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IDAHO PUBLIC  
UTILITIES COMMISSION

27 February 2012

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

RE: **SUPREME COURT DOCKET NO. 39151-2011**  
**IPUC CASE NOS. IPC-E-10-61**  
**IPC-E-10-62**

Dear Ms. Jewell:

Enclosed please find the **REPLY LEGAL BRIEF** for filing on behalf of the Grouse Creek Wind Park, LLC (10-61) and Grouse Creek Wind Park II, LLC (10-62) in the above-referenced docket. We have enclosed an original and eight (8) copies, as well as an additional copy for you to stamp for our records.

Please contact me with any questions.

Sincerely,

Nina M. Curtis, Administrative Assistant  
Richardson & O'Leary PLLC

encl.

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Attorneys for Grouse Creek Wind Park, LLC  
and Grouse Creek Wind Park II, LLC

**BEFORE THE IDAHO PUBLIC UTILITIES COMMISSION**

|                                     |   |                                   |
|-------------------------------------|---|-----------------------------------|
| IN THE MATTER OF THE                | ) | <b>SUPREME COURT DOCKET NO.</b>   |
| APPLICATION OF IDAHO POWER          | ) | <b>39151-2011</b>                 |
| COMPANY FOR A DETERMINATION         | ) |                                   |
| REGARDING THE FIRM ENERGY           | ) |                                   |
| SALES AGREEMENT FOR THE SALE        | ) | <b>IPUC CASE NOS. IPC-E-10-61</b> |
| AND PURCHASE OF ELECTRIC            | ) | <b>IPC-E-10-62</b>                |
| ENERGY BETWEEN IDAHO POWER          | ) |                                   |
| COMPANY AND GROUSE CREEK            | ) |                                   |
| WIND PARK, LLC (10-61) AND GROUSE   | ) |                                   |
| CREEK WIND PARK II, LLC (10-62)     | ) |                                   |
| <hr/>                               |   |                                   |
| GROUSE CREEK WIND PARK, LLC         | ) | REPLY LEGAL BRIEF OF GROUSE       |
| AND                                 | ) | CREEK WIND PARK, LLC AND          |
| GROUSE CREEK WIND PARK II, LLC,     | ) | GROUSE CREEK WIND PARK II,        |
| Petitioners/Appellants,             | ) | LLC                               |
|                                     | ) |                                   |
| v.                                  | ) |                                   |
|                                     | ) |                                   |
| IDAHO PUBLIC UTILITIES              | ) |                                   |
| COMMISSION,                         | ) |                                   |
| Respondent, Respondent on Appeal,   | ) |                                   |
|                                     | ) |                                   |
| and                                 | ) |                                   |
|                                     | ) |                                   |
| IDAHO POWER COMPANY,                | ) |                                   |
|                                     | ) |                                   |
| Respondent-Intervenor/Respondent on | ) |                                   |
| Appeal                              | ) |                                   |

## INTRODUCTION

COMES NOW, Grouse Creek Wind Park, LLC and Grouse Creek Wind Park II, LLC, each of which is managed by Wasatch Wind Intermountain (the “Grouse Creek QF”, the “Grouse Creek II QF,” or collectively the “Grouse Creek QFs”), and pursuant to the Idaho Public Utilities Commission’s (“IPUC’s” or “Commission’s”) Notice of Scheduling and Notice of Oral Argument (Order No. 32191), hereby files this Legal Brief in the above-captioned matters.<sup>1</sup> Pursuant to the IPUC’s implementation of the Public Utility Regulatory Policies Act of 1978, the Grouse Creek QFs attempted to secure executed firm energy sales agreements (“FESAs”) with Idaho Power for several months prior to December 14, 2010. Each QF even filed a Complaint against Idaho Power for its refusal to process the requests timely and in good faith. All material terms to which the Grouse Creek QFs obligated themselves were very well settled prior to December 14, 2010, despite the QFs’ inability to obtain fully executed documents with Idaho Power until December 28, 2010. The Grouse Creek QFs therefore formed a legally enforceable obligation (or “LEO”) prior to December 14, 2010, entitling them to the avoided cost rates contained in the FESAs submitted by Idaho Power on December 29, 2010 in these cases. This conclusion results from any reasonable application of the IPUC’s past precedent regarding formation of a LEO, and the Federal Energy Regulatory Commission’s (“FERC’s”) recent declaratory order in a related matter. *See Cedar Creek Wind LLC*, 137 FERC ¶ 61,006 (2011). The Grouse Creek QFs therefore respectfully request that the Commission exercise its authority

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<sup>1</sup> Pursuant to IPUC Rule of Procedure 247, the Commission has determined to consolidate the above proceedings. The Grouse Creek QFs have therefore filed a single Legal Brief.

under I.C. § 61-624 to modify its prior orders, and approve the FESAs for both projects.

### **ISSUE PRESENTED**

Pursuant to the Commission's Notice of Scheduling and Oral Argument, the issue presented is "whether/when a 'legally enforceable obligation' arose" for the Grouse Creek QFs' FESAs?

