Office of the Secretary
Service Date
March 15, 2012

BEFORE THE IDAHO PUBLIC UTILITIES COMMISSION

IN THE MATTER OF THE PETITION OF HOKU MATERIALS, INC. FOR REPARATIONS AND REFORMATION OF ITS AMENDED SPECIAL CONTRACT WITH IDAHO POWER COMPANY	)))))	**CASE NO. IPC-E-12-02** **ORDER NO. 32486**

On January 9, 2012, Hoku Materials, Inc. filed a Petition requesting that its "Amended and Restated Agreement for Electric Service" (the "amended special contract") with Idaho Power Company dated June 19, 2009, be reformed. Hoku is a special contract customer of Idaho Power and is constructing a new polysilicon manufacturing facility in Pocatello. Hoku also asserted that it is entitled to reparation for its payments under the amended special contract. *Id.* at ¶ 15. Finally, Hoku requested that the Commission suspend its obligation to pay Idaho Power under the special contract "until such time as Hoku is prepared to commence the production ramp-up of its polysilicon deposition reactors." *Id.* at ¶ 16.

The present Petition is related to a complaint Hoku brought against Idaho Power to prohibit the utility from terminating service to Hoku. In both cases, Hoku requested that its minimum monthly payments to Idaho Power be suspended. On January 13, 2012, the Commission issued Order No. 32437 declining to suspend Hoku's payments.[1] However, the Commission directed Idaho Power and Hoku to "immediately enter into [settlement] negotiations regarding Hoku's Petition to reform the amended special contract." Order No. 32437 at 11.

Settlement negotiations were successful and Hoku, Idaho Power, and Commission Staff (collectively the "Parties") subsequently entered into a "Settlement Stipulation" that resolved all the disputed issues in Hoku's Petition. On February 17, 2012, the Parties filed a Joint Motion to approve the Settlement Stipulation and prefiled testimony supporting the settlement. On February 22, 2012, the Commission issued a Notice of Proposed Settlement requesting public comment regarding the proposed Settlement Stipulation. Order No. 32465. No comments were filed in response to the Commission's Notice. Having reviewed Hoku's

[1] In the Hoku complaint case (IPC-E-11-28), Hoku's termination complaint became moot when it paid its November 2011 minimum bill. No person sought reconsideration of final Order No. 32437.

Petition, the proposed Settlement Stipulation, and the supporting testimony, we approve the Settlement Stipulation.

BACKGROUND

The history of the special contract between Hoku and Idaho Power is set out in Order Nos. 32437 and 32465 but the pertinent parts are summarized here. Under the amended special contract, Hoku takes service under two rate blocks. The first rate block is equivalent to Idaho Power's avoided cost rates in 2009. The first block is "take-or-pay" and requires Hoku to either "take" power every month or "pay" a monthly minimum amount regardless of consumption. Order No. 32465 at 2. The second block of 25 megawatts (MW) is priced commensurate with Idaho Power's Schedule 19-T rates. The special contract runs through December 1, 2013, and provides that Hoku's monthly peak demand would not exceed 82 MW. Amended Contract at § 6. Although Idaho Power and Hoku initially agreed to temporarily waive payment of the minimum energy charge (i.e., the minimum take-or-pay provision), Hoku has paid the minimum charge under the take-or-pay provision since April 2011.

In early December 2011, Hoku informed Idaho Power that Hoku's current cash flow was such that the minimum monthly payment for November 2011 may not occur until January 2012. Stipulation at ¶ 4. When Idaho Power did not receive the monthly payment by the December 21 due date, Idaho Power initiated actions to terminate service to Hoku. *Id.* Hoku subsequently filed a formal complaint against Idaho Power requesting that the Commission prohibit the utility from terminating service to Hoku for failure to pay its monthly charges. Case No. IPC-E-11-28. While the 11-28 case was pending, Hoku filed the present reformation petition and also requested that its monthly minimum bills be suspended. Oral argument in the 11-28 complaint case was held on January 11, 2012. Following oral argument, Hoku advised the Commission that it had paid its November 2011 bill in the amount of $1,896,656.26. Order No. 32437 at 8. Although it paid its November 2011 bill, Hoku renewed its request that its December 2011 and future minimum monthly payments under the take-or-pay provision be suspended. *Id.*

On January 13, 2012, the Commission issued Order No. 32437 denying Hoku's request to suspend its December 2011 payment and future monthly payments. The Commission determined that if Hoku fails to pay its December monthly minimum payment plus interest by the close of business on January 19, 2012, "then Idaho Power may issue a Notice of Termination and terminate service to Hoku on January 26, 2012." Order No. 32437 at 11.[2]

