

**BEFORE THE IDAHO PUBLIC UTILITIES COMMISSION**

**IN THE MATTER OF THE APPLICATION )**  
**OF IDAHO POWER COMPANY TO )** **CASE NO. IPC-E-14-15**  
**APPROVE OR REJECT ITS ENERGY SALES )**  
**AGREEMENT WITH CLARK CANYON )** **ORDER NO. 33904**  
**HYDRO, LLC. )**  
**)**

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In June 2014, Idaho Power Company asked the Commission to approve or reject its Energy Sales Agreement (hereafter “Agreement”) with Clark Canyon (hereafter “Clark”). The Agreement is governed by the Public Utility Regulatory Policies Act (PURPA). The Commission issued a Notice of Application and Notice of Modified Procedure, Order No. 33064, then suspended the procedural schedule, Order No. 33088, after Staff discovered discrepancies between the Agreement and Clark’s Federal Energy Regulatory Commission (FERC) license.

On March 31, 2017, Clark received a renewed FERC license. Clark and Idaho Power met with Staff in May 2017, and again in July 2017 after Clark retained counsel. The parties jointly asked the Commission to lift the suspension and adopt an agreed procedural schedule, which the Commission granted. Order No. 33810. Clark timely submitted comments to which Commission Staff and Idaho Power timely responded. Clark also filed a timely reply.

Having reviewed the record, the Commission now enters this Order rejecting the Agreement for failure to satisfy its agreed terms, as described below.

**BACKGROUND**

PURPA was passed as part of the National Energy Act of 1978 to encourage electric energy conservation, the efficient use of resources by electric utilities, and equitable retail rates for electric consumers. 16 U.S.C. § 2601 (Findings). Under PURPA, FERC prescribes “broad, generally applicable rules” for the Act’s implementation. *Portland General Electric Co. v. FERC*, 854 F.3d 692, (D.C. Cir. 2017); 16 U.S.C. § 824a-3(a), (b). The Act “requires state public-utility commissions to implement FERC’s rules at the local level.” *Portland General Electric*, 854 F.3d 692; 16 U.S.C. § 824a-3(f).

PURPA provides that electric utilities must purchase electric energy from “qualifying facilities” (QFs) at rates approved by this Commission. 16 U.S.C. § 824a-3; *Idaho Power Co. v. Idaho PUC*, 155 Idaho 780, 789, 316 P.3d 1278, 1287 (2013). Under PURPA, the purchase rate

for PURPA contracts shall not exceed the “incremental” or “avoided cost” to the utility, defined as the cost of energy which, but for the purchase from [the QF], such utility would generate or purchase from another source.” 16 U.S.C. § 824a-3(d); 18 C.F.R. § 292.101(6) (defining avoided costs).

### **APPLICATION AND CASE HISTORY**

Idaho Power and Clark signed the Agreement in May 2014. Application at 2. The Commission had previously approved an agreement between Idaho Power and Clark in 2011. *Id.* at 3, citing Order No. 32294. However, Clark’s owner at the time encountered “difficulties in development efforts,” and so in March 2014, Clark and Idaho Power entered a Memorandum of Understanding (MOU) to terminate the 2011 agreement and execute the Agreement at issue here. Clark Comments at 3; Osorio Affidavit at 3.

The Agreement contained “published rates for Seasonal Hydro projects of 10 average megawatts (“aMW”) or less . . . which were in effect prior to June 1, 2014, and prior to the published avoided cost rate update . . . effective on June 1, 2014.” Application at 2. In the Agreement, Clark “selected June 1, 2017, as the Scheduled Operation Date.” *Id.* at 6. Also, the Agreement provided that it “shall only become finally effective upon the Commission’s approval of all terms and provisions hereof without change or condition and declaration that all payments to be made to [Clark] hereunder shall be allowed as prudently incurred expenses for ratemaking purposes.” Agreement § 21.1.

On June 27, 2014, FERC Staff issued a Notice of Probable License Termination for Clark’s failure to commence construction by the August 25, 2013, date required in the FERC license. Clark Comments at 6-7. Per the parties’ agreement, Commission Staff moved to suspend the case in July 2014, to “allow the project an opportunity to correct the discrepancies” with Clark’s FERC license. Staff Motion to Suspend Procedural Schedule at 1. On August 5, 2014, the Commission granted the motion and suspended the schedule. Order No. 33088. On March 19, 2015, FERC terminated Clark’s license. Clark Comments at 9. On March 31, 2017 – about two months before the June 1, 2017 Scheduled Operation Date specified in the Agreement – FERC issued a new license to Clark. *Id.* at 12.

### **COMMENTS**

Clark’s comments, Staff’s and Idaho Power’s responses, and Clark’s reply are summarized by issue as follows.