### **SHORT ANSWER**

FERC's regulations provide that a qualifying facility ("QF") may enter into a long term contract or other legally enforceable obligation containing avoided cost rates for the term of obligation calculated on the date that the QF obligates itself. 18 C.F.R. 292.304(d)(2)(ii). The Grouse Creek QFs established a LEO prior to December 14, 2010, under any reasonable application of the IPUC's precedent regarding formation of a LEO, and FERC's recent declaratory order. *See Cedar Creek Wind LLC*, 137 FERC ¶ 61,006 (2011).

Pursuant to the IPUC's LEO precedent, a LEO arose no later than November 8, 2011. On that date, the Grouse Creek QFs' filed meritorious Complaints alleging that they obligated themselves to Idaho Power QF FESAs with standard terms and published rates approved by the Commission, but Idaho Power had negotiated in bad faith and failed to execute FESAs. At that time, the essential and material terms and conditions of the legally enforceable obligation were known, and the Grouse Creek QFs agreed to Commission resolution of the only unresolved term – the amount of delay default security. Alternatively, the Grouse Creek QFs established a LEO, at the very latest on December 9, 2011. By that date, after the filing of the Complaints, every word in the final, written contracts was known and not subject to any dispute to be resolved by the Commission, or subject to any reasonable misunderstanding regarding the contract terms or the projects' characteristics.

## PROCEDURAL BACKGROUND

Idaho Power filed the executed FESAs for Commission determination on December 29, 2010. The Grouse Creek QFs filed extensive Comments, supported by the Affidavit and Exhibits of Christine Mikell, on March 24, 2011. The Grouse Creek QFs' Comments requested approval of the agreements as written, relying on 18 C.F.R. § 292.304(d)(2)(ii) and the Commission's QF grandfathering precedent. Commission Staff filed Comments on March 24, 2011, recommending disapproval of the FESAs on the ground they were not fully executed prior to December 14, 2010. Idaho Power filed Reply Comments on March 31, 2011, which set forth several reasons Idaho Power believed the Commission could reject the FESAs. The Grouse Creek QFs filed a Motion to Set Time for Oral Argument on April 7, 2011, in response to unsupported factual characterizations contained in Idaho Power's Reply Comments. Commission Staff and Idaho Power separately filed an Answer and an Objection, respectively, each opposing Oral Argument on April 21, 2011. The Commission issued an order on April 27, 2011 (Order No. 32236), determining not to hold Oral Argument.

The Commission entered its Final Order in this matter on June 8, 2011 (Order No. 32257). In that order, the Commission announced a "bright line rule" that "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. 32257 at 10. Notably, the Commission issued several orders in the same time frame, rejecting several other QF contracts on the same basis, including five contracts entered into between the Cedar Creek QFs and Rocky Mountain Power. *See, generally, Re Determination Regarding Cedar Creek*

*LLCs Power Purchase Agreements*, IPUC Case Nos. PAC-E-11-01 to -05.

The Grouse Creek QFs filed a Joint Petition for Reconsideration on June 29, 2011, relying again primarily on 18 C.F.R. § 292.304(d)(2)(ii) and the Commission's grandfathering precedent. The Commission issued a Final Order on Reconsideration on July 27, 2011 (Order No. 32299), again concluding that FESAs were ineffective prior to December 14, 2010 because they were not fully executed prior to that date. On September 7, 2011, the Grouse Creek QFs filed a Notice of Appeal to the Idaho Supreme Court, raising the same issues as in their Petition for Reconsideration.

Concurrent with these proceedings, the Cedar Creek Wind QFs filed a Petition for Enforcement at FERC, pursuant to 16 U.S.C. § 824a-3(h), challenging the Commission's use of the "bright line rule," requiring fully executed contracts for QFs to form a legally enforceable obligation. *See* FERC Docket No. EL11-59-000. On October 4, 2011, FERC issued a declaratory order declining to itself initiate enforcement against the IPUC, but determined that the IPUC's order and the "bright line rule" were inconsistent with PURPA and FERC's implementing regulations. *Cedar Creek Wind LLC*, 137 FERC ¶ 61,006. FERC concluded that the IPUC did not recognize that "a legally enforceable obligation may be incurred before the formal memorialization of a contract to a writing." *Id.* at ¶ 36.

On November 4, 2011, the Grouse Creek QFs, the Commission, and Idaho Power filed a Stipulated Motion to Suspend Appeal and Remand to the Administrative Agency. That Motion stated: "Given FERC's recent Order, the Parties believe that it is appropriate for the appeal in this case to be suspended: (1) to allow the PUC to reconsider its Order in this case in light of the

FERC Order; and (2) to provide Parties with an opportunity to discuss the possibility of settling the appeal.” The Supreme Court remanded the matter to the Commission. The Commission entered its Notice of Scheduling and Notice of Oral Argument (Order No. 32191), setting a briefing schedule in the event that settlement could not be reached. The parties were unable to reach settlement, and the matter is now before the Commission for resolution.

