Office of the Secretary
Service Date
December 13, 2016

BEFORE THE IDAHO PUBLIC UTILITIES COMMISSION

IN THE MATTER OF THE PETITION OF IDAHO POWER COMPANY FOR A DECLARATORY ORDER REGARDING PROPER AVOIDED COST PRICING FOR JACKPOT SOLAR	)))))	**CASE NO. IPC-E-16-21** **ORDER NO. 33667**

On September 26, 2016, Idaho Power Company filed a Petition asking the Commission to issue a Declaratory Order regarding proper avoided cost pricing for Jackpot Solar under the Public Utility Regulatory Policies Act of 1978 (PURPA). The Company seeks a declaratory ruling stating that the IRP-based avoided cost prices for negotiated (non-standard) PURPA contracts for Jackpot Solar, including the capacity component, are to be calculated and reset prior to each successive two-year contract term; and that Jackpot Solar is not entitled to lock-in an avoided cost rate beyond the two-year maximum contract term.

The Commission issued an Order providing Notice of the Application, Notice of Modified Procedure, and setting a comment schedule. Order No. 33619. Because the subject matter of this case presented a potential for generic ramifications, the Commission invited feedback from potentially-affected utilities. *Id.* Rocky Mountain Power timely provided such feedback. Commission Staff and Jackpot Solar timely filed comments. Jackpot Solar filed reply comments to Staff's comments and the Company timely filed reply comments.

BACKGROUND: PUBLIC UTILITY REGULATORY POLICIES ACT

PURPA was passed as part of the National Energy Act of 1978, to encourage electric energy conservation, ensure equitable retail rates, and to improve electric service reliability, among other goals. 16 U.S.C. § 2601 (Findings). Under the Act, the Federal Energy Regulatory Commission (FERC) prescribes rules for PURPA's implementation. 16 U.S.C. § 824a-3(a), (b). State regulatory authorities such as this Commission implement FERC rules, and have "discretion in determining the manner in which the rules will be implemented." *Idaho Power Company v. Idaho Pub. Util. Comm.*, 155 Idaho 780, 782, 316 P.3d 1278, 1280 (2013) (*citing F.E.R.C. v. Mississippi*, 456 U.S. 742, 751 (1982)).

PURPA requires electric utilities, unless otherwise exempted, to purchase electric energy from QFs. 16 U.S.C. § 824a-3; *see also* 18 C.F.R. §§ 292.101 (defining QFs), 292.303(a). The purchase rate for PURPA contracts – which must be approved by the state

commission – shall not exceed the "'incremental 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); *Idaho Power*, 155 Idaho at 789, 316 P.3d at 1287.

PURPA and FERC's implementing regulations are silent as to contract length; consequently, the issue is at the discretion of the state commissions. *See Afton Energy, Inc. v. Idaho Power*, 107 Idaho 781, 785-86, 693 P.2d 427, 431-32 (1984); *Idaho Power*, 155 Idaho at 782, 316 P.3d at 1280. In 2015, this Commission reduced the maximum term for PURPA contracts to two years for individually-negotiated contracts (those not subject to standard "published" rates). Order Nos. 33357, 33419. When it shortened the term, the Commission also determined that utilities should establish a capacity deficiency date[1] at the time the initial contract is signed. Order No. 33357 at 25-26; Order No. 33419 at 9, 21-23. As long as the QF continuously sells power to the utility, the QF would be entitled to payments for capacity, based on the capacity deficiency date established at the time of the initial contract. Order No. 33357 at 25-26; Order No. 33419 at 9, 21-23.

PETITION FOR DECLARATORY ORDER

Idaho Power stated it has been in negotiations with Jackpot Solar since August 2015 about Jackpot Solar's various requests, including QF contracts for four 20 MW projects at the same location, for 20 years each. Petition at 3-4. Idaho Power told Jackpot Solar it was not entitled to 20-year contracts nor to capacity rates locked-in upon its initial contract under Commission Order Nos. 33357 and 33419. *Id.* at 4-7. Jackpot Solar eventually acknowledged its contract terms were limited to two years, but insisted it was entitled to capacity rates "calculated at the time [Jackpot Solar] initially enter[s]" a contract with the Company. *Id.* at 5-6 (*quoting* Jackpot Solar letter). Idaho Power asserted Jackpot Solar "threaten[ed] legal action against Idaho Power." *Id.* at 7.

