IN THE SUPREME COURT OF THE STATE OF IDAHO

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| IN THE MATTER OF THE APPLICATION OF IDAHO POWER COMPANY FOR AUTHORITY TO INCREASE ITS RATES AND CHARGES FOR ELECTRIC SERVICE TO CUSTOMERS IN THE STATE OF IDAHO BY INCLUSION OF THE TWIN FALLS PROJECT INVESTMENT AND THE ADDI­TIONAL SWAN FALLS PROJECT INVEST­MENT IN REVENUE REQUIREMENT.    ROSEBUD ENTERPRISES, INC.,  Appellant  vs.  IDAHO PUBLIC UTILITIES COMMISSION, and IDAHO POWER COMPANY,  Respondents. | )  )  )  )  )  )  )  )  )  )  )  )  )  )  )  )  )  )  )  )  )  ) | SUPREME COURT NO. 22670  RESPONDENT’S BRIEF OF THE IDAHO PUBLIC UTILITIES COMMISSION |

On Appeal from the Idaho Public Utilities Commission

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STATUTES

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STATEMENT OF THE CASE

A.Nature of the Case

This appeal has been taken by Rosebud from Commission Order Nos. 26236 and 26264 issued in Case No.  IPC-E-95-5 on November 14, 1995, and December 1, 1995, respectively (copies of these Orders have been attached hereto as Attachments 1 and 2, respectively, for the Court’s convenience).  The case below is  a continuation of Case No. IPC-E-91-4 (the 91-4 case) in which the Commission granted Idaho Power the assurance that, in the ordinary course of events, the Company’s investment in the upgrade of its Twin Falls hydroelectric project would be recognized in Idaho Power’s revenue requirement, i.e., in rates.  The Commission’s final orders in 91-4 are currently pending appeal before the Court in Docket No. 20910.  The amount of Idaho Power’s investment was not yet known at the time the Commission issued its final orders in 91-4.  The Commission ruled, therefore, that the actual amount of the investment would be reviewed upon completion of the project and the filing of a subsequent application by the Company for authority to increase its rates.

In the proceeding below, therefore, Idaho Power provided the Commission with the actual amount of its investment in Twin Falls and asked that its rates be increased to recover that investment. The Commission granted Idaho Power’s application, with modification, increasing the Company’s rates and charges for electric service in the state of Idaho by $3,759,695 to reflect the Company’s investment in Twin Falls as well as an incremental amount of investment in the Company’s Swan Falls hydroelectric facility.  Rosebud Enterprises, Inc. (Rosebud), has appealed only those portions of the Commission’s final Orders pertaining to the Twin Falls project.

B.  Course of Proceedings Below

The course of proceedings below, as taken from the agency record on appeal, is as follows:

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| Filing Date | Action | Description |

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| May 24, 1995  June 2, 1995  June 9, 1995  June 19, 1995  June 20, 1995  June 23, 1995  June 29, 1995  July 7, 1995  July 19, 1995  August 15, 1995  August 28, 1995  September 19, 1995  November 14, 1995  November 21, 1995 | Application  Notice of Application/ Notice of Prehearing Conference/Order No.  26045  Petition to Intervene  Motion to Dismiss  Response to Motion to Dismiss  Motion to Dismiss  Order No.  26056  Answer to Motion to Dismiss  Order No. 26091  Order No.  26119  Post-hearing Brief  Reply Brief  Order No.  26236  Petition for Reconsideration | Idaho Power filed its original Application.  Notice of Application and Prehearing Confer­ence.  Order suspending the proposed effective date of the Company’s requested rate increase.  Rosebud filed its Petition to Intervene.  Idaho Power moved to dismiss Rosebud’s Petition to Intervene.  Rosebud’s Response to Idaho Power’s Motion to Dismiss.  Rosebud’s Motion to Dismiss Idaho Power’s Application.  Order granting Rosebud’s Petition to Intervene and denying Idaho Power’s Motion to Dismiss Rosebud’s Petition.  Idaho Power’s Answer to Rosebud’s Motion to Dismiss Application.  Order denying Rosebud’s Motion to Dismiss Idaho Power’s Application.  Order granting Idaho Power an interim rate increase  subject to refund.  Rosebud submitted Post-hearing Brief.  Idaho Power submitted Reply Brief.  Order granting Idaho Power’s Application, with modifications, and increasing the Company’s revenue requirement.  Rosebud Petitioned for Reconsideration of Order No. 26236. |

