

BEFORE THE IDAHO PUBLIC UTILITIES COMMISSION

IN THE MATTER OF THE COMPLAINT)	
AND PETITION OF IDAHO POWER)	CASE NO. IPC-E-12-25
COMPANY FOR A DECLARATORY)	
ORDER REGARDING THE FIRM ENERGY)	
SALES AGREEMENT AND GENERATOR)	
INTERCONNECTION AGREEMENT WITH)	
NEW ENERGY TWO, LLC.)	
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IN THE MATTER OF THE COMPLAINT)	
AND PETITION OF IDAHO POWER)	CASE NO. IPC-E-12-26
COMPANY FOR A DECLARATORY)	
ORDER REGARDING THE FIRM ENERGY)	NOTICE OF COMPLAINTS AND
SALES AGREEMENT AND GENERATOR)	PETITIONS FOR
INTERCONNECTION AGREEMENT WITH)	DECLARATORY ORDER
NEW ENERGY THREE, LLC.)	
)	ORDER NO. 32692

On November 9, 2012, Idaho Power Company filed a Complaint and Petition for Declaratory Order regarding a Power Purchase Agreement (PPA) between itself and New Energy Two, LLC. In May 2010, Idaho Power and New Energy Two entered into a PPA under which New Energy will operate an anaerobic digester (i.e., the qualifying facility (QF)) at the Swager Farms dairy and provide 1.2 MW of power to the utility. The Agreement provided that the scheduled operation date for the digester is October 1, 2012. Complaint at 2; PPA at App. B. In its complaint (12-25), Idaho Power alleges that the QF did not achieve its scheduled operation date of October 1, 2012.

On November 21, 2012, Idaho Power filed a Complaint and Petition for Declaratory Order regarding a PPA between itself and New Energy Three, LLC. In May 2010, Idaho Power and New Energy Three entered into a PPA under which New Energy proposed to operate an anaerobic digester at the Double B Dairy and provide 1.2 MW of power to the utility. The Double B Agreement provides that the scheduled operation date for the digester is December 1, 2012. In its complaint (12-26), Idaho Power alleges that Double B will not achieve its scheduled operation date of "December 1, 2012, and will likely not achieve [commercial operation] by March 1, 2013." Complaint at ¶ 2.

Idaho Power asserts in both complaints that the QFs have “failed to take the necessary steps required to bring the facilit[ies] online and operational by the dates required in the [PPAs] including, . . . failing to take steps required to secure the interconnection of [their] proposed facilit[ies] to Idaho Power’s system.” Complaints at 3.

BACKGROUND

A. Swager Farms

In October 2009, New Energy Two submitted a small generator interconnection (GI) request for a proposed 1.2 MW methane gas generating project at Swager Farms. Idaho Power assigned the project GI No. 307. Idaho Power and New Energy subsequently held a scoping meeting and executed a Facility Study Agreement on October 27, 2009. Complaint at Tab 16.

In January 2010, Idaho Power submitted its GI Facility Study Report to New Energy. The report estimated that Idaho Power could construct the necessary interconnection facilities with the project in Twin Falls County at a cost of about \$234,800. Complaint at ¶ 23. On May 24, 2010, Idaho Power and New Energy Two entered into a PPA for a 15-year term at PURPA avoided cost rates which were in effect prior to the issuance of Order No. 31025 on March 16, 2010. The PPA provides that the scheduled operation date for the Swager Farms facility is October 1, 2012. Complaint at ¶ 31; Atch. 1 at Appx. B. On May 24, 2012, Idaho Power filed an application requesting that the Commission approve the PPA. The Commission approved the Agreement in Order No. 32026 issued July 1, 2010.

B. Double B

Also in October 2009, New Energy Three filed a small generator interconnection (GI) request with Idaho Power for a 1.2 MW biogas generating project at Double B Dairy. Idaho Power assigned the Double B project GI No. 308. On October 14, 2009, Luis Bettencourt of Double B, LLC authorized New Energy to act on its behalf in negotiating with Idaho Power concerning the proposed QF project. Complaint at ¶ 10. As was the case with the Swager Farms project, Idaho Power and New Energy subsequently held a scoping meeting and executed a Facility Study Agreement for GI Project No. 308 on October 27, 2009. *Id.* at ¶ 12.

In December 2009, Idaho Power issued a draft GI Facility Study Report estimating interconnection for the Double B project at \$225,000. *Id.* at ¶ 13. On April 2, 2010, New Energy returned an executed Facility Study Agreement for Double B GI No. 308. *Id.* at ¶ 20. As was the case with Swager Farms, New Energy entered into a 15-year PPA with Idaho Power on

May 24, 2010. *Id.* at ¶ 23. The scheduled operation date for the Double B project is December 1, 2012. *Id.* at ¶ 23; Atch. 1 at App. B. The next day, Idaho Power filed an application seeking approval of the PPA between Idaho Power and New Energy Three. The Commission approved the Agreement in Order No. 32027 dated July 1, 2010.

C. Interconnection

In addition to negotiating PPAs, utilities and QFs must also negotiate interconnection agreements. Under PURPA, QFs are obligated to pay the cost of constructing the necessary interconnection facilities between the QF project and the utility's system. 18 C.F.R. § 292.306. In Idaho Power's case, it typically requires the QF to enter into a Facility Study Agreement, then it issues a Facility Study Report containing the estimated cost of interconnection, and then the parties enter into a Generation Interconnection Agreement (GIA) before the utility commences construction of the interconnection facilities. After the Swager Farms and Double B PPAs were approved, Idaho Power and the QFs had protracted discussions and communications about interconnection issues. On May 24, 2011, New Energy agent Laura Knothe advised Idaho Power that Exergy Development was associating itself with New Energy for the Swager Farms and Double B projects. Swager Farms at ¶ 45; Double B at ¶ 37.

