DECISION MEMORANDUM

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COMMISSIONER SMITH

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WORKING FILE

FROM:SCOTT WOODBURY

DATE:DECEMBER 18, 1998

RE:CASE NO.  IPC-E-98-10 (IDAHO POWER)

PROPOSED CANCELLATION OF TWO FIRM ENERGY SALES AGREEMENTS

On July 1, 1998, Idaho Power Company (Idaho Power; Company; IPCo) filed an Application with the Idaho Public Utilities Commission (Commission) in Case No. IPC-E-98-10 requesting Commission approval of the Company’s proposed cancellation of two Firm Energy Sales Agreements (Sales Agreements) between Lynn E. Stevenson and Arrowhead Trust (hereinafter collectively referred to as “Stevenson) and Idaho Power.  Reference Agreement to Cancel dated June 10, 1998.  (Attached).

In 1984, Lynn E. Stevenson and Idaho Power entered into two Firm Energy Sales Agreements for the purchase of electrical capacity and energy to be generated by two under 1 megawatt qualified small power hydro electric production facilities (QFs) in Gooding County, Idaho, known as Stevenson Site No. 1 and Stevenson Site No. 2.

As reflected in the Application, the Stevenson QFs did not generate electricity during most of 1992.  In July of 1993 a landslide occurred in the Snake River Canyon.  Water in the Snake River backed up against the landslide and the increased water level upstream of the landslide inundated the Stevenson QF projects.  As reported, it is not known at this time when, if ever, the Stevenson QF projects, as currently configured, will be capable of resuming operation.

In 1996 Idaho Power states that it served Stevenson with several notices of default (for lack of performance in the 1995-1996 period), which defaults have not been cured.  Stevenson, Idaho Power represents, has disputed the occurrence of any defaults and has responded that if any defaults have occurred, they are excused by the “force majeure” provision of the underlying Sales Agreements.

Idaho Power and Stevenson have agreed that to avoid litigation of the issue of defaults and disputed claims  it would be preferable to cancel the Sales Agreements.  On June 10, 1998, the parties entered into an Agreement to Cancel the Firm Energy Sales Agreements thereby agreeing and acknowledging that cancellation is “a full and complete release and settlement of all claims for injury or damage, or underpayment or overpayment which any party may sustain as a result of the other party’s performance” of the Sales Agreements and the cancellation of same.  IPCo reserves the right to remove (at its expense) all interconnect facilities and Stevenson waives any claim for salvage value.  The effectiveness of the Cancellation Agreement is contingent on Commission approval.  The Cancellation Agreement recites an effective date of May 1, 1996.

The Sales Agreements for the Stevenson QF projects, Idaho Power states, provided for payments to Stevenson at the rate of approximately 62 mills per kWh.  The current purchase price of QF energy utilizing Idaho Power’s approved avoided cost for small under one megawatt QFs is approximately 30 mills/kWh.  Cancellation of the Sales Agreements, Idaho Power represents, would provide a significant purchase price reduction if the Stevenson QF projects are rebuilt in the future.

Commission Notices of Application and Modified Procedure in Case No. IPC-E-98-10 were issued on October 9, 1998.  The deadline for filing written comments was October 30.  Commission Staff filed comments on October 30 (attached).  Reply comments (attached) were filed by Idaho Power on December 1st and Lynn Stevenson and Arrowhead Trust on December 2nd.

Commission Staff

As reflected in Staff’s comments, the underlying QF contracts were for a term of 35 years.  Site No. 1 has a capacity of 75 kW, a projected contract annual net energy amount of 286,000 kWh, and a projected annual revenue stream of approximately $16,590.  Site No. 2 has a capacity of 65 kW, a projected contract net annual energy amount of 194,000 kWh, and a projected annual revenue stream of approximately $11,212.

Staff believes that the key issue in this case was Stevenson’s failure to perform according to the Sales Agreements prior to the occurrence of the landslide in 1993 (i.e., the Stevenson QFs failed to generate electricity during most of 1992 and failed in 1992 to maintain required insurance coverages).  Staff believes that the initial instance of default in these Sales Agreements occurred prior to the landslide when Stevenson failed to maintain the required Valued Loss of Income insurance.  The primary purpose of this security provision, Staff contends, is to ensure that funds will be available to Stevenson to pay any debts owed to Idaho Power in the event the Sales Agreement is prematurely terminated, i.e., in this case the accrued overpayment liability resulting from levelized rates.  As the overpayment liability, Staff contends, existed at the time of the initial default, Staff believes force majeure occurring subsequent to the default cannot excuse the overpayment liability.

Based on records provided by Idaho Power, Staff believes that the failure of Stevenson to maintain insurance was not due to insurance being unavailable, but rather due to failure to promptly pay the premiums.  While Stevenson is primarily responsible for maintaining insurance, Staff believes Idaho Power had a concomitant obligation of contract oversight and should shoulder some responsibility for ensuring that project owners maintain adequate insurance coverage in order to protect the Company’s ratepayers.  Staff believes that the Commission in considering this Application should attempt to protect ratepayers from shouldering the loss.

Idaho Power has calculated the amount of overpayment liability as $90,908 for Site No. 1 and $60,699 for Site No. 2, or a total of $151,607.  In addition, Idaho Power contends Stevenson owes $3,066 for unpaid operation and maintenance of interconnection facilities.  The total amount owed Idaho Power is $154,674.  Staff agrees with these figures.

