RICHARDSON & O'LEARY
ATTORNEYS AT LAW
Tel: 208-938-7900 Fax: 208-938-7904
P.O. Box 7218 Boise, ID 83707 - 515 N. 27th St. Boise, ID 83702

RECEIVED
2011 JUN 29 AM 10: 58
IDAHO PUBLIC
UTILITIES COMMISSION

June 29, 2011

Ms. Jean Jewell
Commission Secretary
Idaho Public Utilities Commission
472 W. Washington
Boise, ID 83702

RE: **IPC-E-10-54**

Dear Ms. Jewell:

We are enclosing for filing in the above-referenced docket an original and seven (7) copies of the **PETITION FOR RECONSIDERATION OF DELTA WIND LLC**.

An additional copy is enclosed for you to stamp for our records.

Sincerely,

Gregory M. Adams
Richardson & O'Leary PLLC

encl.

Peter J. Richardson (ISB # 3195)
Gregory M. Adams (ISB # 7454)
RICHARDSON & O'LEARY, PLLC
515 N. 27th Street
Boise, Idaho 83702
Telephone: (208) 938-2236
Fax: (208) 938-7904
peter@richardsonandoleary.com
greg@richardsonandoleary.com

Attorneys for Alpha Wind LLC, Bravo Wind LLC,
Charlie Wind LLC, Delta Wind LLC, and Echo Wind LLC

RECEIVED
2011 JUN 29 AM 10: 58
IDAHO PUBLIC
UTILITIES COMMISSION

BEFORE THE IDAHO

PUBLIC UTILITIES COMMISSION

IN THE MATTER OF THE APPLICATION OF IDAHO POWER COMPANY FOR A DETERMINATION REGARDING A FIRM ENERGY SALES AGREEMENT BETWEEN IDAHO POWER AND ALPHA WIND, LLC	)	**CASE NO. IPC-E-10-51** PETITION FOR RECONSIDERATION OF ALPHA WIND LLC
IN THE MATTER OF THE APPLICATION OF IDAHO POWER COMPANY FOR A DETERMINATION REGARDING A FIRM ENERGY SALES AGREEMENT BETWEEN IDAHO POWER AND BRAVO WIND, LLC	)	**CASE NO. IPC-E-10-52** PETITION FOR RECONSIDERATION OF BRAVO WIND LLC
IN THE MATTER OF THE APPLICATION OF IDAHO POWER COMPANY FOR A DETERMINATION REGARDING A FIRM ENERGY SALES AGREEMENT BETWEEN IDAHO POWER AND CHARLIE WIND, LLC	)	**CASE NO. IPC-E-10-53** PETITION FOR RECONSIDERATION OF CHARLIE WIND LLC

IN THE MATTER OF THE APPLICATION OF IDAHO POWER COMPANY FOR A DETERMINATION REGARDING A FIRM ENERGY SALES AGREEMENT BETWEEN IDAHO POWER AND DELTA WIND, LLC	)	**CASE NO. IPC-E-10-54** PETITION FOR RECONSIDERATION OF DELTA WIND LLC
IN THE MATTER OF THE APPLICATION OF IDAHO POWER COMPANY FOR A DETERMINATION REGARDING A FIRM ENERGY SALES AGREEMENT BETWEEN IDAHO POWER AND ECHO WIND, LLC	)	**CASE NO. IPC-E-10-55** PETITION FOR RECONSIDERATION OF ECHO WIND LLC

COME NOW, Alpha Wind LLC, Bravo Wind LLC, Charlie Wind LLC, Delta Wind LLC, and Echo Wind LLC, each of which is managed by Cotterel WindEnergy Center LLC (collectively "Cotterel Wind Energy LLCs" or "Petitioners"), and pursuant to Rule 331 of the Idaho Public Utilities Commission's Rules of Procedure ("IPUCRP"), hereby file this Joint Petition for Reconsideration of the Commission's Order No. 32254. For the reasons set forth below, the Cotterel WindEnergy Center LLCs respectfully request that the Idaho Public Utilities Commission ("Commission") withdraw its previous Order and issue a new order approving the Firm Energy Sales Agreements ("FESAs") entered into between Petitioners and Idaho Power for each of the five projects as submitted to the Commission.

I.
PROCEDURAL AND FACTUAL BACKGROUND

The procedural background and relevant facts, up to the filing of Comments in the above-captioned matters, are contained in Petitioners' Comments, supported by the Affidavit of Kevin Simmons, which were timely filed with the Commission on March 18, 2011 followed by an Errata Filing on March 22, 2011. Commission Staff filed Comments on Mach 17, 2011 and Idaho Power Company ("Applicant") filed Reply Comments on March 25, 2011.