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| November 28, 1995  December 1, 1995 | Answer to Petition for Reconsideration  Order No.  26264 | Idaho Power filed Answer to Rosebud’s Petition for Reconsideration.  Order denying Rosebud’s Petition for Recon­sider­a­tion and affirming Order No.  26236. |

C.  Statement of Facts

As noted, the case below is a continuation of  91-4, in which the Commission granted Idaho Power the assurance that in the ordinary course of events, the Company’s investment in the Twin Falls project would be included in rates.  Rosebud appealed the Commission’s final Orders in 91-4.  As of the date of this writing, that appeal is still pending before the Court in Docket No. 20910.

In the case below, the Commission reviewed the amount of Idaho Power’s investment in Twin Falls and, noting that no events occurred subsequent to the issuance of the Commission’s final Orders in 91-4 which somehow rendered Idaho Power’s investment in Twin Falls imprudent, the Commission increased the Company’s rates to reflect that investment.  Because Rosebud has used this docket as another opportunity to present many of the same arguments set forth in Docket No. 20910, however, a brief summation of the facts relevant to both appeals is warranted.

On March 25, 1991, Idaho Power filed an Application with the Commission in 91-4 seeking the assurance that the Company’s investment in the Twin Falls project would be included in rates.  Subsequent to the filing of its original Application, the Company submitted a firm cost estimate for Twin Falls which ranged from $42,366,000 to $50,839,000.  The Company agreed to limit the amount that it would seek to factor into rates to a maximum of $50,839,000, which it characterized as the “commitment  estimate.”

Rosebud is an independent power developer proposing to construct a 40 MW petroleum coke-fired generating plant near Mountain Home, Idaho and is a self-certified “qualifying facility” (QF) under the Public Utility Regulatory Policies Act of 1978, 16 USC § 824a-1 et seq. (PURPA).  At the time it was granted intervention in 91-4, Rosebud was also the complainant before the Commission in Case No. IPC-E-92-31 (the 92-31 case) in which it alleged that Idaho Power has failed to offer “avoided cost” rates for the Mountain Home project calculated according to the Commission approved methodology.  Rosebud appealed the Commission’s final Orders in 92-31.  That appeal is also currently pending before the Court in Docket No. 21754.

As the Court is, no doubt, aware by now, an electric utility’s “avoided cost” is a measure  of the price an electric utility may be required to pay QFs under PURPA for power purchased from those facilities.  It is the cost that the utility would have to pay to provide the power from the most economical new source if it did not make the purchase from the QF.  18 CFR Section 292.101(b)(6).  The Commission publishes avoided cost rates for Idaho Power.

On July 22, 1993, the Commission issued Order No. 25021 in 91-4 ruling that all issues pertaining to the rates, terms and conditions to which Rosebud’s Mountain Home project may be entitled were being addressed in 92-31 and were more appropriately resolved in that docket.  With respect to Twin Falls, the Commission found that the project, when compared to a comparable avoided cost rate, was economical.  Given that fact as well as the inherent value of Snake River hydropower, the Commission granted Idaho Power the assurance that, in the ordinary course of events, the Company’s investment in Twin Falls would be recovered through retail rates.

In 91-4, the Commission also noted that the ultimate decision determining the appropriate amount of the Twin Falls investment to include in revenue requirement would be made during the course of a general rate proceeding or a tracker proceeding initiated for that purpose.

