(text box: 1)BEFORE THE IDAHO PUBLIC UTILITIES COMMISSION

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| IN THE MATTER OF THE ENFORCEABILITY OF IPUC ORDER NOS.  25454, 25706, AND 25787 CONSISTENT WITH IDAHO SUPREME COURT OPINION NO. 61 DATED MAY 31, 1996. | )))))) | CASE NO. IPC-E-96-16ORDER NO.  26795 |

On August 20, 1996, Rosebud Enterprises, Inc.  (Rosebud) made a filing with the Idaho Public Utilities Commission (Commission; IPUC) seeking enforcement of IPUC Order Nos.  25454, 25706 and 25787 (Case No. IPC-E-92-31, Rosebud v. Idaho Power Company) consistent with Idaho Supreme Court Opinion No. 61 dated May 31, 1996, 128 Idaho 624, 917 P.2d 781 (1996).  Rosebud is the developer of a self-certified small power production qualifying facility (QF) under the Public Utility Regulatory Policies Act of 1978 (PURPA).  Rosebud proposes to develop a 40 megawatt (MW) electric generating facility near Mountain Home, Idaho.  Rosebud proposes to sell the electrical output of the facility to Idaho Power  Company (Idaho Power; Company) .  Rosebud desires a 20-year contract with an on-line date of January 1, 1999, at rates approved by the Commission in 1994 and affirmed by the Court in 1996.

On October 29, 1996, the Commission in Case No. IPC-E-96-16 issued final Order No. 26645 denying Rosebud’s request for an Order requiring Idaho Power to purchase energy and capacity from Rosebud’s Mountain Home facility at the avoided cost rates established and approved by the Commission in 1994 in Case No. IPC-E-92-31.  Reference Order Nos. 25454, 25706 and 25787.

Rosebud Petition for Reconsideration

On November 12, 1996, Rosebud filed a timely Petition for Reconsideration of Commission Order No. 26645, together with an accompanying Memorandum in Support.  Reference Idaho Code § 61-626; Commission Rules of Procedure, IDAPA 31.01.01.331.  Rosebud cites 16 purported assignments of erroneous, arbitrary, capricious, unlawful and/or unconstitutional Commission error, and a proposed procedural remedy. The issues raised by Rosebud on reconsideration were detailed in the Commission’s prior Order No. 26716 granting reconsideration are included herein by reference and need not be repeated.

In its Order granting reconsideration the Commission stated:

Rosebud has raised numerous issues in its Petition for Reconsideration, some of law, some of fact.  The Commission will address the perceived factual errors in its final Order on Reconsideration.  There are some identified issues, however, that we find merit further development of record and/or briefing for purpose of reconsidering our decision in Order No. 26645.

Specifically, we require additional briefing from Rosebud and Idaho Power regarding the statutory right to appeal and how it affects party rights and Commission Orders during pendency of appeal (Idaho Code § 61-635)—including notice obligation (if any), and effect of subsequent changes in utility avoided cost.

We also find it reasonable to require Idaho Power Company to file supporting documentation for its project-specific IRP avoided cost calculation for the Rosebud Mountain Home project (Reference IPCo Response Exhibit 6), which shall include the following information:

1.Plant data used for the calculations

a.general plant data

b.expected seasonal energy or minimum baseload energy by month for heavy and light load hours

c.guaranteed minimum capacity

d.maintenance schedule and any other operating constraints

2.IRP Avoided Cost Model Output by year (1999-2018) showing

a.total system energy cost for the base case plan with and without the QF

b.total system capacity cost for the base case plan with and without the QF

c.total capacity and energy difference between base case and QF case.

Pursuant to established scheduling, the following briefs and memorandums were filed with the Commission:

RosebudSupplemental Memorandum December 26, 1996

Responsive Brief January 17, 1997

Idaho PowerInitial Brief on ReconsiderationJanuary 3, 1996

including IRP avoided cost

calculation data

Memorandum and ResponseJanuary 16, 1997

Commission Findings

In reconsidering the reasonableness of our prior Order No. 26645, the Commission has reviewed and considered the initial and subsequent filings of Rosebud and Idaho Power in Case No. IPC-E-95-16 and the cited references.  We thank the parties for their additional briefing.  We have reviewed again and considered the underlying Commission orders and Idaho Supreme Court Opinion which form the basis for Rosebud’s filing, i.e., Commission Order Nos. 25454, 25706 and 25787 in Case No. IPC-E-92-31, and the Idaho Supreme Court’s Opinion in Rosebud Enterprises, Inc. v. Idaho Power Company, 128 Idaho 624, 917 P.2d 781 (1996).  We have also again reviewed and considered Sections 201 and 210 of the Public Utility Regulatory Policies Act of 1978 (as amended), the implementing rules, and regulations of the Federal Energy Regulatory Commission and the related implementing Orders of this Commission.

