9-25-2013

New Energy Two, LLC v. Idaho Power Company Appellant's Brief Dckt. 40882

Docket No. 40882-2013

IN THE SUPREME COURT OF THE STATE OF IDAHO

NEW ENERGY TWO, LLC, an Idaho limited liability company, and
NEW ENERGY THREE, LLC, an Idaho limited liability company,

Petitioner-Appellants,

v.

IDAHO POWER COMPANY,

Respondent,

v.

IDAHO PUBLIC UTILITIES COMMISSION,

Intervenor-Respondent.

PETITIONER-APPELLANTS' OPENING BRIEF

Appeal from the Idaho Public Utilities Commission
Commissioner Mack A. Redford, Presiding

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STATEMENT OF THE CASE

This is an appeal of the *Order Denying Petition for Reconsideration* ("*Final Order*") of Order No. 32780 issued by the Idaho Public Utilities Commission ("PUC") and entered on 4 April 2013. The *Final Order* is a denial of reconsideration of prior PUC Order No. 32755, wherein the PUC denied Petitioner-Appellants' Motions to Dismiss the proceedings before the PUC (Case Nos. IPC-E-12-25 and IPC-E-12-26), which Petitioner-Appellants and Respondent are parties to. The basis of that motion to dismiss was (a) that the PUC lacked jurisdiction to adjudicate a dispute over a force majeure issue; (b) the proper forum for such an issue was the Idaho District Court system; and (c) the PUC could not be endowed by jurisdiction by agreement of the parties. It is these issues that are addressed by this appeal. Permission to make the present appeal was granted to Petitioner-Appellants by Order of this Honorable Court on 29 May 2013.[1]

PROCEDURAL HISTORY AND STATEMENT OF FACTS

In October 2009, Petitioner-Appellants initiated discussions with Idaho Power to begin the interconnection process for two anaerobic digester projects to be located at Swager Farms and Double B Dairy, within the State of Idaho. The purpose of the projects was the production of biogas. Under the federal Public Utility Regulatory Policies Act ("PURPA"), qualifying facilities such as the projects in question ("QFs") are obligated to pay the costs of constructing

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[1] The issue on appeal in this proceeding is very narrow and focused. In light of this, Petitioner-Appellants have briefed that issue in as focused and succinct a manner as possible.

the necessary interconnection facilities (or transmission upgrades) between the QF project and the purchasing utility's system. *See* 18 C.F.R. § 292.308 (setting forth requirements for QF project construction costs). Following initial discussions, Petitioner-Appellants submitted a small generator interconnection request to Idaho Power for each project. Clerk's Transcript ("Tr.") at pp. 211-222. Both QF projects executed interconnection Facility Study Agreements with Idaho Power in late October 2009 and were documented by PUC Order No. 32692. Tr. at pp. 226-229, 815. Idaho Power subsequently prepared and submitted separate Study Reports for each project to Petitioner-Appellants. Tr. at pp. 231-239.

In May 2010, Idaho Power and New Energy entered into two separate Power Purchase Agreements ("PPAs") for each of the projects in question. Initially each biogas project was projected to sell 1.2 megawatts of power to the utility. The PPAs contained avoided cost rates which were in effect prior to the issuance of Order No. 31025 (dated 16 March 2010), and contained fifteen (15)-year operating terms. The scheduled commercial operation date ("COD") for Swager Farms was 1 October 2012. The scheduled COD for Double B was December 1, 2012. On 1 July 2010, the PUC approved the Swager Farms and the Double B Dairy PPAs in Order Nos. 32026 and 32027, respectively. On 9 May 2012, Idaho Power sent a draft Generation Interconnection Agreement ("GIA") to Petitioner-Appellants for the Double B project and advised it that failure to submit all of the requested items and the executed GIA "will cause the Generator Interconnection request to have been deemed withdrawn." Tr. at pp. 754-774. On June 19, 2012, Idaho Power sent Double B a final GIA to be executed. Tr. at pp. 781-801. Idaho Power alleged in the proceedings before the PUC that the GIA was not returned and that it

subsequently issued a deficiency notice that the GIA was deemed withdrawn and that the project has been removed from Idaho Power's interconnection queue. On August 28, 2012, Idaho Power refunded Exergy's interconnection deposit for the Double B project. Tr. at p. 805.

