

BEFORE THE
PUBLIC UTILITY COMMISSION OF OREGON

In the Matter of)	CASE NO. UM 1725
)	
IDAHO POWER COMPANY,)	COMMUNITY RENEWABLE ENERGY
)	ASSOCIATION'S RESPONSE TO
Application to Lower Standard Contract)	IDAHO POWER COMPANY'S MOTION
Eligibility Cap and to Reduce the)	FOR TEMPORARY STAY OF PURPA
Standard Contract Term, for Approval of)	
Solar Integration Change, and for Change)	
in Resource Sufficiency Determination.)	

I. INTRODUCTION AND SUMMARY

The Community Renewable Energy Association (“CREA”) hereby submits to the Public Utility Commission of Oregon (“OPUC” or “Commission”) this Response to Idaho Power Company’s (“Idaho Power” or the “Company”) Motion for Temporary Stay of its Obligation to Enter Into New Power Purchase Agreements with Qualifying Facilities. CREA opposes a stay of Idaho Power’s obligations under the Public Utility Regulatory Policies Act of 1978 (“PURPA”). Federal and state law do not allow the Commission to suspend PURPA obligations.

CREA’s interest in Oregon avoided cost proceedings has traditionally focused on the rates, terms and conditions available in PacifiCorp and Portland General Electric Company’s service territories, and CREA ordinarily does not intervene in Idaho Power Company-specific proceedings. However, PacifiCorp’s recently filed request in docket UM 1737 to lower the eligibility cap and shorten QF contract lengths was clearly prompted by Idaho Power’s actions and raises serious concerns for CREA that necessitate CREA’s response to Idaho Power’s filing. Thus, although CREA expended substantial resources to participate in good faith in Phase 1 of docket UM 1610, CREA must expend further resources to address the collateral attacks on the

final order from that proceeding.

To the extent the OPUC believes that Idaho Power has made a prima facie case of an extraordinary problem with the OPUC's implementation of PURPA *as applied to Idaho Power*, the correct course of action is to expedite the updates to Idaho Power's avoided cost rates to send the proper price signal to PURPA developers. Requests for further modification to the OPUC's implementation of PURPA – to lower the eligibility cap to 100 kilowatts (“kW”) for wind and solar qualifying facilities (“QF”) and to shorten contract terms for wind and solar QFs to two years – should be rejected and dismissed from this proceeding. These two proposals constitute a collateral attack on the Commission's final Order No. 14-058.

II. BACKGROUND

In Order No. 14-058, the Commission expressly declined to lower the eligibility cap for standard avoided cost rates to 100 kW, as proposed by Idaho Power. Order No. 14-058 at 5-8. The Commission also refused to implement Idaho Power's proposal to shorten the contract term available to QFs. However, in docket UM 1610, Idaho Power only proposed to shorten the contract term to 10 years of fixed rates. *See* UM 1610 Idaho Power/200, Stokes/74. CREA expended substantial resources to actively participate in docket UM 1610. Idaho Power did not appeal or otherwise seek any modification of Order No. 14-058. Now, a little over a year after the order became final, Idaho Power seeks to lower the eligibility cap to 100 kW for wind and solar QFs and to shorten the contract length for non-standard contracts to *two* years, which is a request for relief even more sweeping than what the Commission rejected in Order No. 14-058.

Idaho Power further seeks to update its sufficiency period to extend to 2021 and to implement a solar integration charge. Unlike its proposal to lower the eligibility cap and shorten

the contract term, both of these proposals to reduce Idaho Power's rates may be consistent with the framework of Order No. 14-058 because the Order allows for out-of-cycle rate changes under extraordinary circumstances. Separately, in docket UM 1730, Idaho Power has filed its annual May 1 update to its avoided cost rates, which would result in a significant reduction in Idaho Power's Schedule 85 avoided costs. Together these rate updates would extend Idaho Power's sufficiency period from 2016 to 2021,¹ significantly reduce the avoided cost rates available prior to 2021, and impose solar integration charges on new solar QFs.

III. RESPONSE TO REQUEST FOR TEMPORARY RELIEF

CREA has reviewed and agrees with the legal arguments set forth in the Renewable Energy Coalition's ("REC") response filed today, and will not repeat those arguments. As REC explains, it is illegal to suspend PURPA, even temporarily, and Idaho Power has not provided sufficient evidence that the Oregon solar QFs it identifies are likely to be constructed. In addition, as set forth below, CREA urges the Commission to reject Idaho Power's collateral attack on Order No. 14-058, and to limit any interim relief to expedited updates to Idaho Power's avoided cost rates.

