DECISION MEMORANDUM

TO:   COMMISSIONER NELSON

COMMISSIONER SMITH

COMMISSIONER HANSEN

MYRNA WALTERS

FROM:  SCOTT WOODBURY

DATE:FEBRUARY 11, 1997

RE:CASE NO. IPC-E-96-16 ROSEBUD/IDAHO POWER

RECONSIDERATION

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 128 Id 624, 917 P.2d 781 (Idaho 1996)).  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 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.

Rosebud Petition for Reconsideration

On November 12, 1996, Rosebud filed a timely Petition for Reconsideration of the Commission’s Order No. 26645, 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, 128 Id 609, 917 P.2d 766 (Idaho 1996)) 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.  CitingIdaho Power v. Cogeneration, Inc., \_\_\_\_ Id \_\_\_\_, 921 P.2d 746 (Idaho 1996).

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 Advanced Materials v. Pennsylvania P.U.C., 579 Atl.2d 1337 (Pa.Cmwlth., 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 (July 6, 1995)— 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, 71 FERC ¶ 61, 153 (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 Pine Co. v. Maudlin, 734 P.2d 1366, 1371 (Ore. App. 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.

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

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 Grants Reconsideration

The Commission granted reconsideration in Order No. 26716 issued December 6, 1996.  Reference Idaho Code § 61-626; Commission Rules of Procedure IDAPA 31.01.01.331-333.  In its Order granting reconsideration the Commission stated as follows:

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 (attached)

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

The Commission in its Order granting reconsideration reserved to itself the right to address perceived factual errors in its final Order on Reconsideration. The following is tendered for Commission consideration

Re:  The Commission representation that Rosebud in Case No. IPC-E-92-31 was seeking rates to ascertain project viability.

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:

Owen 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.

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.

Owen 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.

Owen 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.

Re:  Commission language, Order No. 25706 September 16, 1994

The Commission states its Order . . . “IPCo is further ordered to recalculate and offer avoided cost rates to Rosebud for the proposed Mountain Home facility in accordance with the method and adjustments approved above.”  Order No. 25706 p. 5.  (emphasis added)  Rosebud interprets this language as a direction to Idaho Power to provide Rosebud with a contract containing rates, terms and conditions.  Under its interpretation because Idaho Power had the onus of providing Rosebud with a contract, the Company was required to seek a stay of this obligation.

On this point it should be noted that the Commission in its findings specifically recognized and envisioned that the parties would engage in future contract negotiation.

e.g., As the Company points out in its filing, project reliability is normally addressed in contract security provisions.  Rather than a specific adjustment to the rates the Company proposes, we agree that reliability is more appropriately addressed by negotiated contract terms than a specific numeric adjustment to the rate. . . .  Order No. 25706 p. 4.

Re:  Commission statement that 92-31 was not an application to compel a purchase

Rosebud overlooks the language in Order No. 25454 regarding active contract negotiation and the Commission language regarding Rosebud merely seeking rates to ascertain project viability.

Re:  Commission statement that “there are three parties to any PURPA power purchase agreement, i.e., the QF, the purchasing utility and the ratepayers.

Rosebud quotes out of context.  Additionally, the Commission clarifies its statement as follows:  the first parties are contract signatories.  The interest of the third party, the ratepayer, however, must also be considered in any regulatory contract approval process.  When a utility is compelled to purchase to QF energy and capacity (18 C.F.R. § 292.303(a), that cost is routinely fast on dollar to dollar to ratepayers.

Also of significance — Reference FERC requirement 18 C.F.R. § 292.304(a)(1)(i) that rates for purchases shall be just a reasonable to the electric consumer of the electric utility and in the public interest.

The Commission in speaking of the interest of the ratepayer, is not seeking to establish its own scheme of regulating QFs, and certainly is not seeking to change the referenced utility’s obligation to purchase, 292.303(a).

In this regard however, Rosebud contends that the $243,000,000 additional cost figure is not the sum that ratepayers should pay, but is the exposure of utility shareholders for utility intransigence.

Re:  the Commission’s reference to Rosebud Case No. UPL-E-92-6 (Montpelier) as being a companion, contemporaneous and related case.

Support for this statement is in the first prehearing conference, Tr. Vol. I, p. 1, where Mr. Orndorff addressing the Commission states “I think this case has a similarity with the one we heard here a couple of weeks ago (i.e., UPL-E-92-6).”

Staff in the prehearing conference states that it appears in talking to Owen just prior to the hearing that what he is asking from Idaho Power is no different that what he is asking PacifiCorp. . . .  Tr. Vol. I, p. 9.

The Commission by way of clarification might state that it does not dispute that the individual facts and a calculation of avoided cost for the Montpelier and Mountain Home projects are unique.

Re:  legally enforceable obligation

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” that Rosebud obtained a “legally enforceable obligation” to provide energy and capacity.