On 22 March 2012, Idaho Power sent the draft GIA for Swager Farms. Tr. at pp. 401-419. In April 2012, Petitioner-Appellants (through their affiliate, Exergy Development Group of Idaho, L.L.C.) requested that Idaho Power revisit the interconnection at a lower capacity of 0.8 megawatts. The parties executed a "Re-Study" Feasibility Study Agreement which estimated an interconnection cost for the reduced capacity of $225,000. On 14 September 2012, Idaho Power sent the final GIA to Swager Farms at the lower 0.8 megawatt interconnection assumption. The cover letter for the Swager Farms GIA stated that Idaho Power "must have the executed GIA and funding no later than October 1, 2012, in order to complete construction by this date." Tr. at pp. 453-472. Idaho Power has alleged in the proceedings before the PUC that Swager Farms did not execute the GIA and did not pay for the interconnection.

On 28 September 2012, Petitioner-Appellants provided a joint "Notice of Force Majeure" to Idaho Power. Tr. at pp. 484-485. In accordance with Section 14 of the respective PPAs relating to the Swager Farms and Double B projects, Petitioner-Appellants notified Idaho Power that they could not perform under their respective agreements because of "the occurrence of a Force Majeure event." *Id.* Further, Petitioner-Appellants alleged that the Commission's generic PURPA investigation (bearing docket number GNR-E-1 1-03) and other "pending proceedings" caused the force majeure event. *Id.* Additionally, Petitioner-Appellants cited the Commission's investigation regarding the ownership of renewable energy credits ("RECs") and the issue of

"curtailment" caused lenders to be "unwilling to lend in Idaho pending the outcome of these proceedings." *Id.* With this environment rendering lending to renewable energy projects impossible to procure, it was impossible for Petitioner-Appellants to discharge their respective obligations under the PPAs. *Id.*

On 9 November 2012, Idaho Power filed a "Complaint and Petition for Declaratory Order" regarding the Firm Energy Sales Agreement ("FESA") between it and New Energy Two, LLC and on November 21, 2012 Idaho Power filed with this Commission a "Complaint and Petition for Declaratory Order" regarding the FESA between it and New Energy Three, LLC (collectively, "the Complaints"). These proceedings bear PUC Case Nos. IPC-E-12-25 and IPC-E-12-26, respectively. Tr. at pp. 6, 45. In its Order No. 32692, the PUC ruled that the two Complaints be consolidated into a single proceeding and that New Energy Two and New Energy Three file a single answer or motion in defense to the consolidated complaints and petitions no later than December 27, 2012. Tr. at p. 815. In its Complaints, Idaho Power made certain factual allegations and concluded with a Prayer for Relief in which the PUC was asked to adjudicate whether or not an event of force majeure excusing performance under certain contracts has occurred, whether certain contracts have been breached, and to further adjudicate that Idaho Power was entitled to an award of damages as a remedy for the alleged breach of contract. *Id.* at 43. Specifically, for New Energy Two, LLC, Idaho Power asked for entry of a declaratory order that:

> "1) the Commission has jurisdiction over the interpretation and enforcement of the FESAs and the GIA;

> 2) that Exergy Development's [New Energy Two] claim of force majeure does not exist so as to excuse New Energy Two's failure to meet the amended Scheduled Operation Date for the Swager Farms project;
> 3) that New Energy Two has failed to place the Swager Farms Project in service by the Scheduled Operation Date of October , 2012, and that Idaho Power may terminate the FESA as of December 30, 2012, if the Swager Farms Project fails to achieve its Operation Date by that date;
> 4) that, pursuant to the FESA, Idaho Power is entitled to an award of liquidated damages."