The Commission entered its Final Order in this matter on June 8, 2011 (Order No. 32254).[1] In that order, the Commission announced a "bright line rule", to wit: "a Firm Energy Sales Agreement/Power Purchase Agreement must be executed, i.e., signed by both parties to the agreement, prior to the effective date of the change in eligibility criteria." Order No. 32254, at p. 10.

Pursuant to IPUCRP 331, Petitioners hereby timely file this Joint Petition for Reconsideration.

II.
PETITION

A. Grounds for Reconsideration

This Joint Petition for Reconsideration is based upon the following grounds:

1. Pursuant to 18 CFR Section 292.304(d)(2)(ii), a qualifying facility ("QF") is entitled

[1] The relevant facts for each of these five projects are substantially similar. Pursuant to IPUCRP 247, the Commission has determined to consolidate the above proceedings for hearing. Petitioners have therefore filed a Joint Petition for Reconsideration of Order No. 32254 in each of the above captioned cases.

to the rates that are in effect on the date the QF incurred a legally enforceable obligation to provide energy, and therefore, the Commission's order is arbitrary and capricious and not in conformity with controlling federal law;

2. The Commission's "bright line rule" in Order No. 32254 that a FESA is not enforceable until it is executed by both parties is not in conformity with controlling Idaho case law regarding contract formation;

3. The Commission's Order is arbitrary and capricious because the Commission failed to apply grandfather rights to the Petitioners' FESAs consistent with the Commission's prior precedent; and

4. The Commission's "bright line rule" is in violation of the rulemaking requirements of the Idaho Administrative Procedures Act and is therefore void.

B. Nature and Quantity of Evidence or Argument Petitioners Will Offer in Support of Their Petition for Reconsideration

1. *Pursuant to 18 CFR Section 292.304(d)(2)(ii), a QF is entitled to the rates that are in effect on the date the QF incurred a legally enforceable obligation to provide energy, and, therefore, the Commission's order is arbitrary and capricious and not in conformity with controlling federal law.*

Petitioners will fully brief controlling federal statutes, implementing rules and related case law regarding when a qualifying facility is deemed to have incurred a legally enforceable obligation to provide energy pursuant to a FESA or other denominated power purchase agreement. The Commission's Order No. 32254 asserts that the Federal Energy Regulatory Commission ("FERC") has generally left it to states to determine when and how a legally enforceable obligation is created for purposes of calculating avoided cost rates. Order No. 32254, at p. 9 (citing *West Penn Power Co.*, 71 FERC ¶ 61,153 (1995)).

Petitioners will fully brief federal law establishing that, despite *West Penn Power, Co.*, a state commission is not free to ignore the requirements of the Public Utility Regulatory Policies Act of 1978 or FERC's regulations providing QFs the right to choose to sell pursuant to a legally

enforceable obligation, and the right to choose to have rates calculated at the time that obligation is incurred.[2] The obligation to purchase a QF's output is created by the QF committing itself to sell to an electric utility, which also commits the electric utility to buy from the QF. The Commission's order violates 18 CFR Section 292.304(d)(2)(ii) because, by requiring the QF to obtain the utility's signature to incur a legally enforceable obligation, the Commission's order vests all power to determine the date on which a QF obligates itself in the hands of the utility.

Petitioners will demonstrate with briefing and evidentiary proceedings that they have clearly entered into a legally enforceable obligation prior to the effective date of the eligibility cap reduction.

2. *The Commission's "bright line rule" in Order No. 32254 that a FESA is not enforceable until it is executed by both parties is erroneous because it is not in conformity with controlling Idaho case law regarding contract formation.*

Petitioners will fully brief Idaho case law regarding the law of contract formation in Idaho and the enforceability of contracts regardless of whether signed by either party. *See, e.g., Evco Sound & Electronics, Inc. v. Seaboard Surety Company,* 148 Idaho 357, 365, 223 P.3d 740, 748 (2009) (setting forth the rule that a contract is formed by a meeting of minds manifested by offer and acceptance). Petitioners will demonstrate with briefing and evidentiary proceedings that they satisfied the requirements of contract formation before the effective date of the eligibility cap reduction, despite the lack of Idaho Power's signature.

---

[2] *See, e.g.,* 16 U.S.C. § 824a-3(a)(2); *JD Wind 1, LLC, "Notice of Intent Not to Act and Declaratory Order,"* 129 FERC ¶ 61,148, ¶¶25-26, 29 (2009); *JD Wind 1, LLC, "Order Denying 'Requests for Rehearing, Reconsideration, or Clarification,'"* 130 FERC ¶ 61,127, ¶¶ 23-24 (2010).

