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Attorney for the Commission Staff

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) **COMMENTS OF THE**
CANYON, LLC FOR THE SALE AND) **COMMISSION STAFF**
PURCHASE OF ELECTRIC ENERGY.)

COMES NOW the Staff of the Idaho Public Utilities Commission, by and through its Attorney of record, Kristine A. Sasser, Deputy Attorney General, and in response to the Notice of Application and Notice of Modified Procedure issued in Order No. 32252 on June 1, 2011, in Case No. IPC-E-11-09, submits the following comments.

BACKGROUND

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 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”).

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/RECs) 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.

STAFF ANALYSIS

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's comments will not address the standard rates, terms and conditions, and instead will focus only on those things that make this Agreement unique.

One unique feature of this Agreement is that ownership of environmental attributes is determined in a separate agreement between Idaho Power and Clark Canyon. Another unique feature of this project is that the Facility is not located in Idaho but is seeking a contract containing Idaho's published avoided cost rates. Both issues are discussed in more detail below.

Environmental Attribute Ownership

As the Commission is aware, there is currently no renewable portfolio standard in Idaho or requirement that utilities possess environmental attributes. Furthermore, 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.

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, p. 6. In all prior Idaho Power PURPA contracts in which RECs are produced by a project, Idaho Power has voluntarily waived any right or claim to ownership of RECs and 100 percent of the RECs have been claimed by project owners. In the Clark Canyon contract, however, the parties have negotiated a 50/50 sharing of RECs.

Idaho Power informed Staff that it initially proposed reservation of rights language for the contract that would preserve for Idaho Power and its customers the right to RECs in this contract should the rules, regulations, laws, or legal status as to the ownership of RECs in PURPA contracts be clarified or changed to abide by such change in law. Ultimately, the parties saw a mutual value to both the project and to Idaho Power and its customers in clarifying the ownership of RECs and negotiated the separate agreement whereby the project retains all RECs for the first ten years of the contract and Idaho Power owns all RECs for the last ten years of the contract. There is no monetary payment for RECs in the Agreement. The project receives clarification as to

ownership and retains RECs for the first ten years to obtain what value it can to help offset project costs. Furthermore, Idaho Power and its customers receive clarification as to the ownership and get ownership of all RECs for the last ten years to either obtain what value it can for the RECs, which flows back to customers, or retire such RECs in order to claim the environment attributes of the energy on its system or to meet possible future renewable portfolio standards.

Staff recognizes that 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. Nevertheless, 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. In a separate PURPA agreement recently filed by Idaho Power (IPC-E-11-10, Interconnect Solar Development LLC.)¹, Idaho Power and the project owner have negotiated an agreement in which REC ownership is split 50/50 throughout the entire 25-year term of the contract rather than ownership being split 50/50 between the first and last halves of the contract terms as in this Agreement with Clark Canyon. Although Staff has no objection to the REC ownership arrangements agreed to between Clark Canyon and Idaho Power in this case, the variety of ownership arrangements demonstrated in recent Idaho Power contracts may be an indication that consistent ownership rules or laws need to be established in the future.

The Clark Canyon Facility is Located in Montana

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. A relevant question is 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. 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.

¹ An application was filed in Case No. IPC-E-11-10 on June 17, 2011.

There are three prior cases which are instructive of the Commission's position on this matter. In the first case, *Earth Power Energy and Minerals, Inc. vs. 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 Idaho Power's Humboldt substation in Nevada. Earth Power had requested Idaho avoided cost rates and contended that Idaho Power was obliged to negotiate a contract with it in accordance with Idaho Commission rules and requirements. At the time of the complaint, Idaho Power still served 1200 retail customers in Nevada; consequently, Idaho Power was subject to the regulatory authority and jurisdiction of both the Idaho Commission and the Nevada Commission. Idaho Power argued, however, that the Idaho Commission lacked jurisdiction over this particular contract because both the facility and the point of interconnection were located in Nevada. Initially, the Idaho Commission dismissed the complaint and declined to exercise its jurisdiction because it appeared that the Nevada Commission intended to do so. Reference Order No. 25174. However, shortly thereafter, the Nevada Commission dismissed the complaint because it believed that the Idaho Commission was most capable of setting avoided cost rates for Idaho Power. Subsequently, the Idaho Commission authorized Earth Power, at its discretion, to file a new complaint. However, no complaint was ever filed, so the matter was never fully resolved. Nevertheless, what was made clear was that jurisdiction under PURPA is shared by all state regulatory authorities who exercise "ratemaking authority" over multijurisdictional utilities. Reference PURPA Section 210.

