

GIVENS PURSLEY LLP

LAW OFFICES

601 W. Bannock Street
PO Box 2720, Boise, Idaho 83701
TELEPHONE: 208 388-1200
FACSIMILE: 208 388-1300
WEBSITE: www.givenspursley.com

Deborah E. Nelson
den@givenspursley.com
(208) 388-1215

Gary G. Allen
Peter G. Barton
Christopher J. Beeson
Clint R. Bolinder
Erik J. Bolinder
Preston N. Carter
Jeremy C. Chou
William C. Cole
Michael C. Creamer
Amber N. Dina
Elizabeth M. Donick
Thomas E. Dvorak
Jeffrey C. Fereday
Martin C. Hendrickson
Steven J. Hippler

Don E. Knickrehm
Neal A. Koskella
Debora K. Kristensen
Michael P. Lawrence
Franklin G. Lee
David R. Lombardi
Emily L. McClure
Kenneth R. McClure
Kelly Greene McConnell
Alex P. McLaughlin
Melodie A. McQuade*
Christopher H. Meyer
L. Edward Miller
Patrick J. Miller
Judson B. Montgomery
Deborah E. Nelson

W. Hugh O'Riordan, LL.M.
Angela M. Reed
Matt G. Smith
Jeffrey A. Warr
Robert B. White

Of Counsel
Kimberly D. Maloney

*Licensed in Virginia

Retired:
Kenneth L. Pursley
James A. McClure (1924-2011)
Raymond D. Givens (1917-2008)

October 25, 2013

VIA HAND DELIVERY

Jean Jewell,
Commission Secretary
Idaho Public Utilities Commission
472 W. Washington
Boise, ID 83702

RECEIVED
2013 OCT 25 PM 4:54
IDAHO PUBLIC
UTILITIES COMMISSION

IPC-E-13-19

RE: *Idaho Wind Partners vs. Idaho Power Company*

Dear Jean:

Enclosed are an original and eight (8) copies of a Complaint in the above matter. Please conform a copy and return it to our courier.

Please do not hesitate to contact me if you have questions or concerns.

Sincerely,

Deborah E. Nelson

DEN/kml
Enclosures
1908864_1

Deborah E. Nelson, ISB # 5711
Preston N. Carter, ISB # 8462
GIVENS PURSLEY LLP
601 W. Bannock St.
Post Office Box 2720
Boise, Idaho 83701-2720
Telephone: 208-388-1200
Facsimile: 208-388-1300
11067-18_1885436_15

RECEIVED
2013 OCT 25 PM 4: 54
IDAHO PUBLIC UTILITIES COMMISSION

RECEIVED
2013 OCT 25 PM 4: 56
IDAHO PUBLIC UTILITIES COMMISSION

ORIGINAL

Attorneys for Idaho Wind Partners I, LLC

BEFORE THE IDAHO PUBLIC UTILITIES COMMISSION

IDAHO WIND PARTNERS I, LLC,

Complainant and Petitioner,

vs.

IDAHO POWER COMPANY,

Respondent.

Case No. IPC-E-13-19

**IDAHO WIND PARTNERS I, LLC'S
COMPLAINT AND PETITION FOR
DECLARATORY ORDER**

INTRODUCTION

IDAHO WIND PARTNERS I, LLC ("IWP"), on behalf of its solely-owned subsidiary project companies,¹ files this Complaint and Petition for Declaratory Order ("Complaint and Petition") against Idaho Power Company ("Idaho Power") with the Idaho Public Utilities Commission (the "Commission") pursuant to Idaho Administrative Rules 31.01.01.054 and 31.01.01.101. This Complaint and Petition seeks interpretation and enforcement of certain 2005-era Firm Energy Sales Agreements ("FESAs") between Idaho Power and projects owned by IWP.

¹ Tuana Gulch Wind Park, LLC; Golden Valley Wind Park, LLC; Milner Dam Wind Park, LLC; Oregon Trail Wind Park, LLC; Salmon Falls Wind Park, LLC; Thousand Springs Wind Park, LLC; Burley Butte Wind Park, LLC; and Pilgrim Stage Station Wind Park, LLC.

