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

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| EARTH POWER RESOURCES, INC.,  Complainant,  vs.  THE WASHINGTON WATER POWER COMPANY,  Respondent. | )  )  )  )  )  )  )  )  )  )  ) | CASE NO. WWP-E-96-6  ORDER NO.  27231 |

Under Sections 201 and 210 of the Public Utility Regulatory Policies Act of 1978 (PURPA) electric utilities are required to purchase power produced by cogenerators or small power producers that obtain qualifying (QF) status.  On July 3, 1996, Earth Power Resources, Inc. (Earth Power) a Nevada corporation, filed a complaint against Washington Water Power Company (Water Power; Company) with the Idaho Public Utilities Commission (Commission).  Reference IDAPA 31.01.01.043.  Earth Power represents that it is the developer of two 1 MW geothermal PURPA qualifying projects located at Allen Springs (QF 96-15-000) and Lee Hot Springs (QF 95-1-001) in Churchill County, Nevada.  Earth Power represents that it initiated negotiations with Water Power on December 5, 1995.  Earth Power contends that it has offered to sell the output of its two facilities to Water Power and that Water Power has refused to purchase at rates, terms and conditions that Earth Power believes that it is entitled to.

On July  26, 1996, Water Power filed a response with the Commission.  Water Power denies that its actions reflect a refusal to negotiate with Earth Power and contends that it has acted in accordance with Commission Orders and policy.  Water Power denies that Earth Power is entitled to receive payment for its power at the requested rates.

Pursuant to Commission Notice, public hearing in Case No. WWP-E-96-6 was held in Boise, Idaho on October 9, 1997.  The following parties appeared by and through their respective counsel:

Earth Power Resources, Inc.Peter J.  Richardson

The Washington Water Power Company R.  Blair Strong

Commission StaffScott D. Woodbury

The testimony of the parties can be summarized as follows:

Sections 201 and 210 of the Public Utility Regulatory Policies Act of 1978 (PURPA) and the implementing rules and regulations of the Federal Energy Regulatory Commission (FERC) require electric utilities to purchase power from qualifying small power facilities (QFs).  Earth Power Resources, Inc., a Nevada corporation qualified to do business in Idaho, is the self-certified developer of two QFs, Allen Springs (QF 96-15-000) and Lee Hot Springs (QF 95-1-001).  Reference Exhibits 103 and 102.

The record reveals that by letter dated December 5, 1995, Earth Power proposed to install an under 1 MW plant at each of its QFs and requested separate power purchase contracts for the output of each from The Washington Water Power Company.  Exhibit 104.  The rates requested were the levelized nonfueled rates for under 1 MW facilities available and on file with the Commission.  (WWP Tariff Schedule 62; Tr. p. 3).  Reference Order No. 26135, 44.42 mills/kWh for 1998 online date.  Earth Power was unsuccessful in obtaining power purchase contracts.  On July 1, 1996, the Company’s avoided cost rates changed and were significantly reduced.  Reference Order No. 26511.  Earth Power claims grandfathered entitlement to the older, higher rates.  To qualify for the grandfathered rate, Earth Power must demonstrate that it was “ready, willing and able” to sign a contract, that it demonstrated a commitment to enter into a “legally enforceable obligation”, and that “but for” the actions of Water Power, Earth Power would otherwise have secured a contract prior to the rate change.

The evidence reveals that Earth Power dealt exclusively with H. Douglas Young, the Company’s contracts and resource administrator.  Upon receipt of Earth Power’s letter request for separate power purchase contracts, the Company mistakenly provided Earth Power on the same date by telefax levelized nonfueled rates different (i.e., 48.32 mills/kWh for 1998 online) from those on file with the Commission.  Exhibit 105.  On December 20, 1995, Water Power provided Earth Power with a draft contract and by cover letter indicated that Earth Power would have to obtain clarification from the Commission Staff as to whether geothermal projects are entitled to nonfueled rates.  Exhibit 106.  Earth Power obtained Staff clarification (Exhibit 108) and prepared revisions to the draft contracts, returning the marked-up revisions to the Company in late February 1996  (Tr. p. 14; Exhibits 109, 110), requesting the rates provided by the Company and indicating its readiness to finalize power purchase agreements.