According to Idaho Power, the Company is capacity sufficient, for purposes of PURPA contracts, until July 2024. Idaho Power argued that Jackpot Solar's insistence that it is entitled to lock-in avoided cost capacity rates at the time of its initial two-year contract is

[1] The terms "capacity deficiency date" and "capacity deficit date" interchangeably describe the date when a utility's Integrated Resource Plan (IRP) forecast shows a need for additional resources to meet total system load. Utilities in Idaho file IRPs with the Commission every two years as a status report on the utility's ongoing, changing plans to adequately and reliably serve its customers' future energy needs.

contrary to Order Nos. 33357 and 33419. Because of their conflicting interpretations of those Orders, Idaho Power and Jackpot Solar have been unable to agree on PURPA contract terms for Jackpot Solar's QF projects. Idaho Power requested a Declaratory Order finding that under the facts here, the proper avoided cost rate for Jackpot Solar's projects is determined at the start of each two-year contract term rather than one rate locked-in upon its initial contract. Petition at 5.

COMMENTS

1. Rocky Mountain Power

PacifiCorp dba Rocky Mountain Power stated that the issues in this matter are fact-specific and "should not affect any party other than Idaho Power Company and Jackpot Solar." Rocky Mountain Comments at 2. According to Rocky Mountain, "[a]ny ruling in this case must preserve the current rule of law as it relates to the two-year term of power purchase agreements and the timing of when capacity rates are to be paid in avoided cost pricing under such agreements." *Id.* To the extent any issues here touch upon issues already determined in Order Nos. 33357 and 33419, Rocky Mountain asserted that an "attempt to change them would be barred as an improper collateral attack" under *Idaho Code* § 61-625, which provides that "[a]ll orders and decisions of the commission which have become final and conclusive shall not be attacked collaterally."

Rocky Mountain stated that, on the narrow issue of when an avoided cost capacity rate is calculated and paid, Order No. 33419 "is clear and unambiguous." *Id.* at 3. Rocky Mountain then quoted extensively from Order No. 33419, including the Commission's determination that

> [a] capacity rate ***calculated at the start of each specified term rather than upon a QF's initial contract, is a truer reflection of the utility's avoided cost for capacity***. The capacity adjustment mechanism thus ensures the QF receives the full avoided cost of the utility, consistent with FERC regulations.

Id. at 4, *quoting* Order No. 33419 at 23 (emphasis by Rocky Mountain Power).

2. *Jackpot Solar*

Jackpot Solar stated that, in Order Nos. 33357 and 33419, "the Commission established a process by which QFs may obtain certainty as to the utility's first deficit year and the capacity rate associated with that first deficit year" and that "Idaho Power now seeks to erode the critical foundation in those orders by restricting QFs to just the identity of the first deficit year without also identifying the capacity rate associated with that first deficit year." Jackpot

Solar Comments at 3-4. Jackpot Solar argued that Idaho Power's Petition in this case is a collateral attack on Order No. 33419 – a final Order – impermissible under *Idaho Code* § 61-625. *Id.* at 4. Idaho Power may not, Jackpot Solar contended, challenge a final agency decision for which no appeal was taken. *Id.* at 8 (*citing Perkins v. Perkins,* 119 Colo. 533, 537-538, 205 P.2d 785, 787 (Colo. 1949)(cited with approval by *V-1 Oil Co. v. County of Bannock*, 97 Idaho 807, 810, 554 P.2d 1304, 1307 (1976)).

