Office of the Secretary
Service Date
June 8, 2011

BEFORE THE IDAHO PUBLIC UTILITIES COMMISSION

IN THE MATTER OF THE APPLICATION OF IDAHO POWER COMPANY FOR A DETERMINATION REGARDING A FIRM ENERGY SALES AGREEMENT BETWEEN IDAHO POWER AND ALPHA WIND, LLC	CASE NO. IPC-E-10-51
IN THE MATTER OF THE APPLICATION OF IDAHO POWER COMPANY FOR A DETERMINATION REGARDING A FIRM ENERGY SALES AGREEMENT BETWEEN IDAHO POWER AND BRAVO WIND, LLC	CASE NO. IPC-E-10-52
IN THE MATTER OF THE APPLICATION OF IDAHO POWER COMPANY FOR A DETERMINATION REGARDING A FIRM ENERGY SALES AGREEMENT BETWEEN IDAHO POWER AND CHARLIE WIND, LLC	CASE NO. IPC-E-10-53
IN THE MATTER OF THE APPLICATION OF IDAHO POWER COMPANY FOR A DETERMINATION REGARDING A FIRM ENERGY SALES AGREEMENT BETWEEN IDAHO POWER AND DELTA WIND, LLC	CASE NO. IPC-E-10-54
IN THE MATTER OF THE APPLICATION OF IDAHO POWER COMPANY FOR A DETERMINATION REGARDING A FIRM ENERGY SALES AGREEMENT BETWEEN IDAHO POWER AND ECHO WIND, LLC	CASE NO. IPC-E-10-55 ORDER NO. 32254

On December 16, 2010, Idaho Power Company filed five Applications each requesting acceptance or rejection of a 20-year Firm Energy Sales Agreement ("Agreements") between Idaho Power and Alpha Wind, LLC; Bravo Wind, LLC; Charlie Wind, LLC; Delta Wind, LLC; and Echo Wind, LLC, respectively. The five projects are all located near Burley, Idaho, and are all managed by Cotterel WindEnergy Center LLC. The projects have self-certified as "qualifying facilities" (QFs) under the applicable provisions of the federal Public Utility Regulatory Policies Act of 1978 (PURPA). Idaho Power requested that its Applications be processed by Modified Procedure.

On January 10, 2011, the Commission issued a Notice of Application and Notice of Modified Procedure setting a March 17, 2011, comment deadline and a March 24, 2011, deadline for reply comments. Comments were filed by the Commission Staff, the Company and Cotterel Wind on behalf of the five projects.[1] As set out in greater detail below, the Commission declines to approve the Firm Energy Sales Agreements.

BACKGROUND

On November 5, 2010, Idaho Power, Avista Corporation, and PacifiCorp dba Rocky Mountain Power filed a Joint Petition requesting that the Commission initiate an investigation to address various avoided cost issues related to the Commission's implementation of PURPA. Section 210 of PURPA generally requires electric utilities to purchase power produced by QFs at "avoided cost" rates set by the Commission. "Avoided costs" are those costs which a public utility would otherwise incur for electric power, whether that power was purchased from another source or generated by the utility itself." 18 C.F.R. § 292.101(b)(6). Order No. 32176 at 1.

While the Commission pursues its investigation, the utilities also moved the Commission to "lower the published avoided cost rate eligibility cap from 10 aMW to 100 kW [to] be effective immediately. . . ." *Id. citing* Joint Petition at 7. Under PURPA regulations issued by the Federal Energy Regulatory Commission (FERC), the Commission must "publish" avoided cost rates for small QFs with a design capacity of 100 kW or less. Order No. 32176 at 1. However, the Commission has the discretion to set the published avoided cost rate at a higher capacity amount – commonly referred to as the "eligibility cap." 18 C.F.R. § 292.304(c)(1-2). When a QF project is larger than the published eligibility cap the avoided cost rate for the project must be individually negotiated by the QF and the utility using the Integrated Resource Plan (IRP) Methodology. Order No. 32176.

The purpose of utilizing the IRP Methodology for large QF projects is to more precisely value the energy being delivered. *Id.* at 10. The IRP Methodology recognizes the individual generation characteristics of each project by assessing when the QF is capable of delivering its resources against when the utility is most in need of such resources. The resultant

[1] The parties in these five cases have all filed consolidated comments because the "relevant facts for each of these five projects are substantially similar." Comments of Cotterel Wind at n.1. Consequently, the Commission finds it reasonable and appropriate to consolidate these cases and issue this consolidated final Order. Rule 247, IDAPA 31.01.01.247.

pricing is reflective of the value of QF energy to the utility. Utilization of the IRP Methodology does not negate the requirement under PURPA that the utility purchase the QF energy.