Rosebud’s argument in this case is quite similar to its appellate argument in Case No. UPL-E-92-6 wherein it argued that it had obtained a “legally enforceable right to sell”, a term which Rosebud itself coined.  By joining the term “legally enforceable obligation” (18 C.F.R. § 292.304(d)) with its right “to provide energy and capacity” (18 C.F.R. § 292.303(a) utility obligation to purchase), in this case Rosebud by invention seeks to establish an “equivalent legally enforceable right to a contract” which 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.  It is therefor not entitled to a “lock-in” of rates.  Rosebud requested rates to assess its project viability.  The rates the Commission approved for contract negotiation were never accepted.  The nonbinding “contract right” that Rosebud seeks to protect for itself is more kin to the “option” rejected by the Commission and the Idaho Supreme Court, in Empire Lumber Co. v. Washington Water Power, 114 Idaho 191, 755 P.2d 1229 (1987) cert.denied.  Additionally, 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.

Idaho Power contends that Idaho law prohibits Rosebud from receiving an “option” to reserve a rate during an appeal.  The legally enforceable obligation Rosebud seeks in this case Idaho Power contends is identical to an option.  QF developers desire such options, the Company states, because they obligate the utility and its customers to buy at a fixed avoided cost rate, while placing no reciprocal obligation on the developer to actually perform.  Citing A.W. Brown v. Idaho Power, 121 Idaho 812, 828 P.2d 841 (1992); and Empire Lumber.  The Supreme Court, Idaho Power contends, affirmed Commission determinations that it is not in the public interest to allow QF developers to acquire “options” to develop QF projects.  Idaho Power cites the Supreme Court language in Rosebud v. PacifiCorp, 128 Idaho 600, 91 P.2d 766 wherein the Court found

Rosebud is not entitled to a lock-in of an avoided cost rate until it has entered into a legally enforceable and IPUC approved obligation for the delivery of energy and capacity.  The IPUC finding in Order No. 25870 that Rosebud is entitled to “grandfathered treatment” for negotiation purposes is not equivalent to a finding that Rosebud is entitled to PacifiCorp’s published avoided cost rates for qualifying facility of 10 megawatts or less. . .the nonbinding “contract right” that Rosebud seeks is akin to the “option” to sell power at a fixed avoided cost rate that was rejected in Empire Lumber Company v. Washington Water Power Company, 114 Idaho at 192, 744 P.2d at 1230.

Re:  IPCo Refusal to Offer Rosebud a Contract

The Commission states that prior to this docket Rosebud never filed a complaint with the Commission requesting the Commission established rates and asserting that Idaho Power was refusing to engage in negotiation of contract terms and conditions for the Mountain Home project, or that Idaho Power was refusing to otherwise offer a contract.  Rosebud states that it has never rejected the rates, terms and conditions in Order Nos. 25454, 25706 and 25787 and has consistently requested a definitive contract setting forth rates, terms and conditions (see Exhibits E and F to Rosebud’s Memorandum in Support of its Petition for Reconsideration).

Regarding PURPA and the utility obligation to purchase, it is to be noted that the Commission is the enforcement arm of FERC and the appropriate forum to hear complaints alleging utility refusal to purchase.  The Commission in Case No. IPC-E-92-31 established an avoided cost rate for the Mountain Home project.  The parties had yet to engage in contract negotiations.  Establishing a rate for the Mountain Home project was arguably equivalent to the posting or publishing of the rate for small QFs.  The onus, Rosebud argues, was not on it to wrest a contract from IPCo.  Rosebud contends that the Commission in Order No. 25454 at p. 16 found Rosebud “ready, willing and able” to provide firm power i.e. “Given the nature of the Company’s negotiation and rate proposals, we interpret Rosebud’s offer (to accept Meridian style Contract) as a demonstration of willingness and commitment to provide firm power”.  Idaho Power, Rosebud argues, is the party that was ordered to offer a contract in compliance with the Commission’s final Orders.  Citing Order Nos. 25706 and 25787.  Idaho Power, Rosebud contends, had an affirmative obligation to act and failed to seek a stay of the Commission’s Orders pending appeal.

Rosebud claims that the Commission’s determination that current avoided costs should now be applied to Rosebud’s proposed generating project constitutes a collateral attack on the avoided cost rates previously set by the Commission in Case No. IPC-E-92-31.

Rosebud argues that the Commission’s decision in Order No. 26645 changed the rates set in the 92-31 rate case and that such a change is precluded by the doctrine of “collateral estoppel”.  Rosebud further claims it was not notified that the 92-31 rate case rates might be superseded by avoided cost rates under consideration by the Commission in Case Nos. IPC-E-93-28 and IPC-E-95-9.

Citing Commission language in Order No. 26645 Rosebud states that one of the stated reasons for denial of its requested relief was the conclusion that Rosebud “assumed a risk” in not accepting the rates established by the Commission after it entered its final Order . . . in other words, Rosebud states it was penalized by the Commission for exercising its statutory right of appeal to determine whether its “legally enforceable obligation” was truly consistent with controlling law.  Rosebud interprets the Commission’s Order No. 26645 language as creating “take or leave it” proposition for developers, i.e., if you appeal, you lose your right to Commission established rates.  Rosebud contends that the Commission has rendered the statutory right of appeal meaningless and illusory.  On this point Rosebud cites out of context.  What the Commission said was “Rosebud assumed a risk  in not accepting the rates and not pursuing and entering into ‘legally binding obligation’ to sell power after the Commission issued its final Order on Reconsideration.”  Order No. 26645 pp. 7-8.