Under the FESAs, in specific circumstances, Idaho Power must purchase Surplus Energy at the current month's "Market Energy Cost." "Market Energy Cost" is defined as "Eighty-five percent (85%) of the weighted average of the daily on-peak and off-peak Dow Jones Mid-Columbia Index (Dow Jones Mid-C Index) prices for non-firm energy."

Contrary to the plain language of the FESAs, Idaho Power's calculation of Market Energy Cost does not consider all "daily on-peak and off-peak ... prices for non firm energy" published in the Dow Jones Mid-C Index but, rather, considers only a subset of those prices. Idaho Power's failure to purchase Surplus Energy at Market Energy Cost in accordance with the FESAs has resulted in significant damages to IWP.

Through this proceeding, IWP seeks interpretation and enforcement of the Market Energy Cost component of the FESAs. In support of this Complaint, IWP alleges as follows.

PRELIMINARY MATTERS

1. IWP's representatives for the purpose of service of pleadings and other written materials are:

Deborah E. Nelson
Preston N. Carter
GIVENS PURSLEY LLP
601 W. Bannock Street
P.O. Box 2720
Boise, ID 83701-2720
Telephone No. (208) 388-1200
Fax No. (208) 388-1300
Email address: den@givenspursley.com
prestoncarter@givenspursley.com

IDENTITY OF THE PARTIES

2. IWP's address is:

Idaho Wind Partners I, LLC
c/o RP Wind ID, LLC, its Managing Member
82 Elm Street
PO Box 2049

Manchester Center, VT 05255

3. Through its subsidiary companies, IWP owns eleven wind power generation facilities in Idaho. In 2005, the following eight projects entered into FESAs with Idaho Power: Tuana Gulch, Golden Valley, Milner Dam, Oregon Trail, Salmon Falls, Thousand Springs, Burley Butte, and Pilgrim Stage Station (collectively, “Projects” or “IWP Projects”). The Market Energy Cost component of these FESAs forms the basis of this Complaint and Petition.

4. The Projects are Qualifying Facilities (“QFs”) pursuant to the Public Utility Regulatory Policies Act of 1978 (“PURPA”).

5. Idaho Power is an Idaho corporation with its principal place of business at 1221 West Idaho Street, Boise, Idaho 83702. Idaho Power is an electric company and public utility subject to the jurisdiction and regulation of the Commission under Title 61 of the Idaho Code, including Idaho Code § 61-129.

JURISDICTION

6. This proceeding involves FESAs approved by the Commission. The Commission has jurisdiction to interpret and enforce the FESAs. *See* Idaho Code §§ 61-129, 61-501 through 61-503, and 61-612; *Wash. Water Power Co. v. Kootenai Env'tl. Alliance*, 99 Idaho 875, 880, 591 P.2d 122, 127 (1979) (“The statutes reflect the legislative grant of authority to the Commission to deal broadly with . . . contracts affecting rates.”); Order 32744, Case No. IPC-E-12-25 (concluding the Commission has jurisdiction over complaint alleging breach of FESA).²

7. The parties agreed to submit to the Commission all disputes “related to or arising under” the FESAs, including “the interpretation of the terms and conditions” of the FESAs. FESAs ¶22.1; *see Bunker Hill Co. v. Wash. Water Power Co.*, 98 Idaho 249, 252 561 P.2d 391,

² An appeal of this Order is pending before the Idaho Supreme Court.

394 (1977) (affirming the Commission’s jurisdiction when “the parties agreed to let the P.U.C. settle th[e] dispute”).

8. The Commission has jurisdiction to issue declaratory orders under Idaho Code § 10-1203. *Utah Power & Light Co. v. Idaho Pub. Utils. Comm’n*, 112 Idaho 10, 12, 730 P.2d 920, 932 (1986) (holding Commission has jurisdiction to issue declaratory judgments under Idaho Code § 10-1203).

APPLICABLE LAWS AND REGULATIONS

9. Section 210 of PURPA requires Idaho Power to purchase power produced by QFs. 16 U.S.C. § 824a-3(a)(2).

10. The FESAs constitute a “legally enforceable obligation” under which Idaho Power must purchase electricity at the contractual rate. 18 CFR § 292.304(d)(2).