## **MATERIAL FACTUAL BACKGROUND**

### **A. General Background on the Projects and Development**

Wasatch Wind began wind monitoring in December 2007, and, on February 4, 2008, finalized wind project leases for the private land encompassing the rights necessary for the wind project sites at issue in these contract approval dockets. *Affidavit of Christine Mikell*, at ¶¶ 4, 6, 11.<sup>2</sup> Although it had initially considered developing a larger project which would include federal lands, in summer of 2010, Wasatch Wind scaled the initial project down to the two smaller 10 average monthly MW (“aMW”) QFs on privately owned land separated by at least one mile. *Id.* at ¶¶ 43-44.

### **B. Interconnection and Transmission Rights**

Wasatch Wind began interconnection studies and processes in May 2008, and signed an Interconnection Agreement with Raft River Rural Electric Cooperative on March 31, 2010, for interconnection to a 138 kilovolt line leased to BPA by Raft River Rural Electric Cooperative. *Id.* at ¶¶ 16-20. Although the initial Interconnection Agreement called for interconnection of the

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<sup>2</sup> The *Affidavit of Christine Mikell* and its Exhibits, filed March 24, 2011 in these dockets, provide a detailed narrative of the Grouse Creek QFs development and contracting efforts, and are incorporated herein by reference to the extent that those facts are not reiterated.

initially planned, single project, Raft River Rural Electric Cooperative and BPA have subsequently agreed to amend the Interconnection Agreement to accommodate the two smaller projects each sized 21 MW. *Id.* at ¶¶ 22-23.

With regard to point to point (“PTP”) transmission, BPA stated during the interconnection studies in 2009 that the amount of capacity Wasatch Wind could interconnect (93 MW) was the same as the amount they could deliver to Idaho Power’s Minidoka substation because the applicable transmission line is stranded and not connected to any other part of BPA’s system. *See id.* at Exhibit D, pp. 1-2. Entering into a PTP service agreement requires submission of a substantial non-refundable deposit and requires obligating the Grouse Creek QFs to ongoing fees for transmission for the entire 20-year term. *Id.* at ¶ 33. Thus, the Grouse Creek QFs initiated this process after the interconnection process to limit irretrievable financial expenditures prior to knowing the QFs would obtain FESAs.

On June 30, 2010, the Projects submitted the necessary applications for BPA’s 2010 Network Open Season (“NOS”) to achieve the initially projected online date of June 2012, for a 30 MW and a 21 MW project. *Id.* at ¶ 27. Due to confusion in the contracting process with Idaho Power at that time, Wasatch Wind backed out of the BPA NOS, which would have required a Performance Assurance \$794,376 by August 18, 2010. *Id.* at ¶ 28. As a result, Wasatch Wind was unable to achieve the initially projected online date of June 2012.

On August 19, 2010, Wasatch Wind made a traditional transmission service request (“TSR”) on BPA’s OASIS website with a delayed start date of June 1, 2013. *Id.* at ¶ 29. All of the other parameters of the projects remained the same. *Id.* As expected all along, this process

proceeded well in advance of the projected online date, and BPA provided two Firm PTP agreements in March 2011 for the 21 MW Grouse Creek QF and the 21 MW Grouse Creek II QF. *Id.* at ¶ 31. The Grouse Creek QFs are still awaiting final approval of their FESAs by the IPUC prior to executing the BPA transmission agreement.

**C. Firm Energy Sales Agreement Negotiations with Idaho Power**

Wasatch Wind has been engaged in formal power sales contract discussions with Idaho Power since at least February 26, 2010, when it emailed Randy Allphin, of Idaho Power. *Id.* at ¶ 34 and Exhibit A. Wasatch Wind described the project, progress through the interconnection process with BPA, and that it appeared from Idaho Power's OASIS website that adequate transmission was available on Idaho Power's system from the Minidoka substation to its Treasure Valley load center. *Id.* Mr. Allphin stated on March 2, 2010, that prior to execution of a power sales contract, Wasatch Wind must complete execution of an interconnection agreement and reserve firm transmission on both the BPA and the Idaho Power transmission systems to get the energy from the project to Idaho Power customer loads. *Id.*

As described above, Wasatch Wind had long since commenced the processes necessary to interconnect and deliver the output to Idaho Power's system. But under the FERC's approved Open Access Transmission Tariff ("OATT"), the TSR on Idaho Power's system to its own load center would be a request by Idaho Power's merchant arm to Idaho Power's transmission arm to designate generating facilities as network resources. *See id.* at Exhibit C, pp. 4-5 (describing the process). As such, Wasatch Wind had no power to lodge this request internally within Idaho Power, and once lodged Wasatch Wind would have no direct access to the Idaho Power's

transmission personnel. Unlike its interconnection and PTP transmission requests with BPA for which Wasatch Wind had direct access to the BPA transmission personnel, Idaho Power's PURPA contracts administrators would handle the TSR on Idaho Power's system.

