

**BEFORE THE PUBLIC UTILITY COMMISSION
OF OREGON**

UM 1572

In the Matter of

KOOTENAI ELECTRIC COOPERATIVE,
INC.,

Complainant,

v.

IDAHO POWER COMPANY,

Defendant.

ORDER

DISPOSITION: MOTIONS FOR STAY AND TO STRIKE DISMISSED AS
MOOT; MOTION TO SUPPLEMENT THE RECORD
GRANTED: MOTION FOR SUMMARY JUDGMENT OF
IDAHO POWER GRANTED; MOTION FOR SUMMARY
JUDGMENT OF KOOTENAI ELECTRIC COOPERATIVE
DENIED

I. INTRODUCTION

Kootenai Electric Cooperative, Inc., has developed a 3.2 megawatt landfill gas-to-energy station called the Fighting Creek Landfill Gas Station, located at the Kootenai County Solid Waste Facility near Bellgrove, Idaho. Kootenai self-certified the project as a qualifying facility (QF) under the Public Utility Regulatory Policies Act (PURPA), 18 CFR §292.207(a). Interconnected with Avista Corporation's electrical distribution system in Idaho, Kootenai seeks to have Avista wheel energy produced by its QF over the Lolo-Oxbow transmission line, with Idaho Power Company taking the QF's electrical output at the point of interconnection between Avista and Idaho Power, in Imnaha, Oregon, under the terms and rates of Idaho Power's Oregon Schedule 85 (Schedule 85).

II. PROCEDURAL HISTORY

The parties filed cross-motions for summary judgment and replies. Kootenai then moved for a partial stay of these proceedings pending a determination by the Federal Energy Regulatory Commission (FERC) of an issue addressed in the parties' briefs. Idaho Power filed a response to the motion to stay. After FERC issued its determination, Kootenai filed a motion to supplement the record with FERC's order.

III. DISCUSSION

A. Background

Kootenai claims that it is entitled to a power purchase agreement (PPA) with Idaho Power under the utility's Oregon Schedule 85 for electrical power from its QF wheeled from Idaho into Oregon by Avista. Idaho Power objects to Kootenai's claim, and argues that the output must be purchased under the company's Idaho-approved QF rates.

The dispute centers on whether energy generated by Kootenai and wheeled by Avista will be delivered to Idaho Power in Idaho or Oregon. Kootenai maintains that it is entitled to a PPA that includes Idaho Power's Oregon QF prices because the QF's output will transfer to Idaho Power at the point where ownership of the line transfers from Avista to Idaho Power, a point located in Oregon. Idaho Power responds that the point at which ownership of the line transfers is irrelevant to this dispute, and that as a practical matter the energy will transfer at the Lolo substation in Idaho, the point where delivery and receipt of energy is scheduled.

Kootenai states that it initially pursued a PPA with Avista for sale of its electrical output at a point of delivery in the State of Idaho using avoided costs rates approved by the Idaho Public Utilities Commission, but that Kootenai and Avista were unable to agree on terms addressing ownership of non-energy environmental attributes of the generation. Because this Commission has ruled that QFs retain ownership of non-energy environmental attributes pursuant to PPAs with standard rates, Kootenai states it decided to sell its output in the Oregon QF marketplace.

In an effort to resolve the dispute, Kootenai requested FERC approval of a Long-Term Firm Point-to-Point Transmission Service Agreement (LTF Agreement) under Avista's Open Access Transmission Tariff (OATT), with the point of delivery of power defined as the point of interconnection between Avista and Idaho Power. Avista tendered an executable LTF Agreement to Kootenai describing the Point of Delivery (POD) as the "point on the Lolo-Oxbow 230 kV Transmission Line where the 230 kV facilities of Idaho Power Company and Avista are interconnected, and, for scheduling purposes, the LOLO point of delivery."¹

B. Motions to Stay and to Supplement the Record

During the course of these proceedings, Kootenai filed a motion for a partial stay, requesting that we not address Idaho Power's arguments regarding Avista's OATT until FERC had the opportunity to address the matter first. Idaho Power opposed the motion, arguing that we had independent authority to resolve the issues in this case without relying on a determination from FERC.

¹ See Kootenai Motion for Partial Stay pending FERC Determination at Exhibit 1, p.7. (Jun 14, 2012).

After FERC addressed Avista's OATT,² Kootenai filed a motion to supplement the record in this docket with FERC's order. Kootenai argues that the FERC order conclusively states that Avista will provide point-to-point service past the control area boundary at Lolo substation. Idaho Power does not object to taking official notice of the FERC ruling, but responded to substantive arguments made in the motion.

Resolution

Because FERC issued its order, we dismiss the motion to stay as moot. While our conclusion relies on Idaho Power's PPA as dispositive to the contested issued in this docket, we grant the motion to supplement the record, because FERC's order provides information relevant to this dispute.

