

BEFORE THE IDAHO PUBLIC UTILITIES COMMISSION

IN THE MATTER OF THE APPLICATION)
OF IDAHO POWER COMPANY FOR) **CASE NO. IPC-E-20-27**
APPROVAL OR REJECTION OF AN)
ENERGY SALES AGREEMENT WITH)
COLEMAN HYDROELECTRIC, LLC FOR) **ORDER NO. 34870**
THE SALE AND PURCHASE OF ELECTRIC)
ENERGY FROM THE COLEMAN HYDRO)
PROJECT)
)

On June 25, 2020, Idaho Power Company (“Idaho Power” or “Company”) applied for approval or rejection of its proposed Energy Sales Agreement (“ESA”) with Coleman Hydroelectric, LLC (“Seller”) for energy generated by the Coleman Hydro Project (the “Facility”). *Application* at 1. The Facility, near Leadore, Idaho, is a qualifying facility (“QF”) under the Public Utility Regulatory Policies Act of 1978 (“PURPA”) and has an 800 kW nameplate capacity. *Id.* The Company requested that its Application be processed by Modified Procedure. *Id.* at 5.

On July 16, 2020, the Commission issued a Notice of Application, Notice of Modified Procedure and Order setting comment and reply deadlines. *See* Order No. 34726. The Commission Staff (“Staff”) filed comments on August 6, 2020, and the Company filed reply comments on August 13, 2020. On August 13, 2020, the Seller filed brief comments and a request for an extension of time to file additional comments.¹ The Commission granted the Seller’s request in Order No. 34756 and the Seller filed supplemental comments on August 21, 2020.

Having reviewed the record, the Commission issues this Order approving the ESA conditioned upon compliance with our findings herein.

APPLICATION

The Company represented the ESA, dated June 19, 2020, was signed by the Seller on June 8, 2020, and by the Company on June 19, 2020. *Id.* at 2. The ESA’s “Effective Date” is June 19, 2020. *See* ESA at p. 3, § 1.11 (the ESA’s “Effective Date” is “[t]he date stated in the opening paragraph of this [ESA] representing the date upon which this [ESA] was fully executed by both

¹ The request for an extension of time and brief comments were filed by counsel, C. Tom Arkoosh of Arkoosh Law Offices on August 13, 2020. On August 21, 2020, Gregory Adams of the law firm Richardson Adams, PLLC filed a Notice of Appearance and Supplemental Comments for the Seller.

Parties.”); *see also* ESA at p. 13, § 5.1 (“[s]ubject to the provisions of paragraph 5.2 below, this Agreement shall become effective on the Effective Date”).

The ESA is a new QF contract. *Id.* The ESA provides the Seller would sell the Facility’s electric energy to the Company at the published non-levelized, seasonal hydroelectric avoided cost rates as set by Order No. 34350 (dated May 31, 2019), for a 20-year term. *Id.* at 2 and 4. Because this is a new QF (and ESA), the Company represented the Seller will not receive capacity payments until 2026. *Id.* at 2.

The Seller has selected June 1, 2021, as the Facility’s Scheduled First Energy Date² and Scheduled Operation Date³. *Id.* at 4; *see also Appendix B to the ESA* at p. 39, § B-3. The Company asserted that requirements have been placed on the Seller for the Company to accept energy deliveries from this Facility. *Id.* Idaho Power represented the Company will monitor the compliance requirements to achieve a First Energy Date and Operation Date and the ongoing requirements through the full term of this ESA. *Id.*

The Company represented the ESA was executed in compliance with past Commission orders. *Id.* at 2. Idaho Power asked the Commission to issue an order approving or rejecting the ESA and, if approved, declaring all payments for the purchases of energy under the proposed ESA to be allowed as prudently incurred expenses for ratemaking purposes. *Id.* at 5.

1. Staff’s Comments

Staff recommended the Commission approve the proposed ESA *if the parties update the ESA’s avoided cost rates to those set by Commission Order No. 34683*. Staff based its recommendation on analysis of the ESA, which focused on: 1) the 90/110 rule, with at least five-day advanced notice for adjusting Estimated Net Energy Amounts; 2) eligibility for and the amount of capacity payments; and 3) review of published avoided cost rates.