Wasatch Wind requested that Idaho Power provide it with a PURPA contract for a project up to 65 MW in April 2010. *Id.* at ¶¶ 35-36 and Exhibit B. On June 17, 2010, Wasatch Wind signed a letter or understanding provided by Idaho Power, which stated Idaho Power would not execute a power sales contract prior to when the Project received confirmation that the results of the initial Idaho Power transmission capacity application for transmission to its load center are known and the Project accepts the results. *Id.* at ¶ 37 and Exhibit C, p. 3. The only other requirements to obtain a power purchase agreement involved interconnection, and Wasatch Wind had already met those interconnection requirements. *Id.*

Wasatch Wind was under the impression that Mr. Allphin was working with his team to make the necessary TSR on Idaho Power's system. *Id.* at ¶ 39. On June 25, 2010, Wasatch Wind again responded to Mr. Allphin that based on studies and conversations with BPA, there were 93 MW available on the necessary BPA line to the Minidoka substation, and therefore interconnection and transmission of 65 MW to Idaho Power would not be a problem. *Id.* at ¶¶ 40, 42.

In the June 25, 2010 email, Wasatch Wind also indicated that due to federal permitting issues, Wasatch Wind intended to reduce its overall footprint and wished to discuss power sales contracts for two single 10 aMW projects, instead of the larger 65 MW project it had initially discussed. *Id.* at ¶ 43. On July 14, 2010, Wasatch Wind submitted a formal request for two 10

aMW PURPA contracts to Mr. Allphin. *Id.* at ¶¶ 44-45 and Exhibit D. Wasatch Wind explained the maturity of the Projects in detail, including the Interconnection Agreement which already had progressed to the Facilities Study stage for construction, two years of wind data supporting output projections, final land leases, and explained in detail that BPA had stated transmission would be available to Idaho Power's Minidoka substation. *Id.* at Exhibit D. Wasatch Wind informed Mr. Allphin that on June 30, 2010, Wasatch Wind submitted into BPA's NOS and that by August 18, 2010, BPA would require Wasatch Wind to post the security of approximately \$800,000 for this NOS transmission process. *Id.* at Exhibit D, p. 2. This July 14, 2010 letter also requested that Idaho Power investigate availability of transmission on its system to its load center and provided completed Transmission Capacity Application Questionnaires for each project. *Id.* at Exhibit D, pp. 2-13. But the letter also explained, "Per your suggestion, [Wasatch Wind] went ahead and confirmed on OASIS to the best of our ability that there is capacity form Minidoka Substation to Treasure Valley for Idaho Power to obtain Network Service on behalf of our Qualifying Facilities." *Id.* at Exhibit D, p. 2.

Randy Allphin stated on July 21, 2010 in an e-mail, "I have not been able to submit the TSR. Been getting buy in from various people, looks like I will probably be filing the TSR sometime next week." *Id.* at ¶ 46 and Exhibit E, p. 1; *see also id.* at Exhibit E, p. 2 (Mr. Allphin's June 29, 2010 email stating his routine process was to "not develop a draft agreement for a particular project until the interconnection and transmission is pinned down"). After some more unsuccessful communications, Wasatch Wind became frustrated with the lack of progress, and decided to retain attorneys to assist in the negotiations. *Id.* at ¶¶ 47-48.

Wasatch Wind sent Idaho Power an email on August 17, 2010, in which it clarified that it was formally requesting two power sales contracts for PURPA projects, and explained that each of the Projects would be physically limited such that each would generate no more than 10 average megawatts in a single month. *Id.* at ¶¶ 49-50 and Exhibit F. The email also included, yet again, the two completed Transmission Capacity Application Questionnaires for the two separate projects. *Id.* at Exhibit F, pp. 5-16. This August 17<sup>th</sup> email also stated that Wasatch Wind did “not believe the study process should delay the submission of execution ready power purchase agreements. With the substantial delay security being required in recent Idaho Power PPAs, the risk of our project’s failing to come on line due to transmission constraints is completely mitigated.” *Id.* at Exhibit F, p. 1; *see also id.* at Exhibit A, p 1 (Mr. Allphin’s March 2010 email describing the delay security clause). From emails and a telephone conversation in late August, Wasatch Wind understood there to be a question as to whether Idaho Power would agree to submit a request to its transmission personnel for both Grouse Creek QFs at the same time. *Id.* at ¶ 51.