11. Idaho Code § 28-22-104 provides for the payment of interest at a rate of 12% on, among other things, money due by express contract and on money after it becomes due. *See In re Ryder*, 141 Idaho 918, 927, 120 P.2d 736, 745 (2005) (requiring Commission to award 12% interest under Idaho Code § 28-22-104 on money due).

FACTUAL BACKGROUND

THE FESAS AND MARKET ENERGY COST

12. Idaho Power entered into FESAs with the Projects in February, May, and October 2005.

13. The relevant provisions of the FESAs are identical. The FESAs are attached as Exhibits 1 through 8 to this Complaint and Petition.

14. Under the FESAs, “For all Surplus Energy, Idaho Power shall pay to the Seller the current month’s Market Energy Cost or the Net Energy Purchase Price specified in paragraph 7.1, whichever is lower.” FESAs ¶7.2.

15. “Market Energy Cost” is defined as “Eighty-five percent (85%) of the weighted average of the daily on-peak and off-peak Dow Jones Mid-Columbia Index (Dow Jones Mid-C Index) prices for non-firm energy. If the Dow Jones Mid-Columbia Index price is discontinued by the reporting agency, both Parties will mutually agree upon a replacement index, which is similar to the Dow Jones Mid-Columbia Index. The selected replacement index will be consistent with other similar agreements and a commonly used index by the electrical industry.”
Id. ¶1.12.

16. The Dow Jones Mid-C Index is currently published by Platts, a division of McGraw Hill Financial.

17. The Dow Jones Mid-C Index includes on-peak and off-peak prices for non-firm energy for each day of the year, including weekends and holidays.

18. According to the Dow Jones Mid-C Index, on-peak hours are the sixteen hours from 6:00 am to 10:00 pm, or two-thirds of each day. Off-peak hours are the eight hours from 10:00 pm to 6:00 am, or one-third of each day.

19. The current month’s Market Energy Cost is 85% of the average of the month’s daily on-peak and off-peak prices, as published in the Dow Jones Mid-C Index for non-firm energy, weighted by two-thirds for on-peak and one-third for off-peak.

IDAHO POWER FAILS TO USE MID-C INDEX DAILY PRICES

20. Idaho Power’s calculation of Market Energy Cost fails to consider the “daily on-peak and off-peak . . . prices for non-firm energy” published in the Dow Jones Mid-C Index but, rather, considers only a subset of those prices.

21. Specifically, Idaho Power’s calculation of Market Energy Cost considers only those on-peak and off-peak prices for which the Dow Jones Mid-C Index reports a volume.

22. Idaho Power's use of this subset of Dow Jones Mid-C Index prices violates the express agreement of the parties and the plain language of the FESAs to use the "daily" prices published in the Dow Jones Mid-C Index for non-firm energy.

23. By using a subset of data, Idaho Power distorts the price paid for Surplus Energy. For example, in August 2011, none of the on-peak daily prices and only one of the off-peak daily prices in the Dow Jones Mid-C Index for non-firm energy had a reported volume. Idaho Power calculated the Market Energy Cost for the entire month of August 2011 using this single off-peak price, disregarding the remaining sixty-one published on-peak and off-peak prices for the month.

24. It is possible there could be one or more months in which there are no reported volumes for any on-peak or off-peak daily prices in the Dow Jones Mid-C Index.

25. Under Idaho Power's calculation of Market Energy Cost, if there were no reported volumes in a given month, then there would be no data with which to determine the value of Surplus Energy for that month.

26. The Dow Jones Mid-C Index publishes a daily on-peak price and a daily off-peak price for non-firm energy, regardless of market liquidity.

27. The parties expressly agreed in the FESAs to use the Dow Jones Mid-C Index's daily prices to calculate Market Energy Cost.

IDAHO POWER FAILS TO WEIGHT DAILY ON-PEAK AND OFF-PEAK PRICES

28. The definition of Market Energy Cost in the FESAs does not include any reference to volume.

29. The definition of Market Energy Cost in the FESAs calls for the weighted average of the daily on-peak and off-peak Dow Jones Mid-C Index prices.

