# BEFORE THE IDAHO PUBLIC UTILITIES COMMISSION

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| **INTERCONNECT SOLAR DEVELOPMENT, LLC,** | ) | **CASE NO. IPC-E-12-10** |
| **COMPLAINANT,** | ) | |
| **v.** | ) | |
| **IDAHO POWER COMPANY,** | ) | **ORDER NO. 32531** |
| **RESPONDENT** | ) | |

On February 14, 2012, Interconnect Solar Development, LLC (Interconnect Solar, Project) filed a Complaint and Request to Intervene with the Commission. Interconnect Solar maintains that Idaho Power improperly cancelled its Firm Energy Sales Agreement (FESA) and mishandled its Generator Interconnection Agreement (GIA) and facility study.[1] In its Answer, Idaho Power denies Interconnect Solar's allegations of wrongdoing and requests that the Commission dismiss the complaint with prejudice. Based on a thorough review of the evidence presented in this case, we dismiss the complaint filed by Interconnect Solar as set out in greater detail in the body of this Order.

## BACKGROUND

On June 17, 2011, Idaho Power Company filed an Application with the Commission requesting acceptance or rejection of a 25-year Firm Energy Sales Agreement (Agreement) between Idaho Power and Interconnect Solar. Interconnect Solar would sell and Idaho Power would purchase electric energy generated by the Murphy Flats Solar Power Project located near Murphy, Idaho. On July 8, 2011, the Commission issued a Notice of Application/Notice of Modified Procedure and established comment deadlines.[2] Order No. 32290.

Following the submission of comments by the parties and the public the case was fully submitted for the Commission's consideration. On September 20, 2011, the Commission

[1] The record in this case closed on April 9, 2012, when the case was fully submitted to the Commission for deliberations. On April 16, 2012, Interconnect Solar filed a request for oral argument. Interconnect Solar's request is untimely and, therefore, will not be considered.

[2] Comment deadlines were modified twice with comments ultimately being due no later than September 9, 2011, and reply comments due no later than September 16, 2011. Order Nos. 32308 and 32347.

issued Order No. 32361. The Commission noted that all parties had acknowledged a computational error that was made in the escalation rate that was applied to the CCCT capital cost component from the 2009 IRP that was carried through and used in the IRP pricing model for the Interconnect Solar project. In an effort to permit the parties an opportunity to correct the mathematical error without creating undue delay, the Commission allowed Idaho Power and Interconnect Solar additional time to resubmit their Firm Energy Sales Agreement with accurate calculations prior to the Commission making a final determination regarding the Agreement. Order Nos. 32361 and 32364.

On October 11, 2011, pursuant to Commission Order Nos. 32361 and 32364, Idaho Power resubmitted the parties' Firm Energy Sales Agreement. The adjustments resulted in a levelized price of $97.47 per MWh. In the modified Agreement, Interconnect Solar selected September 1, 2012, as its commercial operation date (COD). The Project had been advised by Idaho Power that its COD was prior to such time that interconnection/transmission facilities were scheduled to be constructed and complete. Interconnect Solar acknowledged and expressly agreed to accept the risk associated with not meeting its COD. On October 20, 2011, the Commission approved the replacement Agreement signed by Idaho Power and Interconnect Solar on October 4, 2011, for the sale and purchase of electric energy. Order No. 32384.

## THE COMPLAINT

Interconnect Solar complains that Idaho Power improperly cancelled its FESA and mishandled its GIA and facility study. Interconnect Solar states that, since it no longer has a valid GIA "and the in service date has not been moved, Interconnect Solar has not been able to complete the new loan based on the 'Investment Tax Credit' and 'Accelerated Depreciation' and post the required LD's [liquidated damages] for the PPA." Complaint at 4. Interconnect Solar maintains that its lenders "are not willing to post a security deposit that is a set-up for failure." *Id.*

Interconnect Solar requests that the Commission (1) require Idaho Power to provide a revised in-service date in its FESA to comport with "the ever moving GIA schedule-72"; (2) require Idaho Power to provide a corrected GIA "which lines up with the BLM meeting and schedules set forth and agreed upon by all Parties"; (3) require Idaho Power to provide the BLM with "a timely EA [Environmental Assessment] and spring Botanical study so the BLM can

expedite the ROW GRANT"; and (4) direct Idaho Power "to stop delaying the project and damaging Interconnect Solar." *Id.* at 5.

## IDAHO POWER'S ANSWER

Idaho Power asserts that Interconnect Solar was put on notice that BLM permitting issues were outside of its control and could influence the Project's commercial operation date. Answer at 2. Idaho Power states that Interconnect Solar agreed to the delay security provisions in its FESA. The Project has failed to post the security pursuant to the terms of the Agreement. As a result, Idaho Power terminated the Agreement.