On March 28, 1996, Water Power responded that it had mistakenly provided (Tr. p. 175)

Earth Power with “the wrong Idaho prototype contract.”  Exhibit 111.  The Company provided Earth Power with a new and significantly longer draft contract which again included incorrect rates and which also included proposed security provisions, a benchmark proposal and a retail wheeling regulatory out clause.  Exhibit 112.  Earth Power retained legal counsel and on May 16, 1996 sent Water Power a detailed 11 page response, including suggested changes.  Exhibit 113.  In its letter, Earth Power stated “Earth Power has obtained QF status for Allen Springs and Lee Hot Springs separately.  Each qualifying facility (as that term is used in PURPA and FERC implementing regulations) will have several generating projects located at each site.”

Water Power responded with a one page letter dated May 24, 1996 (Exhibit 114), offering a ten year contract at significantly lower rates (22.66 mills/kWh, 1998 on line), rates reflecting a proposed change in the Company’s avoided cost and first deficit year (Tr. pp. 119, 133) and rates which were subsequently approved by the Commission in Order No. 26511 for effective date July 1, 1996.  Tr. pp. 184, 185.  Water Power in its letter notes “we are concerned about how Earth Power’s project is characterized, because automatic entitlement to the scheduled avoided costs is conditioned upon the ‘facility’ having a generating capacity of 1MW or less.  It appears that the ‘facility’ in this case consists of several generating units which will collectively exceed the 1 MW threshold.”  At this point, Water Power admits it ceased negotiations for a contract for an under 1 MW facility.  Tr. pp. 191, 193.

Earth Power by letter to Water Power dated June 5, 1996 (Exhibit 115), indicated that the reduced rates were unacceptable and offered a compromise 20 year contract rate (20 year contract at 39.19 mills/kWh) in return for execution of contracts “within the next week or so.”  On June 7, 1997, Water Power provided Earth Power with a draft contract containing 20 year levelized non fueled rates of 32.79 mills for a 1998 on line date, the rates submitted by the Company in Case No. WWP-E-96-3 and rates which reflected a change in first deficit year from 2000 to 2010.

Earth Power responded by letter dated June 21, 1997 (Exhibit 118), representing its belief based on telephone conversations with the Company, that failing to accept the most recent WWP rate offer pushed negotiation back to Water Power’s earlier March 28th draft (Exhibit 112) and Earth Power’s May 16 response (Exhibit 113).  Proceeding from that point Earth Power conceded on many points of prior disagreement, with the exception of substituting a proposed minimum delivery requirement in place of the suggested benchmark requirement (reference Tr. p. 113), reserving the right to request Commission clarification as to the applicability of the “K” factor security requirement (reference Order No. 21690; Tr. p. 213), and if determined by the Commission to be applicable, substitution of Water Power’s actual discount rate (currently 10.13%, Tr. p. 212) in lieu of the 18% set out in the security Order.  Tr. pp. 215, 216.  Earth Power requested the Company’s posted and effective rates.  Reference Order Nos. 26079, 26135.  Although promising that Water Power would be sent a revised re-dapted draft contract on Monday, June 24th, it was not until Friday, June 28th that Earth Power transmitted an executed contract to the Company for its signature.  Exhibit 120.

Regarding the “K factor” the Commission in Order No. 21690 indicated that the K factor was developed as an additive item to reflect its belief that the risk of a QF losing its economic supply of motive force increases exponentially with time.  Tr. p. 31.  Earth Power contends that approximately 15% of project revenue is dependent upon applicability of the K factor.  Tr. p. 239.  Water Power points out that in Order No. 21690 p. 9 dated January 11, 1988, the Commission described hydro projects as a lowest risk technology and described unproven technologies such as geothermal as high risk.  Tr. pp. 242, 243.  Earth Power contends that geothermal is now a more reliable and proven technology, very similar to hydro in that there is no risk of loss of economic motive force when it can be demonstrated by recognized independent experts in the field that there is a sufficient reservoir of geothermal fluids to run the project for the life of the contract.  Tr. p. 217.