On October 1, 2010, counsel for Wasatch Wind sent a letter to Idaho Power for each Grouse Creek QF, expressing Wasatch Wind’s intent to obligate the QFs to two power sales agreements for the two QF projects. *Id.* at ¶ 52-57 and Exhibit G. These letters listed several standard terms applicable through Commission orders, including the daily and seasonality load shape price adjustments (Order No. 30415), as well as the wind integration charge, mechanical availability guarantee, and wind forecasting and cost sharing provisions (Order No. 30488). *Id.* at Exhibit G. The October 1<sup>st</sup> letters objected to any further delay in submitting both TSRs on

Idaho Power's system. *Id.* The October 1<sup>st</sup> letters expressed Wasatch Wind's concern also with the legality of the high \$45/kw delay liquidated damages security provision Idaho Power had begun requiring, and stated the QFs would agree "to any amount deemed reasonable by the Commission if Idaho Power insists on a provision requiring Wasatch to post a delay default liquidated damages security." *Id.* at Exhibit G, pp. 3, 11. The October 1<sup>st</sup> letters provided very detailed project information for each of the Grouse Creek QFs, and stated that both projects would now be sized at 21 MW of maximum capacity and again stated they would generate under 10 aMW. *Id.* at Exhibit G. Idaho Power did not respond by October 27, 2010, and counsel for Wasatch Wind sent a follow up letter to Idaho Power on that same date, reminding Idaho Power that it had still not even provided draft contracts. *Id.* at ¶ 58 and Exhibit H.

On November 1, 2010, Idaho Power responded with a letter from Mr. Allphin, stating that he had not yet submitted the TSRs to Idaho Power's transmission personnel. *Id.* at ¶¶ 59-60 and Exhibit I. Mr. Allphin stated Idaho Power would file TSRs for Grouse Creek Wind Park I for nameplate rating of 21 MW and Grouse Creek Wind Park II for nameplate rating of 21 MW. *Id.* at ¶ 61 and Exhibit I.<sup>3</sup> *Id.* Mr. Allphin's November 1<sup>st</sup> letter also expressed Idaho Power's position that the Projects must agree to a \$45/kw delay security amount, and for the first time provided a draft standard FESA for the Projects. *Id.* This FESA contained the \$45/kw delay security clause. *Id.* It also required in Section 5.7, that prior to execution of the FESA, with regard to the TSR for Idaho Power's system, "Results of the initial transmission capacity request

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<sup>3</sup> Although Mr. Allphin's November 1, 2010 letter seemed to imply that he had withheld the TSRs on account of changes in the project sizes, the same changes did not compromise Wasatch Wind's ability to proceed through the interconnection and PTP transmission processes with Raft River Rural Electric Cooperative and BPA. *See id.* at ¶¶ 22, 23, 30.

are known and acceptable to the Seller,” and that “Seller must provide evidence that the Seller has acquired firm transmission capacity from all required transmitting entities to deliver the Facility’s energy to an acceptable point of delivery on the Idaho Power electrical system.” *Id.* at Exhibit I, pp. 16-17.

The QFs had not met these transmission requirements. In the case of the TSR on Idaho Power’s system, Mr. Allphin had not yet even initiated that process despite repeated requests to do so since at least June 2010. In the case of BPA, compliance with Idaho Power’s requirement would have required the QFs to obligate themselves to long-term PTP wheeling agreements prior to any assurance they could secure executed power sales contracts with the published rates.

Then, on November 5, 2010, Idaho Power, along with Avista Utilities and Rocky Mountain Power, filed the Joint Motion to Reduce the Published Rate Eligibility Cap. *See* Case No. GNR-E-10-04. The Grouse Creek Wind Park, LLC and the Grouse Creek Wind Park II, LLC each filed complaints against Idaho Power on November 8, 2010.<sup>4</sup> The Complaints alleged the QFs had “expressed a willingness to agree to a delay security damages clause reasonably calculated by the Commission to approximate Idaho Power’s damages in the event of a delay default, and [that each QF] remain[ed] committed to such a provision deemed reasonable by the Commission.” *Complaints*, Case Nos. IPC-E-10-29 and -30, at ¶ 9. Further, the QFs alleged that with the “commitment to such a provision, Idaho Power’s insistence on completion of the

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<sup>4</sup> Because the Complaints were filed in separate dockets (IPC-E-10-29 and -30) from the instant contract approval dockets (IPC-E-10-61 and -62), the Complaints were not previously a part of the record in these contract approval dockets. Therefore, the Grouse Creek QFs are including the Complaints as attachments to the Affidavit of Gregory M. Adams, filed contemporaneously with this brief for the convenience of the Commission. This brief will cite to the Complaints themselves.

protracted interconnection and transmission processes prior to executing a PPA is unreasonable.”

