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June 29, 2011

Via Hand Delivery

Jean Jewell, Secretary
Idaho Public Utilities Commission
472 W. Washington St.
Boise, Idaho 83720

Re: In the Matter of the Application of Rainbow Ranch Wind LLC
Case No. IPC-E-10-59

In the Matter of the Application of Rainbow West Wind LLC
Case No. IPC-E-10-60

Dear Ms. Jewell:

Enclosed for filing, please find an original and seven (7) copies of Rainbow Ranch Wind, LLC and Rainbow West Wind, LLC's Petition for Reconsideration of Commission Order No. 32256.

Kindly return a file stamped copy to me.

Very Truly Yours,
McDevitt & Miller LLP

Dean J. Miller

DJM/hh
Encl.

ORIGINAL

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IDAHO PUBLIC
UTILITIES COMMISSION

BEFORE THE IDAHO PUBLIC UTILITIES COMMISSION

IN THE MATTER OF THE APPLICATION OF IDAHO POWER COMPANY FOR DETERMINATION REGARDING A FIRM ENERGY SALES AGREEMENT BETWEEN IDAHO POWER AND RAINBOW RANCH WIND, LLC	**Case No. IPC-E-10-59** **PETITION FOR RECONSIDERATION OF COMMISSION ORDER NO. 32256**
IN THE MATTER OF THE APPLICATION OF IDAHO POWER COMPANY FOR DETERMINATION REGARDING A FIRM ENERGY SALES AGREEMENT BETWEEN IDAHO POWER RAINBOW WEST WIND, LLC	**Case No. IPC-E-10-60** **PETITION FOR RECONSIDERATION OF COMMISSION ORDER NO. 32256**

COME NOW Rainbow Ranch Wind, LLC and Rainbow West Wind LLC (collectively referred to as "Rainbow" or "Petitioner") and pursuant to IPUCRP 331 and Idaho Code §61-626 respectfully Petition for Reconsideration of Commission Order No. 32256, service dated June 8, 2011("the Order") as more fully set forth below.

Rainbow requests reconsideration of the Order because those parts of the Order set forth below are unreasonable, unlawful, erroneous, and not in conformance with the law.

Because the essential facts pertaining to this matter are not in dispute, Petitioner does not request reconsideration by re-hearing. Rather, Petitioner requests reconsideration by written briefs or comments. (*See* IPUCRP 331.02).

INTRODUCTION

In Order No. 32131, (Case No. GNR-E-10-4) the Commission announced its intent that a subsequent decision on whether to reduce the eligibility cap for PURPA published avoided costs would be effective, retroactively, to December 14, 2010.

Thereafter, on February 6, 2011, the Commission issued Order No. 32176, reducing "...the eligibility cap for published avoided cost rates from 10 aMW to 100 kW for wind and solar QF's only, effective December 14, 2010." (Order No. 32176, Pgs. 11-12).

On December 13, 2010, the Rainbow project entities executed Firm Energy Sales Agreements (FESAs) and physically delivered them to Idaho Power Company. The FESAs contained published avoided cost rates established in Commission Order No. 31025. But for the unavailability of a Company executive, the FESAs would have been executed on December 13, 2010. Rather, the FESAs were executed on December 14, 2010. (*See* Idaho Power Company Reply Comments, March 24, 2011, Pg.7). Here, Rainbow does not mean to imply any impropriety or unfair dealing by Idaho Power, and,

in fact, appreciates Idaho Power's prompt response in executing the FESAs after their submittal by Rainbow.

Despite the fact that the FESAs became effective between the parties on the same date as the effective date of the cap reduction, in Order No. 32256, the Commission adopted a "Bright Line Rule", holding that agreements must be signed by both parties prior to the effective date of the change in eligibility criteria. Accordingly, the Commission disapproved the agreements.

ARGUMENT

I.

Application of the "Bright Line Rule" to the Rainbow FESAs is Unreasonable and Should Be Reconsidered

In subsequent sections of this Petition, Rainbow questions whether adoption of the Bright Line Rule is within the Commission's legal and policy authority generally. Here, however, Rainbow argues that, putting aside for the moment the broader legal and policy concerns, the Bright Line Rule should not be applied to the Rainbow projects.

A. The FESAs became legally binding between the parties on December 14, 2010.

By their express terms, the FESAs define the date upon which they become a binding contract between the parties. Section 1.10 of the FESAs defines the effective date as:

> "The date stated in the opening paragraph of this Firm Energy Sales Agreement representing the date upon which this Firm Energy Sales Agreement was fully executed by both Parties". (*See* Copies of the FESAs, accompanying Application of Idaho Power Company, December 16, 2010).

As noted above, the date stated in the opening paragraph of the FESAs is December 14, 2010.

In its Reply Comments, Idaho Power acknowledges that the FESAs were binding legal obligations as of December 14, 2010. There, the Company argues that the Commission may modify an otherwise valid contract, but the Company does not argue that the FESAs were ineffective or not binding between the parties. (*See* Idaho Power Company's Reply Comments, Pg. 9).

B. **A reasonable person could believe that FESAs effective December 14, 2010, qualified for published avoided cost rates.**

The announced intent in Order No. 32131, to make the decision effective December 14, 2010, is, it must be admitted, vaguely written. The Order provides, "IT IS FURTHER ORDERED that the Commission's decision regarding whether to reduce the published avoided cost eligibility cap become effective on December 14 2010".

It seems clear enough that FESA's executed after December 14, 2010, would be subject to the lower eligibility cap, but the Order is silent regarding contracts effective on December 14, 2010.

Staff Comments interpret the Order to mean FESAs must be fully executed before December 14, 2010, to be eligible for the higher cap, but the Staff Comments offer no real legal or policy analysis to support that conclusion, other than to say it is Staff's "belief". (*See* Staff Comments Dated March 17, 2011, Pg. 5).

