DECISION MEMORANDUM

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WORKING FILE

FROM:SCOTT WOODBURY

DATE:NOVEMBER 27, 1996

RE:CASE NO. IPC-E-96-16

ROSEBUD’S MOTION

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  (Reference Supreme Court Docket No. 21754).  Rosebud is the  self-certified developer of a 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 (attached) 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.  Reference Order Nos. 25454, 25706 and 25787.

On November 12, 1996, Rosebud filed a timely Petition for Reconsideration of the Commission’s Order No. 26645 (attached), together with accompanying memorandum in support thereof.  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.  Specifically, Rosebud cites the following alleged errors:

1.Order No. 26645 mischaracterizes the record in Case No. IPC-E-92-31 in the following instances.

◆States “in Case No. IPC-E-92-31, Rosebud represented that it was seeking rates to ascertain project viability. . . .”

◆States “the case was not an application to compel a purchase. . . .”

◆States “rather than accept the rates approved by the Commission, Rosebud appealed the Commission’s Orders.”

◆States “in a companion, contemporaneous and related case (see Rosebud v. PacifiCorp dba Utah Power & Light, Case No. UPL-E-92-6; Idaho Supreme Court Docket No. 21964) the Commission stated [citation deleted].”

2.Failed to comply with 16 U.S.C. § 824a-3(a)(2), 18 C.F.R. §§ 292.303(a), 292.304(b)(5), and 292.304(d)(2) to require Idaho Power Company to purchase Rosebud’s energy and capacity pursuant to a legally enforceable obligation upon the Commission’s issuance of Order Nos. 25454, 25706 and 25787 and Idaho Supreme Court Opinion No. 61 becoming final.

3.As a result of Rosebud’s appeal, the Commission inconsistent with Idaho Code 61-635 and 18 C.F.R. § 292.304(b)(5) terminated Rosebud’s rights to require Idaho Power to purchase Rosebud’s energy and capacity, thereby denying Rosebud the right to a legally enforceable obligation under 18 C.F.R. § 292.304(d)(2) without due process of law or just compensation for taking Rosebud’s property rights.

4.Determined inconsistent with PURPA, 16 U.S.C. § 824a-3(e)(1), 18 C.F.R. § 292.303(a)(1), Idaho Law and Order No. 25454 that Rosebud incurred no legally enforceable obligation to provide capacity and energy to Idaho Power.

5.Refused to recognize that Rosebud obtained a legally enforceable obligation under PURPA and the Commission’s Orders in Case No. IPC-E-92-31.

6.Terminated Rosebud’s legal rights under the Commission’s Orders in Case No. IPC-E-92-31 unlawfully and without any basis in law because Idaho Power never offered Rosebud a contract consistent with 16 U.S.C. § 824a-3(a) and 18 C.F.R. § 292.304(d)(2).

7.Failed to require Idaho Power to offer to purchase capacity and energy pursuant to a contract requiring the specific terms and conditions set forth in Order Nos. 25706 and 25787.

8.Determined that Rosebud’s avoided costs were at issue in IPC-E-93-28 and terminated Rosebud’s preexisting rights to a legally enforceable obligation.

9.Determined that Rosebud’s avoided costs were at issue in IPC-E-95-9 after specifically denying Rosebud’s right to testify and submit evidence in said case as to whether its avoided cost rates were at issue.

10.Determined that “there are three parties to any PURPA power purchase agreement, i.e., the QF, the purchasing utility and the ratepayer.”

11.Determined that the cost of any QF contract for energy and capacity is passed onto ratepayers thereby ignoring Idaho Power’s shareholder liability for wrongful acts as determined by Idaho Power’s refusal to comply with PURPA and Commission Orders in Case No. IPC-E-92-31.

12.Determined that a lock-in of rates and legally enforceable obligation does not occur until the Commission approves a contract, even though Idaho Power never to date has offered a contract to Rosebud consistent with Commission Orders in Case No. IPC-E-92-31.

13.Engaged in preempted and prohibited regulation of the QF (16 U.S.C. § 824a-3(e) in determining that avoided costs approved for Rosebud in Order No. 25706 became “unreasonable rates” and not in the public interest as of October 28,1996.