A. The Commission Should Reject the Collateral Attack on Order No. 14-058.

The portions of Idaho Power's filings that seek to lower the eligibility cap for wind and solar QFs and to shorten the contract term to two years for solar and wind QFs are impermissible collateral attacks on the Commission's final Order No. 14-058. Collateral attacks on final orders are disfavored for obvious reasons, including avoidance of endless litigation, and the public

¹ The resulting rates, without the reduction associated with a solar integration charge, are set forth in the Attachment 2 to Idaho Power's application in docket UM 1730.

interest in final adjudication of controversies. *See* Am. Jur. 2d, *Judgments* at § 739 (2008); *see also Oregon v. Guzek*, 546 U.S. 517, 526-27 (2006) (“The law typically discourages collateral attacks....”); *Allen v. McCurry*, 449 U.S. 90, 94 (1980) (“As this Court and other courts have often recognized, res judicata and collateral estoppel relieve parties of the cost and vexation of multiple lawsuits, conserve judicial resources, and, by preventing inconsistent decisions, encourage reliance on adjudication.”).

These principles apply fully to administrative proceedings. The Federal Energy Regulatory Commission (“FERC”) recently explained that a “collateral attack is an ‘attack on a judgment in a proceeding other than a direct appeal’ and is generally prohibited.” *Louisville Gas & Electric Co.*, 144 FERC ¶ 61,054, at P 12 (2013) (quoting *Wall v. Kholi*, 131 S.Ct. 1278, 1284 (2011)). In *Louisville Gas & Electric Co.*, FERC rejected Southern Companies’ “attempt to challenge the FERC's findings in Order No. 1000 as applied to Southern Companies, notwithstanding that Southern Companies raised, and the Commission rejected, the same arguments in the Order No. 1000 proceedings.” *Id.* As with Idaho Power’s proposal to lower the eligibility cap and shorten the contract length here, that attempt was an “improper collateral attack upon the Commission's findings in Order No. 1000 and therefore must be rejected.” *Id.*

The OPUC has emphasized the importance of finality to its orders and bars against re-litigation. *See In re Ascertaining the Unbundled Network Elements that must be Provided by Incumbent Local Exchange Carriers to Requesting Telecommunications Carriers Pursuant to 47 C.F.R. - 51.319*, Docket Nos. UT 138 & UT 139 (Phase III), Order No. 03-085 at 14-16 (Feb. 5, 2003). There, the Commission rejected Verizon’s attempt to re-litigate an issue decided in Phases I and II of telecommunications proceedings when raised again in Phase III only a few

years later based on new information developed in another proceeding, docket UM 773. The Commission explained that re-litigation “would require, among other things, a comprehensive review of the UM 773 record, which alone comprises several thousand pages. . . . An undertaking of this magnitude would result in a lengthy delay in the disposition of this matter.” *Id.* at 16 n. 58. The Commission concluded that the other parties “will be prejudiced if Verizon is allowed to relitigate this issue.” *Id.* at 17. The same is true here, where Idaho Power appears to rely on temporary relief it has obtained from the Idaho Public Utilities Commission (“IPUC”) in an ongoing proceeding there. There is no basis to require Oregon parties to again revisit a recently resolved issue because the IPUC has decided to do so.

All of the factors at issue in the cases cited above weigh in favor of rejecting Idaho Power’s collateral attack of Order No. 14-058. CREA, other parties, and the Commission expended substantial time and effort to arrive at the final outcome of Order No. 14-058. Idaho Power’s collateral attack threatens to undermine confidence in the finality of the Commission’s decisions and advantage well-funded utilities with an unlimited budget to re-litigate these issues until they finally win. Idaho Power asks the Commission to set a dangerous precedent. The Commission should not allow Idaho Power to pick and choose issues it lost in Phase 1 of docket UM 1610 and force interested parties to again re-litigate those issues at this time. The harm of re-litigation is compounded in this case by the fact that PacifiCorp has now also sought to re-litigate these issues in its own separate new docket UM 1737.

While Idaho Power points to allegations regarding new solar QFs that did not exist at the time of Phase 1 of docket UM 1610, that fact does not distinguish Order No. 14-058 because at the time of Phase 1 to docket UM 1610 Idaho Power was making the very same allegations

regarding an influx of alleged wind QFs.² Additionally, as REC explains, there is no showing that substantial amounts of the recent contracting inquiries in Idaho Power's Oregon jurisdiction are likely to result in fully constructed solar QFs. Idaho Power has recently confirmed in discovery that there is no further network transmission available to accept the power from solar QFs other than the six solar projects that already have executed contracts. *See* Attachment No. 1 (indicating the five wind QFs and six solar QFs already under contract "will use all of the incremental transmission capacity from their respective network transmission upgrades leaving no transmission capacity for additional generation projects, regardless of size, in this area of Idaho Power's transmission system.")³ Because QFs pay for additional transmission upgrades under the OPUC's implementation of PURPA, the necessary upgrades will be an additional barrier to the additional solar QFs Idaho Power discusses in its filing.