C. Motion to Strike

After the parties filed their respective motions for summary judgment, Kootenai filed a motion to strike two paragraphs from an affidavit attached to Idaho Power's motion for summary judgment. Kootenai argues that the affidavit of Tessia Park offers legal conclusions, which should only be made in briefs and oral arguments of attorneys, rather than affidavits of lay witnesses. Idaho Power counters that the contested portions of Ms. Park's affidavit are proper, and do not draw legal conclusions.

Resolution

We resolve the disputed issues in the parties' motions without relying on the challenged paragraphs in Ms. Park's affidavit. As a result, we dismiss the motion to strike as moot.

D. Motions for Summary Judgment

The parties filed competing motions for summary judgment, as well as replies to one another's motions for summary judgment.

Kootenai

Kootenai argues that it is entitled to an order requiring Idaho Power to enter into a PPA under the company's Oregon Schedule 85. Kootenai maintains that the point of delivery of its plant's output to Idaho Power occurs at the point in change of ownership of the transmission line which will be in Imnaha, Oregon.

Kootenai claims that under regulatory filings, Imnaha is the point that delineates change in ownership of the transmission line, delineates the allocation of line losses, change in the utility responsible for interconnection agreements with QFs, and change in the utility response for operation and maintenance of the line. Kootenai relies first on the 1958

² See Order Accepting Conforming Long-Term Firm Point-to-Point Service Agreement, 140 FERC ¶ 61,165 (Aug 21, 2012).

Interconnection Agreement between Idaho Power and Avista and supporting regulatory filings, which state that the point of delivery between the two utilities is the point in change in ownership and control of facilities, and draws the line for liability at the point in change of ownership. The agreement also provides that line losses are allocated to Avista from Imnaha up. Kootenai adds that in 2003 Idaho Power filed an amended version of the 1958 agreement with FERC, and the revised agreement still defines point of delivery as the point in change in ownership.

Kootenai also looks to the terms of Avista's OATT, which charges QFs transmission rates and line losses that include embedded within them the cost of using Avista's transmission facilities up to Imnaha, Oregon. Kootenai notes the line from Lolo to Imnaha is posted as available capacity on Avista's Open Access Same Time Information System (OASIS) website as part of Avista's transmission system, and Avista is responsible for operations and maintenance of the line from Lolo to Imnaha. Kootenai also notes Idaho Power has no retail customers from Lolo to Imnaha.

Kootenai also relies on Avista's FERC-approved transmission agreement to wheel the QF output. That agreement described the POD as the point on the Lolo-Oxbow line "where the 230 kV facilities of Idaho Power Company and Avista are interconnected and, for scheduling purposes, the LOLO point of delivery." Kootenai argues FERC's order resolves the contested question of where Avista's delivery of power to Idaho Power will happen: Avista will provide point-to-point service past the control area boundary at Lolo substation to the point in change in ownership near Imnaha, Oregon.³

Kootenai further argues that construing Idaho Power's Schedule 85 tariff in a manner that declares out-of-state qualifying QF's ineligible for Schedule 85 if their electricity will first enter Idaho Power's control area at a location outside of Oregon violates the dormant commerce clause by excluding a large portion of out-of-state QFs from the Oregon QF market.

Idaho Power

Idaho Power relies on the terms of its Schedule 85 Standard Energy Sales Agreement, which provides that service is available "for power delivered to [Idaho Power's] control area within the State of Oregon." Idaho Power argues the boundary between Idaho Power's and Avista's control areas lies at the Lolo substation in Idaho, and notes that all energy exchanged between Idaho Power and Avista on the Lolo-Oxbow line is scheduled and metered at the control area boundary, here the Lolo substation.

³ In FERC's order on the proposed transmission agreement, FERC found that "it is not uncommon for a POR/POD to represent multiple facilities or capacity between multiple transmission service providers, not just a single control area interface. Additionally, we conclude that Avista's description of the POD provides Kootenai non-discriminatory transmission service all the way across Avista's transmission system, because the description incorporates the entirety of Avista's transmission assets on the Lolo-Oxbow line." 140 FERC ¶ 61, 165.

Idaho Power argues it is not physically possible for Kootenai, *via* a wheeling agreement with Avista, to deliver energy to Idaho Power in Imnaha, Oregon. Idaho Power contends that, in reality, the transfer happens at the OASIS-identified POD/point of receipt (POR), which is Lolo. Idaho Power notes that it has balancing-area authority over the entire Lolo-Oxbow transmission line, and that even though part of that line is owned by Avista, Idaho Power is responsible for coordinating the line and transmission paths under FERC. While Avista owns the Lolo substation, Lolo is a POD, receipt and interchange between Avista's and Idaho Power's balancing areas, and is the scheduling point for electricity exchange on the OASIS website for Idaho Power and Avista. Further, Idaho Power notes Avista's OATT provides for transmission service to designated points of delivery and receipt; a QF cannot designate a new POD under the OATT.