*Id.*

After the Commission did not grant the immediate reduction in the published rate eligibility cap, on November 19, 2010, Idaho Power and the QFs agreed to stay the complaint proceeding and execute standard QF wind contracts containing the published rates. *Id.* at ¶ 70. Idaho Power sent a letter dated November 24, 2010, acknowledging Wasatch Wind’s agreement to accept the \$45/kw security clause, and highlighting some provisions of the November 1<sup>st</sup> FESA, including those regarding curtailment for system reliability purposes. *Id.* at ¶ 71 and Exhibit J. Idaho Power’s November 24<sup>th</sup> letter requested that the QFs fill in project-specific information in the November 1<sup>st</sup> FESA and “return the draft to Idaho Power so that the Company can then initiate the Sarbanes-Oxley contract approval process and generate an executable draft for signatures.” *Id.*

On December 2, 2010, Wasatch Wind sent a letter and versions of the Idaho Power’s November 1<sup>st</sup> contract for each project, containing all project specifics. *Id.* at ¶ 72 and Exhibit K.<sup>5</sup> Wasatch Wind’s December 2<sup>nd</sup> letter confirmed the parties’ agreement that the FESAs would not contain the onerous transmission requirements in Section 5.7, but would contain the \$45/kw delay security clauses. *Id.* at Exhibit K, p. 1. The letter also confirmed the QFs understood the provisions of the November 1<sup>st</sup> FESA highlighted in Idaho Power’s November 24<sup>th</sup> letter. *Id.* No dispute remained regarding the terms and provisions of the FESAs.

Idaho Power confirmed receipt on December 7, 2010. *Id.* at ¶ 74. On December 9, 2010,

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<sup>5</sup> The *Affidavit of Christine Mikell* contains a typo referring to Idaho Power’s draft FESA provided November 1<sup>st</sup> as “Idaho Power’s November 30<sup>th</sup> contract.” *See id.* at ¶ 72.

counsel for Wasatch Wind requested through email to Idaho Power that the FESAs contain online dates of a First Energy Date of June 2013 and a Commercial Online Date of December 2013, rather than the dates filled in by the QFs in contracts provided on December 2<sup>nd</sup>, which were First Energy in December 2012 and Commercial Online Date June 2013. *Id.* at ¶ 75. This change was consistent with the delay necessary in the wheeling arrangements over BPA's system caused when Wasatch Wind decided not to submit the \$794,396 for the 2010 NOS, and instead proceeded through the traditional TSR on BPA's OASIS in August 2010. *See id.* at ¶¶ 27-29.

Idaho Power next contacted the QFs on December 14, 2010, but it only responded to ask for clarification for the cartographic sections within which the QFs were located and for the identity of the transmitting entity, which items had inadvertently been omitted from blank spaces in the contracts Wasatch Wind provided on December 2, 2010. *Id.* at ¶ 76. However, the Grouse Creek QFs previously provided the precise cartographic sections in the October 1<sup>st</sup> letters. *See id.* at Exhibit G, pp. 5, 13. And Wasatch Wind had stated that BPA would be the transmitting entity on multiple occasions. *See id.* at Exhibit A, p. 2 (February 26, 2010), Exhibit C, p. 9 (June 17, 2010); Exhibit D, pp. 1-2, 5, 7, 11, 13 (July 14, 2010); Exhibit F, p. 1, 7, 9, 13, 15 (August 17, 2010); Exhibit G, pp. 1, 6, 9, 15 (October 1, 2010); *Complaints*, Case Nos. IPC-E-10-29 and -30, at ¶ 7 (November 8, 2010).

On December 15, 2010, Idaho Power stated that the online dates provided December 9<sup>th</sup> would be included in the contracts, and later that day counsel for the QFs provided the same information regarding the transmitting entity and the same cartographic sections previously provided. *Affidavit of Christine Mikell*, at ¶ 77. On December 16, 2010, Idaho Power provided

the executable FESAs, which counsel for Wasatch Wind sent by overnight delivery to Wasatch Wind, which is not located in Boise. *Id.* at ¶ 78. These versions of the FESAs were consistent with the parties' agreement, well in advance of December 14, 2010, to remove the requirements in section 5.7 for completion of transmission processes. *Id.* On December 20, 2010, the Grouse Creek QF and the Grouse Creek II QF executed the FESAs, and sent them by overnight delivery to Idaho Power. *Id.* at ¶ 79. Idaho Power executed the FESAs on December 28, 2010.

### LEGAL BACKGROUND

#### A. The Public Utility Regulatory Policies Act of 1978's Mandatory Purchase Provisions

This case involves the Commission's implementation of the mandatory purchase obligation of PURPA, which requires electric utilities to purchase power produced by cogenerators or small power producers that obtain status as a QF. 16 U.S.C. § 824a-3(a)(2). Congress's intent "was to encourage the promotion and development of renewable energy technologies as alternatives to fossil fuels and the construction of new generating facilities by electric utilities." *Rosebud Enterprises, Inc. v. Idaho Pub. Util. Commn.*, 128 Idaho 609, 613, 917 P.2d 766, 780 (1996); *see also FERC v. Mississippi*, 456 U.S. 742, 750, 102 S.Ct. 2126, 2132-2133 (1982).

