

BEFORE THE IDAHO PUBLIC UTILITIES COMMISSION

IN THE MATTER OF THE FORMAL) CASE NO. IPC-E-20-28
COMPLAINT OF WOOD HYDRO AGAINST)
IDAHO POWER COMPANY)
) ORDER NO. 34982
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On June 25, 2020, Wood Hydro, LLC formally complained that Idaho Power Company improperly withheld payments owed to Wood Hydro under a Firm Energy Sales Agreement (“FESA”) for the Mile 28 hydroelectric (“Mile 28 Hydro”) qualifying facility (“QF”).

On August 3, 2020, Idaho Power filed an Answer and Cross-Complaint against Wood Hydro, Enel Green Power North America, Inc. (“Enel”) for the Rock Creek #2 QF, and Central Rivers Power US, LLC (“Central Rivers”) for the Lowline #2 QF. On September 17, 2020, Enel and Central Rivers filed separate Motions to Dismiss and Wood Hydro filed a Reply. On October 1, 2020, Idaho Power filed an Answer to Cross-Respondents’ Motions to Dismiss.

On November 9, 2020, Idaho Power filed a Joint Motion to Stay signed by all parties. The Motion asked the Commission to issue a stay so the parties would have time to negotiate a settlement and submit it for Commission approval. The Commission granted the Motion and issued the stay. Order No. 34846.

On January 25, 2021, the Company filed a Settlement Stipulation and Motion to Approve Settlement Stipulation. On February 23, 2021, the Commission issued a Notice of Settlement Stipulation and Notice of Modified Procedure setting deadlines for interested persons to submit comments. Order No. 34929. Wood Hydro, Enel, and Central Rivers filed comments supporting the Settlement Stipulation. No other comments were received.

Now, having reviewed the record, the Commission approves the Settlement Stipulation.

BACKGROUND

Under the Public Utility Regulatory Policies Act of 1978 (“PURPA”), electric utilities such as Idaho Power must purchase energy generated by QFs. 18 C.F.R. § 292.303(a). The rate and contract terms by which the utility must purchase the energy are determined by state utility commissions within broad contours established by PURPA and the federal regulations issued by

the Federal Energy Regulatory Commission (“FERC”) implementing PURPA. 16 U.S.C. § 824a-3(b); 18 C.F.R. § 292.304; *Indep. Energy Prod. Ass’n v. Cal. Public Utilities Comm’n*, 36 F.3d 848, 856 (1994) (stating, “PURPA delegates to the states broad authority to implement section 210 of the statute.” (formatting omitted)).

At issue in this case are three similar contracts for Idaho Power to buy energy from QFs over 35-years at levelized rates. The QFs entered the contracts with Idaho Power between 1986 and 1993. Each contract has similar language requiring the QF to pay liquidated damages if it “permanently curtails in whole or in part its long-term average deliveries [of energy].” Idaho Power Answer and Cross-Complaint at 3. Idaho Power asserted “permanent curtailment” under the contracts operates annually, and when the contract year ends there is no way for the QF to compensate for the shortfall in a different contract year. *Id.* at 12, 15.

Wood Hydro’s complaint against Idaho Power alleged Idaho Power improperly withheld payments due to Wood Hydro for energy from the Mile 28 Hydro QF. Formal Complaint at 1. Idaho Power answered that the Mile 28 Hydro QF “permanently curtailed” its generation by not delivering energy from November 2018 through July 2019 and Idaho Power withheld payments to recover the liquidated damages. Idaho Power Answer and Cross-Complaint at 4. The forecasted annual production of Mile 28 is 5,798,590 kWh, and its contract year runs from June 1 through May 31. *See id.* In the contract year in question, Contract Year 25, Wood Hydro delivered 3,355,049 kWh. *Id.* Idaho Power stated the curtailment continued into Contract Year 26 but this did not become a “permanent curtailment” because the QF subsequently met its forecasted generation for Contract Year 26. *Id.* at 9. Idaho Power initially calculated the liquidated damages for Mile 28 Hydro to be \$1,163,125. *Id.* at 4. The Mile 28 Hydro contract has a provision that refunds 90% of the liquidated damages amount if the QF begins generating again within one year. *Id.* at 5. With the 90% reduction, Idaho Power’s initial claim against Mile 28 Hydro was \$116,312. *Id.* The Settlement Stipulation requires Mile 28 Hydro to pay \$14,000. Joint Settlement and Motion at 7.

Idaho Power stated that Enel’s Rock Creek #2 facility delivered no energy to Idaho Power from June 2019 through May 2020. Idaho Power Answer and Cross-Complaint at 12. Rock Creek #2’s annual forecast is 14,073,550 kWh. *Id.* Idaho Power stated Rock Creek #2 delivered 978,479 kWh during the relevant contract year, Contract Year 31. *Id.* Idaho Power calculated the

liquidated damages for Rock Creek #2's shortfall at \$4,059,472. *Id.* at 12-13. The Settlement Stipulation requires Rock Creek #2 to pay \$50,000. Joint Settlement and Motion at 7.