Again, the Commission’s final Orders in 91-4 are  still pending review by the Court. Those Orders, however, were never stayed and Idaho Power commenced with the construction of the Twin Falls project in approximately August of 1993.  On May 24, 1995, Idaho Power filed its Application in the case below stating that its total investment in Twin Falls was $40,886,354 and that its additional investment in Swan Falls was $2,686,354, which would result in an increase to the Company’s revenue requirement of $6,309,116 or 1.48%. R. p. 22.

On August 14, 1995, the Commission conducted an evidentiary hearing in the case below.  At the conclusion of that hearing, the Commission issued a bench ruling granting Idaho Power’s request for an interim increase to the Company’s revenue requirement in the amount of $3,759,695, subject to refund pending a final determination in the matter.  The Company’s actual investment in Twin Falls was approximately $38 million or roughly $12 million less than the commitment estimate.  The Commission’s bench ruling was affirmed in Order No. 26119, issued on August 15, 1995, in which the Commission also granted Rosebud’s request to submit post-hearing briefing on the issue of whether any of Idaho Power’s investment in Twin Falls should be included in the Company’s revenue requirement. R. p. 175.

In its post-hearing brief, Rosebud argued that subsequent to the issuance of Order No. 25021 in July 1993 in 91-4, Idaho Power somehow became aware that its avoided costs had changed and that the Company failed to inform the Commission of this alleged fact. R. p. 178.  Because Idaho Power’s avoided costs had changed, Rosebud argues, the avoided cost rate Twin Falls was compared to in determining its economic viability was no longer valid.  Rosebud insinuates that had Twin Falls been compared to what Idaho Power knew was its actual avoided cost, the project would not have been considered cost effective. Id. at p. 179.

On November 14, 1995, following the submission of briefing, the Commission issued Order No. 26236 affirming Order No. 26119 and granting final approval of Idaho Power’s Application. R. p. 206.  The Commission noted that the Company’s actual investment in Twin Falls was considerably less than the commitment estimate.  The Commission concluded that because the Company constructed Twin Falls for less than the commitment estimate, there could be no basis for disallowing the recovery of the investment unless substantial, competent evidence was presented during the course of the proceeding which clearly showed that circumstances had changed subsequent to the issuance of Order No. 25021 that somehow rendered the project imprudent. Id. at p. 214.  The Commission found that no such evidence had been presented. Id. at p. 216.

With respect to Rosebud’s allegations that Idaho Power had knowledge that its avoided cost had changed subsequent to the issuance of Order No. 25021, the Commission generally concluded that it was the sole authority for setting Idaho Power’s avoided cost rates and that regardless of what the Company believed or declared its avoided cost to be, Idaho Power was entitled to rely upon the assurance granted by the Commission in Order No. 25021 and upon the avoided cost rates then in existence until changed by the Commission.  The Commission concluded:

We find that Rosebud has failed to present substantial, competent evidence that circumstances changed subsequent to the issuance of Order No. 25021 and prior to the start of construction on Twin Falls that rendered the project imprudent.  Regardless of what it believed its avoided costs to be at any point in time, Idaho Power justifiably relied on the assurance given by this Commission in 91-4 in commencing with the construction of Twin Falls.

R. at p. 216.

On November 21, 1995, Rosebud petitioned for reconsideration of Order No. 26236 arguing, essentially, that the Commission violated 16 USC Section 824a-3, a provision of PURPA, “by allowing IPC’s recovery of Twin Falls costs based on the avoided cost methodology set forth in IPUC Order No. 23576, while the IPUC has denied in IPUC Order No. 25706 Rosebud similar avoided costs based on the same methodology applicable to Twin Falls in IPUC Order No. 23576.”  R. at pp. 220-221.