Id. With respect to New Energy Three (Double B Dairy Project) Idaho Power asked for a declaratory order that:

> "1) the Commission has jurisdiction over the interpretation and enforcement of the FESAs and the GIA;
>
> 2) that Exergy Development's [New Energy Two] claim of force majeure does not exist so as to excuse New Energy Three's failure to meet the amended Scheduled Operation Date for the Double B project;
>
> 3) that if New Energy Three has failed to place the Double B Project in service by the Scheduled Operation Date of December 1, 2012, Idaho Power may collect delay damages;
>
> 4) that, if New Energy Three fails to achieve its Operation Date by March 1,2013, Idaho Power may terminate the FESA."

Tr. at pp. 501-530. In the body of its Complaints, Idaho Power further asserted that the PUC has jurisdiction over its declaratory ruling and breach of contract claims with reference to scant and unsupportive legal authority supporting that assertion. *Id.* at pp. 35-37, ¶¶ 76-81; and at pp. 520-523, ¶¶ 62-67. For additional authority, Idaho Power referenced the FESAs themselves, which, as Petitioner-Appellants asserted to the PUC during the proceedings below, could not be used to expand the PUC's limited jurisdiction it into that of a court of general jurisdiction. *Id.* at p. 35, ¶ 78. On 27 December 2012, Petitioner-Appellants filed a "Motion to Dismiss for Lack of

Subject Matter Jurisdiction" on the basis that the PUC lacked subject matter jurisdiction to adjudicate the issue of a force majeure clause in the PPAs in question. Tr. at pp. 821-834. Idaho Power filed an answer to the Motion, and Petitioner-Appellants filed a reply to the answer. Tr. at pp. 835-853. On 5 March 2013, the PUC denied Petitioner's Motion to Dismiss in its Order No. 32755, issued on 5 March 2013, asserting that it did have jurisdiction to determine the issues in dispute. Tr. at p. 854. On 13 March 2013, Petitioner-Appellants filed an omnibus motion with the PUC including a request for reconsideration, a request for permissive appeal, and request for imposition of a stay of the administrative proceedings pending any appeals; the basis for such requested relief was the same as Petitioner-Appellants' prior motion to dismiss. Tr. at p. 877. On 4 April 2013, the PUC denied all relief except for the imposition of a stay in its Order No. 32780. Tr. at p. 880. On 17 April 2013, Petitioner-Appellants filed a Motion for Permissive Appeal with this Honorable Court to challenge the propriety of the PUC's denial of the request for permissive appeal contained in their omnibus motion filed on 13 March 2013 and to preserve their rights of appeal. This Honorable Court granted review on 29 May 2013 and Petitioner-Appellants filed their Notice of Appeal on 7 June 2013.

ISSUE PRESENTED

1. Whether the PUC has jurisdiction to adjudicate whether or not an event of force majeure excusing performance under certain contracts has occurred.

STANDARD OF REVIEW

This Honorable Court has original jurisdiction, under Article V, Section 9 of the Idaho Constitution, to issue writs of prohibition and to review any decision of the Public Utilities

Commission. *Clark v. Ada County Bd. of Com'rs*, 98 Idaho 749, 752 (1977); Idaho Const. Art. V, § 9 ("The Supreme Court shall also have original jurisdiction to issue writs of mandamus, certiorari, prohibition, and habeas corpus, and all writs necessary or proper to the complete exercise of its appellate jurisdiction."). Additionally, the scope of the review of this Honorable Court is limited by Idaho Code Section 61-629 which states, in relevant part:

> "No new or additional evidence may be introduced in the Supreme Court, but the appeal shall be heard on the record of the commission as certified by it. The review on appeal shall not be extended further than to determine whether the commission has regularly pursued its authority, including a determination of whether the order appealed from violates any right of the appellant under the constitution of the United States or the state of Idaho. Upon the hearing the Supreme Court shall enter judgment, either affirming or setting aside in part the order of the commission."

