

DECISION MEMORANDUM

TO: COMMISSIONER KJELLANDER
COMMISSIONER SMITH
COMMISSIONER REDFORD
COMMISSION SECRETARY
COMMISSION STAFF

FROM: DON HOWELL
DEPUTY ATTORNEY GENERAL

DATE: NOVEMBER 20, 2012

SUBJECT: IDAHO POWER'S COMPLAINTS AND PETITIONS FOR
DECLARATORY ORDER AGAINST SWAGER FARMS AND DOUBLE B
DAIRY, CASE NOS. IPC-E-12-25 AND IPC-E-12-26

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 facilities 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 concluded that Idaho Power could make the necessary interconnection with the project in Twin Falls County at an estimated cost of \$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 Farms. 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 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 execute 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 PPAs were approved, Idaho Power and both 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. 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]." Idaho Power alleges that Swager Farms did not execute GIA.

D. Force Majeure

On September 28, 2012, Swager Farms and Double B provided a joint “Notice of Force Majeure” to Idaho Power. 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

Given the legal issues raised in the Swager Farms and Double B cases involve the same parties and the same legal arguments, Staff recommends that the Commission consolidate these two cases under Rule 247. In addition, Staff recommends the Commission Secretary serve a copy of these complaints upon the digesters and Exergy pursuant to Rule 54.05.

COMMISSION DECISION

Does the Commission wish to consolidate these two cases and instruct the Commission Secretary to serve the complaints?



Don Howell
Deputy Attorney General

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