Also, according to Jackpot Solar, Idaho Power's Petition does not meet the standard for when a state agency may issue a declaratory order. *Id.* at 5. Jackpot Solar argued, "a state agency is limited in its ability to issue a declaratory order to those situations where it is necessary to remove uncertainty as to rights, status, and legal relations." *Id.*, *citing Sweeney v. Amer. Nat'l Bank*, 62 Idaho 544, 115 P.2d 109 (1941). Jackpot Solar contended the Commission's Orders are clear and conclusive, and if the Commission were to "accept Idaho Power's invitation to modify the order, such modification would violate the minimum due process rights of all QFs and potential QFs who justifiably rely on the stability and integrity of the Commission's orders." *Id.* Jackpot Solar acknowledged that the Commission may clarify Orders, but it states that the Commission may not make substantive changes to fundamental rights through a "clarification," and that "such wholesale changes can only be made through full evidentiary hearings." *Id.* at 8.

3. Commission Staff

Staff agreed with Rocky Mountain that Order No. 33419 is clear and unambiguous that a capacity rate is calculated for each specified two-year term. Staff Comments at 4. Staff noted that in the Order, the Commission "directed utilities to establish a capacity deficiency date at the time when a QF's initial IRP-based contract is signed, to recognize that 'a QF continu[ously] provid[ing] energy to a utility through [such date] will be paid for its capacity contribution.'" *Id.* (quoting Order No. 33419 at 22). Further, "until a QF enters into a contract during which that capacity deficit date occurs, the avoided cost capacity rate is zero." *Id.* (quoting Order No. 33419 at 22).

In addition, Staff agreed with Rocky Mountain Power that, "to the extent Jackpot Solar intends to attack the language of Order Nos. 33357 or 33419, . . . such attack is barred by *Idaho Code* § 61-625, which precludes collateral attack on a Commission order that is final and conclusive." *Id.* Staff concluded that it "supports a declaratory order providing that Jackpot

Solar is not entitled to lock in an avoided cost capacity rate at the time of any initial contract with Idaho Power during which Idaho Power is capacity surplus." *Id.* at 4, 5.

4. Jackpot Solar's Reply to Staff

Jackpot Solar filed a reply asserting that it "has not initiated an 'attack on the language of Order Nos. 33357 or 33419,'" but is "actively defending and justifiably relying on the explicit findings in those orders." Jackpot Solar Reply at 2. Jackpot Solar further argued, "[t]o the extent that Staff also asserts that the plain language of those orders must be altered to support Idaho Power's attack . . . then Staff's attack must also fail" for the reasons described in Jackpot Solar's comments. *Id.*

5. Idaho Power's Reply

Idaho Power noted that the Commission directly addressed the argument now made by Jackpot Solar, in a "dedicated subsection" of Order No. 33419. Idaho Power Reply at 2. Idaho Power highlighted that Jackpot Solar's counsel here is the same attorney who represented Clearwater Paper Corporation and J.R. Simplot Company in raising the argument in a Petition for Reconsideration of Order No. 33357, which the Commission ultimately rejected in Order No. 33419. *Id.*

According to Idaho Power, it does not seek any change, modification, or interpretation of the Commission's Orders; rather, it seeks a declaratory ruling as to the proper avoided cost pricing applicable to Jackpot Solar's requests for QF contracts. *Id.* at 3. Idaho Power stated it provided two-year indicative pricing to Jackpot Solar, consistent with the Commission's Orders and the Company's Schedule 73, and that Jackpot Solar rejected it. *Id.* Idaho Power emphasized that Jackpot Solar has not addressed the Commission's direct findings on this issue. Idaho Power thus reiterated its request for a Declaratory Order.

COMMISSION FINDINGS AND DECISION

This Commission has jurisdiction over Idaho Power Company, an electric utility, pursuant to the authority and power granted it under Title 61 of the Idaho Code and PURPA. The Commission has authority under PURPA and FERC's implementing regulations to set avoided costs, order electric utilities to enter into fixed-term obligations for the purchase of energy from QFs, and implement FERC rules.