On December 3, 2010, the Commission issued Order No. 32131 declining the utilities' motion to immediately reduce the published avoided cost rate eligibility cap from 10 aMW to 100 kW. Order No. 32131 at 5. However, the Order did notify parties that the Commission's decision regarding the motion to reduce the published avoided cost eligibility cap would become effective on December 14, 2010. *Id.* at 5-6, 9.

Based upon the record in the GNR-E-10-04 case, the Commission subsequently found that a "convincing case has been made to temporarily reduce the eligibility cap for published avoided cost rates from 10 aMW to 100 kW for wind and solar only while the Commission further investigates" other avoided cost issues. Order No. 32176 at 9 (emphasis original). On reconsideration, the Commission affirmed its decision to temporarily reduce the eligibility cap for published avoided cost rates from 10 aMW to 100 kW. Order No. 32212. Thus, the eligibility cap for the published avoided cost rate for wind and solar QF projects was set at 100 kW effective December 14, 2010.

THE AGREEMENTS

On December 15, 2010, Idaho Power and the five wind projects entered into their respective Agreements. Under the terms of the Agreements, each wind project agrees to sell electric energy to Idaho Power for a 20-year term using the 10 aMW non-levelized published avoided cost rates. Applications at 4. The Applications recite that Alpha, Bravo, Delta and Echo will have a maximum capacity amount of 29.9 MW, and Charlie will have a maximum capacity of 27.6 MW. *Id.* at ¶ 7. Under normal and/or average conditions, each QF will not generate more than 10 aMW on a monthly basis. Idaho Power warrants that the Agreements comport with the terms and conditions of the various Commission Orders applicable to PURPA agreements for a wind resource. *Id.* at ¶ 6 *citing* Order Nos. 30415, 30488, 30738 and 31025.

The projects have all selected October 31, 2014, as the Scheduled First Energy Date and December 31, 2014, as the Scheduled Operation Date. Applications at 5. Idaho Power asserts that various requirements have been placed upon the projects in order for Idaho Power to accept the project's energy deliveries. Idaho Power states that it will monitor each project's compliance with initial and ongoing requirements through the term of the Agreement. The

parties have agreed to liquidated damage and security provisions of $45 per kW of nameplate capacity. Agreements ¶¶ 5.3.2, 5.8.1.

Idaho Power asserts that it has advised each project of the project's responsibility to work with Idaho Power's Delivery business unit to ensure that sufficient time and resources will be available for the Delivery unit to construct the interconnection facilities, and transmission upgrades if required, in time to allow the projects to achieve their December 31, 2014, Scheduled Operation Date. The Applications state that the projects have been advised that delays in the interconnection or transmission process do not constitute excusable delays and if a project fails to achieve its Scheduled Operation Date, delay damages will be assessed. Applications at 7. The Applications further maintain that each project has acknowledged and accepted the risk inherent in proceeding with its Agreement without knowledge of the requirements of interconnection and possible transmission upgrades. *Id.* at 7.

Idaho Power also states that each project has been made aware of and accepted the provisions in the Agreement and Idaho Power's approved Schedule 72 regarding non-compensated curtailment or disconnection of the project should certain operating conditions develop on Idaho Power's system. The Applications note that the parties' intent and understanding is that "non-compensated curtailment would be exercised when the generation being provided by the Facility in certain operating conditions exceeds or approaches the minimum load levels of [Idaho Power's] system such that it may have a detrimental effect upon [Idaho Power's] ability to manage its thermal, hydro, and other resources in order to meet its obligation to reliably serve loads on its system." *Id.* at 7-8.

By their own terms, the Agreements will not become effective until the Commission has approved all of the terms and conditions and declares that all payments made by Idaho Power to each project for purchases of energy will be allowed as prudently incurred expenses for ratemaking purposes. Agreements ¶ 21.1.