Re:  Collateral attack

Rosebud argues that “given the fact that the 92-31 Orders affirmed by the Supreme Court were final orders, the Commission’s refusal to enforce those orders (on the basis that the rates established in those orders no longer represent Idaho Power’s avoided cost) is a collateral attack by the Commission on their validity.  Reference Idaho Code § 61-625:  “all orders and decisions of the commission which have become final and conclusive shall not be attacked collaterally,” and is prohibited by Idaho Code § 61-627 Appeal to the Supreme Court and Idaho Code § 61-629 Matters reviewable on appeal – Extent of review – Judgment.  Rosebud further argues that “where a final order is affirmed, the Commission may not alter or amend the order appealed from. However, it is to be noted that Rosebud does not cite the significance of Idaho Code § 61-624 Rescission or change of orders – rescind, alter or amend.”

The collateral estoppel doctrine is a part of the doctrine of res judicata.  Collateral estoppel, or issue preclusion, bars the relitigation of issues actually adjucated, and essential to the judgment, in a prior litigation between the same parties.

Re:  Notice—due process

Rosebud argues that as a result of Commission orders in the 92-31 case Rosebud obtained a valuable property interest in the form of a “legally enforceable obligation.”  Reference 18 C.F.R. § 292.304(d).  Before that property interest can be taken or diminished by state action, Rosebud contends that it must be afforded due process.  Citing U.S. Constitution Amendment Fourteen § 1; Idaho Constitution Article 1, § 13.  Due process it contends requires meaningful notice and a meaningful opportunity to be heard.  Citing Rudd v. Rudd, 105 Idaho 112; 666 P.2d 639 (1983).  The Commission, it argues, failed to notify Rosebud that if it appealed, it might lose entitlement to the rate.

Re:  quasi-estoppel

Furthermore, Rosebud contends that because Idaho Power did not challenge the correctness of the Commission’s Orders, Idaho Power should be barred by the doctrine of quasi estoppel from asserting a claim inconsistent with a position previously taken with the knowledge of the facts.

Re:  Obligation to seek a stay of commission orders pending appeal

Idaho Power argues that Rosebud did not obtain a stay of the Commission’s orders in 92-31.  Reference Idaho Code §§ 61-633, -634.  Idaho Code § 61-635, the Company notes, provides that the pendency of an appeal does not itself stay or suspend the operation of an order.  Unless stayed, the orders of the Commission, Idaho Power contends, can be superseded by subsequent Commission orders.  Citing UPL v. IPUC, 107 Idaho 47, 685 P.2d 276 (Idaho 1984); Rosebud Enterprises, Inc. v. IPUC, 128 Idaho 633, 917 P.2d 790 (Idaho 1996) (Rosebud-Twin Falls).

Idaho Power interprets the law to be that “it is the obligation of the party which seeks to suspend (or maintain) the operation of a Commission order during the pendency of an appeal to obtain to a stay from the Supreme Court.”

Idaho Power points out that the orders in the 93-28 case in Case No. IPC-E-95-9 did not modify the 92-31 case orders — they superseded them.

The validity of Rosebud’s claim to an entitlement to avoided cost rates set in the 92-31 case, Idaho Power contends, is further refuted by the fact that the generating project that Rosebud is now pursuing is not the same project that was the subject of the 92-31 case.  The new project is not in the same location as the old project nor does it have the same operation date.  The new project does not even propose to use the same fuel type and as a result may not even be a QF.  Considering all of these uncertainties Idaho Power contends that it is impossible to ascertain how any “legally enforceable obligation” has been created.

Rosebud concludes by arguing that the Idaho Supreme Court is not in the business of expounding upon abstract questions of law for its own edification; it is a tribunal whose sole purpose is to conclusively and finally resolve concrete issues between parties.  Citing Idaho Constitution Article 5 § 1 (feigned issues prohibited).

Commission Decision

Are Rosebud’s arguments persuasive?

Does the Commission have any comment regarding IPCo’s project specific IRP calculation workpapers and public interest?

Do you wish to address any of the perceived factual errors identified by Rosebud?

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”

Does the Commission have any comment re: statutory right to appeal (Idaho Code § 61-627) and how it affects party rights and Commission Orders during the pendency of an appeal — including notice obligation (if any).

Does the Commission find “Requirement of Stay pending appeal (Idaho Code § 61-633; 61-635)” and “no options to purchase” to be reconcilable standards when speaking of the “legally enforceable obligation” requirement of PURPA?

What’s your decision on reconsideration?

Final Order on Reconsideration deadline — Friday, February 14, 1997.

Scott D. Woodbury

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