Also, the Commission has jurisdiction to issue declaratory orders under Title 61 of the Idaho Code and the Idaho Uniform Declaratory Judgments Act of 1933, *Idaho Code* §§ 10-

1201 *et seq.* *See Utah Power & Light v. Idaho Pub. Util. Comm'n*, 112 Idaho 10, 12, 730 P.2d 930, 932 (1986) (PUC had jurisdiction to determine which regulated electrical utility had the right to be the sole supplier of electricity to electric customer under the Uniform Declaratory Judgments Act). A declaratory judgment "must clarify and settle the legal relations at issue, and afford leave from uncertainty and controversy which gave rise to the proceeding." *Harris v. Cassia County*, 106 Idaho 513, 517, 681 P.2d 988 (1984) (*citing Sweeney v. Am. Nat'l Bk.*, 62 Idaho 544, 115 P.2d 109 (1941)). For a declaratory judgment to be rendered, there must be "an actual or justiciable controversy" that is "real and substantial," and "definite and concrete, touching the legal relations of parties having adverse legal interests." *Id.* at 516 (*quoting Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 240-41 (1937)).

1. The Commission has Jurisdiction to Issue a Declaratory Order in this Case

Under the applicable statutes and case precedent, and in light of the circumstances here, we have jurisdiction to issue a Declaratory Order. Idaho Power believes Jackpot Solar is not entitled to avoided cost capacity rates at the time of the initial contract for the future term in which Idaho Power becomes capacity deficient; Jackpot Solar believes it is so entitled. Both parties assert their respective contrary positions are clear. Jackpot Solar contends that, because its interpretation of Order Nos. 33357 and 33419 is clear, there is "no uncertainty as to the legal rights of the parties," thus a Declaratory Order is inappropriate. Jackpot Solar Comments at 5. We find no cogent connection between Jackpot Solar's argument and its conclusion, and therefore reject it.

Jackpot Solar's position fails to acknowledge that Jackpot Solar *has been unable to negotiate the necessary terms of a QF contract* because of the parties' conflicting interpretations of Order No. 33417. The fact that Idaho Power and Jackpot Solar both believe their opposing positions are clear is the very core of the parties' legal uncertainty – that is, their inability to determine the requisite terms governing their contractual relations. Also, the circumstances here support that, but for Idaho Power's and Jackpot Solar's conflicting interpretations of Order No. 33417, Jackpot Solar would have a real and concrete ability to enter a PURPA contract with Idaho Power. We thus have jurisdiction under *Idaho Code* §§ 10-1201 *et seq.* and related precedent, and find it appropriate to issue a Declaratory Order to resolve the uncertainty over the parties' legal rights.

2. ***Under Order Nos. 33357 and 33419, Jackpot Solar's avoided cost capacity rates are to be calculated at the start of each two-year term, based on the deficit date determined at the time of its initial contract.***

As agreed by all commenting parties in this matter, Order No. 33419 is clear and unambiguous. We find no need to amend, modify, or clarify it. In addition, we find that Idaho Power's Petition in this case is not an attack on that Order. As we stated in Order No. 33419 in **rejecting** the argument then-made by Jackpot Solar's current counsel (that QFs are entitled to forecasted capacity rates), "[w]e find the [QFs] misunderstand our Order and FERC regulations." Order No. 33419 at 22.

With this Order, and under the unambiguous language of Order No. 33419, we declare that Jackpot Solar is "entitled to receive avoided cost capacity rates for the specified term calculated at either the time of delivery or at the time [Jackpot Solar] enter[s] into [its] contract/obligation." *Id.* (emphasis original). Idaho Power is to "establish [Jackpot Solar's] capacity deficiency date when [the] QF's initial IRP-based contract is signed." *Id.*, *citing* Order No. 33357 at 25-26. "[U]ntil [Jackpot Solar] enters into a contract during which that capacity deficit date occurs, the avoided cost capacity rate is zero." *Id.* Jackpot Solar's first non-zero avoided cost capacity rate is to be calculated at the start of the two-year contract term during which the capacity deficiency date occurs.

ORDER

IT IS HEREBY ORDERED that Idaho Power's Petition for Declaratory Order is granted as set forth above.

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 13th day of December 2016.

PAUL KJELLANDER, PRESIDENT

KRISTINE RAPER, COMMISSIONER

ERIC ANDERSON, COMMISSIONER

ATTEST:

Jean D. Jewell
Commission Secretary