After reviewing our prior Orders and the filings of record, we make the following additional findings:

The Commission representation that Rosebud in Case No. IPC-E-92-31 was seeking rates to ascertain project viability is clearly supported in the Record.  There is no error of fact in that conclusion.

Support for the Commission’s representation is language in the first prehearing conference (February 3, 1993) as reflected in Tr. Vol. I, pp. 1, 2, 9-12, 20:

Mr. Orndorff  (Rosebud)

“I might just simply say we are looking for avoided cost rates . . . we have filed a complaint.  We are looking for the avoided costs to determine whether or not we can build a plant . . . if we can get the avoided costs, we can find out if we can get the fuel and the financing to see if a plant is feasible.  Without the avoided cost, its impossible to determine whether or not a qualified facility can build a plant.”  Tr. Vol. I, pp. 1, 2.

Mr. Woodbury (Staff)

“It appears in talking to Owen just prior to the hearing this morning that what he is asking from Idaho Power is no different than what he is asking PacifiCorp . . . in the PacifiCorp case, he was not asking for a lock-in of rate.  He was not asking for a contract.  What he was asking for was a working number so that he can determine the viability of the project. . . .”  Tr. Vol. I, pp. 9-10.

Mr. Orndorff

“Obviously, I’ll be a little upset if I’m told what the avoided costs are as a result of this proceeding and two weeks later the rates change.  I mean, that doesn’t solve my need.  I need to know what they are and then go out and do what I can to see if the project is feasible. . . .  I would hope the Company would come to its senses and be forth coming with rates so that we can have meaningful negotiations.”  Tr. Vol. I, pp. 11-12.

Mr. Orndorff

Its tough to negotiate in good faith when you don’t know what the rates are . . . Tr. Vol. I, p. 20.

In Order No. 25454 Case No. IPC-E-92-31 issued April 20, 1994 the Commission states the following

Rosebud seeks an avoided cost rate to ascertain project viability.  Order No. 25454 p. 1.

Active contract negotiation between the parties in this case has really advanced little further than a discussion of power purchase rates.  Tr. p. 567.  Simply put, Rosebud requested avoided cost rates calculated consistent with Commission approved methodology to ascertain project viability. . .  Order No. 25454 p. 3.

Rosebud contends that when the Commission in Order No. 25706 determined and ordered IPCo to “recalculate an offer of avoided cost rates to Rosebud for the proposed Mountain Home facility,” Rosebud was subject to a “legally enforceable obligation” to provide energy and capacity.  We conclude that Rosebud seeks to establish an “equivalent legally enforceable right to a contract” that does not exist.  A “legally enforceable obligation” is a term of art used by FERC at 18 C.F.R. § 292.304(d), wherein discussing QF rate options FERC states:

(d)  Purchases “as available” or pursuant to a legally enforceable obligation.  Each qualifying facility shall have the option either:

(1)  to provide energy as qualifying facility determines such energy to be available for such purchases, in which case the rates for such purchases shall be based on the purchasing utilities avoided cost calculated at the time of delivery; or

(2)   to provide energy or capacity pursuant to a legally enforceable obligation for the delivery of energy or capacity over a specified term, in which case the rates for such purchases shall, at the option of the qualifying facility exercise prior to the beginning of the specified term, be based on either:

(I)  the avoided cost calculated at the time of delivery; or

(ii)  the avoided cost calculated at the time the obligation is incurred.

Rosebud, however, as the record reflects has not entered into a “legally enforceable obligation” to sell its power.  It has incurred no binding obligation to provide capacity or energy to Idaho Power.  Rosebud is not entitled to a “lock-in” of an avoided cost rate until it has entered into a legally enforceable and Commission approved obligation for the delivery of energy and capacity.