Idaho Power stated that Central Rivers' Lowline # 2 facility delivered no energy to Idaho Power from June 2019 through at least April 2020. Idaho Power Answer and Cross-Complaint at 15. Lowline #2's annual forecast is 15,755,610 kWh. Idaho Power stated that Lowline #2 delivered 1,287,678 kWh during the relevant contract year, Contract Year 32. *Id.* Idaho Power calculated the liquidated damages for Lowline #2's shortfall at \$3,616,983. *Id.* The Settlement Stipulation requires Lowline #2 to pay \$44,000. Joint Settlement and Motion at 7.

THE SETTLEMENT STIPULATION

Besides the settlement amounts, the Settlement Stipulation states that the parties agree to define "permanent curtailment" as a "failure to deliver Net Energy for the entire remaining term of the FESA, and failure to deliver for a period of time less than the entire remaining term will not be a permanent curtailment." Joint Settlement and Motion at 7. The parties agreed that the Settlement Stipulation, if approved by the Commission, fully resolves their dispute and no party will bring additional actions at the Commission or elsewhere based on the facts arising before the execution of the Settlement Stipulation. *Id.* at 8

Idaho Power acknowledged that the settlement amounts are "less than the [liquidated damages] calculated by Idaho Power under the facility's respective FESAs, discounted by 90 percent for projects that come back online (based on the application of the discount provisions contained in Mile 28's FESA), but [are] proportional across the QF parties in relation to that larger amount[.]" Joint Settlement and Motion at 6. Idaho Power stated it would accept the settlement amounts in full satisfaction of the liquidated damages amounts for the periods of non-generation that are the subject of the dispute. *Id.* at 7.

ARGUMENTS OF PARTIES IN SUPPORT OF SETTLEMENT STIPULATION

The QF parties assert the Settlement Stipulation is a fair, just, and reasonable resolution of the dispute because of the numerous uncertain legal claims that would need to be litigated in absence of the Settlement Stipulation. The QF parties' arguments focus on 1) the definition of "permanent curtailment" and whether failure to deliver for a number of months is "permanent" under the terms of the contract; and 2) whether the Annual Net Firm Energy, or similar terms in the respective FESAs, are a commitment to deliver energy or an estimate to deliver energy; and 3) the Commission's jurisdiction to interpret the contracts or whether the dispute belongs in district

court; and 4) if the Commission cannot award damages for breach of contract, as all parties seem to agree, whether the dispute is better suited for district court; and 5) the enforceability of the liquidated damages provisions under Idaho law; and 6) whether the Company and its ratepayers were actually injured by the non-delivery because the Company was likely able to purchase replacement energy cheaper than the contract prices. In addition to removing litigation uncertainty, the QF parties assert that the Settlement Stipulation clarifies the definition of “permanent curtailment” going forward.

a.) Wood Hydro on Behalf of Mile 28.

Wood Hydro pointed to the term “permanent curtailment” as the crux of the dispute and stated, “A curtailment of less than four months is not ‘permanent’ in a 30-year contract. The clear language of the contract itself is not applicable to the circumstance before the Commission. This is the major reason for the settlement between the parties.” Wood Hydro Comments at 2. Wood Hydro argued that Idaho Power added the 90/110 requirement in later contracts because its earlier contracts, such as those at issue in this dispute, did not have a penalty for intermittent non-delivery of power, only for “permanent curtailment.” *Id.*

Wood Hydro also argued that the liquidated damages provision in its contract was non-enforceable because it is simple to prospectively and retrospectively ascertain the replacement cost of the energy by looking at nearby energy markets. *Id.* at 3. Despite filing the complaint with the Commission, Wood Hydro also joined in the other QF parties’ argument that a contract cannot convey subject matter jurisdiction on the Commission. *Id.* Lastly, Wood Hydro cited to Idaho’s Energy Plan, adopted in 2007, and expounded upon by House Concurrent Resolution 9 in 2019, for the proposition that the Commission “should administer its responsibilities under [PURPA] in a way that encourages the development of customer-owned renewable generation and combined heat and power facilities[,]” and “recognize hydropower as our state’s greatest renewable resource and further recognize the immense benefit hydropower provides to our state as a carbon-free, inexpensive electrical power source and as an economic driver for tourism, recreation, and agriculture in Idaho.” *Id.* at 3-4. Wood Hydro stated that “the unwarranted penalization for these plants being offline for repair and upgrade ranges from damaging to permanently putting hydropower offline in contravention of the state’s energy policy.” *Id.* at 4.

b.) Enel on Behalf of Rock Creek #2.