The price PURPA section 210(b) requires the utilities to pay to QFs in exchange for a QF's electrical output is termed the avoided cost rate, which is the cost to the utility of producing the energy itself or purchasing it from an alternative source. 16 U.S.C. § 824a-3(b), (d). FERC's regulations entitle QFs to long term contract rates set at the purchasing utility's full avoided costs at the time the QF commits itself to a legally enforceable obligation to deliver its

project's output over a specified term. 18 C.F.R. § 292.304(a), (b), (d)(2)(ii); *Cedar Creek Wind LLC*, 137 FERC ¶ 61,006 at ¶¶ 30-37; *JD Wind 1, LLC*, 130 FERC ¶ 61,127, ¶ 23 (2010); see also *American Paper Institute, Inc. v. FERC*, 461 U.S. 402, 417-18, 103 S.Ct. 1921, 1930 (1983). FERC's regulations require utilities to publish "standard rates" available for long term contracts available to QFs below a state-implemented maximum generating capacity. 18 C.F.R. § 292.304(c)(1)-(3). The IPUC has traditionally set the eligibility cap for published avoided cost rates at 10 average monthly MW. But on February 7, 2011, the IPUC reduced the eligibility cap to 100 kw nameplate capacity for wind and solar QFs and stated the effective date of this reduction would be December 14, 2010. See Order No. 32176, at 11-12.

**B. The IPUC's PURPA Grandfathering Precedent Regarding Formation of a Legally Enforceable obligation.**

When the published rates change, or become otherwise unavailable to a QF before the QF can obtain a written contract, the QF is entitled to grandfathered rates if the QF formed a "legally enforceable obligation" prior to the date the rates became unavailable. 18 C.F.R. 292.304(d)(2)(ii). Under the IPUC's implementation of PURPA, a QF obtains grandfathered rates if it can "demonstrate that 'but for' the actions of [the utility, the QF] was otherwise entitled to a power purchase contract." *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); see also *Blind Canyon Aquaranch v. Idaho Power Company*, Case No. IPC-E-94-1, Order No. 25802 (1994).

Prior to the "bright line rule" discussed above, the most onerous test the IPUC has ever used for determining grandfather eligibility is the pre-filed complaint test. This test requires,

prior to the effective date of the rate change, the QF must have obtained an executed contract, or have filed a meritorious complaint at the Commission alleging it is entitled to a contract. *See A.W. Brown Co., Inc. v. Idaho Power Co.*, 121 Idaho 812, 816-18, 828 P.2d 841, 845-47 (1992). The Commission has not applied this onerous pre-filed complaint test consistently. The Commission has employed much less onerous tests in the past. *See, e.g., Blind Canyon Aquaranch*, Order No. 25802; *Earth Power Resources, Inc.*, Order No. 27231. Indeed, the Commission has approved grandfathered rates where no formal writing was even exchanged prior to the date the previous rates became unavailable. *See Re Approval of a Firm Energy Sales Agreement with Yellowstone Power Company*, Order 32104, at 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]” in part because QF had “familiarity with PURPA projects and the standard terms of Idaho Power’s power purchase agreements”).

**C. FERC held that the IPUC’s “bright line rule,” requiring a signature of both parties prior to formation of a legally enforceable obligation was inconsistent with 18 C.F.R. 292.304(d)(2)(ii), and noted that a legally enforceable obligation can arise prior to memorialization of a contract to a writing.**

In *Cedar Creek Wind*, FERC held that requiring a fully executed, written contract to establish a LEO is inconsistent with 18 C.F.R. § 292.304(d)(2)(ii). FERC explained:

Thus, under our regulations, a QF has the option to commit itself to sell all or part of its electric output to an electric utility. While this may be done through a contract, if the electric utility refuses to sign a contract, the QF may seek state regulatory authority assistance to enforce the PURPA-imposed obligation on the electric utility to purchase from the QF, and a non-contractual, but still legally enforceable, obligation will be created pursuant to the state’s implementation of PURPA. Accordingly, a QF, by committing itself to sell to an electric utility, also

commits the electric utility to buy from the QF; these commitments result either in contracts or in non-contractual, but binding, legally enforceable obligations.

*Cedar Creek Wind LLC*, 137 FERC ¶ 61,006 at ¶ 32.

FERC explained that “a legally enforceable obligation may be incurred before the formal memorialization of a contract to writing.” *Id.* at ¶ 36. FERC noted:

Courts have recognized that negotiations regarding terms that parties to the negotiations intend to become a finalized or written contract, may in some circumstances result in legally enforceable obligations on those parties notwithstanding the absence of a writing. *See generally Burbach Broadcasting Company of Delaware v. Elkins Radio Corp.*, 278 F.3d 401, 407-09 (4th Cir. 2002); *Adjustrite Systems, Inc. v. GAB Business Services, Inc.*, 145 F.3d 543, 547-50 (2d Cir. 1998); *Miller Construction Co. v. Stresstek*, 697 P.2d 1201, 1202-04 (Idaho 1985).

*Id.* at ¶ 36 n.62.

## ARGUMENT

- A. The Grouse Creek QFs each satisfy the Commission’s prior grandfather tests for forming a legally enforceable obligation on November 8, 2010 by filing meritorious Complaints, or alternatively, no later than December 9, 2010 when all terms were agreed to by the Grouse Creek QFs and Idaho Power.**

The Grouse Creek QFs each entitled themselves to long term contracts with rates set at the published avoided costs in Order No. 31025 because each QF satisfied the Commission’s grandfathering tests before December 14, 2010.