Idaho Power and Staff believe that Stevenson was not excused from the overpayment liability as a result of force majeure.  Stevenson disagrees.   Staff recognizes that the dispute between the parties is a contractual matter falling within the jurisdiction of the District Courts.

Idaho Power has suggested that the cancellation agreement be viewed similar to a contract buy-out.  In exchange for forfeiting any claim to overpayment liability and unpaid O&M charges, Idaho Power would be relieved of any future obligations under the existing contract to purchase energy in the event the projects are rebuilt.  The existing contracts include levelized rates of 57.79 mills /kWh.  Today’s avoided cost rates for projects like Stevenson’s are 31.06 mills/kWh.  Given the difference in rates today, and Idaho Power’s forecast of what those rates may be in the future, Idaho Power calculates that it could save $383,911 over the remaining life of the contracts by acquiring an equivalent amount of energy from some source other than the Stevenson projects.  The present worth of these savings is $116,553 (computed at 9.199%, Idaho Power’s overall rate of return as determined in their last rate case).

Staff questions the reasonableness of the Company’s contract buy-out analogy.  Staff queries whether Stevenson has ever seriously intended to rebuild the projects and continue to generate under the existing contracts.  Indeed, for a period of more than four years, Stevenson has made no apparent attempt to remedy the force majeure.  Furthermore, Staff contends that it is significant that neither project was generating for most of the year before the landslide occurred.  Staff contends that Idaho Power, had it exercised proper oversight, should have been able to terminate both Sales Agree­ments at no cost to Idaho Power or its ratepayers.  Ratepayers would have benefited from termination of the contracts, and Idaho Power should have been able to collect the overpayment liability owed.

Staff believes that Stevenson owes Idaho Power $154,674 and that this obligation remains in force, whether the Sales Agreements are canceled or not.  However, despite its belief regarding overpayment liability, Staff also agrees with Idaho Power that the expense associated with pursuing the matter in court, and the small likelihood of being able to collect on any judgment, makes settlement a preferred alternative.  With one small but significant caveat, Staff believes that the settlement agreement negotiated by the parties is reasonable.  Staff recommends that as a result of the outstanding overpayment liability, approval of the cancellation agreement must be conditioned upon a requirement that Stevenson repay the overpayment liability from the salvage value of any generation equipment (if realized) and/or prior to the execution of any new contracts should Stevenson choose to sell his interest in the project sites or to redevelop and sell the generation from either site.

Idaho Power Reply

Idaho Power in its Reply states that it has no objection to any of Staff’s proposed conditions but notes that in these pre-292 Sales Agreements the Company possesses no recorded security interest in the generation equipment or the real property.  Obtaining such a security interest (without a court judgment) would require the cooperation and consent of Stevenson.

Idaho Power agrees that regardless of the size of the project, it is important for the Company to actively monitor and enforce contract terms and conditions.  The Company states however, that in allocating its limited resources, it concentrated its enforcement efforts on the large QFs because of the magnitude of the overpayment liability risk.  The Company reports that most of the larger QFs that previously relied on Valued Loss of Income insurance have converted to the new security provisions approved by the Commission in the U-1006-292 security case.  Idaho Power commits to increase its efforts to enforce the terms of all contracts.

Idaho Power notes that in its enforcement of the legal and technical requirements of QF contracts, particularly for small QF projects, the Company has been guided by prior expressions of the Commission that utilities work with the owners and operators of QF projects to avoid requiring Commission intervention in contract matters.  As a result, the Company states that it has tried to make the intensity of its enforcement of legal and technical requirements commensurate with the level of legal and technical sophistication of the QF owners and operators.  Should it be the Commission’s desire that Idaho Power modify this approach in the future, the Company requests specific guidance.

Stevenson Reply

Stevenson disputes the calculation of the alleged net overpayment liability, contending that the amount is roughly $75,000 rather than the estimated $155,500.  The reason for the disparity, Stevenson contends, is that the projects never generated the projected amounts of energy during their operational period.

Stevenson states that Staff is correct in its assertion that Stevenson did not maintain Valued Loss of Income insurance during the project’s operational period.  Stevenson disputes Staff’s contention however, that the required Value Loss of Income insurance was available, contending that despite repeated inquiries he was never able to obtain a premium quote.

Stevenson maintains that the force majeure event relieved him from the obligation to repay any alleged overpayments and entitled him to reinstate the contracts should generation at the site again become possible.  Under these circumstances and because of what he contends is his legitimate legal claim, it is represented that the proposed settlement is a reasonable resolution of competing contractual rights and claims.  The Commission is advised that it “should not lightly interfere with such a settlement proposal, particularly when no authority has been cited for the Staff’s implied assumption that the Commission has the power to void or alter a proposed settlement of a contract dispute.

Notwithstanding the above, however, Stevenson states he is willing to agree to the proposed condition requiring delivery to Idaho Power of any net salvage value from the projects.  However, Stevenson states that he cannot agree to the proposed condition that sale of the Stevenson real property or redevelopment of the site(s) would trigger payments to Idaho Power.  This condition, Stevenson states, would effectively negate the settlement in its entirety.  The result of such a condition, Stevenson states, would be exactly the same as if he abandoned perfectly legitimate legal claims and defenses and confessed judgment in an Idaho Power collection action.

Commission Decision

Idaho Power has requested Commission approval of a proposed agreement canceling two Firm Energy Sales Agreements.  Does the Commission find that approval of cancellation is required?  If so, does the Commission find the terms of the cancellation to be reasonable?  If not, how does the Commission wish to proceed?

Scott Woodbury

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