On May 9, 2012, Idaho Power asserts that it sent a draft GIA to Exergy for the Double B project and advised it that failure to submit all of the requested items and the executed GIA "will cause the Generator Interconnection request to have been deemed withdrawn." Double B Complaint at ¶ 49. On June 19, 2012, Idaho Power sent Double B a final GIA to be executed and returned to Idaho Power no later than July 20, or "your Generation Interconnection Application will be deemed withdrawn." *Id.* at ¶ 53. Idaho Power insists that the GIA was not returned and that Idaho Power subsequently issued a deficiency notice that the GIA has been deemed withdrawn and that the project has been removed from Idaho Power's interconnection queue. On August 28, 2012, Idaho Power refunded Exergy's deposit for the Double B GI project No. 308. *Id.* at ¶ 54-55.

On September 14, 2012, Idaho Power states that it sent the final GIA to Swager Farms for GI No. 307. Swager Farms at ¶ 66. The cover letter for the Swager Farms GIA noted that Idaho Power "must have the executed GIA and funding no later than October 1, 2012, in order to complete construction by [December 31, 2012]." *Id.* (emphasis original). Idaho Power alleges that Swager Farms did not execute the GIA.

D. Force Majeure

On September 28, 2012, Swager Farms and Double B provided a joint “Notice of Force Majeure” to Idaho Power. Swager Complaint at ¶ 71; Double B Complaint at ¶ 60. In accordance with Section 14 of their respective PPAs, the QFs notified the utility that they could not perform under their respective Agreements because of “the occurrence of a Force Majeure event.” Swager Complaint at Tab 56; Double B Complaint at Tab 36. More specifically, the QFs allege that current Commission proceedings regarding the ownership of renewable energy credits (RECs) and the issue of “curtailment” caused lenders to be “unwilling to lend in Idaho pending the outcome of these proceedings.” *Id.* Thus, with “no financing available, . . . it [is] impossible for [the QFs] to perform [their] obligation” under the PPAs. *Id.* at ¶ 4.

STAFF RECOMMENDATION

At the Commission’s decision meeting held on December 3, 2012, Staff recommended the Commission consolidate these two cases pursuant to Rule 247, IDAPA 31.01.01.247. Without addressing the merits of the complaints, Staff suggested that the legal arguments and the parties in these two cases are the same. Staff also recommended the Commission Secretary serve a copy of the two complaints pursuant to Rule 54.05, IDAPA 31.01.01.054.05.

FINDINGS

Based upon our review of the two complaints and Staff’s recommendation, we find it is reasonable to consolidate these cases into a single proceeding. Rule 247. Consequently, we direct the Commission Secretary to serve a copy of the complaints upon the parties pursuant to *Idaho Code* § 61-621 and Rule 54.05. Given the voluminous nature of the attachments, and the fact that Idaho Power has already served both the complaints and attachments upon both New Energy companies and Exergy Development Group, we find it unnecessary for the Secretary to serve the attachments to each complaint. We further find that it is appropriate to direct New Energy Two/Three and Exergy Development Group to file their consolidated answers or motions to the complaints no later than the close of business on December 27, 2012.

ORDER

IT IS HEREBY ORDERED that Idaho Power Company’s complaints/petitions against New Energy Two and Exergy Development Group in Case No. IPC-E-12-25, and New Energy Three and Exergy Development Group in Case No. IPC-E-12-26 be consolidated into a

single proceeding. The Commission Secretary shall serve a copy of the two complaints and petitions (without attachments) upon the parties pursuant to *Idaho Code* § 61-621 and Rule 54.05. The Secretary shall also serve this Order and the complaints via electronic mail pursuant to Rule 16.01.

IT IS FURTHER ORDERED that New Energy Two/Three and Exergy Development file their answer or motion in defense to said consolidated complaints and petitions no later than December 27, 2012.

DONE by Order of the Idaho Public Utilities Commission at Boise, Idaho this 4th day of December 2012.



PAUL KJELLANDER, PRESIDENT

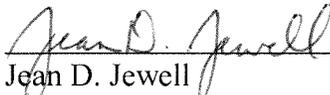


MACK A. REDFORD, COMMISSIONER



MARSHA H. SMITH, COMMISSIONER

ATTEST:



Jean D. Jewell
Commission Secretary

O:IPC-E-12-25_IPC-E-12-26_dh

CERTIFICATE OF SERVICE

I HEREBY CERTIFY THAT I HAVE THIS 4th DAY OF DECEMBER 2012, SERVED THE FOREGOING ORDER NO. 32692 ALONG WITH THE COMPLAINTS AND PETITIONS OF IDAHO POWER IN CASE NOS. IPC-E-12-25 AND IPC-E-12-26, BY MAILING COPIES THEREOF UPON THE FOLLOWING BY THE METHOD INDICATED BELOW:

Leslie White, Registered Agent New Energy Two, LLC New Energy Three, LLC 6152 N. Sparkford Way Boise, ID 83713	<input checked="" type="checkbox"/> Certified Mail <input checked="" type="checkbox"/> Email lwhite@exergydevelopment.com
Exergy Development Group of Idaho, LLC Molly O'Leary, Registered Agent/Attorney Peter J. Richardson, Attorney RICHARDSON AND O'LEARY 515 N. 27 th Street Boise, ID 83702	<input checked="" type="checkbox"/> Certified Mail <input checked="" type="checkbox"/> Email peter@richardsonandoleary.com molly@richardsonandoleary.com
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JEAN D. JEWELL, COMMISSION SECRETARY