THE COMMENTS

A. Staff Comments

Staff observed that the five Agreements are nearly identical. All five of the projects are proposed to be built in the same general vicinity. Staff calculated that the five projects collectively are expected to generate 377,737 MWh annually. Under the non-levelized rates in the Agreements, the annual energy payments by Idaho Power for the expected generation will be

approximately $26.0 million in 2015 increasing to approximately $46.8 million in 2033, or a cumulative total of $716.4 million over the 20-year term of the Agreements. The collective net present value of the energy payments over the life of the Agreements will be approximately $236.5 million.

The five Agreements were signed by the project developer on December 13, 2010, and signed by Idaho Power on December 15, 2010. The Agreements were filed with the Commission on December 16, 2010. The Agreements contain the published avoided cost rates from Order No. 31025. However, Staff observed that Order No. 32176 lowered the availability of published avoided cost rates for wind and solar QF projects to 100 kW, effective December 14, 2010. As a matter of law, Staff considers the effective date of the contract to be the date upon which both parties signed the agreement. A signature by only one party, Staff believes, does not create an enforceable contract nor establish the effective date of the Agreement. Consequently, Staff considers the effective date for the five Agreements to be December 15, 2010.

Because the Agreements were executed after the date upon which the 100 kW eligibility cap became effective for wind and solar projects and because the size of each proposed wind project clearly exceeds 100 kW, Staff maintains that approval of the Agreements is prohibited by Order No. 32176. Staff believes that the avoided cost rate for these Agreements must be negotiated using the IRP methodology. Consequently, Staff recommended denial of the Agreements as submitted.

B. Idaho Power Reply

Idaho Power stated that it executed the five Agreements in good faith and will honor them if approved by the Commission. Reply at 9-10. Idaho Power argued that "the continuing and unchecked requirement for the Company to acquire additional intermittent and other QF generation regardless of its need for additional energy or capacity on its system not only circumvents the Integrated Resource Planning process and creates system reliability and operational issues, but it also increases the price its customers must pay for their energy needs above the Company's actual avoided costs." *Id.* at 10.

Idaho Power's reply comments explained its internal processing of PURPA power purchase agreements.[2] Idaho Power states that, once the proposed draft PPA is in final draft

[2] The Firm Energy Sales Agreements are also known as Power Purchase Agreements, or "PPAs."

form, an internal Sarbanes Oxley ('SOX') review is required. This review takes approximately 10 business days and provides confirmation from all necessary divisions within the Company that the contract meets all SOX requirements and thus enables Idaho Power to execute the PPA. Following the SOX review, three executable copies of the PPA are prepared and sent to the project. When signed contracts are returned to Idaho Power by the project, Idaho Power schedules a time for the appropriate Idaho Power executive to sign and execute the agreement. *Id.* at 6. "Generally this is accomplished within one to two business days of when the executed agreement is received back from the project, but is dependent on the limited availability of the required Company executive with the requisite authority to execute contracts containing such large monetary obligations as those contained in the typical 20-year PURPA PPA." *Id.*

Idaho Power stated that the projects presently before the Commission initially bid into Idaho Power's 2009 request for proposals for a wind resource "as one large wind project of 150 megawatts('MW')." *Id.* at 7. The projects were selected and began contract negotiations, but an agreement was never reached and negotiations were subsequently terminated. In October 2010, the projects again contacted Idaho Power by submitting five PURPA QF contracts (forms obtained from the Internet) requesting the current published avoided cost rate. Idaho Power asserts that the five contracts "were for the same project that Cotterel had proposed in [response to] the Company's [previous] RFP as a single 150 MW resource, but had now broken apart into five 10 aMW, approximately 30 MW nameplate, pieces with a corresponding request for five QF contracts at [the] published . . . 10 aMW rates." *Id.*

Idaho Power responded to the projects on November 4, 2010, with a standard PURPA contract process letter requesting information to initiate the PURPA process. On November 8, 2010, each project filed a separate complaint with the Commission asserting that the Company "has not negotiated in good faith."[3] On December 6, 2010, Idaho Power received confirmation from the projects that proposed changes to the draft PPAs were acceptable. On December 7, 2010, final draft agreements were provided to the projects for review. On Friday, December 10, 2010, final, executable agreements were provided to the projects. "The contracts were executed by Shell, the owner of the Projects, (presumably in their offices in Houston) on [Monday] December 13, 2010, and then mailed to Idaho Power. The contracts were received by Idaho

[3] See Case Nos. IPC-E-10-32, IPC-E-10-33, IPC-E10-34, IPC-E-10-35, and IPC-E-10-36. The projects asked that the summonses for the five complaint cases be stayed pending resolution of the present cases.