Idaho Power acknowledges that on December 21, 2011, it received a letter from the Project's legal counsel asserting a claim of force majeure. Idaho Power disputes the claim of force majeure. *Id.* at 6. Idaho Power argues that Interconnect Solar "affirmatively accepted and assumed any and all risk associated with the contingency that the interconnection/transmission facilities would not be constructed by the Scheduled Operation Date...." *Id.*

Idaho Power asserts several affirmative defenses, i.e., waiver, estoppel, unclean hands. Ultimately, Idaho Power claims that Interconnect Solar filed its complaint "for the purposes of harassment, to cause unnecessary delay and needless increase in the cost of the parties' outstanding litigation, and without evidentiary support for its factual contentions." *Id.* at 7. Idaho Power maintains that any alleged damages suffered by Interconnect Solar were caused by and the result of Interconnect Solar's own conduct. *Id.* at 8.

## DISCUSSION AND CONCLUSIONS

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.

Interconnect Solar's complaint is based on an assertion that Idaho Power improperly terminated its FESA. Pursuant to the terms of that Agreement, "[w]ithin thirty (30) days of the date of a final non-appealable Commission Order . . . [Interconnect Solar] shall post liquid security ('Delay Security') . . . . Failure to post this Delay Security in the time specified above

will be a Material Breach of this Agreement and Idaho Power may terminate this Agreement." Agreement ¶ 5.8. The Commission's final Order approving the Agreement was issued on October 20, 2011. No person or party sought reconsideration. Consequently, the Commission's Order became final and conclusive on November 11, 2011. *Idaho Code* §§ 61-625, 61-626. Interconnect Solar's Delay Security was, therefore, due no later than December 11, 2011.

On December 16, 2011, Idaho Power notified Interconnect Solar that it was in material breach of its Agreement because of the Project's failure to post its required delay security. Answer, Attachment 1. The Project was put on notice that "Idaho Power will terminate this FESA if this Material Breach is not cured as expeditiously as possible." *Id.* On February 23, 2012, Idaho Power notified Interconnect Solar that its FESA had been terminated after it failed to cure the material breach by posting the required delay security deposit. Interconnect Solar does not dispute that it has not posted the delay security pursuant to Section 5.8 of the Agreement. Interconnect Solar asserts that it cannot obtain a loan to post the required delay security with an obsolete GIA and unworkable commercial operation date.

Interconnect Solar was repeatedly warned about choosing a commercial operation date that preceded Idaho Power's estimated time for completion of the Project's interconnection. At the time the FESA was approved by this Commission, we expressed our concern regarding the Project's choice for commercial operation. Specifically, we stated

> We share the concerns of Commission Staff and Idaho Power regarding Interconnect Solar's choice of a Scheduled Operation Date that precedes Idaho Power's estimated date for completion of the Project's interconnection. The Project's optimism may prove to be foolhardy. Interconnect Solar maintains its position that interconnection will occur ahead of Idaho Power's estimated schedule at its own peril.

Order No. 32384 at 10. Interconnect Solar argues that its failure to post a delay security stems from issues with its GIA. However, its Agreement with Idaho Power states that "[d]elays in the interconnection and transmission network upgrade study, design and construction process that **are not** Force Majeure events accepted by both Parties, **shall not** prevent Delay Liquidated Damages from being due and owing as calculated in accordance with this Agreement." Agreement, ¶ 5.3 (emphasis in original).

This Commission approved the FESA with the admonition that Interconnect Solar proceeded at its own peril. The concerns of Idaho Power, Staff and this Commission have been

realized. Setbacks with regard to Interconnect Solar's GIA have affected the Project's ability to post its required delay security deposit. Pursuant to the terms of the Agreement, Interconnect Solar is in material breach and has failed to cure the defect. We find that Idaho Power terminated its FESA with Interconnect Solar consistent with the terms of the Agreement. Accordingly, we dismiss the complaint filed by Interconnect Solar.

## ORDER

IT IS HEREBY ORDERED that the February 14, 2012, complaint filed by Interconnect Solar against Idaho Power is dismissed.

THIS IS A FINAL ORDER. Any person interested in this Order may petition for reconsideration within twenty-one (2 1) 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 24th day of April 2012.

PAUL KJELLANDER, PRESIDENT

MACK A. REDFORD, COMMISSIONER

MARSHA H. SMITH, COMMISSIONER

ATTEST:

Jean D. Jewell
Commission Secretary

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