Although the Commission did not grant Hoku's request to suspend its monthly minimum payments, the Commission did direct Idaho Power and Hoku to enter into settlement negotiations. *Id.* at 11. More specifically, the Commission directed Hoku, Idaho Power, and Staff to enter into immediate negotiations to see if settlement of the Petition for Reformation is possible. The Commission further directed that "waiver of the first block energy charge beginning with the January 2012 bill should be part of their negotiations." *Id.*

The parties met on five occasions in settlement negotiations. They subsequently entered into a proposed "Settlement Stipulation" that resolves all disputed issues in Hoku's Petition. On January 17, 2012, the Parties filed a Joint Motion to Approve the Proposed Settlement Stipulation and each party filed testimony in support of the settlement. On February 22, 2012, the Commission issued a Notice of Proposed Settlement and requested that interested persons file written comments regarding the proposed settlement no later than March 14, 2012. Order No. 32465. No public comments were filed.

THE PROPOSED SETTLEMENT

As set out in the Stipulation, the Parties agreed to reduce the monthly minimum payment for the first block to $800,000 per month for a period not to exceed 18 months from January 1, 2012, through June 30, 2013. Hoku will continue to pay the applicable energy efficiency surcharge (Schedule 91). The amended special contract will be extended for another year (until December 1, 2014), and the cumulative difference between the monthly minimum payment under the existing contract and the reduced minimum payments under the "revised" (settlement) contract will be added to the end of the special contract.[3] Stipulation § 6.4.

Other elements of the proposed Settlement Stipulation include:

1. Up-front Payment. In consideration for amending the contract, Hoku shall pay to Idaho Power $3.8 million as an "up-front payment." Idaho Power will immediately collect $2 million for the up-front payment from the existing $4 million deposit held by Idaho Power. The

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[2] Hoku made its December payment in the amount of approximately $1.91 million.

[3] The Stipulation also required that Hoku make the first payment under the Settlement Stipulation for services rendered in January 2012 in the amount of $932,000. Stipulation § 6.1. Idaho Power received the first payment on February 17, 2012.

remaining balance ($1.8 million) will be collected by assessing Hoku an additional monthly payment of $100,000 per month for 18 months. Stipulation § 6.3. The up-front payment will be recorded in the same account as the second block energy charge. *Id.*

2. Balancing Mechanism. Effective January 1, 2012, Idaho Power will establish a "balancing mechanism" to be capped at $16.5 million and the balancing mechanism will accrue interest at 6%. The purpose of the mechanism is to track the difference between: (1) the deferred first block minimum energy charges under the existing amended special contract (excluding all first and second block demand charges); and (2) the "revised" minimum monthly billed energy charges (excluding demand) under the proposed Settlement Stipulation. Beginning with the invoice for service in December 2013, Idaho Power will then charge and recover from Hoku 1/12 of the balance in the balancing mechanism at 6% interest, in addition to the then applicable monthly energy and demand charges, over a 12-month period. In other words, Idaho Power will charge and recover minimum payment amounts that were deferred during the 18-month deferral period over 12 months, in addition to all other monthly energy and demand charges. All payments collected from the balancing mechanism will be allocated to ratepayers in the Company's PCA mechanism. Stipulation § 6.2.

3. Usage. If Hoku plans to begin commercial operation during the 18-month deferral period, it must provide a 6-month advance notice to Idaho Power before Hoku's monthly consumption may exceed 20 MW. *Id.* § 6.5. Hoku's notice must include a firm, 12-month forward-looking ramp-up schedule. Idaho Power will provide energy above the 20 MW monthly limit after receiving the required notice and after Hoku makes any required additional deposit. Hoku's failure to comply with the ramp-up schedule or the additional deposit requirement relieves Idaho Power of its obligation to provide the additional requested energy. *Id.* at § 6.5. Once Hoku uses more than 20 MW of energy in any given month, then Hoku shall be obligated to pay the minimum billed energy charge according to the current amended special contract for the remainder of the deferral period. Stipulation § 6.6.

The Parties recommended that the Commission issue a Notice of Proposed Settlement and request comments within 14 days of the Commission's Notice. Stipulation at § 10. Each party also filed testimony supporting the approval of the proposed Settlement Stipulation. The Parties assert that the Settlement Stipulation is in the public interest and that all of its terms and conditions are fair, just and reasonable. *Id.* at § 13. If the Commission approves of the proposed settlement, then the Stipulation provides that the Parties shall submit a "revised" amended special contract within 30 days that "reflect[s] the terms and conditions of this Settlement Stipulation." *Id.* at § 8.