90/110 Rule and 5-Day Advanced Notice for Adjusting Estimated Net Energy Amounts

Staff confirmed the ESA contains the 90/110 Rule as required by Commission Order 29632. *Staff Comments* at 2. The 90/110 Rule requires a QF to provide utilities with a monthly estimate of the amount of energy the QF expects to produce. *Id.* If the QF delivers more than 110

² *See* ESA, Appendix B, p. 39, § B-3.

³ “Scheduled Operation Date” is defined in the ESA as “[t]he date specified in Appendix B when Seller anticipates achieving the Operation Date. The Scheduled Operation Date provided by the Seller shall be a reasonable estimate of the date that the Seller anticipates that the Seller’s Facility shall achieve.” ESA at 8, § 1.42.

percent of the estimated amount, then the utility must buy the excess energy for the lesser of 85 percent of the market price or the contract price. *Id.* If the QF delivers less than 90 percent of the estimated amount, then the utility must buy total energy delivered for the lesser of 85 percent of the market price or the contract price. *Id.*; *see also* Order No. 29632 at 20. Staff also confirmed the ESA requires the Seller to give the Company five-day advanced notice if the Seller wants to adjust its Estimated Net Energy Amounts to comply with 90/110 Rule. *Id.* at 2-3. Staff believed this timeframe is reasonable and appropriate. *Id.* at 3.

Staff noted that the Commission has approved a five-day notice in other cases because the Company can more accurately plan its short-term operations if the QF submits its Estimated Net Energy Amounts closer to when the QF delivers energy to the Company. *Id.* at 3; *see also*, e.g., Case Nos. IPC-E-19-01, IPC-E-19-03, IPC-E-19-04, IPC-E-19-07, and IPC-E-19-12. *Id.* Staff stated these cases involved existing QFs with ample historical generation data. *Id.* But the principle remains the same here where the ESA involves a new QF project: for short-term planning on any project-whether old or new-the Company's short-term planning benefits because forecasts are more accurate when made closer to actual delivery. *Id.* Staff believed that while a five-day notice is appropriate here, a longer notice could sometimes benefit the Company. *Id.* For example, if a project gave month-ahead notice before adjusting an estimate, then the Company's month-ahead planning could capture that adjustment. *Id.* Under a five-day timeframe, the Company's month-ahead planning for that month would not capture that adjustment. *Id.* Staff represented that the Company expressed, through an August 4, 2020 e-mail, that the benefits of more accurate monthly estimates in short-term operations provided by the five-day notice outweigh the need for month-ahead adjustments of monthly estimates, even for new projects that lack historical generation data. *Id.* Staff concur and believes a five-day advanced notice is appropriate for both new and existing projects, including the new QF project at issue here. *Id.*

Capacity Payment

Staff noted that because this QF is a new project, the Company will not pay the Seller for capacity until 2026, which is the Company's first capacity deficit year as determined in Order No. 33898. *Id.*

Avoided Cost Rates

Staff argued that the Commission has determined that QFs cannot lock-in a certain rate until the QF has: 1) a signed contract to sell at that rate, or 2) filed a meritorious complaint that the

project is mature and the QF has attempted and failed to negotiate a contract with the utility; that is, there would be a contract but for the utility's conduct. *Id.* at 3-4 citing *A.W. Brown Co., Inc. v. Idaho Public Utilities Commission*, 121 Idaho 812, 816-818, 828 P.2d 841, 845-847 (1992); *see also Rosebud Enterprises, Inc. v. Idaho Public Utilities Commission*, 131 Idaho 1, 951 P.2d 521 (1997); *Idaho Power Company v. Idaho Public Utilities Commission*, 155 Idaho 780, 316 P.3d 1278 (2013); Commission Order Nos. 32257 and 32635. Staff stated that in this case the Seller can lock-in a rate because it has a legally enforceable obligation with the Company that entitles the Seller to sell at a specified rate. *Id.* at 4.

