

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. |) | |
| <hr/> | | |
| 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 |) | |
| SALES AGREEMENT AND GENERATOR |) | ORDER NO. 33126 |
| INTERCONNECTION AGREEMENT WITH |) | |
| NEW ENERGY THREE, LLC. |) | |

On June 17, 2014, the Idaho Supreme Court issued its opinion in *Idaho Power Company v. New Energy Two*, 156 Idaho 462, 328 P.3d 442 (2014). In its opinion, the Supreme Court held that the Commission has jurisdiction to determine whether events of force majeure have occurred that excuse New Energy's performance under its power purchase agreements (PPAs) with Idaho Power Company. On July 9, 2014, the Court issued its remittitur and remanded the matter to the Commission. This Scheduling Order sets a deadline for New Energy to file an answer to Idaho Power's complaints.

BACKGROUND***A. The Parties' Conduct***

The underlying facts and the sequence of events in this consolidated case is set out in greater detail in Order Nos. 32755 and 32780. Briefly, New Energy proposed to build two separate anaerobic digester projects at Swagger Farms (New Energy Two) and Double B Dairy (New Energy Three) that would generate electricity for sale to Idaho Power pursuant to the Public Utility Regulatory Policies Act (PURPA). In May 2010, New Energy entered into separate PPAs with Idaho Power. The PPAs called for the Swagger Farms facility to begin operations in October 2012, and the Double B facility to begin operations in December 2012. Both PPAs were submitted to the Commission and the Commission approved them on July 1, 2010.

Among other terms, each PPA contained a force majeure provision and a dispute resolution provision. This latter provision stated that all “disputes related to or arising under this Agreement, including, but not limited to, the interpretation of the terms and conditions of this Agreement, will be submitted to the Commission for resolution.” PPA at § 19.1; Order No. 32780 at 6.

The parties also initiated negotiations for the construction of the necessary interconnection facilities. PURPA requires qualifying facilities (QFs), such as the anaerobic digesters in this case, to pay the costs of constructing the necessary interconnection facilities or transmission upgrades to “connect” the QF projects with the purchasing utility’s system. Order No. 32780 *citing* 18 C.F.R. § 292.308. After extended discussions, the parties were unable to negotiate the required interconnection agreements. In September 2012, New Energy notified Idaho Power that it was invoking the force majeure provision of each PPA.

B. The Commission Proceedings

On November 9 and 21, 2012, Idaho Power filed two separate “Complaints and Petitions for Declaratory Order” against New Energy Two and New Energy Three, respectively. Idaho Power generally alleged that the projects breached their respective PPAs by failing to supply power to the utility. Order No. 32780 at 1. The Commission consolidated the two cases into a single proceeding and directed New Energy to answer the Complaints and Petitions by December 27, 2012. Order No. 3269. Rather than file an answer, New Energy filed a “Motion to Dismiss for Lack of Subject Matter Jurisdiction.” Idaho Power filed an answer to the Motion and New Energy filed a reply to the answer. On March 5, 2013, the Commission issued interlocutory Order No. 32755 denying New Energy’s Motion to Dismiss and directing New Energy to file its answer no later than March 19, 2013.

On March 18, 2013, New Energy filed another Motion generally seeking the Commission’s permission for leave to file an interlocutory appeal with the Idaho Supreme Court pursuant to Idaho Appellate Rule 12.¹ New Energy challenged the Commission’s decision in Order No. 32755 that the Commission has the jurisdiction to resolve the dispute between the parties. On April 4, 2013, the Commission issued Order No. 32780 denying permission for New Energy to appeal from the interlocutory Order. Although the Commission denied the Motion, it

¹ Appellate Rule 12(b) provides that a “motion for permission to appeal from an interlocutory order . . . shall be filed with . . . [the PUC] within fourteen (14) days from the date of entry of the order. . . .”

granted a stay so that New Energy could pursue a permissive appeal under Appellate Rule 12(c)(1).² Order No. 32780 at 14. New Energy timely filed its Motion with the Court, and the Court granted New Energy's Motion to File an Interlocutory Appeal. New Energy then filed a Notice of Appeal.

Given the dispute resolution provision in the PPAs, the Court ruled that "the Commission has authority to interpret contracts where the parties have agreed to permit the Commission to do so." *Idaho Power v. New Energy*, 156 Idaho at 463, 328 P.3d at 443. The Court also observed that the Commission has the statutory authority "to determine whether a regulated utility has an obligation under PURPA to purchase power from an applicant." *Id.* at 465, 328 P.3d at 445 (emphasis omitted).

DISCUSSION

Having rendered its opinion in this interlocutory appeal, the Court remanded the case back to the Commission. Consequently, we direct New Energy to file its consolidated answer to the complaints within 21 days of the service date of this Order. New Energy may provide its answer in a narrative form addressing its force majeure claims. The Commission also encourages the parties to discuss whether settlement of this case is possible in lieu of further litigation.

ORDER

IT IS HEREBY ORDERED that New Energy file its consolidated answer to Idaho Power's Complaints and Petitions within 21 days of the service date of this Order. The parties are encouraged to explore whether settlement is possible.

² Appellate Rule 12(c)(1) provides that after an agency denies a motion for a permissive appeal, a party may file a motion with the court requesting acceptance of an interlocutory appeal by permission.

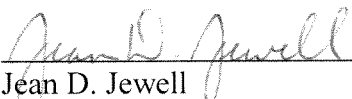
DONE by Order of the Idaho Public Utilities Commission at Boise, Idaho this 12th
day of September 2014.


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_dh5