3. *The Commission's Order is arbitrary and capricious because the Commission failed to apply grandfather rights to the Petitioners' FESAs consistent with the Commission's prior precedent.*

Petitioners will fully brief their position that the Commission's Order No. 32254 is arbitrary and capricious for its failure to apply prior Commission precedent establishing grandfather tests. The Commission's Order No. 32254 erroneously purports to create a new bright line test for changes in the "eligibility cap," as opposed to tests used for changes in "rates." *See* Order No. 32254, at p. 10.

As discussed in the Petitioners' Comments, the Petitioners have satisfied all of the Commission's prior tests for establishing grandfathered rights to previously available avoided cost rates, including a prior test used the other time rates became unavailable because the Commission reduced the eligibility cap for published rates. *See In the Matter of Petition of Cassia Wind to Determine Exemption Status*, Case No. IPC-E-05-35, Order No. 29954, pp. 1-4 (2006) (finding wind QF entitled to *published* rates after Commission reduced the *eligibility cap* based on maturity of development of project).[3] Petitioners will demonstrate with briefing and evidentiary proceedings that they satisfied the requirements of the Commission's prior precedent before the effective date of the eligibility cap reduction, despite the lack of Idaho Power's signature.

---

[3] *See also A.W. Brown Co., Inc. v. Idaho Power Co.*, 121 Idaho 812, 816-18, 828 P.2d 841, 845-47 (1992) (approving of Commission test that the QF may establish grandfather rights by filing a meritorious complaint at the Commission alleging it is entitled to a contract prior to date rates become unavailable); *In the Matter of the Application of Idaho Power Company for Approval of a Firm Energy Sales Agreement with Yellowstone Power Company for the Sale and Purchase of Electric Energy*, Case No. IPC-E-10-22, Order 32104, p. 12 (2010) (approving of grandfathered rates despite "the apparent lack of any *written* documentation . . . evidencing that the terms of a power purchase agreement were materially complete [before the rate change]"); *Earth Power Resources, Inc. v. Washington Water Power Company*, Case No. WWP-E-96-6, Order No. 27231 (1997) (finding utility delayed negotiations and therefore QF was entitled to grandfathered rate).

4. *The Commission's "bright line rule" is in violation of the rulemaking requirements of the Idaho Administrative Procedures Act and is therefore void.*

Petitioners will fully brief the rulemaking requirements under the Idaho Administrative Procedures Act ("IAPA") as those requirements apply to the Commission and to the facts of this proceeding. *See, e.g.,* I.C. § 67-5201 *et seq.*; *Asarco Inc. v. State,* 138 Idaho 719, 69 P.3d 139 (2003); *Tomorrow's Hope, Inc. v. Idaho Dep't of Health and Welfare,* 124 Idaho 843, 864 P.2d 1130 (1993). The Commission's Order No. 32254 stated that it did not implement a rate change. Order No. 32254, at p. 10. Thus, the IAPA is applicable to the Commission's non-rate making act establishing a new rule. *See A.W. Brown Co., Inc. v. Idaho Power Co.*, 121 Idaho 812, 818-19, 828 P.2d 841, 847-48 (1992). Petitioners will demonstrate with briefing and evidentiary proceedings that the Commission's Order No. 32254 violated Idaho Administrative Procedures Act by creating a new rule without following the proper rule-making proceedings.

III.
PRAYER FOR RELIEF

For the foregoing reasons, Petitioners respectfully request the Commission to grant their petition for reconsideration of its Order No. 32254 in the above-captioned matters. Pursuant to Rule 331.03, Petitioners further request that the Commission reconsider its decision based on written briefing submitted by the parties, and evidentiary proceedings.

RESPECTFULLY SUBMITTED this 29th day of June, 2011.

RICHARDSON AND O'LEARY, PLLC

Peter J. Richardson
Attorney for Alpha Wind LLC, Bravo Wind LLC,
Charlie Wind LLC, Delta Wind LLC, and
Echo Wind LLC

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 29th day of June, 2011, a true and correct copy of the within and foregoing JOINT PETITION FOR RECONSIDERATION was served in the manner shown to:

Ms. Jean Jewell Commission Secretary Idaho Public Utilities Commission P O Box 83720 Boise, ID 83720-0074 Jean.jewell@puc.idaho.gov	_X_ Hand Delivery __ U.S. Mail, postage pre-paid __ Facsimile _X_ Electronic Mail
Lisa D Nordstrom Donovan E Walker Idaho Power Company PO Box 70 Boise, Idaho 83707-0070 lnordstrom@idahopower.com dwalker@idahopower.com	___ Hand Delivery _X_ U.S. Mail, postage pre-paid ___ Facsimile _X_ Electronic Mail
Kristine Sasser Idaho Public Utilities Commission P O Box 83720 Boise, ID 83720-0074 kris.sasser@puc.idaho.gov	___ Hand Delivery _X_ U.S. Mail, postage pre-paid ___ Facsimile _X_ Electronic Mail

Peter J. Richardson