Staff disputed the rate specified in the ESA. *Id.* Staff noted that the ESA's Effective Date of June 19, 2020, occurred after the Commission updated its published non-levelized, seasonal hydroelectric avoided cost rates on June 1, 2020. *Id.*; *see also* Order No. 34683 (updating published avoided rates). Thus, Staff asserted the Company's proposed published avoided cost rates for the ESA-the old rates set by Order No. 34350-are unavailable because the ESA was fully executed and effective after new rates took effect on June 1, 2020, per Order No. 34683. *Id.* Staff contended that the Commission should condition its approval of the ESA on the Company and Seller updating the ESA's published avoided cost rates to those set in Order No. 34683, which Staff attached as Attachments A and B to its comments. *Id.*

2. Idaho Power Reply Comments

In response to Staff's comments, Idaho Power contacted the Seller to ask if it wanted to amend the ESA. *Idaho Power Reply Comments* at 2. The Company represented that the Seller wished for the matter to be submitted to the Commission for decision. *Id.*

Idaho Power asserted that the Seller began the Schedule 73 contracting process on May 8, 2019, and was sent an executable version of the submitted ESA on May 27, 2020. *Id.* The Company provided a timeline of the Seller's movement through the tariffed contracting process in its Reply Comments. *Id.* at 2-3.

The Company stated that a QF's entitlement to a previously effective avoided cost rate under a contract, or through a non-contractual but legally enforceable PURPA obligation, is a determination left to the Commission's discretion. *Id.* at 3. Idaho Power noted that Staff correctly cited precedent requiring a signed contract or a meritorious complaint that the project is mature and the QF has attempted and failed to negotiate a contract with the utility, before locking in a previously effective avoided cost rate under a legally enforceable obligation. *Id.*

Additionally, Idaho Power represented that the Company did not refuse to contract nor delay the contracting process. *Id.* at 3-4. The Company asserted that the only element absent when rates changed on June 1 was that the ESA remained unsigned until June 8 by the Seller, and June 19, 2020, by the Company. *Id.* at 4. Under these facts, the Company did not believe it could refuse to sign the ESA. *Id.*

3. Seller's Comments and Supplemental Comments

On August 13, 2020, the Seller filed comments arguing there was a legally enforceable obligation (“LEO”) before May 31, 2020, because the Facility had completed the Schedule 73 contracting process, except for signing the ESA before that date. *Coleman Hydroelectric, LLC Comments* at 1. The Seller alternatively argued for grandfathering; that is even if a LEO did not exist, the Commission still could approve the ESA with the old rates because the Commission has grandfathered expired rates into previous contracts. *Id.* at 2.

On August 21, 2020, the Seller filed Supplemental Comments and the Declaration of Jordan Whittaker, who attested that he was a developer of the Facility. *Declaration of Jordan Whittaker* at 1. The Seller again asked the Commission to approve the ESA with the published avoided cost rates from Order No. 34350 that were effective until June 1, 2020. *Supplemental Comments of Coleman Hydroelectric, LLC* at 1. The Seller also agreed with the contracting timeline in Idaho Power’s Reply Comments. *Id.* at 2. Further, the Seller asserted that before June 1, 2020, it had taken several steps to develop the Facility by buying and installing equipment at significant cost. *Decl. Whittaker* at 2.

The Seller asserted that Federal Energy Regulatory Commission (“FERC”) regulations entitle a QF to form a LEO with the rates and terms in effect when the QF commits to selling power to the utility. *Id.* The Seller asserts these commitments result in contracts or in non-contractual, but binding, LEOs. *Id.* IPC-E-10-22.

The Seller also noted that in the past the Commission approved an executed energy sales agreement between Idaho Power and Yellowstone Power, Inc. (“Yellowstone”) containing rates that expired before the agreement was signed despite “the apparent lack of any written documentation . . . evidencing that the terms of a power purchase agreement were materially complete [before the rate change].” *Id.* at 5; *see also* Order No. 32104, Case No. IPC-E-10-22.

The Seller further asserted that the Commission has looked to a project's maturity and the QF's developer's level of commitment to completing the project in determining whether to approve the use of pre-existing rates. *Id.* citing Order No. 29954.