14.Determined contrary to 18 C.F.R. § 292.304(b)(5) that subsequent PURPA avoided rate changes in Order Nos. 25884 and 26576 impacted Rosebud’s rights to rates established in Case No. IPC-E-92-31.

15.Determined that the risk of rates changing over time must be with Rosebud, not the utility or its customers—(Rosebud asserts that pursuant to the Commission’s Orders in Case No. IPC-E-92-31, it obtained a legally enforceable obligation under PURPA.)

16.Determined without any evidence in the record that Rosebud’s rates were no longer in the public interest or in the interest of Idaho Power’s ratepayers.

By way of affirmative relief and because of the alleged unlawful conduct by Idaho Power and the errors of the Commission, Rosebud contends that it is entitled to the following:

Rosebud should be permitted to adjust the project’s location within the vicinity of Mountain Home, the project’s fuel source, the project’s on-line date and corresponding rates to recognize a full 20-year contract term starting with a later commercial operating date while otherwise enforcing Commission Orders requiring Idaho Power to purchase Rosebud’s predetermined amounts of capacity and energy.

Rosebud Memorandum—Petition for Reconsideration

In support of its Petition for Reconsideration, Rosebud has provided the Commission with a memorandum which can be summarized as follows:

Re: Factual errors

Regarding the Commission’s representation that Rosebud in Case No. IPC-E-92-31 was seeking rates to ascertain project viability, Rosebud states that in fact it filed its Complaint seeking to compel Idaho Power to purchase energy and capacity.  Rosebud thereafter, it states, agreed to Commission demands and prehearing conferences that the parties negotiate to determine rates.  Rosebud also cites the significance of its contract offer to provide capacity and energy at essentially Meridian Energy/IPCo rates, terms and conditions.

Regarding the Commission’s statement that Case No. IPC-E-92-31 was not an Application to compel a purchase, Rosebud notes that the Commission in Order No. 25706 required Idaho Power to offer to purchase Rosebud’s energy and capacity at rates determined by the Commission.

Regarding the Commission’s statement that Rosebud never accepted the rates approved by the Commission, Rosebud contends that it never rejected a contract containing the rates—that indeed, Idaho Power never offered a contract.  Rosebud states that the Commission’s Order No. 25706 and Idaho Code 61-627 grant Rosebud a legal right to appeal which does not, by operation of law, void the legal effect of Commission Orders pending the appeal’s resolution.

Regarding the Commission’s statement that there are three parties to any PURPA power purchase agreement including the QF, utility and ratepayers, Rosebud contends that there is no basis in law for such a statement.  To the extent the Commission seeks to create its own scheme of regulating QFs, Rosebud contends that the Commission is preempted.  Citing 16 U.S.C. § 824a-3(e); 18 C.F.R. § 292.303(a)(1).

Regarding the Commission’s reference to Rosebud Case No. UPL-E-92-6 (Montpelier) as being a companion, contemporaneous and related case, Rosebud contends that there is no basis in fact or law for such a statement, and that the individual facts and calculation of avoided costs for the Montpelier and Mountain Home projects are unique.

Legally Enforceable Obligation

At the heart of Commission Order No. 26445, Rosebud contends, is the presumption that Rosebud never acquired a “legally enforceable obligation.”  Reference 18 C.F.R. § 292.304(d)(2).  The Commission believes, Rosebud contends, that a legally enforceable obligation is only created when and if the Commission in its sole discretion chooses to approve a contract voluntarily provided by a utility to a QF.

Contrary to the Commission’s findings, Rosebud contends that when the Commission determined and ordered Idaho Power to offer such avoided costs (Order No. 25706, p. 5: “ordered to recalculate and offer avoided cost rates”), Rosebud obtained a “legally enforceable obligation” to provide energy and capacity.  The Commission, Rosebud contends, is preempted thereafter from changing such rates as market rates increase or decrease.  Citing 18 C.F.R. § 292.304(b)(5).