See Idaho Code § 61-629. Finally, as the issue presented is one concerning subject-matter jurisdiction, such issues present questions of law over which appellate courts exercise free review. *State v. Barros,* 131 Idaho 379, 380 (1998); *State v. Doyle,* 121 Idaho 911, 913 (1992).

ARGUMENT

The issue before this Honorable Court is straightforward: does the PUC have jurisdiction to interpret contractual provisions? The correct answer to that question is "no". The reason for this is because this Honorable Court has repeatedly ruled on this precise issue by repeatedly confirming jurisdiction over such issues as laying exclusively with the District Courts.

I. THE SCOPE OF THE PUC'S JURISDICTION IS FIXED BY STATUTORY AUTHORITY.

The PUC's ability to adjudicate contract disputes of a very generic nature is what is at issue in this appeal: a matter of jurisdiction. It is axiomatic that determinations as to the existence of jurisdiction are critical prerequisites to any adjudication of facts and issues and therefore must be resolved prior to the determination of matters on their merits: "A question of subject matter jurisdiction is fundamental and a matter of law; it cannot be ignored when brought to our attention and should be addressed prior to considering the merits of an appeal." *See State v. Kavajecz*, 139 Idaho 482, 483 (2003); *State v. Savage*, 145 Idaho 756, 758 (Ct. App. 2008). Relevant to the instant case, "The Public Utilities Commission has no inherent power; its powers and jurisdiction derives in its entirety from the enabling statutes, and nothing is presumed in favor of its jurisdiction." *Lemhi Telephone Co. v. Mountain Slates Tel. & Tel. Co.*, 98 Idaho 692, 696 (1977) (internal quotation omitted). Furthermore, "It has been firmly established that the PUC has no authority not given it by statute." *Utah Power & Light Co. v. Idaho Public Utilities Comm'n.* 107 Idaho 47, 52 (1984).

II. CONTRACT ADJUDICATION OF FORCE MAJEURE ISSUES ARE OUTSIDE THE SCOPE OF THE PUC'S JURISDICTION.

Given the lack of inherent power of the PUC, and with specific focus upon the issue before this Honorable Court in the instant case, matters of contractual interpretation have been specifically reserved for the District Court. Respondent has argued throughout the proceedings before the PUC that its contract with Petitioner-Appellants confers the PUC with authority to adjudicate contractual disputes under the guise that because the contract was drafted to confer jurisdiction over the PUC and the issue of contract breach is before the PUC there is somehow

"continuing jurisdiction" over the issue of interpretation. Tr. at pp. 35-37, ¶¶ 76-81; and at pp. 520-523, ¶¶ 62-67. This is a self-contrived position that fails as a matter of law. This Honorable Court's own ruling, in *Afton Energy, Inc. v. Idaho Power Co.* (hereinafter *Afton I/III*), 107 Idaho 781, 784-786 (1984), rejected such machinations with indelible clarity:

> "[W]e reject Idaho Power's argument that the Commission does not have any authority to establish an avoided cost rate which is fixed for the duration of the contract and which is *not subject to the Commission's continuing jurisdiction.* It is clear that both Congress and FERC, through its implementing regulations, intended that CSPPs [QFs] should not be subjected to the pervasive utility-type regulation which would result if the contract language proposed by Idaho Power were approved by the Commission. In fact, one of Congress' main objectives in enacting PURPA was to encourage cogeneration and small power production by exempting CSPPs from pervasive state regulation. Congress was aware that such regulation presented a strong disincentive for CSPPs to engage in power production where the financial risks were great and the returns were not guaranteed to be recoverable. The Commission, in refusing to adopt Idaho Power's proffered language was merely carrying out the directives imposed by PURPA and the implementing FERC regulations."