Alternatively under established policy, a complaint could have been filed with the Commission demonstrating that “but for” the actions of Idaho Power, Rosebud was otherwise entitled to a firm energy sales contract.  (Idaho Code § 61-612).  Rosebud requested rates to assess its project viability.  The rates the Commission approved for contract negotiation were never accepted.  The Idaho Supreme Court in Afton v. Idaho Power recognized that “legally enforceable obligations” are the rights accruing to a QF and utility when a QF has obligated itself to deliver at a future date energy and capacity to an electric utility.  Afton Energy Inc. v. Idaho Power Co., 107 Idaho 781, 788, 693 P.2d 427, 434 (1984). The nonbinding “contract right” that Rosebud seeks to establish for itself is more akin to the “option” rejected by the Commission and the Idaho Supreme Court, in Empire Lumber Co. v. Washington Water Power, 114 Idaho 191, 194, 755 P.2d 1229, 1231 (1987) cert.denied; and A.W. Brown v. Idaho Power Co., 121 Idaho 812, 817, 828 P.2d 841 (1992).

We find Rosebud’s arguments in this case regarding collateral attack (Idaho Code § 61-625), notice and due process, and collateral and quasi-estoppel to be without merit.  Although both Idaho Power and Rosebud contend that the other was required to seek a stay of the Commission’s Orders to suspend (or maintain) the operation of a Commission Order pending appeal (reference Idaho Code §§ 61-633, -634), we question how in the context of PURPA and the Commission’s Orders in IPC-E-92-31 a stay would have been effected.  We find, however, that because neither party requested a stay, that the question is moot.

What we continue to find pivotal in this case is the absence of a legally enforceable obligation.  Rosebud has never committed to and the Commission did not in its Orders in Case No. IPC-E-92-31 recognize a legally enforceable obligation.  Reference 18 C.F.R. § 292.304(d).  We merely established a rate to be used by Rosebud to assess project viability, as requested.  Rosebud thereafter had a statutory right to file a complaint with the Commission alleging Idaho Power’s refusal to negotiate contract terms and conditions and did not do so.  We continue to find our prior Order No. 26645, including our findings in that Order, incorporated herein by reference, to be well supported both in fact and law.  Reviewing the IRP avoided cost calculation workpapers provided by Idaho Power, we remain certain that the rates we approved in 1994 in Case No. IPC-E-92-31 are no longer a fair, just and reasonable representation of the Company’s avoided costs.  Reference 18 C.F.R. § 292.304(a)(2); 18 C.F.R. § 292.304(a)(1)(i).  We therefore continue to find it reasonable to deny Rosebud its requested relief in Case No. IPC-E-96-16.

CONCLUSIONS OF LAW

The Idaho Public Utilities 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 the Public Utility Regulatory Policies Act of 1978 (PURPA).

The Idaho Public Utilities Commission has authority under the Public Utility Regulatory Policies Act of 1978 and the implementing regulations of the Federal Energy Regulatory Commission (FERC) to set avoided costs, to order electric utilities to enter fixed term obligations for the purchase of energy from qualified small power production facilities, and to implement FERC rules.

O R D E R

In consideration of the foregoing and as more particularly described above and in the Commission’s prior Order No. 26645, IT IS HEREBY ORDERED that Rosebud’s request for an Order requiring Idaho Power Company to purchase energy and capacity from its Mountain Home facility at rates approved by the Commission in Order Nos. 25454, 25706 and 25787 is denied.

THIS IS A FINAL ORDER ON RECONSIDERATION.  Any party aggrieved by this Order or other final or interlocutory Orders previously issued in this Case No.  IPC-E-96-16  may appeal to the Supreme Court of Idaho pursuant to the Public Utilities Law and the Idaho Appellate Rules.  See Idaho Code § 61-627.

DONE by Order of the Idaho Public Utilities Commission at Boise, Idaho this                  day of  February 1997.

                                                                                                                                       RALPH NELSON, PRESIDENT

                                                                                            MARSHA H. SMITH, COMMISSIONER

DENNIS S. HANSEN, COMMISSIONER

ATTEST:

Myrna J. Walters

Commission Secretary

vld/O:IPC-E-96-16.sw3

**COMMENTS AND ANNOTATIONS**

Text Box 1:

**TEXT BOXES**

Office of the Secretary

Service Date

February 14, 1997