

## **DECISION MEMORANDUM**

**TO: COMMISSIONER KJELLANDER  
COMMISSIONER SMITH  
COMMISSIONER HANSEN  
COMMISSION SECRETARY  
COMMISSION STAFF  
LEGAL**

**FROM: SCOTT WOODBURY**

**DATE: MAY 24, 2004**

**RE: CASE NOS. IPC-E-03-16 (Idaho Power); AVU-E-03-9 (Avista); PAC-E-03-13 (PacifiCorp)  
MODIFICATIONS TO PURPA CONTRACT SECURITY PROVISIONS  
PETITION FOR RECONSIDERATION/CLARIFICATION OF FINAL ORDER  
NO. 29482 – (Idaho Power)**

On November 5, 2003, Idaho Power Company (Idaho Power; Company) filed a Petition with the Idaho Public Utilities Commission (Commission) requesting authority to eliminate the second lien requirement as a risk mitigation measure in PURPA Power Purchase Agreements containing levelized avoided cost rates. Staff objected to the proposed elimination of the second lien requirement noting that without a second lien, PURPA Qualifying Facilities (QFs) desiring levelized rates must post 35% liquid funds as security for the calculated overpayment that results from the front-end loading that occurs with a levelized rate structure. Idaho Power in reply comments represented that should the Commission continue with the second lien requirement that the Company intended to outsource the legal work and requested that it be permitted to collect the estimated \$1,000-1,500 cost directly from the QF or alternatively recover the lien expense as part of its annual PCA filing. Addressing this issue of cost recovery, Staff contended that this was a contract administration cost and has never been a cost directly billed to QFs; nor was it the type of power cost that was appropriate for recovery through the PCA. Staff opposed the direct billing of this cost to QFs or the recovery of same through the PCA.

On April 27, 2004, the Commission issued final Order No. 29482 in Case Nos. IPC-E-03-16, AVU-E-03-9, and PAC-E-03-13. In its Order the Commission denied Idaho Power's request to eliminate the second lien requirement as a risk mitigation measure for PURPA Power

Purchase Agreements containing levelized avoided cost rates. The Commission authorized the Company for a new levelized contract to recover lien expense (estimated \$1,000 to \$1,500) from the contracting QFs; or alternatively, permitted a QF to prepare the lien documentation and file the lien itself.

On May 17, 2004, Idaho Power filed a Petition for Reconsideration (IDAPA 31.01.01.331) or in the alternative a Petition for Clarification (IDAPA 31.01.01.325) regarding that portion of Commission Order No. 29482 where QFs are provided the option to prepare and file the lien or security interest documentation.

#### Background – Levelized Rates/Second Lien Requirement

In Order No. 21446 in the -292 case the Commission made the following findings regarding lien rights:

We believe that some form of security and/or risk mitigation is necessary to achieve an optimum level of ratepayer indifference. ...

The lien rights available to secure ratepayer interests in [QF] projects are usually subordinate to the first lien of the project financier. The value of a second lien position in all the QF property and facilities is the measure or degree of control over the project that it imparts with respect to its continued financing, operations and maintenance. Although it provides no liquid fund for satisfaction of overpayment obligation, we nevertheless recognize it as a valuable tool in safeguarding the interests of the ratepayer. To be acceptable a lien should be subordinate only to the first lien of the project financier and the FERC license, as evidenced by an appropriate policy of title insurance.

In Commission Order No. 21690 the Commission stated:

The value to the utility and the ratepayer of a lien is directly related to the quality of the underlying QF. Hence, the 35% reduction in liquid security requirement for this risk mitigation item shall remain in effect only so long as the QF fulfills all requirements of Sections G. (Basic Insurance), H. (Engineering Certification), I. (Maintenance Escrow) and J. (Lien Rights).

Failure to maintain these terms and conditions at any time during the life of the power sales agreement shall result in the 35% reduction being revoked. Failure to establish and maintain the appropriate new level of liquid overpayment security shall constitute breach of contract.

Order No. 29482, p. 6.

