASE NO. IPC-E-11-09**  
**DETERMINATION REGARDING THE )**  
**FIRM ENERGY SALES AGREEMENT )**  
**WITH CLARK CANYON, LLC FOR THE )** **ORDER NO. 32294**  
**SALE AND PURCHASE OF ELECTRIC )**  
**ENERGY. )**

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On May 24, 2011, Idaho Power Company filed an Application with the Commission requesting acceptance or rejection of a 20-year Firm Energy Sales Agreement (Agreement) between Idaho Power and Clark Canyon, LLC (Clark Canyon) dated May 20, 2011. The Application states that Clark Canyon would sell and Idaho Power would purchase electric energy generated by the Clark Canyon hydroelectric project (Facility) located near Dillon, Montana. The Company requested that its Application be processed by Modified Procedure.

On June 1, 2011, the Commission issued a Notice of Application and Notice of Modified Procedure setting a June 29, 2011, comment deadline, and a July 6, 2011, deadline for reply comments. By this Order, the Commission approves the Agreement between Idaho Power and Clark Canyon without change or condition and declares that all payments made by Idaho Power to Clark Canyon be allowed as prudently incurred expenses for ratemaking purposes.

**THE APPLICATION**

The Application states that Clark Canyon proposes to own, operate and maintain a 4.7 MW (maximum capacity, nameplate) hydroelectric generating facility. Application at 2. The Facility will be a QF under the applicable provisions of PURPA. The Agreement is for a term of 20 years and contains the current non-levelized published avoided cost rates established by the Commission in Order No. 31025 for energy deliveries of less than 10 average megawatts (“aMW”). Should the Facility exceed 10 aMW on a monthly basis, Idaho Power will accept the energy that does not exceed the maximum capacity amount, but will not purchase or pay for the inadvertent energy. Agreement ¶ 7.5.

***A. The Agreement***

Clark Canyon selected November 1, 2012, as its Scheduled First Energy Date and March 31, 2013, as its Scheduled Operation Date. Application at 3. Idaho Power asserts that

various requirements have been placed upon the Clark Canyon 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.

The Application maintains that all applicable interconnection charges and monthly operation or maintenance charges under Schedule 72 will be assessed to Clark Canyon. Idaho Power states that the Facility is currently in the generator interconnection process. "Upon resolution of any and all upgrades required to acquire transmission capacity for this Facility's generation, and upon execution of the FESA and the GIA, this Facility may then be designated as a network resource." *Id.* at 4.

Clark Canyon and Idaho Power have agreed to liquidated damage and security provisions of \$45 per kW of nameplate capacity or the sum of three months' estimated revenue. Agreement ¶¶ 5.3.2, 5.8.1.

Ownership of environmental attributes (i.e., Green Tags, Renewable Energy Credits) associated with this Facility are addressed in a separate agreement. Application at 3.

Idaho Power states that the Facility has also been made aware of and accepted the provisions in the 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 Application notes 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." *Id.* at 5.

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

## THE COMMENTS

### *Staff Comments*

Staff noted that, with few exceptions, the rates, terms and conditions contained in the Agreement are identical to those contained in other recently approved PURPA contracts.

Consequently, Staff did not address the standard rates, terms and conditions, and instead focused on two aspects of this Agreement that make it unique: (1) ownership of environmental attributes is addressed in a separate agreement and (2) the Facility is not located in Idaho but is seeking a contract containing Idaho's published avoided cost rates.

Clark Canyon and Idaho Power negotiated a separate agreement whereby the project retains all RECs for the first 10 years of the contract and Idaho Power owns all RECs for the last 10 years of the contract. There is no monetary payment for RECs in the Agreement. The Commission has previously stated, "The utility and the QFs are free to voluntarily contract and negotiate the sale and purchase of such green tags should environmental attributes be perceived by the contracting parties to have value. The price of the same we find, however, is not a PURPA cost and is not recoverable as such by the Company." Case No. IPC-E-04-16, Order No. 29577 at 6. Even though Idaho Power has voluntarily waived any right or claim to ownership of RECs in all prior Idaho Power PURPA contracts and 100% of the RECs have been claimed by project owners, the parties to this Agreement have negotiated a 50/50 sharing of RECs.

Staff noted that although the sharing arrangement negotiated in this case is a clear departure from the REC ownership arrangements Idaho Power has agreed to in prior PURPA contracts, agreement between the parties regarding REC ownership seems to be exactly the type of negotiation contemplated by the Commission when it issued Order No. 29577.

Staff observed that there is currently no renewable portfolio standard in Idaho or requirement that utilities possess environmental attributes. Staff further noted that neither the Commission nor the Idaho State Legislature has issued orders or passed legislation specifying who – the utility or the project owner – owns the RECs and is entitled to sell them. Nevertheless, RECs are produced by PURPA projects in Idaho and they undeniably have value if sold. Although Staff did not object to the REC ownership arrangements agreed to between Clark Canyon and Idaho Power in this case, Staff suggested that the Commission consider consistent ownership rules or laws for future PURPA contracts.

