

## DECISION MEMORANDUM

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

**FROM:** KRISTINE SASSER, DAG  
RICK STERLING

**DATE:** MAY 2, 2013

**RE:** IDAHO POWER COMPANY'S MOTION FOR APPROVAL OF SETTLEMENT AGREEMENT WITH GLENN'S FERRY COGENERATION PARTNERS, LTD., CASE NO. IPC-E-13-12

On April 25, 2013, Idaho Power filed a Motion for Approval of Settlement Agreement pursuant to *Idaho Code* § 61-502, Commission Procedural Rules 56 and 274 requesting an Order approving the Settlement Agreement and Mutual Release (“Settlement Agreement”) between Idaho Power and Glenn's Ferry Cogeneration Partners, LTD. (“Glenn's Ferry”). IDAPA 31.01.01.056 and .274. Idaho Power amended its Motion on May 2, 2013. Idaho Power requests that the Commission grant its Motion and approve the Settlement Agreement in its entirety, without material change or condition, pursuant to Rule 274. IDAPA 31.01.01.274.

### BACKGROUND

The Firm Energy Sales Agreement between Idaho Power and Glenn's Ferry is dated December 9, 1992, and provides for a 20-year contract term. *See* Case No. IPC-E-92-32. The Agreement was approved by the Commission on January 22, 1993. Order No. 24674. In February 2008, Glenn's Ferry lost its sole thermal host and ceased the delivery of energy to Idaho Power.

On October 16, 2008, Idaho Power filed a Petition for Declaratory Order and Complaint for Breach of Contract (“Petition”) against Glenn's Ferry with the Commission. Idaho Power alleged that the permanent curtailment of energy deliveries amounts to a default of the Firm Energy Sales Agreement. Idaho Power sought termination of the Agreement. *See* Case No. IPC-E-08-20. On October 6, 2011, pursuant to Procedural Rule 68, Idaho Power filed a Notice of Withdrawal of its

Petition. By operation of the rule, the notice was effective as of October 20, 2011, and the case was closed. *See* IDAPA 31.01.01.068.

On October 28, 2011, Idaho Power filed a Complaint for Breach of Contract and Declaratory Judgment (“Complaint”) against Glens Ferry in the District Court of the Fourth Judicial District of the State of Idaho alleging a breach of contract and seeking a declaratory judgment terminating the FESA (“State Court Action”). On November 15, 2011, Glens Ferry removed the State Court Action to the United States District Court for the District of Idaho (“Federal Court Action”).

The complaint alleged, among other things, that Glens Ferry materially breached the FESA by losing its thermal host, Idaho Fresh-Pak; failing to maintain its Public Utility Regulatory Policies Act of 1978 qualifying facility (QF) status; and permanently curtailing its deliveries of annual net firm energy. The complaint also alleged that in or about April 2008, Idaho Fresh-Pak defaulted on the Thermal Host Agreement between Glens Ferry and Idaho Fresh-Pak. The Thermal Host Agreement provided, among other things, that Idaho Power was a third-party beneficiary to that agreement and that Idaho Fresh-Pak would be liable to Idaho Power, limited to amounts specified in the Thermal Host Agreement, in the event Idaho Fresh-Pak defaulted on the Thermal Host Agreement.

On January 22, 2013, Idaho Power, Glens Ferry, and Idaho Fresh-Pak attended mediation before the Honorable Mikel H. Williams of the U.S. District Court and settled all claims among them, subject to the approval of the Commission.

### **THE SETTLEMENT AGREEMENT**

The Settlement Agreement provides for: (1) the termination of the FESA; (2) a Stipulated Judgment in the amount of \$15,000,000 entered in favor of Idaho Power in the Federal Court Action, to which Idaho Power agrees to enter into a Covenant Not to Execute on the Stipulated Judgment; (3) provisions prohibiting Glens Ferry from developing any new facility at the current location until such time as the Stipulated Judgment is paid in full; (4) payment of \$250,000 from Glens Ferry and payment of \$750,000 from Idaho Fresh-Pak; (5) provisions for securing the above-mentioned payment amounts; and (6) other provisions such as a mutual release of liability, liability for power bills at the project site, mutual cooperation, etc.

Idaho Power maintains that the Settlement Agreement avoids additional, costly litigation, recognizes a judgment in favor of Idaho Power and its customers, and provides for the partial recovery of damages pursuant to the FESA. Idaho Fresh-Pak has a sale pending for its facility, and the

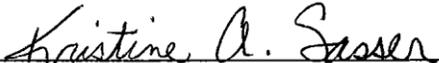
Settlement Agreement provides that Idaho Power would receive any proceeds from such sale to satisfy Idaho Fresh-Pak's \$750,000 liability. Although the Settlement Agreement acknowledges a judgment in favor of Idaho Power in the Federal Court Action in the amount of \$15,000,000, the Settlement Agreement provides for the collection of \$1,000,000 of that amount. Through its investigation and discovery related to this matter, Idaho Power determined that there was not sufficient cash or assets available from the limited liability, special purpose business organizations representing Glens Ferry, the contracting QF, or any party with liability under the contract—essentially making a resulting judgment in favor of Idaho Power uncollectable. Idaho Power, through the underlying contract and the limited security provisions allowed by Commission rules and orders, does have a second security interest in certain assets of the contracting QF. Such assets were determined to have an approximate value of \$1,000,000, which is the amount provided for collection from the responsible parties pursuant to the Settlement Agreement.

The Settlement Agreement contains a provision stating that all terms and conditions of the Settlement Agreement are subject to approval by this Commission and that only after such approval, without material change or modification, has been received shall the Agreement be valid and effective. Idaho Power believes that the Settlement Agreement is a fair and equitable resolution to this matter, and in the public interest. Idaho Power respectfully requests that the Commission grant this Motion and approve the Settlement Agreement in its entirety, without material change or condition, pursuant to Rule 274, IDAPA 31.01.01.274.

Commission Staff concurs with Idaho Power that recovery of the full \$15 million Federal Court Judgment is highly improbable. Therefore, Staff does not oppose approval of the proposed Settlement Agreement. Staff also believes this matter can be resolved without further process.

#### **COMMISSION DECISION**

Does the Commission wish to grant Idaho Power's Motion for Approval of the Settlement Agreement between Idaho Power and Glens Ferry Cogeneration Partners (in its entirety, without material change or condition) without further process?

  
\_\_\_\_\_  
Kristine A. Sasser  
Deputy Attorney General

M:IPC-E-13-12\_ks\_rs