Office of the Secretary
Service Date
February 10, 2012

BEFORE THE IDAHO PUBLIC UTILITIES COMMISSION

IN THE MATTER OF THE PETITION OF IDAHO POWER COMPANY FOR A DECLARATORY ORDER REGARDING PURPA JURISDICTION.	)))))	**CASE NO. IPC-E-11-14** **ORDER NO. 32453**

On July 8, 2011, Idaho Power Company filed a Petition for a Declaratory Order asking the Commission to exercise its jurisdiction over Public Utility Regulatory Policies Act of 1978 (PURPA) transactions proposed by Western Desert Energy and Tumbleweed Energy II (the "Projects"). Idaho Power is a regulated electric utility serving primarily Idaho and portions of eastern Oregon (revenue by jurisdiction: 95% Idaho and 5% Oregon). Idaho Power requests that the Commission issue an Order determining that the Commission will exercise jurisdiction over the proposed PURPA qualifying facility (QF) transactions proposed by Western Desert Energy 1, LLC (Western Desert) and Tumbleweed Energy II, LLC (Tumbleweed).

On July 29, 2011, the Projects filed a Joint Answer and Motion to Dismiss Idaho Power's Petition. On August 18, 2011, the Commission issued a Notice of Petition and set a comment deadline of September 8, 2011. Rule 102, IDAPA 31.01.01.102. Idaho Power and PacifiCorp dba Rocky Mountain Power filed comments. Two public comments were also received.

Based upon our review of the facts and the arguments presented by the parties, we partially grant Idaho Power's Petition. Given the facts of this case, we find that Idaho is the more appropriate jurisdiction to exercise authority over the QF transactions proposed by Western Desert and Tumbleweed. However, we cannot and will not order the Projects to submit themselves to this Commission's jurisdiction.

IDAHO POWER'S PETITION

Western Desert is a proposed 5 MW wind QF project located in Owyhee County, Idaho. Tumbleweed is a proposed 10 MW wind QF project located in Elmore County, Idaho. Each project requested from Idaho Power a PURPA QF contract in the State of Oregon – specifically, an Energy Sales Agreement pursuant to the Public Utility Commission of Oregon's rate Schedule 85-4. Each project also requested "Firm Point-to-Point Transmission Service"

from its interconnection with Idaho Power in the State of Idaho for delivery to "Idaho Power's Oregon jurisdiction." Presently, in Oregon, QFs with a nameplate capacity of 10 MW or less are eligible for a "standard" contract with SAR-based published rates. Currently in Idaho, the published avoided cost rates for wind QF projects are limited to QFs generating no more than 100 kW. Order No. 32262.

Idaho Power's Petition explains that both Western Desert and Tumbleweed are QFs located in the State of Idaho, interconnecting with Idaho Power in the State of Idaho, and Idaho Power is a regulated utility that provides retail electric service in Idaho. Idaho Power further argues that the Idaho Commission has a regulatory framework for PURPA QF projects for Idaho Power in Idaho. Idaho Power maintains that common sense would dictate that Western Desert and Tumbleweed must contract with Idaho Power pursuant to the Idaho Commission's PURPA rates, rules and regulations. Idaho Power states that these Projects "submit this veiled attempt to seek the same published rate SAR-based contracts that they are ineligible for in Idaho by concocting a scheme to attempt delivery to Idaho Power in its Oregon service territory, from Idaho Power's Idaho service territory, entirely over Idaho Power's own system." Petition at 10-11. Idaho Power describes the Projects' actions as a "blatant attempt to manipulate and avoid the Idaho Commission's rates, rules, and regulations that are designed to implement PURPA and protect Idaho Power's customers." *Id.* at 11.

THE PROJECTS' ANSWER AND MOTION

The Projects filed their Answer and Motion to Dismiss arguing that Idaho Power's Petition is fatally flawed for several reasons. First, the Projects state that Idaho Power fails to cite to any Order, law or rule upon which the Petition is based. Second, the Projects maintain that the Commission is prohibited by federal law from regulating QFs – as such, the Commission does not have the authority to restrict their access to markets. Finally, the Projects argue that granting Idaho Power's Petition would violate the Commerce Clause of the U.S. Constitution by restricting QFs from access to markets outside of the boundaries of Idaho. Moreover, the Projects state that FERC rules "specifically require utilities to wheel (even involuntarily) QF output to third party purchasers and prohibit utility-type regulation of QFs." *Id.* at 3.