Id. at 788 (emphasis added). Further, in *Idaho Power Co. v. Cogeneration, Inc.*, 134 Idaho 738, 748 (2000), this Honorable Court cited another case of *Afton* progeny: *Afton Energy Inc. v. Idaho Power Co.*, 111 Idaho 925, 929 (1986) (hereafter, *Afton II*), by stating: "Questions of contract interpretation and enforcement are normally the sole province of the courts." This Honorable Court in *Afton II* was equally clear, stating that:

> "It [Idaho Power] has simply asked the Commission, through a motion to modify a previous order, to declare that one of two freely negotiated payment options is in effect as selected by a legal determination of this Court. In other words, Idaho Power has asked for an interpretation of its contract. The district court is the proper forum for this action. We hold the Commission acted properly when it dismissed Idaho Power's motion to modify previous orders."

Id. at 930. Jurisdiction to interpret the terms of a PURPA contract and to award or declare

entitlement to damages is exactly the type of notion the Idaho Supreme Court rejected in *Afton*. It is not for the PUC to interpret a force majeure clause or adjudicate a dispute based upon such a contractual provision.

Although limited exceptions to this rule do indeed exist if issues "out of the norm," exist --*See, e.g., McNeal v. Idaho Public Utilities Commission*, 142 Idaho 685 (2006) (validating PUC interpretation of an interconnection agreement governed by federal law)--even cases addressing such limited scenarios are predicated on the specific acknowledgment that "The Commission is not a "court": '[T]he commission is an arm of the legislative authority and not a court of justice'". *Id.* at 691. Furthermore, no such exceptions apply to the present facts. There are no extraordinary or unique circumstances that are out of the norm; the present facts are that Petitioner-Appellants and Respondent entered into a power purchase agreement, facts arose that Petitioner-Appellant believe constituted a force majeure event, and a determination of whether force majeure exists is required. This is not a novel issue, it is a well-established exercise in applying a unobscure principle of contractual interpretation vis-à-vis the specific facts of the case. Indeed, facts of this type have been deemed by this very Court to be outside the jurisdiction of the PUC. This Honorable Court, in *Bunker Hill Co. v. Wash. Water Power Co.*, held that:

> "Here, as in Lemhi, the parties' dispute arises from differing constructions and interpretations of the contract rights of the parties. While one of the parties is a public utility, and while the general area of power supply may be one in which the Commission is presumed to have expertise, nevertheless, the matter remains a contractual dispute involving the legal interpretation of a contract which historically lies within the jurisdiction of the courts. Hence, no jurisdiction is vested in the Public Utilities Commission and the refusal of the Commission to

grant Bunker Hill's motion to dismiss was error."

101 Idaho 493, 494 (1980).

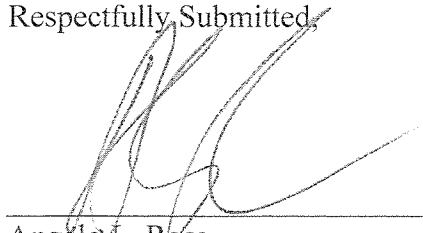
Idaho Power has taken the egocentric position that it can empower the PUC to interpret its contracts by conferring jurisdiction upon it through contract drafting. The statutory authority and appellate guidance provided by this Honorable Court itself does not recognize or support such hubris.

CONCLUSION

Plainly stated, Respondent cannot endow the PUC with jurisdiction that it does not, and cannot, have as a matter of law. For these reasons, Petitioner-Appellant's respectfully submit that this Honorable Court issue a Writ of Prohibition barring the PUC from exercising jurisdiction over the contractual issues and directing that the matter be referred to the appropriate division of the District Court for further adjudication.

DATED: 24 September 2013

Respectfully Submitted,



Angelo L. Rosa
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New Energy Two, LLC and New Energy Three, LLC

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on 25 September 2013, I caused a true and correct copy of the document herein by the method indicated below, and addressed to the following:

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