Two letters were dispatched from Earth Power on June 28, 1996, one from its legal counsel which accompanied the contracts (Exhibit 119), provided a chronology of negotiation and requested that Water Power affix its signatures; the other from Ron Barr himself (Exhibit 120), indicating in return for a contract and the March 28 draft rates, his commitment to accept all proposed disputed terms (including K factor, discount rate, etc.), “with the exception of substituting a minimum net delivery provision to replace the benchmark provision and a few minor non substantive changes included in the new draft.”  It does not appear that Water Power reviewed the submitted contract when it was submitted.  Tr. pp. 146, 147.  On July 1, 1996, Water Power’s posted rates changed.  Reference Order No. 26511.

Water Power’s Schedule 62 tariff rates are available to QFs with a generating capacity of 1 MW or less.  Tr. pp. 100, 121.  It is Water Power’s contention that Earth Power did not qualify for the Company’s less than 1 MW rates because Earth Power proposed to build multiple projects at each QF, which collectively exceeded 1 MW (Tr. pp. 99, 121), a fact that Water Power contends that it only first learned in writing of May 16, 1996.  Tr. p. 115; Exhibit 113).  It is Earth Power’s contention that it was reasonable during the time frame during its negotiation with Water Power for it to assume that it could develop three less than 1 MW projects at each QF selling the output of one project from each QF to Water Power, Utah Power and Idaho Power.  It is only since Commission clarification and after its filing of its complaint against Water Power, that Earth Power contends that it learned that if it wants individual less than 1 MW contracts that it is necessary to separately qualify each generator.  Tr. pp. 75, 249.  Reference Case No. UPL-E-96-5, Order No. 26772 issued January 30, 1997.  It should be noted that Earth Power has an approved June 26, 1996 contract with PacifiCorp  dba UP&L for a less than 1 MW power purchase contract for Lee Hot Springs (QF- 95-1-001).  Tr. p. 261.  No additional QFs in the vicinity of the Lee site have been certified by Earth Power.  Tr. p. 76.  Earth Power having contracted with PacifiCorp for the Lee QF, Water Power contends that Earth Power is not eligible to receive a contract from Water Power for its Lee Hot Springs project.  Tr. p. 105.

Post hearing briefs were filed by both Earth Power and Water Power.

Commission Findings

The Commission has reviewed and considered the filings of record in Case No. WWP-E-96-6 including the transcript and posthearing briefs.  The Commission has also considered the transcript and Order Nos. 26772 and 26996 in Case No. UPL-E-96-5, which the parties by stipulation have agreed to incorporate into this case.

The issue before the Commission is Earth Power’s right to a contract and a lock-in of a grandfathered levelized non-fueled avoided cost rate for the Lee Hot Springs (QF 95-1-001) and the Allen Springs (QF 96-15-000) qualified small power production facilities.  Tangential questions that we find reasonable to address are the contract issues related to authorized contract length, “K” factor applicability, and the appropriateness of benchmark and regulatory out provisions.

Under Section 210 of PURPA, electric utilities are required to purchase power from small power producers that obtain qualifying status under Section 201.  16 U.S.C. § 824a-3(a) -(d); 18 C.F.R. § 292.303(a).  The published avoided cost rates of Water Power available to QFs less than 1 MW on the date Earth Power filed its complaint were the rates established in Commission Order No. 26135, Case No. WWP-E-95-3.  The significance of the posted rates is that they require no negotiation and are available to eligible QFs smaller than 1 MW.  The posted rates are approved by the Commission, are presumed just and reasonable, and remain the effective avoided cost rates until determined otherwise by Commission Order.

Since its initial implementation of PURPA in 1980, the Commission has required that signed contracts be submitted for review, approval and lock-in of effective rates.  A lock-in of rates does not occur until the Commission approves a contract and the developer assumes a legally enforceable obligation to provide power.  18 C.F.R. § 292.304(d).  Earth Power was unsuccessful in its attempts at negotiation and does not have a power purchase contract.  Alternatively, the Commission requires that a meritorious complaint be filed setting forth facts “entitling” the facility to the requested relief and a “lock-in” of avoided cost rates.  Earth Power must demonstrate that “but for” the actions of Water Power, Earth Power was otherwise entitled to a power purchase contract.