### ***A. Clark's Requested Relief***

Clark asked the Commission to change the Agreement's Scheduled Operation Date from June 1, 2017 to December 31, 2019, and then approve the revised Agreement. Clark Comments at 1. Clark argued its proposed amendment to the agreed-upon Scheduled Operation Date is "consistent with the parties' past conduct and course of dealing" and their MOU. *Id.* at 15-16, 20-21. According to Clark, its proposal is supported by Idaho contract law, and to deny its proposal would cause Clark undue hardship.

### ***B. Contract Law Arguments***

Clark argued that its change to the Agreement's Scheduled Operation Date is warranted under the mistake of fact doctrine, which reshapes contractual duties to achieve a just result consistent with the parties' intent. Clark Comments at 21 (citing *Thieme v. Worst*, 113 Idaho 455 (Ct. App. 1987)). Clark contended the mistake of fact doctrine should be applied to correct "the parties' mistaken belief here that no regulatory delays were likely to preclude [Clark] from completing construction . . . ." Clark Comments at 23. Clark also contended the doctrine of impossibility or impracticability of performance should apply to permit amendment to the Scheduled Operation Date, because Clark's performance of that contractual term has been made impossible without Clark's fault. *Id.* at 24 (citing *Landis v. Hodgson*, 109 Idaho 252, 256-58 (Ct. App. 1985)). Clark argued that the circumstances surrounding FERC's revocation of Clark's license fit squarely within the impossibility doctrine. Clark Comments at 24-25 (citing *Landis*, 109 Idaho at 257).

Staff asserted the missed Scheduled Operation Date is not a mistake of fact that can be corrected, and Clark's "mistaken belief here that no regulatory delays were likely to preclude [it] from completing construction" was a risk taken in any PURPA contract. *Id.* at 4 (citation omitted). Staff also argued the impossibility doctrine does not apply because the Commission has not approved the Agreement, thus the contract has yet to be formed. *Id.* at 4-5. Staff therefore recommended that the Commission reject the Agreement.

Clark argued Staff misunderstood how the mistake of fact doctrine applies here. Reply at 7. Clark contended the mistake of fact is not the missed Scheduled Operation Date, but the assumption when the 2014 Agreement was executed "that there were no latent defects in the project's regulatory approvals by FERC." *Id.* Regarding the impossibility doctrine, Clark asserted Staff ignored that the doctrine applies after "government imposition of a new law,

regulation or order which makes the performance of a duty impractical.” *Id.* at 9 (quoting *Landis*, 109 Idaho at 257). Clark argued that FERC’s Notice of Probable Termination and later termination order fits squarely within the impossibility doctrine, thus Clark should be relieved of its duty to achieve the Scheduled Operation Date in its 2014 Agreement. *Id.*

Idaho Power noted this is “the third time that Idaho Power and [Clark] have had a fully signed [agreement] where [Clark] has failed to construct the project and failed to meet the Scheduled Operation Dates that it chose” in those agreements. Idaho Power Comments at 2. The Company asserted that Clark’s contractual arguments are “not dispositive of the Commission’s role, responsibility, and authority . . . to approve or reject” this signed Agreement. *Id.* The Company further asserted, because the Scheduled Operation Date has passed and “the project configuration is now different,” the Commission cannot approve all terms and provisions without “‘change or condition’ as is required before the [Agreement] becomes a fully effective contract.” *Id.* at 8.

### ***C. Undue Hardship***

According to Clark, if the Agreement is terminated and not corrected, “Idaho Power’s currently effective avoided cost rates for a new [Agreement] would not be economically viable for the Clark Canyon project.” Clark Comments at 29. Clark asserted that such a result “would work an unjust and undue hardship on Clark Canyon.” *Id.* at 2. Clark urged the Commission to ignore that avoided cost rates have decreased since Clark and Idaho Power signed the 2014 Agreement. *Id.* at 29-30. Clark cautioned, the Commission should not “assume that the delay of time or approval of the 2014 [Agreement] harms Idaho Power’s customers.” *Id.* at 30.

The Company contended there is a substantial difference between the avoided cost rates in the Agreement and those that would be available today, therefore it “cannot simply agree to extend the Scheduled Operation Date.” Idaho Power Comments at 8. Idaho Power calculated that the “net present value in total cost to customers over the 20-year contract is \$17,924,845 for the 2014 [Agreement], and \$11,337,522 for a 2017 [agreement] – a net present value difference of over \$6,587,000.” *Id.* Idaho Power stated it

has no ability to agree on its own to an extension of time in the 2014 [Agreement], where that would extend the application of higher prices to Idaho Power customers. That decision is only one that the Commission could make by finding it to be in the public interest—or not—to extend the dates in the 2014 [Agreement].

*Id.* at 10.