Power on December 14, 2010, signed by the Company on December 15, 2010, and filed for review with the Commission on December 16, 2010." *Id.* at 8.

Idaho Power maintains that the Commission, "in the exercise of its legislative, state police power and authority to protect the public" may review the Agreements and determine "whether they are in the public interest and issue its Order either accepting or rejecting the same." *Id.* at 13.

C. The Projects' Reply

The five projects submitted a consolidated reply. In its reply, Cotterel maintained that on October 28, 2010, it submitted five standard PURPA contracts to Idaho Power that were "mirror images of the most recently approved wind QF standard contract at the time. . . ." Reply at 10-11. Idaho Power responded with letters of understanding, requiring that the projects agree, prior to execution of PPAs, that the projects would proceed through new interconnection and transmission processes. *Id.* at 11.

After the utilities filed their Joint Petition in the GNR-E-10-04 case, Cotterel responded by filing complaints against Idaho Power on November 8, 2010. *Id.* at 3-4. The complaints alleged that the projects were entitled to standard PURPA contracts and that Idaho Power's insistence on proceeding through unnecessary interconnection and transmission processes unreasonably delayed the progression of the five Cotterel contracts. *Id.* at 4,

On December 21, 2010, Idaho Power's PURPA contracts administration department required that the five Cotterel projects sign Network Resource Integration Study Agreements and submit a deposit of $2,000 for each project. *Id.* at 13. The projects complied by returning signed agreements and $10,000. In February 2011, Idaho Power refunded the $10,000 to the projects. Cotterel asserted that

> Idaho Power stated in a letter from its transmission personnel on February 23, 2011, that it approved [the projects'] changes from the original Generator Interconnection request of 177 MW to the smaller interconnection of only 148 MW for PURPA projects, and would proceed with the same Generator No. 302 under the Large Generation Interconnection Procedures of the OATT. This is the process [Cotterel] requested Idaho Power follow for the QFs when [the projects] first submitted contracts on October 28, 2010, and the process each QF alleged it was entitled to follow in the Complaints filed on November 8, 2010. Idaho Power now apparently agrees that the Cotterel WindEnergy Center LLCs may proceed through the interconnection process under the OATT.

Id. at 13-14.

Cotterel claims that it is entitled to published avoided cost rates despite the Commission's decision reducing eligibility to published rates because it satisfied "even the most stringent grandfather test ever used by the Commission because each [project] had a meritorious complaint on file at the Commission on November 8, 2010." *Id.* at 14. Cotterel argues that, "[w]hen the published rates change, or become otherwise unavailable to a QF before the QF can obtain a contract, the QF is entitled to grandfathered rates if it can 'demonstrate that 'but for' the actions of [the utility, the QF] was otherwise entitled to a power purchase contract.'" *Id.* at 7.

Cotterel further alleges that Idaho Power's lack of signature on the Agreements prior to the December 14, 2010, effective date for the 100 kW published rate eligibility cap for wind and solar projects "makes no difference because Idaho Power provided the final FESAs itself on December 10, 2010, and obviously had no remaining issues with the contract terms." *Id.* at 15. In addition, execution of the Agreements was delayed by Idaho Power's refusal to "execute the FESAs . . . until after the [projects] agreed to proceed through a different interconnection and transmission process. . . ." *Id.*

DISCUSSION AND FINDINGS

The Commission has jurisdiction over Idaho Power, an electric utility, and the issues raised in this matter 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 Commission has authority under PURPA and the implementing regulations of the Federal Energy Regulatory Commission (FERC) to set avoided cost rates, to order electric utilities to enter into fixed-term obligations for the purchase of energy from qualified facilities (QFs) and to implement FERC rules. *Rosebud Enterprises, Inc., v. Idaho Public Utilities Commission*, 128 Idaho 609, 612, 917 P.2d 766, 769 (1996).

The Commission has reviewed the record in this case, including the Applications, the Firm Energy Sales Agreements, and the comments of Commission Staff, Idaho Power, and the wind projects. It is clear from the record that extensive review of PPAs is conducted by both parties prior to signing an agreement. From the Commission's perspective, a thorough review is appropriate and necessary prior to signing Agreements that obligate ratepayers to payments in excess of $700 million over the 20-year term of these Agreements. Indeed, the Commission has

directed the utilities to assist the Commission in its gatekeeper role when reviewing QF contracts.