Enel stated that it had recommenced delivering energy to Idaho Power before Idaho Power filed its cross-complaint. Enel Comments Regarding Settlement Stipulation at 3. Enel stated that “Rock Creek #2 experienced an unexpected equipment failure that caused the inability to safely operate the facility during Contract Year 31 of the 35-year FESA. This forced outage was repaired at substantial expense, and the facility is now expected to operate at normal levels for the remainder of the term of the FESA.” *Id.* at 5. Enel stated that its contract “contains no provision for damages in the case of a temporary forced outage of the sort that occurred in this case.” *Id.* Enel stated that the liquidated damages provision in its contract was only triggered if the QF “permanently curtails in whole or in part its long-term average deliveries of the Net Firm Energy amount . . .” and the damages were calculated as “potential overpayment damages as if the Seller walks away from the contract for the remainder of the term and permanently ceases selling under the FESA’s levelized rates.” *Id.* at 6.

Enel also argued circumstances beyond its control that would excuse performance under the contract including “an unexpected equipment failure, delays in obtaining replacement equipment, and then an intervening global pandemic that delayed efforts to place the facility back in service.” *Id.* Enel also asserted that Idaho Power did not promptly notify Enel of the alleged default, instead waiting almost a year before claiming almost \$4 million in damages after Enel brought the plant back online, another defense against recovery under contract and equity. *Id.* at 6-7. Enel also argued that the liquidated damages clause would be unenforceable because under Idaho law, liquidated damages provisions are unenforceable if the breaching party proves that “the damages specified in the contract bear no reasonable relation to actual damages or that the liquidated damages are exorbitant and unconscionable.” *Id.* at 7 *citing Magic Valley Brokers v. Meyer*, 133 Idaho 110, 117, 982 P.2d 945, 952 (Ct. App. 1999).

Enel stated that historically it has generated about half of the 14,073,550 kWh estimated as the Annual Net Firm Energy in its FESA and therefore the liquidated damages, calculated on the full estimate, are grossly inflated. *Id.* at 8. Enel also stated that the cost of replacement energy during the outage period was likely less than or equivalent to what it would have received during its outage. *Id.* Finally, Enel questioned the Commission’s jurisdiction to hear the complaint and noted that if Idaho Power were unsuccessful in its court claims against the QFs, Idaho Power would have to pay the QFs’ attorney fees. *Id.* at 9. Enel stated that the Settlement Stipulation allows the

parties to avoid protracted and costly litigation and prevents further disputes over the term “permanent curtailment.”

c.) Central Rivers on Behalf of Lowline # 2.

Central Rivers asserted that the Settlement Stipulation reasonably accounts for the litigation uncertainties in the case. Central Rivers Comments at 2. Central Rivers pointed to uncertainties around the Commission’s authority to award damages for breach of contract, whether the liquidated damages clause is enforceable, proper interpretation of the term “permanent curtailment,” and whether there was any actual damage to Idaho Power and its ratepayers. *Id.* at 3-4. Central Rivers asserted that approving the Settlement Stipulation would protect ratepayers from litigation expense and uncertain litigation outcomes and promotes certainty going forward. *Id.* Central Rivers asserted that the relatively small settlement amounts compared to the initially claimed damages reflect the risks for Idaho Power to litigate the case and that the Settlement Stipulation provides a benefit by settling the interpretation of “permanent curtailment” going forward. *Id.* at 5.

COMMISSION FINDINGS AND DISCUSSION

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. Under Commission Rules, the Commission must independently review proposed settlements. “The Commission is not bound by settlements. It will independently review any settlement proposed to it to determine whether the settlement is just, fair and reasonable, in the public interest, or otherwise in accordance with law or regulatory policy.” IDAPA 31.01.01.276.

First, the Commission finds that approving the Settlement Stipulation is well within the Commission’s jurisdiction under Title 61 and PURPA. Because it is unnecessary to do so, we will not opine on whether we would have had jurisdiction to interpret the contracts or whether it would have been prudent to do so. Having reviewed the Settlement Stipulation and the record, we find

that the Settlement Stipulation is a fair, just, and reasonable settlement of the dispute and is in the public interest. We find that Idaho Power's ratepayers benefit from the Settlement Stipulation. Idaho Power did not refute the QF parties' arguments that Idaho Power was able to purchase the anticipated QF generation at a rate equal to or less than what would have been owed to the QFs had they delivered under their contracts. Further, the Settlement Stipulation prevents what otherwise likely would have been costly, time-consuming, and uncertain litigation to determine the parties' rights under their contracts. Finally, the originally claimed liquidated damages appear to be calculated based on each QF never coming back online, and each QF has since returned to service. This helps to explain the disparity between the originally claimed liquidated damages and the settlement amounts.

ORDER

IT IS HEREBY ORDERED that the Motion to Approve Settlement Stipulation is granted and the Settlement Stipulation is approved.

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 with regard to 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.

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DONE by Order of the Idaho Public Utilities Commission at Boise, Idaho this 6th day of March 2021.



PAUL KJELLANDER, PRESIDENT

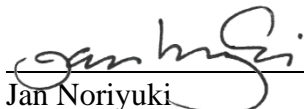


KRISTINE RAPER, COMMISSIONER



ERIC ANDERSON, COMMISSIONER

ATTEST:



Jan Noriyuki
Commission Secretary

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