If Idaho Power chooses to refuse to sign or even offer a contract, Rosebud contends, that it is then entitled under 18 C.F.R. 292.304(d)(2) to a court determination that Idaho Power is required to accept energy/capacity pursuant to the legally enforceable obligation established in Order Nos. 25454, 25706, 25787 and affirmed by the Court.

Rosebud notes that the Commission’s Orders in Case No. IPC-E-92-31 failed to state that an appeal by Rosebud terminates its right to a legally enforceable obligation.

Rosebud contends that the Commission’s attempt to regulate PURPA QF rates through the “contract approval process” is inconsistent with congressional mandated preemption.  Citing 16 U.S.C. 824a-3(e); 18 C.F.R. § 292.304(b)(5); (d)(2).  Rosebud contends that it obtained an equivalent obligation to a contract which the Commission is preempted from subjecting to “reasonable rate regulation” criteria.  Citing Idaho Supreme Court’s 1996 Idaho Power v. Cogeneration Opinion.

Rosebud contends that it has an equivalent legally enforceable right to a contract which Idaho Power refuses to offer.  Rosebud’s legally enforceable right, it states, was created by PURPA (18 C.F.R. § 292.304(d)(2)), which anticipated that monopolistic utilities would seek to shirk their duty under 18 C.F.R. § 292.303(a) to purchase QF energy/capacity.  Citing Armco, 579 Atl.2d 1337 (PA, 1990)—. . . where a QF has done everything within its power to create such an obligation either by tendering a contract to the utility or by petitioning the PUC to approve a contract or to compel a purchase.  At 1347.

Rosebud contends that its rights to the benefits of a “legally enforceable obligation” under 18 C.F.R. § 292.304(d)(2) and Idaho Power’s obligations under PURPA are separate from whether the Commission approves Rosebud’s contract for Idaho Power ratemaking purposes.

Rosebud contends that the Commission’s interpretation of “legally enforceable obligation” is erroneous and must be reconsidered to avoid the conclusion that the Commission has unilaterally elected to repeal PURPA’s requirement that utilities must purchase.

Neither Rosebud nor any QF, it contends, can be “ready, willing and able” to enter into an enforceable obligation as required by the standard established in Empire/WWP, when Idaho Power refuses during the negotiation process to offer to purchase.  CitingMetropolitan Ed, 72 FERC ¶ 61, 015— Re: 18 C.F.R. § 292.304(d) “Legally Enforceable Obligation.”

Rosebud contends that when the Commission “grandfathered” Rosebud’s rights in Order Nos. 25454 and 25706, the Commission created a legally enforceable obligation equivalent to a legally enforceable right, separate and apart but equal to a formal contract.  Rosebud’s legal right became perfected, it contends, when Idaho Power refused to offer any avoided costs in the form of a contract following the issuance of Order No. 25706.  Rosebud cites West Penn Power case, FERC May 8, 1995, wherein the FERC recognizes that it is a state utility commission’s duty and authority under PURPA to determine when a legally enforceable obligation has been incurred.—I.e., “it is up to the  states, not this Commission, to determine the specific parameters of individual QF power purchase agreements, including the date at which a legally enforceable obligation is incurred under state law.”

Rosebud contends that there is absolutely no requirement under PURPA that a QF have a signed contract before a QF has rights under 18 C.F.R. § 292.304(d)(2).  A utility cannot, merely by refusing to enter into a contract deprive a QF of its right to commit to sell power in the future at prices which are determined at the time the QF makes its decision to provide power.  Citing Snow Mountain, 734 P.2d 1366, 1371 (Ore.  1987).

Rosebud contends that the Commission created a legal right in Order No. 25706 and that the Commission has no right to change the rates because of changed circumstances.

Right of Appeal

Rosebud contends that the Commission arbitrarily concludes that Rosebud accepted the risk that rates would change by choosing to appeal the Commission’s Orders.  The Commission’s Order No. 26645, Rosebud contends, renders the right to appeal meaningless.  The Commission’s final Orders, Rosebud contends, are subject to review under Idaho Code 61-629, but such Orders are final Orders, which thereafter, cannot be subject to the Commission later opting to ignore them—to allow otherwise, Rosebud contends, is to allow the Commission to retroactively “take” rights which it has previously established in final form.  Such conduct, Rosebud contends, is clearly unconstitutional.