Rosebud further argued that the Commission acted arbitrarily and capriciously by allowing Idaho Power rate recovery for its Twin Falls investment when there was no evidence presented in the record to support a finding that the upgrade was in the public convenience and necessity given Idaho Power’s forecasted period of prolonged surplus until the year 2006.  Rosebud also argued that the Commission acted unlawfully, arbitrarily and capriciously by allowing Idaho Power to benefit from manipulating and delaying the revision of avoided costs.

On December 1, 1995, the Commission issued Order No. 26264 denying Rosebud’s Petition for Reconsideration. R. p. 244.  The Commission ruled that “Rosebud has failed to offer any new evidence or arguments in support of its petition. . . .” R. at p. 245.  The Commission further ruled that Rosebud has consistently and continuously demonstrated a lack of understanding of the methodology by which utility construction projects are rate based.  Contrary to Rosebud’s assertions, the Commission held, Idaho Power was not allowed recovery of its Twin Falls costs based on the avoided cost methodology.  Rather, the revenue requirement for Twin Falls was calculated under the conventional “rate of return” methodology, i.e., the Company’s rates were increased to allow Idaho Power a return on its actual investment in Twin Falls plus an additional amount for operating expenses, including depreciation. Id. at p. 246.

The Commission observed that Rosebud has never challenged the validity of the rate of return methodology for rate basing utility-constructed plants or the actual amount of the investment Idaho Power made in Twin Falls.  Instead, Rosebud has continued to assert that the Company has somehow been paid avoided costs for the Twin Falls project while refusing to pay Rosebud comparable rates, terms and conditions for its Mountain Home project.  The Commission noted that the only relevance that avoided costs have to the rate basing of Twin Falls is the fact that the Commission has, in the past, chosen to use comparable avoided cost rates as one factor in assessing the overall viability of a utility proposed project. Id.

The Commission also noted that Rosebud failed to introduce new evidence in its Petition for Reconsideration which would establish that Twin Falls is not a cost-effective resource.  To the  contrary, the Commission noted, the original lower and construction estimate of $42,000,000 was only 65% of comparable avoided costs. The project was actually constructed for approximately $38 million and, therefore, was even more cost-effective than originally anticipated. R. at p. 247.

The Commission concluded by reiterating that it is vested with the sole authority for calculating Idaho Power’s avoided cost rates.  Regardless of what the Company believed or declared its avoided costs to be, the Commission ruled that the Company was entitled to rely upon the assurance given by the Commission in 91-4 and to commence construction of Twin Falls, unless and until the Commission revised the Company’s avoided cost rates. R. at p. 248.

Rosebud now appeals the Commission’s final Orders in Case No. IPC-E-95-5.

ARGUMENT

I.

STANDARD OF REVIEW

The standard of review on appeal from an Order of the Commission is well settled.  The Idaho Constitution Article 5, Section 9, provides that the Supreme Court shall have jurisdiction to review on appeal any Order of the Commission.  Idaho Code § 61-629 defines the scope of the Supreme Court’s review stating in part:

The review on appeal shall not be extended further than to determine whether the commission has regularly pursued its authority, including a determination of whether the order appealed from violates any right of the appellant under the constitution of the United States or of the state of Idaho.

See, Idaho State Homebuilders v. Washington Water Power, supra; Utah Power & Light v. Idaho Pub. Util. Comm’n, 102 Idaho 282, 629 P.2d 678 (1981).  Rosebud has not asserted that any of its constitutional rights have been violated.  Consequently, the question on appeal is whether the Commission “regularly pursued its authority.”

In a recent decision, the Idaho Supreme Court recognized the deference that must be given to decisions of the Commission.  In A.W. Brown v. Idaho Power Co., 121 Idaho 812, 828 P.2d 841 (1992), the Court ruled that review of Commission decisions as to questions of law is limited to a determination of whether the Commission has regularly pursued its authority and whether the constitutional rights of the Appellant have been violated. Id. at 815.  Regarding questions of fact, the Court ruled that “where the Commission’s findings are supported by substantial, competent evidence, this court must affirm those findings” and “is obligated to affirm its decision.” Id. at 815-816, 828 P.2d at 844-843 (quoting Empire Lumber v. Washington Water Power, 114 Idaho 191, 193, 755 P.2d 1229, 1231 (1988)).  See Application of Hayden Pines Water Co., 111 Idaho 331, 723 P.2d 875 (1986); Cambridge Telephone Company v. Pine Telephone System, Inc., 109 Idaho 875, 712 P.2d 576 (1985).