The primary issue to be determined in these cases is whether the Agreements – which utilize the published avoided cost rate – were executed before the eligibility cap for published rates was lowered to 100 kW on December 14, 2010, for wind and solar projects. "According to the FERC, 'it is up to the States, not [FERC] to determine the specific parameters of individual QF power purchase agreements, including the date at which a legally enforceable obligation is incurred under State law.'" *Rosebud Enterprises,* 128 Idaho at 780-781, 917 P.2d at 623-624, *citing West Penn Power Co.*, 71 FERC ¶ 61, 153 (1995). We find that the Agreements were not fully executed (signed by both parties) prior to December 14, 2010. More specifically, each Firm Energy Sales Agreement states that the "Effective Date" of the Agreement is "The date stated in the opening paragraph of this . . . Agreement representing the date upon which this [Agreement] was fully executed by both Parties." Agreements ¶ 1.10. The opening paragraph is dated "this 15 day of December, 2010." Agreements at 1. It is not disputed that the projects signed the Agreements on December 13, and Idaho Power signed on December 15, 2010. *Id.* at 29. Thus, on the date the five Agreements became effective, published avoided cost rates were available only to wind and solar projects with a design capacity of 100 kW or less.

The proposed change in the eligibility cap was clearly noticed in our Order No. 32131 issued on December 3, 2010. As we observed in Order No. 32176: "One need look no further than the abundance of firm energy sales agreements filed with the Commission [between the notice and December 14] to realize that the parties took the Commission's notice of its effective date seriously." Order No. 32176 at 11. The Commission does not consider a utility and its ratepayers obligated until both parties have completed their final reviews and signed the agreement. In other words, in order for the 10 aMW eligibility cap to be available to wind and solar QFs, the agreement must have been effective prior to December 14, 2010. The Idaho Supreme Court has recognized that "a balance must be struck between the local public interest of a utility's electric consumers and the national public interest in development of alternative energy sources." *Rosebud Enterprises*, 128 Idaho at 613, 917 P.2d at 770. We find that it is not in the public interest to allow parties with contracts executed on or after December 14, 2010, to avail themselves of an eligibility cap that is no longer applicable.

The projects also argue that "[w]hen the published rates change, or become otherwise unavailable to a QF before the QF can obtain a contract, the QF is entitled to grandfathered rates if it can 'demonstrate that but for the actions of [the utility, the QF] was otherwise entitled to a power purchase contract.'" Reply at 7. However, the published avoided cost rates established in Order No. 31025 have not changed. What has changed is the size at which wind and solar projects can avail themselves of the published avoided cost rates. Consistent with FERC regulations, and as set out in Order No. 32176, published rates are available to wind and solar QFs with a design capacity of 100 kW or less. 18 C.F.R. § 292.304(c)(1-2). Wind and solar projects larger than 100 kW are still entitled to PURPA contracts at avoided cost rates calculated using the IRP Methodology. Because published avoided cost rates remain unchanged and only the eligibility size has changed, grandfathering criteria applied to rate changes are not applicable here. Regarding the application of a change in the eligibility cap, we adopt a bright line rule: a Firm Energy Sales Agreement/Power Purchase Agreement must be executed, i.e., signed by both parties to the agreement, prior to the effective date of the change in eligibility criteria.

The Firm Energy Sales Agreements between Idaho Power and the five projects were executed on December 15, 2010. The Agreements recite that each project will have a maximum capacity amount of 29.9 MW (except Charlie of 27.6 MW). Under normal and/or average conditions, each project will not exceed 10 aMW on a monthly basis. Because the size of each of these wind projects exceeds 100 kW, they are not eligible to receive published rate contracts. Simply put, the rates contained in the Agreements do not comply with Order No. 32176. Therefore, we disapprove the five Firm Energy Sales Agreements.

ORDER

IT IS HEREBY ORDERED that the December 15, 2010, Firm Energy Sales Agreements between Idaho Power and Alpha Wind, Bravo Wind, Charlie Wind, Delta Wind, and Echo Wind are disapproved.

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 8th day of June 2011.

PAUL KJELLANDER, PRESIDENT

MACK A. REDFORD, COMMISSIONER

MARSHA H. SMITH, COMMISSIONER

ATTEST:

Jean D. Jewell
Commission Secretary

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