30. On-peak prices represent two-thirds of each day and off-peak prices represent one-third of each day.

31. Idaho Power's failure to calculate the weighted average of the daily on-peak and off-peak prices fails to account for the different proportion of each day the prices represent.

IDAHO POWER HAS UNDERPAID IWP FOR SURPLUS ENERGY

32. From January 2011 through September 2013, Idaho Power's failure to pay IWP the Market Energy Cost as defined in the FESAs resulted in underpayment for Surplus Energy in all but two months (May 2011 and September 2013). In May 2011 and September 2013, Idaho Power's calculation resulted in overpayment for Surplus Energy.

33. Idaho Power's failure to purchase Surplus Energy at Market Energy Cost in accordance with the FESAs has resulted in significant damages to IWP. For the period of January 2011 through September 2013, Idaho Power has underpaid IWP for Surplus Energy by \$852,116.

34. IWP has attempted to resolve this dispute through negotiations with Idaho Power over the course of many months. IWP has also pursued informal proceedings with Commission staff and Idaho Power.

35. IWP has incurred and is continuing to incur significant fees and costs as a result of the underpayment, efforts to resolve the dispute, and this proceeding.

LEGAL CLAIM

36. IWP incorporates by reference the allegations in the preceding paragraphs.

37. The FESAs are valid and enforceable contracts between Idaho Power and the IWP Projects.

38. The FESAs are subject to interpretation and enforcement by the Commission.

39. Idaho Power has breached the FESAs by failing to calculate Market Energy Cost and to pay Surplus Energy in accordance with ¶1.12 and ¶7.2 of the FESAs.

40. Idaho Power has underpaid IWP for Surplus Energy by \$852,116 for the period of January 2011 through September 2013. The amount of damages will continue to change until Idaho Power's miscalculation is corrected.

PRAYER FOR RELIEF

IWP respectfully requests the Commission to issue an order:

A. Declaring that Idaho Power has breached the FESAs by failing to calculate Market Energy Cost, and thus failing to pay IWP Surplus Energy, in accordance with ¶1.12 and ¶7.2;

B. Requiring Idaho Power to calculate Market Energy Cost and to pay IWP Surplus Energy in accordance with ¶1.12 and ¶7.2 of the FESAs;

C. Requiring Idaho Power to pay IWP the amount of underpayment of Market Energy Cost, as required by the FESAs, for Surplus Energy it previously purchased and as ongoing;

D. Requiring Idaho Power to pay IWP interest, pursuant to Idaho Code § 28-22-104, on the amount it has underpaid and continues to underpay for Surplus Energy;

E. Requiring Idaho Power to pay IWP reasonable attorney and expert fees and costs incurred as a result of the underpayment and this proceeding; and

F. Granting any other relief the Commission deems proper.

DATED this 25th day of October 2013.

GIVENS PURSLEY LLP

By: 
Deborah E. Nelson
Attorneys for Idaho Wind Partners I, LLC

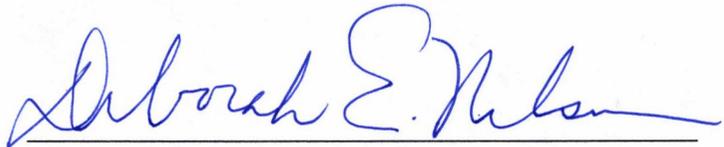
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have on this 25th day of October, 2013, served the foregoing DAHO WIND PARTNERS I, LLC'S COMPLAINT AND PETITION FOR DECLARATORY ORDER upon all parties of record in this proceeding, by delivering an original and seven copies upon:

Jean Jewell,
Commission Secretary
Idaho Public Utilities Commission
472 W. Washington
Boise, ID 83702

And by mailing a copy thereof, properly addressed with postage prepaid, to:

Donovon E. Walker
dwalker@idahopower.com
Idaho Power Company
1221 W. Idaho St.
P.O. Box 70
Boise, ID 83702



Deborah E. Nelson