Staff asserted the Commission should not consider the hardship Clark would bear if the Agreement were rejected. Staff Comments at 5. Staff noted the Company's calculation that approving the Agreement with 2014 rather than current avoided cost rates would have a negative net present value customer impact of \$6.6 million. *Id.* Staff opposed as unreasonable, Clark's proposal to place this \$6.6 million burden on ratepayers. *Id.*

Clark challenged Idaho Power's calculation that the present value difference in avoided cost rates between the 2014 Agreement and today is \$6.6 million. Reply at 11-12. Clark noted that Idaho Power assigned no value to the RECs Idaho Power would receive under the 2014 Agreement, and that the Company failed to account for capacity payments to which Clark would be entitled under a replacement contract if the 2014 Agreement were terminated.<sup>1</sup> *Id.* at 12-15. Clark contended that the present value difference between using 2014 rather than current avoided cost rates is about \$700,000 rather \$6.6 million. *Id.* at 16 (citing Reading Affidavit, submitted with Clark's Reply).

### **COMMISSION FINDINGS AND DECISION**

The Commission has jurisdiction over this matter under *Idaho Code* §§ 61-502 and 61-503. The Commission has the express statutory authority to investigate rates, charges, rules, regulations, practices, and contracts of public utilities and to determine whether they are just, reasonable, preferential discriminatory, or in violation of any provision of law, and may fix the same by Order. *Idaho Code* §§ 61-502 and 61-503. In addition, the Commission has authority under PURPA and FERC's implementing regulations to set avoided costs, to order electric utilities to enter into fixed-term obligations for the purchase of energy from qualified facilities and to implement FERC rules. The Commission may enter any final Order consistent with its authority under Title 61 and PURPA. The Commission has reviewed the record, including the Application and comments.

This Application initially came to us in 2014 requesting approval or rejection of the Agreement. The Agreement contemplates that it will become effective upon our approval "without change or condition." Agreement § 21.1. Because the Agreement's Scheduled

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<sup>1</sup> Clark argues it is "entitled to the capacity payments from the start of its replacement contract," as its project should have been included in the Company's Integrated Resource Plan (IRP) analysis once the parties signed that 2014 contract. Reply at 13-14. Clark states that it was included "as a committed resource" but its output was not considered in the calculations of capacity deficiency dates, in the Company's 2015 and 2017 IRPs. *Id.* at 14 (citing Idaho Power discovery responses).

Operation Date has passed, Clark now asks us to approve the Agreement *with a change*—to the Scheduled Operation Date. The Company raises concerns with that approach, specifically objecting to the ratepayer impacts of approving the Agreement with its 2014 avoided cost rates, versus approving an Agreement with today’s avoided cost rates. The net present value of the ratepayer impacts could be as high as \$6.6 million.

We find it would not be just or reasonable to approve the Agreement with a provision we know is incorrect, as is the case with the Scheduled Operation Date that has passed. If we approved the Agreement with a lapsed Scheduled Operation Date, Clark would be immediately in breach. We further find it would not be just or reasonable to approve the Agreement and modify the Scheduled Operation Date. Our authority to modify agreements is limited—for example, we must find the modifications are either agreed to by the contracting parties or supported by the public interest. *See, e.g., Afton Energy, Inc. v. Idaho Power Co.*, 111 Idaho 925, 928 (1986); *Agricultural Products Corp. v. Utah Power & Light Co.*, 98 Idaho 23 (1976). Neither is true here.

The parties do not agree to Clark’s proposed change, nor does the public interest support it. Notably, Clark was responsible for maintaining a valid FERC license, a responsibility contemplated by the parties and provided for in the very terms of Clark’s Agreement with Idaho Power. Agreement § 3.3 (Clark recognizes that retaining a valid FERC license or exemption “is a material part” of the Agreement, and Clark’s “failure to maintain a valid FERC license or exemption will be a material breach” thereof). Clark’s failure to maintain a valid FERC license is no one’s fault but their own. Further, approving the Agreement with its 2014 avoided cost rates instead of current rates could have as much as a \$6.6 million impact on customers, which we find demonstrably contrary to the public interest. Accordingly, we find it appropriate, just, and reasonable to reject the Agreement.

## **ORDER**

IT IS HEREBY ORDERED that the Agreement that is the subject of the Application in this proceeding is rejected.

THIS IS A FINAL ORDER. Any person interested in this Order may petition for reconsideration within twenty-one (21) days of the service date of this Order with regard to any matter decided in this Order. Within seven (7) days after any person has petitioned for

reconsideration, any other person may cross-petition for reconsideration. *See Idaho Code § 61-626.*


DONE by Order of the Idaho Public Utilities Commission at Boise, Idaho this *13<sup>th</sup>* day of October 2017.

  
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PAUL KJELLANDER, PRESIDENT

  
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KRISTINE RAPER, COMMISSIONER

  
\_\_\_\_\_  
ERIC ANDERSON, COMMISSIONER

ATTEST:

  
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Diane M. Hanian  
Commission Secretary

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