If the Commission approves the Settlement Stipulation, then Hoku agrees to dismiss its Petition for Reformation with prejudice. Hoku also agrees to remain current on all invoices it receives from Idaho Power for the remainder of the "revised" special contract. *Id.* at § 7.

THE SUPPORTING TESTIMONY

Hoku, Idaho Power and Commission Staff all submitted supporting testimony. The parties urged the Commission to accept and approve the Settlement Stipulation.

1. Hoku. Hoku offered the testimony of its CEO, Scott Paul. He generally described the history surrounding the construction of Hoku's manufacturing facility and the history of the amended special contract. He also described the polysilicon market. He indicated that when Hoku entered into the polysilicon business in 2006, the spot market price for polysilicon was approximately $200 per kilogram and "industry analysts were forecasting robust demand in the years to come." Paul at 4. In 2008 the market price climbed even higher exceeding at some points $500 per kilogram. *Id.* These prices led to increases in the supply of polysilicon production and "in the second half of 2011, supply began to exceed demand by an extraordinarily wide margin." *Id.* This oversupply led to prices falling below the industry's average production cost. This oversupply "is expected to continue for at least the next six months, until the excess inventory is consumed by the downstream solar cell market." *Id.* at 5.

Mr. Paul said that the Stipulation addresses Hoku's primary concern of obtaining relief "from the near-term cash flow burden while staying connected to the grid and maintaining flexibility to ramp-up production as the market conditions improve." *Id.* at 8. The proposed Settlement Stipulation provides that the monthly minimum billing charge be reduced to $800,000 plus the current first block and second block demand charges for a period of 18 months. He declared that the revised special contract will hold other ratepayers harmless and provide flexibility for Hoku. *Id.* at 8. He urged the Commission to approve the settlement.

2. Idaho Power. Michael Youngblood, Manager of Regulatory Projects, testified in support of the Settlement Stipulation. He urged the Commission to adopt the proposed settlement without material change or condition. Youngblood at 4. He characterized the settlement as providing Hoku relief from its former minimum payments for up to the next 18

months "while at the same protecting Idaho Power and its customers by requiring a one-time, up-front payment of $3.8 million and repayment of deferred amounts during the final year of the [revised] contract." *Id.* at 8. He characterized the $3.8 million up-front payment as an amount that would allow Idaho Power "to recover the net revenues it would have received had Hoku performed under the [existing] special contract . . . between January 2012 and June 2013." *Id.*

He next explained the operation of the balancing mechanism. He said that Idaho Power will track the difference between what Hoku would have paid for its monthly minimum energy charge under the existing contract, and the monthly minimum energy charge under the "revised" or "modified" special contract. "Idaho Power will track that difference each month, including a 6.0 percent carrying charge. Beginning with its January 2014 invoice . . . Idaho Power will begin amortization of the total amount of the deferred balance over 12 months." *Id.* at 10. The recovery of the deferred amounts in the balancing mechanism are revenues other customers would have received had Hoku continued to make the existing minimum monthly charges during the period January 2012 through June 2013. *Id.* at 8-9.

He also noted that Hoku retains the flexibility to ramp-up its power consumption by providing at least a six-month prior notice that Hoku desires to use more than 20 MW of energy in any given month. *Id.* at 10. From the Company's perspective, he concluded that the proposed settlement provides flexibility to Hoku, up-front revenue to the Company and recovery of the deferred billings (plus a carrying charge) to other customers. *Id.* at 11.

3. <u>Staff</u>. The administrator of the Commission's Utilities Division, Randy Lobb, testified for Staff. He stated that the Stipulation reduces Hoku's minimum monthly payments, thereby addressing Hoku's cash flow concerns and provides additional time for market conditions to improve. Lobb at 2. "At the same time, recovering the deferred minimum payments with interest at the end of the deferral period will assure that other Idaho Power customers are no worse off than they otherwise would have been had the agreement not been modified." *Id.* He explained that the settlement and the eventual revision of the special contract significantly reduces the monthly minimum "take-or-pay" charges. These deferral payments "along with carrying charges [will] be amortized and paid by Hoku on a monthly basis over 12 months starting in December of 2014." *Id.* at 8; Staff Exh. 101.