The Commission’s findings of fact are to be sustained unless it appears that the clear weight of the evidence is against its conclusion or that the evidence is strong and persuasive that the Commission abused its discretion. A.W. Brown, 121 Idaho at 816, 828 P.2d at 845.  The Court should not displace the Commission’s findings of fact when faced with conflicting evidence, even though the Court would justifiably have made a different choice had the matter been before it de novo.  Hayden Pines, 111 Idaho at 336, 723 P.2d at 879.  Thus, the Commission’s findings in this case are entitled to a presumption of correctness and the burden is on Rosebud to show that those findings are unsupported by the evidence.

II.

ROSEBUD IS ATTEMPTING TO LITIGATE IRRELEVANT ISSUES

This appeal is somewhat redundant to the extent that it involves the same subject matter and issues already pending before the Court in Docket Nos. 20910 or 21754.  The Commission agrees with Rosebud’s statement in its Appellant Brief filed in this case that should the Court rule in the Commission’s favor in Docket No. 20910, this Appeal is without merit.  Appellant’s Brief at p. 1.

Furthermore, Rosebud is, once again, attempting to litigate matters that are irrelevant.  There can be no doubt that Rosebud’s only objective in Docket Nos. 20910, 21754 or this appeal, is that it receives the rates, terms and conditions to which it believes it is entitled for its Mountain Home project.  That dispute, however, is the sole purpose of Docket No. 21754, currently pending before the Court.  It was unnecessary and inappropriate for Rosebud to attempt to litigate the issues pertaining to its Mountain Home project in Docket No. 20910. It is equally unnecessary and inappropriate to do so here.  It is ironic that Rosebud argues that Twin Falls should not be allowed into rates because Idaho Power knew that its avoided costs had decreased subsequent to the issuance of Order No. 25021 while, at the same time, Rosebud asserts that it is entitled to rates based on those same avoided costs, for its Mountain Home project in Docket No. 21754.

III.

THE COMMISSION’S DECISION TO ALLOW RATE RECOVERY OF IDAHO POWER’S TWIN FALLS INVESTMENT IS NOT IN ERROR REGARDLESS OF WHAT THE COMPANY BELIEVED OR DECLARED ITS AVOIDED COSTS TO BE

The various arguments made by Rosebud in this appeal are all, essentially, to the effect that subsequent to the issuance of Order No. 25021 in 91-4, the Company became aware that its avoided costs had changed and that Idaho Power failed to bring this knowledge to the attention of the Commission.  In support of its contention, Rosebud relies on three specific documents; a December 10, 1992 letter from Idaho Power to Rosebud regarding the Mountain Home project, rate schedules provided by Idaho Power to Rosebud on April 1, 1993, and the Company’s Integrated Resource Plan issued in March 1993.  Rosebud contends that all of these documents demonstrate that Idaho Power was aware that it had no need for new resources before the year 2000 and that its surrogate avoided resource (SAR) had changed from a coal-fired plant to some other resource or combination of resources.  By contrast, Rosebud argues, the Twin Falls project was compared to an avoided cost rate based on a first deficit year of 1994 and on the higher cost, coal-fired SAR.  Because Idaho Power’s avoided costs changed, Rosebud insinuates, Twin Falls could not be considered a prudent resource by comparison.