## IPCo – Petition for Reconsideration/Clarification

While Idaho Power states that it understands the Commission's desire to minimize QF transaction costs, the Company states that it is concerned with the conflict of interest created by allowing QF developers to prepare and file the documents needed to secure Idaho Power's security interest in the assets of their respective QF projects. Idaho Code, Title 28, Chapter 9, the Company notes, sets out very precise documentation and filing requirements to protect security interests. If the requirements are not filed precisely, the security interest is not perfected and is subject to attack in the event of competing creditors seeking to foreclose on the QF's assets. The QF's failure to correctly document, perfect and maintain its security interest in QF project assets would jeopardize the Company's ability to maintain a priority creditor position on the assets covered by the security interest. Idaho Power maintains that QF developers have a disincentive to do a thorough job of creating and perfecting Idaho Power's security interest. If the Commission still desires to provide this option to QF developers, Idaho Power requests that the Commission clarify Order No. 29482 by requiring that QF developers electing to prepare and file the lien documentation must permit the Company to review and approve all aspects of the creation of the security interest. The Company also requests that the Commission clarify that if the QF exercises this option to self file, Idaho Power will have no obligation to take remedial steps if the QF developer fails to adequately cover all project assets or fails to file any required continuation statements to maintain the viability of this security interest over the full-term of the contract.

Idaho Power notes that the recommended review and approval procedure will require the Company to incur additional legal expense. Nevertheless, Idaho Power believes the initial review and approval by Idaho Power is necessary to at least reduce the likelihood of potential problems if a QF project experiences financial problems.

The Commission's final Order No. 29482 contains the following language.

...For existing levelized PURPA contracts, the Company is expected to administer its contracts in a responsible fashion and to require QF compliance with Commission –292 security requirements. For those levelized QF contracts without a second lien, the QF should be brought into compliance or the Company should require a posting of liquid security. The Commission expects the Company to follow Commission Orders. Reference *Idaho Code* § 61-706. If liquid security is required but not enforced, it is the Company and not its customers that are at risk for the foregone security.

Order No. 29482, p. 12.

Idaho Power in its Petition believes that it is unreasonable for the Commission to require the Company to accept a security interest created by the QF developer and then put the Company at risk if those security interests are not enforceable or do not cover all of the assets associated with a QF project. If the Commission gives QF developers the option to prepare and file the documents needed to perfect Idaho Power's security interest in the QF's assets, the Company believes that it should be relieved of any liability, even if it has review and approval authority, if it is ultimately determined that the security interest provisions of the Commission's -292 security requirements do not cover all of the QF assets or cannot be enforced.

If the Commission grants reconsideration, Idaho Power believes that written comments would be sufficient to address the issues raised by its Petition.

### **COMMISSION DECISION**

Idaho Power has requested reconsideration and/or clarification of that portion of Commission Order No. 29482 pertaining to -292 security lien requirements and the QF option to prepare and file related documentation. The Company requests that the QF be required to submit the proposed QF-prepared security interest (lien) filing to the utility for prior review and approval. The Company also requests that the utility be relieved of any liability, even if it has review and approval authority, should the QF-prepared lien later prove to be insufficient or unenforceable.

Regarding the liability issue raised by the Company with respect to QF-prepared lien documentation – Staff suggests that the Company-referenced Commission Order language, i.e., “If liquid security is required but not enforced, it is the Company and not its customers that are at risk for the foregone security,” is taken out of context and should be read with the immediately preceding language, as set forth above. The Commission's language was an admonition regarding the Company's QF contract administration practice – it appearing from Company filings and representations that there are a number of levelized Idaho Power/QF contracts out there with no second lien and for which the Company has not required a posting of liquid security nor requested Commission authorization to exclude same. It was in that context, Staff contends, that the Company was being reminded to follow the Commission's Orders. The issue of liability regarding sufficiency or enforceability raised by the Company for QF-prepared documentation is a separate issue. Arguably the issue would be the same if preparation of the lien documents were outsourced by the Company. Staff notes that part of the contract package currently used by the Company for QFs includes engineer certification forms. Staff contends that an appendix form

could also be included for liens, setting out or referencing Title 28, Chapter 9, Idaho Code lien requirements and including any stock or sample lien language that the Company desires to have included in security interest documentation. Required changes to the lien could be addressed in the Company's contract administration QF report and certification requirements.

Does the Commission wish to grant reconsideration or provide any clarification?

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Scott Woodbury

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