Mr. Lobb reported that the reduction in the monthly minimum payments will flow through the Power Cost Adjustment (PCA) as a loss of surplus sales revenue resulting in higher than normal net power supply expenses. He estimated the reduced Hoku monthly payments in 2012 and 2013 will increase PCA rates for retail customers in 2013, 2014, and 2015. *Id.* at 8-9. He agreed with Company witness Youngblood that the deferred monthly minimum payments will be reimbursed to Idaho Power's other customers over the 12-month period between December 2013 and November 2014 under the terms of the settlement. *Id.* at 9. He characterized the Settlement Stipulation as providing some monthly revenue (i.e., $800,000) during part of the revised contract "and will still make customers no worse off during the term of the agreement if Hoku were to be disconnected." *Id.* at 11.

He conceded that Staff supports using $2 million of the $4 million deposit as partial payment of Hoku's $3.8 million up-front payment to Idaho Power. Mr. Lobb said that even after reducing the deposit by $2 million, the remaining balance of the deposit exceeds two monthly payments under the revised special contract. *Id.* at 11-12.

Mr. Lobb also supported the six-month advanced notice requirement before Hoku can exceed 20 MW in any month. He stated the six-month notification period allows Idaho Power time to plan and acquire the necessary energy and capacity to serve Hoku. *Id.* at 13. Mr. Lobb concluded that some near-term revenue from Hoku under the revised special contract is better than no near-term revenue, disconnection and litigation. Reducing the monthly minimum payments will improve Hoku's cash flow, improve its ability to make payments, and allow Hoku to complete construction of its Pocatello plant. Over the term of the revised contract, customers are held harmless by requiring Hoku to make up for the deferred payments with 6% interest. *Id.* at 14.

DISCUSSION AND FINDINGS

In Order No. 32437, we directed the Parties to enter into settlement negotiations to see whether the Parties could resolve their underlying disputes. Procedural Rule 276 provides that the Commission is not bound by the Parties' Settlement Stipulation. IDAPA 31.01.01.276. The Commission will "independently review any settlement proposed to it to determine whether the settlement is just, fair and reasonable, in the public interest or otherwise in accordance with law or regulatory policy." *Id.* The Commission may accept, reject, or modify settlement provisions. Moreover, the proponents of settlements carry the burden of showing that the settlement is reasonable and in the public interest. Rule 275, IDAPA 31.01.01.275.

After reviewing Hoku's Petition, the proposed Settlement Stipulation and the supporting testimony, we find that the settlement is fair, just and reasonable, and in the public interest. In particular, we find that the settlement adequately balances the burdens and benefits among Hoku, Idaho Power and other customers. As explained by the Parties in their prefiled testimony, Hoku obtains immediate relief from its minimum monthly payments. This allows Hoku to better manage its cash flow, complete its plant construction, and allows time for the polysilicon market to adjust. Should the situation dictate, Hoku has the option – with advance notice to Idaho Power – to ramp-up its production. For its part, Idaho Power is protected by the up-front payment and avoids litigation. Finally, ratepayers are made whole by the recovery of deferred minimum payment at the end of the "revised" special contract. Further, ratepayers are compensated by the 6% carrying charge on the deferred balancing mechanism.

We also note that there were no public comments in opposition to the proposed settlement. We further find that the settlement represents a reasonable compromise of the positions held by the Parties. We commend the Parties for their diligence and efforts at resolving the underlying disputes in this matter.

Having approved the Settlement Stipulation, we direct Hoku and Idaho Power to begin the task of making the necessary revisions of its existing special contract. As contemplated by the Parties, Idaho Power and Hoku shall submit a "revised" special contract that reflects the terms and conditions of the approved Settlement Stipulation. Idaho Power and Hoku shall submit the revised special contract for our review within 30 days from the date of this Order.

ORDER

IT IS HEREBY ORDERED that the Joint Motion of the Parties for approval of the Settlement Stipulation is granted. The Commission approves the terms and conditions of the Settlement Stipulation.

IT IS FURTHER ORDERED that having approved the Settlement Stipulation, Hoku's Petition for Reformation is dismissed with prejudice.

IT IS FURTHER ORDERED that Idaho Power and Hoku shall revise the existing amended special contract to incorporate the terms and conditions of the Settlement Stipulation. Hoku and Idaho Power shall submit their revised special contract to the Commission no later than 30 days from the date of this Order.

THIS IS A FINAL ORDER. Any person interested in this Order (or in issues finally decided by this Order) or in interlocutory Orders previously issued in this Case No. IPC-E-12-02 may petition for reconsideration within twenty-one (21) days of the service date of this Order with regard to any matter decided in this Order or in interlocutory Orders previously issued in this case. 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 15th day of March 2012.

PAUL KJELLANDER, PRESIDENT

MACK A. REDFORD, COMMISSIONER

MARSHA H. SMITH, COMMISSIONER

ATTEST:

Jean D. Jewell
Commission Secretary

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