If the Commission’s final Orders were not appealable and no review was possible without Rosebud losing the benefit of the rate determination, then Rosebud contends that it was incumbent on the Commission to so state in its final Orders.  Failing such a statement, Rosebud states that it was, at a minimum, entitled to a reasonable expectation that the rates remained in effect during the pendency of appeal, barring an Order staying Idaho Power’s obligation to offer to purchase under 18 C.F.R. § 292.303(a) consistent with Idaho Code 61-633.

Idaho Power Refusal to Offer Rosebud a Contract

Rosebud contends that since the issuance of Order No. 25706 Idaho Power has never offered Rosebud a contract setting forth rates, terms and conditions.  Rosebud therefore it states, has never rejected the rates, terms and conditions in Order Nos. 25454, 25706 and 25787 and has consistently requested a contract.  Reference Memorandum Exhibit E (letters attached).

Re: Case No. IPC-E-93-28

Regarding the Commission’s noting that Rosebud participated in Case No. IPC-E-93-28, Rosebud notes that by express Commission language in that case, Rosebud was barred from presenting any evidence regarding applicable rates for the Rosebud project.  Citing Commission Order No. 25361 dated January 15, 1994, wherein the Commission states, that the rate eligibility of QFs involved in project specific PURPA complaint actions will be determined in those individual cases.

Re: Case No. IPC-E-95-9 (QFS > 1 MW)

Rosebud contends that IPC-E-95-9 was merely a continuation of IPC-E-93-28.  While barring Rosebud’s testimony on project specific rates in the 95-9 case, the Commission, Rosebud contends, cannot, consistent with the due process and any sense of “fair play” rely on a proceeding in which Rosebud was barred from presenting evidence concerning whether Rosebud’s rates were applicable.  Given Order No. 25361, Rosebud contends, that the Commission was estopped from now alleging that the rates in Order No. 25882 (Case No. IPC-E-93-28, January 31, 1995) and Order No. 26576 (Case No. IPC-E-95-9, Sept.  04, 1996) are any authority which the Commission can rely upon without being arbitrary, capricious and unreasonable.

Idaho Power Company Shareholder Liability

Rosebud contends that there is nothing “routine” about Idaho Power’s conduct in this case.  There is no factual or legal basis, Rosebud contends, to conclude that the ratepayers must bear the burden for Idaho Power’s unlawful conduct if Rosebud is determined to be entitled to the IPC-E-92-31 rates.

Public Interest Findings

Rosebud contends that the Commission’s finding that the IPC-E-92-31 rates are “not in the public interest” is unsupported by the record, and even if the record were presented, is inconsistent with 16 U.S.C. § 824a-3(e) and 18 C.F.R. § 292.304(b)(5).

Commission Decision

How does the Commission wish to process Rosebud’s Application for Reconsideration?

Does the Commission desire further development of record and/or briefing from the parties?

•  Regarding the statutory right to appeal (I.C. § 61-635) and how it affects party rights and Commission orders during the pendency of an appeal – including notice obligation (if any).

•  Regarding “legally enforceable obligation”

•  Regarding effect of subsequent changes in utility avoided cost

•  Regarding “takings”

•  Regarding public interest

•  Regarding IPCo alleged “refusal” to offer Rosebud a contract

Does the Commission desire a project specific IRP calculation by IPCo for the Rosebud Mtn. Home project?

Does the Commission desire to clarify any of its prior Orders?

•  Regarding requirement that IPCo recalculate and offer avoided cost rates to Rosebud

•   Regarding Idaho Power’s obligations following Commission Orders in Case No. IPC-E-92-31

•  Regarding legally enforceable obligation

•  Regarding “ready, willing and able” standard

•  Regarding contract/complaint requirement for “lock-in”

•  Regarding Rosebud participation in Case Nos. IPC-E-93-28; IPC-E-95-9

Scott Woodbury

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