The testimony and exhibits in this case demonstrate that Earth Power attempted to negotiate and did everything possible to commit itself to a “legally enforceable obligation” and obtain a power purchase contract with Water Power.  We find that Water Power Company, however, either knowingly or through negligence or ineptitude acted so as to prevent Earth Power from obtaining a contract.  We find Water Power’s actions and inactions vis-á-vis Earth Power to be inexcusable.  We expect regulated electric utilities to negotiate with QFs in a professional, responsible and honest manner.  We are regrettably unable to find that Earth Power has been dealt with in such a manner by Water Power.

We find that “but for” the actions of Water Power, Earth Power would have obtained a power purchase contract prior to July 1, 1996, and is therefore entitled to the levelized nonfueled posted rates established in Order No. 26135.  In so finding, we acknowledge that a geothermal project is non-fueled, in the context of the distinction between fueled and non-fueled.

We find, however, that Earth Power despite initially offering Water Power the output of two self-certified QFs, Lee Hot Springs and Allen Springs (reference 18 C.F.R. § 292.207) did elect on June 26, 1996, to sell the output of the Lee Hot Springs qualifying facility (QF 95-1-001) to PacifiCorp dba Utah Power & Light Company for an under 1MW contract.  Reference Case No. UPL-E-96-3, Order No. 26705.  In electing to contract with Utah Power for the published less than 1 MW rate, we find that Earth Power elected to limit the size of its project at Lee Hot Springs to 999 kW.  We find Earth Power’s contention that it is able to develop multiple under 1 MW projects at any given QF to be unpersuasive regarding QF eligibility for the Commission’s under 1 MW posted rates.  As we stated in Order No. 26772, “if the total or aggregate generation of a QF is 1 MW or greater, the appropriate methodology for calculating avoided costs is the Integrated Resource Plan (IRP) methodology.”  We find that Earth Power is eligible for an under 1 MW contract with Water Power for the remaining Allen Springs qualifying facility (QF 96-15-000).

We turn now to contract issues.  We address them because we are reluctant to send Earth Power back into negotiation with Water Power without some Commission guidance and direction to Water Power.  We will not allow Water Power to demand or require Earth Power to accept a “retail wheeling” regulatory out provision.  Such a provision for small QFs will preclude reasonable financing.  We find that Earth Power is entitled to a grandfathered 20-year contract term.  We did not reduce the maximum contract length available to small QFs until Order No. 27212, Case No. WWP-E-97-8, issued November 14, 1997.  We also find the minimum net delivery provision proposed by Earth Power to be a reasonable substitute for the Company proposed benchmark provision.  We further find that it is reasonable to waive the “K” factor security requirement for a geothermal facility, if Earth Power is able to demonstrate by recognized independent experts in the field, that there is a sufficient reservoir of geothermal fluids to run the Allen Springs project for the length of the contract.

CONCLUSIONS OF LAW

The Idaho Public Utilities Commission has jurisdiction over The Washington Water 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 PURPA 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 and qualified above, IT IS HEREBY ORDERED that Earth Power Resources, Inc. has demonstrated entitlement to a less than 1 MW power purchase contract with The Washington Water Power Company for the Allen Springs qualifying facility (QF 96-15-000) at the levelized non-fueled posted rates established in Order No. 26135.  The parties are directed to submit within a reasonable period of time an executed power purchase contract for Commission approval.

IT IS FURTHER ORDERED that Earth Power having entered into a contract with PacifiCorp dba Utah Power & Light Company for a less than 1 MW power purchase contact for the Lee Hot Springs (QF 95-1-001) qualifying facility, is not eligible for an additional less than 1 MW power purchase contract with Water Power for Lee Hot Springs.

THIS IS A FINAL ORDER.  Any person interested in this Order may petition for reconsideration within twenty-one (21) days of the service date of this Order.  Within seven (7) days after any person has petitioned for reconsideration, any other person may cross-petition for reconsideration.  See Idaho Code § 61-626.

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

                                                                                                                                      DENNIS S. HANSEN, PRESIDENT

                                                                                           RALPH NELSON, COMMISSIONER

MARSHA H. SMITH, COMMISSIONER

ATTEST:

Myrna J. Walters

Commission Secretary

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**COMMENTS AND ANNOTATIONS**

Text Box 1:

**TEXT BOXES**

Office of the Secretary

Service Date

November 25, 1997