Idaho Power argues that FERC's order is not dispositive of the issue presented in this case, because the company's Schedule 85 was approved by this Commission under its authority to implement PURPA, and interpretation of its terms does not require reliance on the FERC order. Idaho Power further argues that the order would not support Kootenai's claim to a Schedule 85 PPA, because FERC concluded only that the POD described in Avista's proposed transmission agreement conformed to applicable standards.

Resolution

Having reviewed the parties' arguments, we conclude that we may resolve the parties' dispute on summary judgment, because no material facts are disputed by the parties, and the evidence, viewed in the light most favorable to Kootenai supports finding in favor of Idaho Power.⁴

We first review the relevant authority. Under PURPA, electric utilities are required to purchase from QFs any energy and capacity which is made available either directly from the QF to the electric utility, or indirectly in accordance with the statute.⁵ To implement PURPA, Oregon has enacted legislation that closely parallels the federal act, and this Commission has, in turn, promulgated administrative rules.⁶

As required by the federal and state rules implementing PURPA, Idaho Power submitted its Schedule 85 Standard Energy Sales Agreement, which this Commission approved in Order No. 07-197. As relevant here, Schedule 85 has provisions regulating service for power delivered from a QF "to the Company's control area within the State of Oregon." Under Schedule 85, when using a transmitting entity, a QF must pay for the transmission of its energy and capacity "over the facilities of the Transmitting Entity to the Point of Delivery," in accordance with the terms and conditions of the transmission agreement between the seller (here, Kootenai) and the transmitting entity (here, Avista).

⁴ See ORCP 47; OAR 860-001-0000(1).

⁵ 18 CFR § 292.303(a)-(d).

⁶ See ORS 758.505, *et seq.*; OAR 860-029-0030.

Turning to the merits, we conclude that Kootenai is not eligible for a PPA under Schedule 85 for the electricity produced by its QF project and wheeled by Avista to Idaho Power. Eligibility for a Schedule 85 PPA requires a QF to show that the power it proposes to sell will be delivered to Idaho Power's "control area" within the state of Oregon, and that its POD will be in Oregon. Kootenai fails on both counts because, as Idaho Power explains, its control area extends to the Lolo substation in Idaho, and, regardless of where ownership of the Lolo-Oxbow transmission line shifts, the Lolo substation serves as the formal scheduling point and POD/POR for receipt and delivery of energy between Idaho Power and Avista.

We agree with Idaho Power that FERC's order, while relevant to the question of whether Avista's proposed interconnection agreement should be approved, cannot conclusively address how Idaho Power's Oregon Schedule 85 tariff should be interpreted. That question falls within our jurisdiction. We point out, however, that FERC's order does not state the POR/POD for Avista and Idaho Power will be at Imnaha, Oregon. Rather, the order simply states that a POR/POD may "represent multiple facilities." In this instance, the POR/POD in Lolo will represent a number of facilities, including facilities in Oregon. Regardless, the POR/POD will remain at Lolo, in Idaho.

Further, we reject Kootenai's argument that denying the proposed transaction violates the dormant commerce clause of the United States Constitution by excluding an out-of-state QF from participating in the benefits of a PPA in Oregon. Our analysis of Idaho Power's PPA rests on the terms of the PPA and the point at which power enters Idaho Power's control area. Out-of-state QFs, like any QF located within Oregon, must comply with the terms of PPAs approved by this Commission. Furthermore, to the extent that Kootenai is pursuing an Oregon PPA with Idaho Power because the terms available in Idaho were less attractive, we decline to find that an out-of-state QF is legally entitled to access to more advantageous terms in Oregon when the QF fails to meet the terms of service of a utility as approved by this Commission.

IV. ORDER

IT IS ORDERED THAT the Motion for Summary Judgment of Idaho Power is granted. The Motion to Supplement the Record of Kootenai is granted. The Motion for Summary Judgment and Motion to Stay Proceedings of Kootenai Electric Cooperative, Inc. are denied.

Made, entered, and effective FEB 26 2013.



Susan K. Ackerman
Chair



John Savage
Commissioner



Stephen M. Bloom
Commissioner



A party may request rehearing or reconsideration of this order under ORS 756.561. A request for rehearing or reconsideration must be filed with the Commission within 60 days of the date of service of this order. The request must comply with the requirements in OAR 860-001-0720. A copy of the request must also be served on each party to the proceedings as provided in OAR 860-001-0180(2). A party may appeal this order by filing a petition for review with the Court of Appeals in compliance with ORS 183.480 through 183.484.