

DECISION MEMORANDUM

TO: COMMISSIONER KJELLANDER
COMMISSIONER REDFORD
COMMISSIONER SMITH
COMMISSION SECRETARY
COMMISSION STAFF

FROM: DON HOWELL
DEPUTY ATTORNEY GENERAL

DATE: AUGUST 22, 2012

SUBJECT: JOINT MOTION TO APPROVE SETTLEMENT STIPULATION, CASE
NOS. IPC-E-12-20, IPC-E-12-22, AND IPC-E-12-23

On July 24, 2012, in Case No. IPC-E-12-20, Idaho Power Company filed a Complaint and Petition for Declaratory Order against Exergy Development Group of Idaho LLC, the developer of four wind projects previously approved by the Commission (Cottonwood, Deep Creek, Rogerson Flats, and Salmon Creek). Complaint at 4. In essence, Idaho Power alleges that each of four projects have failed to meet their “scheduled operation date” of June 30, 2012. *Id.* at 2. The utility requests that the Commission issue a Declaratory Order finding that: (1) “Exergy’s claim of force majeure does not exist”; (2) Idaho Power may terminate the PPAs as of September 28, 2012; and (3) Idaho Power is entitled to an award of liquidated damages pursuant to the provisions of the Power Purchase Agreements (PPAs). *Id.* at 40.

On July 31, 2012, Idaho Power filed two additional Complaints and Petitions for Declaratory Order concerning Exergy’s wind projects at Notch Butte and Lava Beds wind parks (Case Nos. IPC-E-12-22 and IPC-E-12-23, respectively). In these two latter cases, Idaho Power seeks similar relief and claims that Notch Butte and Lava Beds have failed to achieve their scheduled operation date, and are in default of their PPAs. Notch Butte Complaint at 32-33; Lava Beds Complaint at 23-24.

On August 14, 2012, Exergy and Idaho Power Company filed a “Joint Motion” for approval of a Settlement Stipulation. More specifically, the parties move the Commission to accept a confidential Settlement Stipulation that resolves Idaho Power’s Complaints and requests for Declaratory Orders regarding the three cases (and all six wind projects). As described in the

Joint Motion, Exergy agrees to termination of the six PPAs in exchange for Idaho Power returning Exergy's Letters of Credit in the four projects included in the 12-20 case. Motion at 4. In their Settlement Stipulation the parties assert the Settlement is reasonable and in the public interest. The parties urge the Commission to issue an Order accepting their confidential Settlement Stipulation without material condition or modification. They recommend that the settlement be processed under Modified Procedure. Rules 202-204, IDAPA 31.01.01.202-204.

BACKGROUND

In October 2005, the Commission approved two Power Purchase Agreements (PPAs) for the Lava Beds and Notch Butte wind projects, respectively. See Order Nos. 29949 and 29950. Each of these PPAs committed Idaho Power to purchase the 10 aMW output of each project (18 MW nameplate rating) over a 20-year period with an initial operation date in May 2007. Applications at 5 (same for both). The operation date for the two projects was subsequently deferred by the parties to be September 1, 2010. See Letter dated June 4, 2008.

On December 10, 2010, Idaho Power and Exergy executed four PPAs for the Cottonwood, Deep Creek, Rogerson Flats, and Salmon Creek wind projects. Each PPA provided that Idaho Power would buy 10 aMW of power per month at the then published avoided cost rate. Each project has a 20 MW nameplate capacity and was for a term of 20 years with a schedule operation date for all four projects of June 30, 2012. On February 11, 2011, the Commission approved each of the four PPAs in Order Nos. 32182, 32183, 32184 and 32185. The four PPAs all contain delayed liquidated damage provisions calculated at \$45 per kW.

After approval of the six PPAs, disputes arose regarding the generator interconnection processes and transmission service arrangements for the wind projects. Joint Motion at 3-4. These disputes culminated in Idaho Power filing its three Complaints and Petitions for Declaratory Order.

THE JOINT MOTION TO ACCEPT THE SETTLEMENT

The parties' confidential Settlement Stipulation is a result of settlement negotiations conducted after Idaho Power filed its complaints. The Settlement Stipulation provides that Idaho Power shall return to Exergy the four Letters of Credit held by Idaho Power as delayed security. Joint Motion at 4. "In addition, the Settlement Stipulation provides that the [six PPAs] for the Exergy Projects shall be terminated." *Id.*

The parties recommend that the Commission approve the Settlement Stipulation in its entirety pursuant to Commission Rule 274. The parties also believe that the public interest does not require a hearing and suggest that the Commission process the request to approve the Settlement Stipulation by Modified Procedure. *Id.*

STAFF ANALYSIS AND RECOMMENDATION

Procedural Rule 276 provides that the Commission is not bound by the parties' Settlement Stipulation. IDAPA 31.01.01.276. The Commission 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." *Id.* The Commission may accept, reject, or modify settlement provisions. Moreover, proponents of settlements carry the burden of showing that the settlement reasonable, in the public interest, or otherwise in accordance with law or regulatory policy. Rule 275. When reviewing a settlement, the Commission will prescribe appropriate procedures to consider the settlement. Rule 274. For example, the Commission may summarily accept settlement of an essentially private dispute, or may convene an evidentiary hearing to consider the reasonableness of the settlement.

After reviewing the underlying PPAs, the Joint Motion and the Settlement Stipulation, Staff recommends that the Commission adopt and approve this Settlement Stipulation. Staff concurs with the parties that the proposed Settlement is reasonable for several reasons. First, the Staff believes it is reasonable to return Exergy's four Letters of Credit in exchange for terminating the six PPAs with a total nameplate capacity of 116 MW. From Idaho Power's perspective, the utility (and its ratepayers) avoid paying for generation that Idaho Power generally claims that it does not need to meet its service obligations. From a ratepayer perspective, ratepayers avoid paying more than \$594 million over the 20-year lives of the PPAs. From Exergy's perspective, it recovers the Letters of Credit valued at more than \$3 million.

Second, resolution of this matter will avoid extensive litigation regarding the parties' conduct and the facts underlying the six PPAs. Settlement will conserve resources (both time and money). The Settlement represents a significant benefit to Exergy, Idaho Power and ratepayers.

Given the benefits of the proposed Settlement and the request of Exergy's counsel for expeditious treatment, Staff believes it is appropriate for the Commission to approve the Settlement without further proceedings. Pursuant to Rule 274, the Commission has the

discretion to determine the manner in which it considers proposed Settlements. Here, the two parties have agreed to resolve their private dispute. The parties and the Commission Staff assert that the Settlement is reasonable and in the public interest.

COMMISSION DECISION

Does the Commission find that the proposed Settlement is reasonable and in the public interest?

Pursuant to Rule 274, does the Commission wish to approve this Settlement based upon its review and the particular facts of this case without Modified Procedure?



Don Howell
Deputy Attorney General

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