What Rosebud has failed to point out is the fact that the Commission alone is empowered to calculate and publish Idaho Power’s avoided costs for the state of Idaho.  Furthermore, the rates to which Twin Falls were compared were in existence until January 14, 1994 at which time the Commission suspended them pending a full review of avoided costs for all of Idaho’s major electric utilities.  It was not until January 31, 1995, 17 months after construction of Twin Falls commenced, that the Commission adopted a surrogate avoided resource and established new rates for Idaho Power in Order No. 25884, Case No. IPC-E-93-28.  Rosebud’s witness in the proceeding below,  Dr. Richard Slaughter, testified that he did not know how much construction had been completed on Twin Falls at the time the Commission issued Order No. 25884 revising Idaho Power’s avoided cost rates.  Tr. p. 99.

Incidentally, the Commission adopted a first deficit year for Idaho Power of 1998 in that case, contrary to what Idaho Power proposed in that proceeding as well as in its position paper.  Thus, regardless of what Idaho Power believes its avoided costs to be, including the components used to calculate avoided costs, the Commission makes its own determinations and assumptions which may or may not coincide with those of the Company.

The calculation of avoided costs has been characterized as being more art than science.  It is, admittedly, a process that involves a considerable number of subjective assumptions.  Moreover, it is a dynamic process that evolves with changes in technology and in the environment in which regulated electric utilities operate.  Because it is impractical to attempt to review and reestablish avoided cost rates on a daily basis, once rates are set they remain static until changed by the Commission.  In short, regardless of what Idaho Power may believe and declare its avoided costs to be at any given point in time, the Commission is the sole authority for determining and establishing those rates and the utility is entitled to rely upon them unless and until they are changed by the Commission.  The Court should note that Rosebud has failed to present any factual or legal authority to contradict this fundamental fact.

While the Commission did ultimately adopt a gas-fired, combined cycle combustion turbine as Idaho Power’s SAR, it could have chosen to continue with a coal-fired thermal plant.  Until the Commission made its final decision in the matter, however, Idaho Power was entitled to rely on the published rates in existence as well as the assurance provided by the Commission in 91-4.  This is precisely what the Company did and Rosebud’s contention that Idaho Power somehow misled the Commission regarding its avoided costs is utterly without merit. Incidentally, Rosebud is entitled to those same, historical avoided costs for its Mountain Home project in Docket No. 21754.

Finally, it is undisputed that the Twin Falls project, when compared to avoided cost rates existing at the time the Company filed its original application seeking ratemaking assurance, was  cost-effective.  As noted earlier, the estimated cost of Twin Falls compared at a fraction of Idaho Power’s comparable avoided cost rate. The actual cost was even lower. The Commission, not Idaho Power, ultimately reduced the Company’s avoided costs but not until well after construction on Twin Falls had commenced.

At the time that Idaho Power filed its original application seeking ratemaking assurance for Twin Falls, the Company was under obligation to purchase the output of Qfs at the avoided cost rates and methodology then in existence.  Idaho Power was justified in relying on those same rates and methodologies, therefore, in assessing its own projects, including Twin Falls.  To the extent that Rosebud believes that it was not offered rates, terms or conditions comparable to those to which Twin Falls was compared, then that matter is pending review before the Court in Docket No. 21754 and should not be litigated here.

CONCLUSION

Rosebud is, once again, attempting to litigate its claim to specific rates, terms and conditions for its Mountain Home QF project which is the subject matter of Docket No. 21754 and irrelevant to this proceeding.

The Commission did not err in allowing rate recovery for the Twin Falls project.  Regardless of what Idaho Power believed and declared its avoided costs to be when it sought rate making assurance for Twin Falls, the Commission is the sole body responsible for setting those rates and the Company was entitled to rely upon them in assessing the cost effectiveness of Twin Falls. It is undisputed that, when compared to the avoided cost rates in existence at the time Idaho Power filed its original application in 91-4, the Twin Falls project is cost-effective. The Commission’s final  Orders issued in the case below should be affirmed.

RESPECTFULLY SUBMITTED this              day of April 1996.

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