Western Desert maintains that it investigated the possibility of obtaining a PURPA contract in Idaho utilizing IRP-based avoided cost rates. However, the Project concluded that "IRP modeling results are not favorable for the development of wind projects in Idaho." Answer

at 2. Consequently, the Projects state that they have no interest in selling output from their QF wind projects "to any utility that is operating under the jurisdiction of the Idaho Public Utilities Commission." *Id.*

PACIFICORP'S COMMENTS

PacifiCorp insists that the Commission has authority and proper jurisdiction over the subject of Idaho Power's Petition. PacifiCorp argues that FERC's implementation of PURPA provides two ways a QF may impose a PURPA purchase obligation on a utility. QFs have the right to interconnect with a public utility and sell the net output of the QF to the directly interconnected utility. 18 C.F.R. § 292.303(a)(1). Alternatively, a QF may forego the right to sell to the directly interconnected utility and instead compel another utility to purchase its net output if the QF can "wheel" its net output to the second utility. 18 C.F.R. § 292.303(d), (a)(2). In this second scenario, PacifiCorp argues that the plain language of FERC's regulations makes clear that the indirect purchase obligation under subsection 292.303(d) only applies to a utility that is not the wheeling utility. PacifiCorp argues that "by choosing to have a directly interconnected utility wheel net output, the QF developer thereby waives its right to obligate the directly interconnected utility to purchase net output." Comments at 5. PacifiCorp maintains that, under FERC's PURPA regulations, a QF developer cannot obligate a utility to wheel its net output *and* purchase its net output. *Id.* at 7.

In the alternative, if the Commission finds that a PURPA purchase obligation exists under the proposed transaction, PacifiCorp argues that the Projects "should receive the avoided cost rate they would have received if they sold to Idaho Power in Idaho because the wheel from the point of interconnection in Idaho to the point of delivery in Oregon is a contrivance aimed only at obtaining Oregon's avoided cost rates." *Id.* at 8.

FINDINGS AND CONCLUSIONS

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). *Rosebud Enterprises, Inc., v. Idaho Public Utilities Commission*, 128 Idaho 609, 614, 917 P.2d 766, 771 (1996). "Although FERC promulgated the general scheme and rules, it left implementation of PURPA to state regulatory authorities." *Id.* at 614, 917 P.2d at 771. The Projects argue that this Commission does not have jurisdiction to consider Idaho Power's Petition. However, the

Projects acknowledge in their Answer that "State utility regulatory commissions such as the Idaho PUC implement FERC's regulations on the purchases and sales of power between utilities and QFs." Answer at 7. Moreover, this Commission has previously addressed our authority to assert jurisdiction over PURPA matters. *See* Earth Power Energy and Minerals, Inc. v. Idaho Power Company (Order No. 25174); Island Power Company, Inc. v. PacifiCorp (Order No. 25245); Vaagen Bros. Lumber, Inc. v. Washington Water Power Company (Order No. 25716); Idaho Power Company v. Clark Canyon, LLC (Order No. 32294).

Jurisdiction is shared by all state regulatory authorities that exercise "ratemaking authority" over multi-jurisdictional utilities. PURPA Section 210, 18 U.S.C. § 824a-3(f)(1). The Projects' assertion that Idaho Power failed to cite to any Order, law or rule upon which its Petition is based is erroneous. Idaho Power did, in fact, note this Commission's jurisdiction pursuant to PURPA and citations to several pertinent Commission Orders were included. Because Idaho Power is a regulated utility serving customers in both Idaho and Oregon, both this Commission and the Public Utility Commission of Oregon (OPUC) have jurisdiction over these PURPA transactions. However, the question presented in this Petition is which Commission has primary jurisdiction. Based upon the particular facts of this case, we find that Idaho Power's Petition is properly before this Commission and the underlying transaction is appropriately subject to the Idaho Commission's primary jurisdiction for the reasons set out below.

First, Western Desert is a PURPA QF developing a 5 megawatt (MW) wind project in Owyhee County, Idaho. Tumbleweed is a PURPA QF developing a 10 MW wind project in Elmore County, Idaho. Both Projects will interconnect with Idaho Power's system in Idaho. Under these facts alone it is obvious that Idaho would be the appropriate state to exercise primary jurisdiction over the transactions proposed by Western Desert and Tumbleweed. Projects located in Idaho, interconnecting with Idaho Power's system in Idaho should reasonably expect to be governed by Idaho's rules and regulations regarding the sale and purchase of QF power to Idaho's regulated utilities.

Second, the Projects' reliance on PURPA and FERC's PURPA regulations to justify their transactions is misplaced. FERC's regulations specifically address the sale and purchase of power between QFs and utilities:

> (a) Obligation to purchase from qualifying facilities. Each electric utility shall purchase . . . any energy and capacity which is made available from a qualifying facility:

(1) Directly to the electric utility; or

(2) Indirectly to the electric utility in accordance with paragraph (d) of this section.

. . . .

(d) Transmission to other electric utilities. If a qualifying facility agrees, an electric utility which would otherwise be obligated to purchase energy or capacity from such qualifying facility may transmit the energy or capacity to any **other** electric utility. Any electric utility to which such energy or capacity is transmitted shall purchase such energy or capacity under this subpart as if the qualifying facility were supplying energy or capacity directly to such electric utility.

18 C.F.R. § 292.303(a) and (d) (emphases added). Thus, FERCs regulations allow a QF two distinct paths for imposing a PURPA purchase obligation on a utility: (1) selling directly to the interconnected utility or (2) selling indirectly, by requesting that the directly interconnected utility transmit the QF output to any other electric utility.