Staff pointed out that the Clark Canyon Facility is not located in Idaho but is seeking a contract containing Idaho's published avoided cost rates. The Facility will be directly connected to Idaho Power's Peterson substation which is also located in Montana. Based on these facts, Staff considered whether Clark Canyon should be entitled to receive Idaho's avoided cost rates under Idaho's rules and regulations, or whether the project should be subject to

Montana's rates and rules because the point of delivery is in Montana. Staff noted that, in general, in order for a facility located outside Idaho to be eligible for an Idaho QF contract, the Commission's policy has been that the QF must either deliver power directly to a substation located within Idaho, or alternatively, that the QF must pay wheeling charges to have the power delivered to an Idaho substation. Currently, there are six facilities located outside Idaho that have PURPA contracts with Idaho utilities at Idaho avoided cost rates, and several others have been proposed.

Staff analyzed prior cases that it believed were indicative of the Commission's position on this matter. *Reference Earth Power Energy and Minerals, Inc. v. Idaho Power Company*, Case No. IPC-E-92-29; *Island Power Company, Inc. v. PacifiCorp*, Case No. UPL-E-93-04; *Vaagen Bros. Lumber, Inc. v. The Washington Water Power Company*, Case No. WWP-E-94-6. The facts regarding the Clark Canyon project are distinct from previous projects considered by the Commission. Clark Canyon is a QF located in the State of Montana with a proposed point of interconnection directly to Idaho Power's Peterson substation in the State of Montana. There would be no different interconnecting utility and subsequent wheel of the power in order to reach Idaho Power. An additional distinguishing feature in this case is that Idaho Power has no retail electric service territory in the State of Montana.

Based on these facts, and pursuant to the direction provided by previous Commission Orders, Staff determined that the Idaho Commission has sole jurisdiction in this matter, and that Idaho Power has an obligation to enter into a PURPA contract under Idaho's rules, regulations and rates. Consequently, Staff recommended that the Firm Energy Sales Agreement between Clark Canyon and Idaho Power be approved as filed.

### ***Clark Canyon Reply Comments***

Clark Canyon filed reply comments on July 6, 2011. Clark Canyon's reply expressed concern with Staff's comments regarding REC ownership. It is Clark Canyon's position that "it owned and will own all RECs associated with renewable projects it develops in Idaho unless it voluntarily gives or sells those RECs to another party." Reply at 6. Clark Canyon maintains that it negotiated a REC agreement with Idaho Power as a compromise and to avoid "protracted negotiations and possible litigation against Idaho Power to prevent the power company's 'taking' of the value of Clark Canyon' [sic] RECs." *Id.* Clark Canyon expressed that Staff's comments regarding REC ownership rule or laws were "off the mark" because "REC ownership

unequivocally and legally lies with the renewable energy developer.” *Id.* Ultimately, Clark Canyon requested that the Commission approve its Agreement as quickly as possible and without reservation.

### FINDINGS AND CONCLUSIONS

The Commission has previously addressed its authority to assert jurisdiction over PURPA matters. In *Earth Power Energy and Minerals, Inc. v. Idaho Power Company*, Case No. IPC-E-92-29, Earth Power proposed to develop a 9.9 MW geothermal project in Nevada that would deliver power to an Idaho Power substation in Nevada. Earth Power requested Idaho’s avoided cost rates, maintaining that Idaho Power was obliged to negotiate a contract with it in accordance with the Idaho Commission’s rules and requirements.<sup>1</sup> Idaho Power argued that the Idaho Commission lacked jurisdiction because both the facility and the point of interconnection were located in Nevada. Initially, the Idaho Commission declined to exercise its jurisdiction because it appeared that the Nevada Commission intended to assert jurisdiction over the matter. Order No. 25174. However, shortly thereafter, the Nevada Commission determined that it was more appropriate for the Idaho Commission to set avoided cost rates for Idaho Power. As a result, the Idaho Commission authorized Earth Power, at its discretion, to file a new complaint. No complaint was ever filed. Nevertheless, *Earth Power* demonstrates that jurisdiction under PURPA is shared by all state regulatory authorities who exercise “ratemaking authority” over multi-jurisdictional utilities. Reference PURPA Section 210.