A second relevant case was *Island Power Company, Inc. vs. PacifiCorp*, Case No. UPL-E-93-04. Island Power proposed to develop a 4.4 MW hydro project at the Clark Canyon Dam, coincidentally, a nearly identical facility at the same exact location as is being proposed in this case. One significant difference, however, was that Island Power proposed to wheel the power from Montana to Idaho and deliver to either the Goshen or Jefferson substations both located in Idaho. At the time of the complaint, PacifiCorp was providing retail electric service both in Montana and Idaho. Island Power alleged that PacifiCorp was refusing to accept delivery of power in Idaho and was refusing to pay Idaho 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, and alleged that the Idaho Commission had no jurisdiction because the project was to be sited in Montana. In its decision in the case, the Commission, as in the *Earth Power* case, stated that jurisdiction was shared by all state regulatory authorities who exercise "ratemaking authority" over the utility. The Commission noted that although the project was to be sited in Montana, the

proposed point of delivery to PacifiCorp was in Idaho. The Commission denied a motion to dismiss filed by PacifiCorp to the complaint filed by Island Power for failure to negotiate a contract. Shortly after the Commission issued its decision, an avoided cost case was opened that resulted in a lowering of avoided cost rates. Island Power's initial complaint then transformed into a dispute over whether Island Power was entitled to grandfathered rates. The Commission ruled that PacifiCorp was required to purchase the output of the Clark Canyon project at an Idaho delivery point, but that Island Power was not entitled to grandfathered rates. Reference Order No. 25245. Island Power, however, never chose to pursue a contract.

A third relevant case was *Vaagen Bros. Lumber, Inc. vs. The Washington Water Power Company*, Case No. WWP-E-94-6. In this case, Vaagen Brothers had a 1979 power sales agreement with Washington Water Power (WWP) that had 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 the state of Washington and Idaho, just as it does now, and was therefore under the regulatory jurisdiction of both the Idaho and Washington Commissions. Under the facts of this case, the Commission found that it had concurrent jurisdiction with Washington, but believed that the Washington avoided cost rates and rules should apply, subject to the jurisdiction of the Washington Commission. The Commission distinguished this case from the Earth Power and Island Power cases stating, "Vaagen is an existing facility sited in the Washington service territory of the utility that it wishes to sell to, the Washington Water Power Company. The established point of delivery is in the state of Washington." The Commission further stated that the Washington Commission had established a regulatory framework for PURPA in Washington, and that although Idaho did have concurrent jurisdiction with the Washington Commission, "common sense dictates that there are some instances when we should elect not to exercise our jurisdiction." Subsequent to the Commission's decision, Vaagen Brothers negotiated a PURPA contract with Idaho Power at Idaho's avoided cost rates; however, Vaagen Brothers pays a wheeling charge to deliver the power to Idaho Power's system in Idaho.

Clark Canyon is slightly different than the other three cases discussed above. 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. A significant distinguishing feature in this case, however, is that Idaho Power has no retail electric service territory in the state of Montana; therefore, the Montana Commission has no regulatory framework for PURPA that is applicable to Idaho Power. NorthWestern Energy owns transmission lines that are immediately adjacent to the proposed Clark Canyon facility, and PacifiCorp jointly owns transmission facilities that are equidistant to Idaho Power's transmission facilities (approximately 11.5 miles away). Nonetheless, as long as it is willing to pay the necessary interconnection costs, there is nothing that prevents Clark Canyon from choosing which utility's transmission system it wishes to interconnect.

Under these facts, and pursuant to the direction provided by the previously discussed Commission Orders above, Staff believes that that the Idaho Commission does, in fact, have 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.

RECOMMENDATIONS

Staff recommends that the Firm Energy Sales Agreement between Clark Canyon LLC and Idaho Power be approved as filed. Staff further recommends that the Commission declare that all payments for purchases of energy under the Agreement be allowed as prudently incurred expenses for ratemaking purposes.

Respectfully submitted this 29TH day of June 2011.


Kristine A. Sasser
Deputy Attorney General

Technical Staff: Rick Sterling

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY THAT I HAVE THIS 29TH DAY OF JUNE 2011, SERVED THE FOREGOING **COMMENTS OF THE COMMISSION STAFF**, IN CASE NO. IPC-E-11-09, BY MAILING A COPY THEREOF, POSTAGE PREPAID, TO THE FOLLOWING:

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