Additional factors weigh against Idaho Power's proposal as to the contract term because, in addition to having been litigated and resolved at the OPUC very recently, Idaho Power's proposal is not consistent with PURPA. *See, e.g.*, 18 C.F.R. § 292.304(d)(2)(ii) (allowing QF to choose to sell at rates calculated "over a specified term"); FERC Order No. 69, 45 Fed. Reg. 12214, 12,224 (Feb. 25, 1980) (discussing QFs' need for "long-term" contracts). Extensive testimony in the Idaho proceeding demonstrates that the request to shorten the contract length to an extremely short term violates FERC's regulations that entitle QFs to elect to sell energy and capacity at a long-term fixed rate. *See, e.g.*, Direct Testimony of Adam Winner, Sierra Club and Idaho Conservation League, IPUC Case No. IPC-E-15-01 (filed April 23, 2015) (providing

² Notably, it now appears that many of the alleged wind QFs have not come to fruition.

³ CREA has provided this discovery response as Attachment No. 1 to this response.

testimony by former FERC counsel who aided in the drafting of FERC's regulations and concluding that a two-year contract term violates those regulations); Direct Testimony of Don C. Reading, J.R. Simplot Co. and Clearwater Paper Corporation, IPUC Case No. IPC-E-15-01 (filed April 23, 2015) (reaching similar conclusions but without providing a legal opinion).⁴ This testimony only provides further support for the positions set forth in Phase I of docket UM 1610, where this Commission refused to implement such an unreasonably short contract term for any QFs. The OPUC's 15-year term complies with the FERC rules, but a two-year term would violate PURPA. The OPUC should not simply follow the IPUC's lead because the OPUC has its own independent obligation to implement FERC's regulations.

B. If the Commission Grants Temporary Relief, It Should Be Limited to Updating Idaho Power's Rates.

Idaho Power also requests that the Commission implement updates to its avoided cost rates that will significantly reduce the rates available to solar QFs seeking contracts. This rate reduction would therefore likely address the problems Idaho Power has alleged in its filings. As REC points out in its response, the Commission's existing orders allow for out-of-cycle rate updates under extraordinary circumstances. *See* Order No. 14-058 at 25-26. CREA is skeptical that Idaho Power's filing has fully disclosed all relevant information regarding the viability of the solar QFs under contract and seeking contracts in Oregon for the reasons set forth in REC's filing. However, if the Commission is convinced that extraordinary events are occurring and that it must take temporary action, CREA urges the Commission to limit any interim relief to an out-of-cycle rate update to lower the rates to a level that sends the correct price signal to QFs

⁴ Available online at: <http://www.puc.idaho.gov/fileroom/cases/summary/IPCE1501.html> .

regarding Idaho Power's avoided costs based upon current information.

IV. CONCLUSION

The Commission should reject the requests to lower the eligibility cap and to shorten the contract term for solar and wind QFs. If the Commission determines to grant temporary relief, the Commission should limit the temporary relief to an out-of-cycle update to Idaho Power's avoided cost rates to send the correct price signals to the QFs.

RESPECTFULLY SUBMITTED this 2nd day of June, 2015.

RICHARDSON ADAMS, PLLC

/s/ Gregory M. Adams

Gregory M. Adams (OSB No. 101779)
Of Attorneys for the Community Renewable
Energy Association

ATTACHMENT NO. 1

STAFF'S DATA REQUEST NO. 11:

Assume the Oregon QF projects that have been contracted for but are not yet operating (50 MW for five wind projects plus 60 MW for six solar projects) begin generating by their commercial operation dates. Given Idaho Power's existing transmission ownership and rights, please provide an estimate of the number of additional 10 MW capacity generators that the transmission system would be able to reliably interconnect without adding transmission capacity, excluding the required upgrades to the generators' interconnecting substations.

IDAHO POWER COMPANY'S RESPONSE TO STAFF'S DATA REQUEST NO. 11:

The five Oregon Qualifying Facility ("QF") wind projects and the six Oregon QF solar projects will require network transmission upgrades for network transmission service. These projects will use all of the incremental transmission capacity from their respective network transmission upgrades leaving no transmission capacity for additional generation projects, regardless of size, in this area of Idaho Power's transmission system.