Western Desert and Tumbleweed do not propose either of the transactions contemplated by the PURPA regulations. The Projects seek to interconnect with Idaho Power in Idaho and compel the same utility to transmit the output for delivery to a substation located in another state that has preferable avoided cost rates. This transaction is contrary to what is permissible under FERC regulations and pursuant to FERC Orders. FERC has stated that "[i]interconnection [s]ervice or an interconnection by itself does not confer any delivery rights from the [g]enerating facility to any points of delivery." *FERC Order No. 2003*, 104 FERC 61,103 (2003) at ¶ 23. FERC goes on to state that "[w]hen an electric utility is obligated to interconnect under Section 292.303 of [FERCs] Regulations, that is, when it purchases the QF's total output, the relevant state authority exercises authority over the interconnection. . . ." *Id.* at ¶ 813.

Third, the Projects argue that FERC rules require utilities to wheel – even involuntarily – QF output to "third party purchasers." Idaho Power's ability to provide electric service in two states does not negate the fact that the Company is a single entity. Notwithstanding the fact that there is no third party utility purchaser in the Projects' proposed transactions, FERC has specifically stated that no utility can be forced to wheel. "It is clear that the provisions of 18 C.F.R. § 292.303(d) can only be invoked with the consent of the QF, as well

as the consent of the electric utility with which the QF is interconnected." *Utah Power and Light*, 57 FERC ¶ 61,363 at ¶ 62,188 (1991); *Consumer Power Company*, 133 P.U.R. 4th 497, 516 (Mich, PSC 1992) (the interconnecting utility must agree to wheel the power). In other words, the first utility must agree to wheel the QF power to a second utility. *Id.*; *Re Association of Businesses Advocating Tariff Equity*, 135 P.U.R. 4th 553, 557 (Mich. PSC 1992). In the present case, there is no "other" utility and the interconnecting utility (Idaho Power) has not agreed to wheel. Involuntary wheeling must be gained under provisions of the Federal Power Act (FPA).

> Although a facility may meet the requirements for QF status, its owner nevertheless may elect to be an electric utility as defined in section 3(22) of the FPA rather than have the facility be treated as a QF. If such a facility sells electric energy at wholesale in interstate commerce, the owner is also a public utility. If the owner of the facility elects electric utility status, it may then request wheeling under section 211 of the FPA. Thus, a QF owner has the option to remain a QF and seek voluntary transmission from its local utility or in effect to waive its PURPA rights by electing to be an electric utility and thereby obtaining the ability to seek involuntary wheeling under the FPA.

Id. at ¶ 62,190. Therefore, a QF seeking to involuntarily wheel its power waives its PURPA rights and is subject to regulation pursuant to the FPA. The Projects' assertion that a utility must involuntarily wheel QF power is erroneous. "QFs [have] no statutory right (under PURPA or otherwise) to wheeling." *Id.*

Finally, sound public policy suggests that the Idaho Commission should exercise primary jurisdiction over the two transactions. Western Desert and Tumbleweed are projects located within Idaho seeking to interconnect with Idaho Power in Idaho Power's Idaho service territory. The costs associated with PURPA transactions – regardless of the jurisdiction approving the agreements and avoided cost rates – are borne primarily by Idaho ratepayers (95%) as compared to Oregon ratepayers (5%). To allow the Projects to seek higher avoided cost rates from Oregon for Projects located and interconnecting in Idaho with an illusory wheel of the Projects' output would be an arbitrage of federal and state regulations regarding PURPA. Consequently, we find that a QF located in Idaho, seeking to interconnect to a regulated utility in Idaho is most appropriately subject to Idaho's rules and regulations regarding PURPA. Furthermore, FERC regulations do not allow a QF to impose the type of transaction that the Projects' propose on a regulated utility.

This Commission is neither subjecting Western Desert or Tumbleweed to utility-type regulation nor is it attempting to compel the Projects to sell their output to Idaho Power pursuant to Idaho's PURPA rules and regulations. This Commission cannot compel the Projects to enter into contracts for the sale of their energy. Finally, this Commission is not attempting to prohibit the Projects from selling their output to eligible customers in other states. The commerce cases cited by the Projects are not applicable and are distinguishable. The Projects may voluntarily negotiate to sell their output to any utility in any state that they wish. However, if the Projects wish to sell their output as a PURPA QF, then they must abide by FERC's PURPA regulations that govern such transactions. The transactions proposed by Western Desert and Tumbleweed do not meet FERCs criteria. 18 C.F.R. § 292.303(d).

ORDER

IT IS HEREBY ORDERED that Idaho Power's Petition for a Declaratory Order is partially granted.

IT IS FURTHER ORDERED that the Idaho Public Utilities Commission has proper jurisdiction to address the Petition for Declaratory Order filed on July 8, 2011, by Idaho Power. It is further determined that Idaho is the more appropriate jurisdiction to exercise primary jurisdiction over the QF transactions proposed by Western Desert and Tumbleweed.

IT IS FURTHER ORDERED that the Projects' Motion to Dismiss the Petition is denied.

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 10th day of February 2012.

PAUL KJELLANDER, PRESIDENT

MACK A. REDFORD, COMMISSIONER

MARSHA H. SMITH, COMMISSIONER

ATTEST:

Jean D. Jewell
Commission Secretary

O:IPC-E-11-14_ks2