*Island Power Company, Inc. v. PacifiCorp*, Case No. UPL-E-93-04, presented a slightly different jurisdictional consideration for this Commission. Island Power sought to develop a 4.4 MW hydro project.<sup>2</sup> Island Power proposed to wheel the power from Montana to Idaho and deliver the power to an Idaho substation. At the time of the complaint, PacifiCorp was providing retail electric service in Montana and Idaho. Island Power alleged that PacifiCorp was refusing to accept delivery of power in Idaho and, thereby, refusing to pay Idaho’s avoided cost rates. PacifiCorp indicated that it was willing to purchase the power only if it was wheeled north to a PacifiCorp substation in Montana. PacifiCorp maintained that the Idaho Commission had no jurisdiction because the project was to be sited in Montana. Regardless of where the project was

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<sup>1</sup> At the time of the request, Idaho Power still served retail customers in Nevada. Consequently, Idaho Power was subject to the regulatory authority and jurisdiction of both the Idaho Commission and the Nevada Commission.

<sup>2</sup> Of note, Island Power’s project proposed a nearly identical facility at the same exact location as the Clark Canyon project in this case.

to be sited, the proposed point of delivery to PacifiCorp was in Idaho. Based on these facts, we determined that it was reasonable for the Idaho Commission to exercise jurisdiction. Order No. 25245. Consequently, we ruled that PacifiCorp was required to purchase the output of the project at the proposed Idaho delivery point. *Id.*

Finally, in *Vaagen Bros. Lumber, Inc. v. The Washington Water Power Company*, Case No. WWP-E-94-6, this Commission was again presented with a unique jurisdictional question. Vaagen Brothers had a 1979 power sales agreement with Washington Water Power (WWP) that expired in 1994. Vaagen Brothers was seeking a new contract with WWP as a PURPA QF pursuant to the Idaho avoided cost methodology and rates. The facility was located in WWP's service territory in the State of Washington, with a point of interconnection also in Washington. Vaagen Brothers filed a complaint with the Idaho Commission seeking to force WWP to enter into a contract. WWP had retail electric service territory in both Washington and Idaho and was therefore under the regulatory jurisdiction of both the Idaho and Washington Commissions. We found that, although the Idaho Commission shares jurisdiction over WWP with the State of Washington, "common sense dictates that there are some instances when we should elect not to exercise our jurisdiction." Order No. 25716. Vaagen was an existing facility sited in the Washington service territory of the utility that it wished to sell to, i.e., WWP, with an established point of delivery in the State of Washington. Based on these facts, this Commission stated that the applicable rates for the sale of Vaagen's power should be determined by the Washington Commission.

The facts and circumstances of the Clark Canyon facility are distinguishable from those of prior Commission cases and subsequent Orders. Clark Canyon is a QF located in the State of Montana with a proposed point of interconnection directly to Idaho Power's Peterson substation in the State of Montana. There will be no additional interconnecting utility and/or subsequent wheeling of the power in order to reach Idaho Power's system. Although NorthWestern Energy owns transmission lines that are immediately adjacent to the proposed Clark Canyon facility and Idaho Power's transmission facilities are approximately 11.5 miles away, as long as Clark Canyon is willing to pay the necessary interconnection costs, there is nothing that prevents this Facility from choosing which utility's transmission system it wishes to interconnect. The Facility's power is being produced for Idaho Power customers and will be paid for by Idaho Power customers. Idaho Power has no retail electric service customers in the

State of Montana. As a result, it is reasonable and in the public interest for this Commission to assert jurisdiction. Clark Canyon is properly subject to Idaho's rules and regulations and is entitled to receive Idaho's avoided cost rates.

Moreover, the Idaho Public Utilities 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 costs, to order electric utilities to enter into fixed-term obligations for the purchase of energy from qualified facilities (QFs) and to implement FERC rules.

The Commission has reviewed the record in this case, including the Application, the Agreement, and the comments of the parties. Based on the record, we find that the proposed Agreement submitted in this case contains acceptable contract provisions including the non-levelized published avoided cost rates approved by the Commission in Order No. 31025. We further find it reasonable to allow payments made under the Agreement as prudently incurred expenses for ratemaking purposes.

It is unnecessary for us to make a finding regarding the parties' separate REC agreement in this case. As this Commission has previously stated, "[t]he utility and the QFs are free to voluntarily contract and negotiate the sale and purchase of [RECs] should environmental attributes be perceived by the contracting parties to have value." Order No. 29577. In this case, the parties have accomplished precisely what the Commission intended.

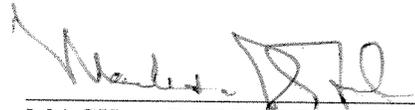
### **ORDER**

IT IS HEREBY ORDERED that the May 20, 2011, Firm Energy Sales Agreement between Idaho Power and Clark Canyon is approved without change or condition.

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 19th  
day of July 2011.

  
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PAUL KJELLANDER, PRESIDENT

  
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MACK A. REDFORD, COMMISSIONER

  
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MARSHA H. SMITH, COMMISSIONER

ATTEST:

  
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Jean D. Jewell  
Commission Secretary

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