However, an equally reasonable interpretation of Order No. 32131 is that FESAs executed *on or before* December 14, 2010, are eligible for the higher cap. Order No. 32131 is susceptible to two reasonable interpretations. It could mean FESAs executed *on or after* December 14, 2010, are not eligible for the higher cap, or it could mean FESAs

executed *on or before* December 14, 2010 are eligible. For the reasons set forth below, the ambiguity should be resolved in favor of Rainbow.

C. Rainbow almost certainly would have been eligible for "grandfathering" under traditional criteria.

The Commission's long history of grappling with claims eligibility for higher rates following a reduction in rates or change in methodology is well known and will not be repeated here. Rainbow does note, however, that the Commission has adopted eligibility criteria in circumstances where the eligibility cap has changed; adoption of eligibility criteria has not been limited to circumstances only where rates have changed. (*See* Order No. 29389, Case No. IPC-E-05-22, Order No. 29954, *Petition to Suspend PURPA Obligation* Case No. IPC-E-05-35; *In the Matter of Cassia Wind*; Order No. 30109, Case No. IPC-E-05-34, *In the Matter of Magic Wind).*

In the most recent case, *In the Matter of Yellowstone Power,* Order No. 32104, Case No. IPC-E-10-22, the Commission applied a "materially complete" test. There, the Commission found that contract negotiations were materially complete, even though the parties had not exchanged a draft FESA on the effective date of a rate change.

The Comments of Rainbow, filed herein on March 17, detail the efforts expended by Rainbow to bring the projects to the contract execution stage. It is apparent from those Comments that Rainbow would satisfy any interpretation of a "material completeness" test.

D. Application of the Bright Line Rule to the Rainbow FESAs may constitute and improper governmental interference with contractual rights.

As noted above, in its Reply Comments, Idaho Power acknowledges, correctly, that FESAs are contracts shielded from governmental interference by Art. I Sec. 16 by

the Idaho Constitution. "No bill of attainder, ex post facto law, or law impairing the obligation of contracts shall ever be passed."

The constitutional provision applies to contracts within the jurisdiction of the Commission:

> "In determining the status of public utility contracts, and the ability of the Public Utilities Commission to alter the terms of such contracts, it is important to remember the special protected status given any contract by the constitution." *Agricultural Products v. Utah Power* 98 Idaho 23, 29, 557 P.2d 617 (1976).

In *Agricultural Products* and subsequent cases, the question before the Commission and Supreme Court was the quantity of proof necessary to justify altering a rate fixed by contract. In contrast, in the present case, application of the Bright Line Rule to the Rainbow FESAs does more than adjust a rate—it renders the contracts a nullity. (*See also, Morgan Stanley v. Public Util. Dist. No.1 of Snohomish City.*, 128 S.Ct. 2733 (2008) and *NRG Power Marketing v. Maine Public Utilities Commission,* 130 S.Ct. 694 (2009 for a discussion of permissible alteration of contracts by regulatory bodies).

E. Application of the Bright Line Rule to the Rainbow FESAs results in manifest injustice.

The preceding arguments can be summarized in a more general way, which is this: as a result of the Order, a hyper-technicality—whether the FESAs were signed on December 13 or December 14, 2010—erases Rainbow's substantive rights under valid legal agreements and in so doing offends fundamental conceptions of justice.

II.

The Bright Line Rule Suffers From Other, More General, Infirmities.

For the reasons set forth above, Rainbow hopes that, upon reconsideration, the Commission will come to the conclusion that application of the Bright Line Rule to the Rainbow projects is wrong. Rainbow, however, is aware that other parties in companion cases intend to assert more general objections to the Bright Line Rule.

Those objections include:

- The Bright Line Rule is inconsistent with federal law;
- The Order is the adoption of a Rule within the meaning of the Administrative Procedures Act, without observing the requirements of that Act;
- The retroactivity feature of the Order is suspect;
- Adoption of the Bright Line Rule is an unexplained departure from past precedent.

In the event the Commission is unable to reach the result herein requested, Rainbow will, of necessity, join in the assertion of those other, more general objections[1].

CONCLUSION

Based on the reasons and authorities cited herein, Petitioner respectfully requests that the Commission reconsider the Order, as applied to Rainbow, and enter its order approving the FESAs.

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[1] Rainbow identifies these objections so as to preserve its record. (*See, Eagle Water Company v. Idaho Public Utilities Commission,* 130 Idaho 314, 940 P.2d 1133 (1997).

DATED this 16 day of June, 2011

MCDEVITT & MILLER, LLP

By: _____
Dean J. Miller
Attorney for Rainbow Ranch Wind LLC
and Rainbow West Wind LLC

CERTIFICATE OF SERVICE

I hereby certify that on the 29th day of June, 2011, I caused to be served, via the method(s) indicated below, true and correct copies of the foregoing document, upon:

Jean Jewell, Secretary Idaho Public Utilities Commission 472 West Washington Street P.O. Box 83720 Boise, ID 83720-0074 jjewell@puc.state.id.us	Hand Delivered U.S. Mail Fax Fed. Express Email	X ف ف ف ف
Kristine Sasser Idaho Public Utilities Commission 472 West Washington Street P.O. Box 83720 Boise, ID 83720-0074 Kris.Sasser@puc.idaho.gov	Hand Delivered U.S. Mail Fax Fed. Express Email	ف ف ف ف X
Donovan E. Walker Idaho Power Company 1221 W. Idaho Street P.O. Box 70 Boise, ID 83707 dwalker@idahopower.com	Hand Delivered U.S. Mail Fax Fed. Express Email	ف ف ف ف X

BY: Heather Houle
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