The Seller also argued that FERC's recent Order No. 872, proposing new rules (which are not in effect yet) reaffirms FERC's prior LEO precedent and confirms that a QF may be entitled to previously effective avoided costs without an executed written contract. *Id.* at 5. The Seller also claimed FERC in Order No. 872 listed requirements it had found to be inconsistent with the LEO rule. *Id.* The Seller claimed these unlawful LEO requirements include a requirement for a utility's execution of a power purchase agreement or requiring that QFs file a formal complaint with the state commission. *Id.* The Seller highlighted that FERC specifically cited *Grouse Creek Wind Park, LLC*, 142 FERC ¶ 61,187 at ¶ 40 (2013), for the proposition that requiring the QF to file a complaint to establish a LEO is unlawful. *Id.*

The Seller asserted that based on the foregoing, the Seller created a LEO before June 1, 2020, and the Commission should approve the ESA as submitted. *Id.* at 7. The Seller also asserted this Commission has acknowledged that pre-existing rates should apply where the facility has matured to the level that demonstrates the QF's commitment to the project, and the Seller satisfies such test. *Id.*

The Seller also asserted that the parties' inability to sign the written agreement before the rates changed on June 1, 2020, was simply due to logistics like the parties' physical separation, the resulting need to mail the document back and forth, and remote working conditions caused by a global pandemic. *Id.* at 9.

COMMISSION FINDINGS AND DECISION

The Commission has jurisdiction over this matter under *Idaho Code* §§ 61-502 and 61-503. The Commission is empowered to investigate rates, charges, rules, regulations, practices, and contracts of public utilities and to determine whether they are just, reasonable, preferential, discriminatory, or in violation of any provision of law, and to fix the same by order. *Idaho Code* §§ 61-502 and 61-503. In addition, the Commission has authority under PURPA and FERC regulations to set avoided costs, to order electric utilities to enter fixed-term obligations for the purchase of energy from QFs, and to implement rules. The Commission may enter any final order consistent with its authority under Title 61 and PURPA.

Published avoided cost rates are updated by this Commission every year. The new rates go into effect on June 1 every year. *See* Order Nos. 32817, 33041, 33305, 33538, 33773, 34062, 34350, and 34683. Contracts executed after June 1 are subject to the new rates. Indeed, the parties explicitly agreed to an “Effective Date” within the *terms* of their negotiated ESA. Notwithstanding the arguments made in this case, we accept the parties’ representations in their contract – that they intended the “Effective Date” to be when the ESA was fully executed by both parties on June 19, 2020. Furthermore, a LEO argument is inappropriate based on the facts of this case. The parties entered negotiations that, ultimately, resulted in an agreement. Neither party asserts that the other caused undue delay. FERC’s LEO standards, prior to the issuance of Order No. 872 and after it, are intended to prevent intransigence and undue delay by a utility in negotiating with a QF. None of those circumstances apply here.

Based on our review of the record, the Commission finds it is fair, just, and reasonable to approve the ESA with published avoided cost rates set in Order No. 34683. The rates set by Order No. 34683 became effective on June 1, 2020. The mutually negotiated ESA has an effective date of June 19, 2020. If the Company and Seller had intended a different effective date, they could have negotiated one. Because the ESA’s effective date is after the June 1, 2020 rate change, the Seller is not entitled to the previously effective rates. *See A.W. Brown Co., v. Idaho Public Utilities Commission*, 121 Idaho 812, 816-818, 828 P.2d 841, 845-847 (1992).

The Commission also finds that the Company’s payments for purchases of energy under the ESA are prudently incurred expenses for ratemaking purposes.

ORDER

IT IS HEREBY ORDERED that the ESA is approved conditioned upon on the Company and Seller updating the ESA’s published avoided cost rates consistent with Order No. 34683.

IT IS FURTHER ORDERED that all payments made by the Company for purchases of energy under the ESA are allowed as prudently incurred expenses for ratemaking purposes.

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 about any matter decided in 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 17th
day of December 2020.



PAUL KJELLANDER, PRESIDENT

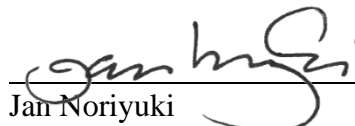


KRISTINE RAPER, COMMISSIONER



ERIC ANDERSON, COMMISSIONER

ATTEST:



Jan Noriyuki
Commission Secretary

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