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IDAHO PUBLIC
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BEFORE THE IDAHO PUBLIC UTILITIES COMMISSION

WOOD HYDRO, LLC, Complainant, v. IDAHO POWER COMPANY, Respondent/Cross-Complainant, v. WOOD HYDRO, LLC, Cross-Respondent, ENEL GREEN POWER NORTH AMERICA, INC. Cross-Respondent, v. CENTRAL RIVERS POWER US, LLC Cross-Respondent.	Case No. IPC-E-20-28 **CENTRAL RIVERS POWER US LLC'S COMMENTS IN SUPPORT OF SETTLEMENT STIPULATION**

In accordance with Order No. 34929, Central Rivers Power US, LLC ("Central Rivers" or "Lowline #2") respectfully submits the following Comments Regarding Settlement Stipulation.

INTRODUCTION

This proceeding involves hotly contested legal issues regarding, among other things, the Commission's jurisdiction to award damages for alleged breach of contract;[1] whether the liquidated damages clause in Central Rivers Power's contract is enforceable, or instead whether the liquidated damages would be punitive and thus unenforceable under Idaho law; proper interpretation of the phrase "permanent curtailment;" and other legal issues.

In light of the considerable uncertainty regarding these legal questions, the parties negotiated the Settlement Stipulation. Central Rivers respectfully submits that the Settlement Stipulation reasonably accounts for the litigation uncertainties in this case. Approving the Settlement Stipulation rather than requiring the parties to litigate the legal issues preserves the parties' respective resources; protects ratepayers from litigation expense and uncertain litigation outcomes; and promotes certainty on a going-forward basis.

COMMENT

As the Commission is aware, this case has a somewhat complicated procedural history. The other parties have set forth that history in detail, and Central Rivers does not repeat that history here in full. Suffice it to say that this proceeding involves a dispute between Idaho Power and three qualifying facilities ("QFs"), each of which has a 35-year Firm Energy Sales Agreement ("FESA") under the Public Utility Regulatory Policies Act of 1978 ("PURPA"). In Central Rivers' view, each FESA is similar, but the key provisions differ such that adjudication

[1] By entering into the settlement stipulation, and by submitting these comments, Central Rivers does not concede that the Commission has jurisdiction over this dispute.

of this proceeding—which, in Central Rivers' view, must occur in court rather than in the Commission—would require independent consideration of each FESA.

This proceeding involves a number of disputed legal issues, summarized below. While none of the parties knows how these legal issues would be resolved, they do know one thing—it would take significant efforts, significant expense, and a significant period of time to litigate them. After considering these issues, the parties have elected to reach a settlement that preserves their respective resources and provides certainty going forward. Central Rivers submits that this is a reasonable approach that protects ratepayers, the parties, and the Commission.

The legal issues include:

- **Jurisdiction.** As set forth in more detail in Central Rivers's Motion to Dismiss, this case appears to fall well within the general rule that contractual disputes should be heard by the courts rather than the Commission. Idaho PUC Order No. 32780 (April 2013) ("If the matter is a contractual dispute, it should be heard by the courts."). None of the exceptions to this general rule apply here, particularly in light of the specific language in Central Rivers's FESA.[2] In addition, this proceeding will involve legal arguments that fall within the specialized expertise of Idaho courts rather than the Commission. The Settlement Stipulation reflects a reasonable compromise of this threshold jurisdictional question.

- **Contractual interpretation.** As discussed in more detail in other parties' comments, the liquidated damage clauses in the FESAs—to the extent they are enforceable at all—appear to be triggered by a "permanent curtailment." Like the other QFs, in this instance Central Rivers suffered a temporary halt in production. Any "curtailment"—if there was a curtailment at all—was therefore "temporary" rather than "permanent." As Central Rivers understands it, Idaho Power is prepared to argue that the term "permanent" should be interpreted in light of the FESAs' structure as meaning something other than the terms' dictionary definition would imply. The Stipulated Settlement appropriately reflects the legal uncertainty associated with the proper interpretation of this phrase in the FESA.

- **Enforceability of liquidated damages clause.** As noted in Central Rivers's Motion to Dismiss, the disputed provision in the FESAs is labelled as—and operates as—a liquidated damages provision. Under Idaho law, liquidated damages clauses are not enforceable when the liquidated damages operate as a penalty rather than a reasonable estimation of the parties' damages. In this proceeding, the cost to Idaho Power of obtaining replacement energy appears to be significantly less than the cost of purchasing power under the FESA. As such, the amounts claimed by Idaho Power as liquidated

[2] Each QF's FESA contains different language regarding the Commission's jurisdiction. Central Rivers's FESA does not contain a clause consenting to the Commission's jurisdiction to interpret the contract.

damages appears to have no correlation to Idaho Power's damages, and the liquidated damages clause would be punitive and unenforceable. The Settlement Stipulation appropriately reflects the litigation risk associated with this well-established legal doctrine.

- **Actual damage to Idaho Power and/or ratepayers.** Although this issue has not yet been fully fleshed out, given recent market conditions it appears that neither Idaho Power nor its ratepayers were damaged by the alleged breach of the FESAs. Indeed, it appears as though Idaho Power and its ratepayers may have benefitted from the decrease in generation that forms the basis of this dispute. Accordingly, even if Idaho Power were able to prove a breach of the FESAs, the amount of recoverable damages appears minimal. The Settlement Stipulation appropriately reflects the lack of harm suffered by Idaho Power and its ratepayers, even assuming that the QFs actually breached an enforceable provision of the FESAs.

Central Rivers acknowledges that the Settlement Stipulation may be seen as involving a relatively small—though far from insubstantial—payment from the QFs to Idaho Power, in comparison to the amounts initially claimed by Idaho Power. However, Central Rivers respectfully submits that the settlement amount appropriately reflects the litigation risk associated with the proceeding. The settlement amounts also appropriately reflect the resources that each party would have to expend to litigate this case to the merits; the time any litigation would take; and the available damages (if any) Idaho Power could collect even if it succeeded on the merits.

In addition, the Settlement Stipulation contains language clarifying the parties' interpretation of the FESAs on an ongoing basis. This certainty is of great value to the parties, and to Idaho Power's ratepayers, as it will prevent disputes of this nature in the future.

CONCLUSION

For the reasons set forth above, Central Rivers respectfully submits that the Settlement Stipulation provides a reasonable resolution of this proceeding. As such, Central Rivers respectfully requests that the Commission approve the Settlement Stipulation.

Dated: March 9, 2021

Respectfully submitted,

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CERTIFICATE OF DELIVERY

I certify that on March 9,2021, a true and correct copy of the foregoing was served upon all parties of record in this proceeding via electronic mail as indicated below:

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