Each QF satisfies even the most stringent grandfather test ever used by the Commission because each had a meritorious complaint on file at the Commission on November 8, 2010. *See A.W. Brown Co., Inc.*, 121 Idaho at 816-18, 828 P.2d at 845-47. Although it may seem out of the ordinary for a party to form a binding contract by filing a complaint against its contracting counter party, this is admittedly and necessarily a unique contracting situation. In the words of

one court finding a LEO had arisen: “We are not after all, dealing with completely free enterprise. We are, rather, dealing with the twilight world of regulated monopolies.” *Pub. Service Co. of Oklahoma v. State ex rel. Oklahoma Corp. Commn.*, 115 P.3d 861, 873 (Okla. 2005) (internal quotation omitted).<sup>6</sup> In Idaho, a QF can form a LEO by attempting to negotiate, providing the utility with the necessary project information, and filing a complaint after the utility refuses to process the request timely and in good faith.

Each Grouse Creek QF’s Complaint alleged that it attempted to negotiate and committed itself to Idaho Power’s standard QF terms. *Complaint* at ¶ 8. Each also alleged that Idaho Power’s insistence on completion of the protracted transmission processes prior to executing a PPA was unreasonable because the QFs had expressed willingness to agree to a delay default liquidated damages security provision reasonably calculated to offset Idaho Power’s actual damages in the event of a delay default. *Id.* at ¶¶ 9, 16.

The allegations in the Complaints were meritorious because the facts asserted therein are now supported by the record discussed above. Despite diligent efforts for many months prior to filing the Complaints, the QFs did not even obtain a draft contract until November 1, 2010, apparently due to Idaho Power’s position that it does not even provide draft contracts until after interconnection and transmission are “pinned down.” *Affidavit of Christine Mikell*, Exhibit E, p. 2. Even then, the draft contract contained the onerous requirements that the QFs secure firm transmission to Idaho Power and proceed through Idaho Power’s internal TSR process prior to execution. The QFs had no trouble progressing through the interconnection and transmission

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<sup>6</sup> See also *Snow Mountain Pine v. Maudlin*, 84 Or. App. 590, 600, 734 P.2d 1366, 1371 (1987).

processes on BPA's system. But the QFs had no power to begin Idaho Power's internal TSR process, and Idaho Power did not begin that process until November 4, 2010, despite repeated requests that it do so many months earlier. That Wasatch Wind reduced the capacity of the QFs caused no problem in the interconnection and transmission processes with Raft River Rural Electric Cooperative and BPA, and should not have been a problem for Idaho Power's transmission personnel's processing either, if Idaho Power had initiated its TSR process when initially requested. *See Affidavit of Christine Mikell* at ¶¶ 22-23, 30.

Idaho Power ultimately agreed to execute standard PURPA contracts without regard to the status of the transmission processes that had delayed exchange of written contracts for several months. Further, the QFs' position on the liquidated damages provision was entirely consistent with Idaho law and Commission orders. *See Magic Valley Truck Brokers, Inc. v. Meyer*, 133 Idaho 110, 117, 982 P.2d 945, 952 (Ct. App. 1999); Order No. 30608. That written contracts were executed shortly after filing of the Complaints further underscores the merit to the allegations that the QFs had done everything in their power to obligate themselves prior to filing the Complaints.

Additionally, the large sums of money and time spent on developing the projects and the advanced stage of their maturity evidences their intent to obligate themselves to the FESAs. *See In the Matter of Cassia Wind to Determine Exemption Status*, Case No. IPC-E-05-35, Order No. 29954, 2-4 (2006) (finding wind QF entitled to grandfathered rates based on maturity of development of project when it had merely submitted a completed application for interconnection study, including the applicable fee, and had performed wind studies, commenced

preliminary permitting and licensing activities, and made efforts to secure sites to place turbines); *Affidavit of Christine Mikell* at ¶¶ 12, 25. Prior to filing Complaints, the Grouse Creek QFs had entered into an Interconnection Agreement, had obtained all necessary real property rights for the sites, collected over two years of wind data, conducted extensive wildlife and vegetation studies, and attempted to negotiate various aspects of the projects with Idaho Power for almost a year.

Finally, even if the filing of the Complaints did not create a LEO in this case, the QFs' demonstrated knowledge and agreement to all of the final contract terms evidences the intent of the QFs in this case to obligate themselves no later than December 9, 2010, under IPUC grandfather precedent. *See Re Approval of a Firm's Energy Sales Agreement with Yellowstone Power Company*, Order 32104, at 12. The Grouse Creek QFs had obtained and reviewed a draft PURPA FESA from Idaho Power on November 1, 2010, a month and a half prior to the rate change date, and letters exchanged between the parties on November 24, 2010, and December 2, 2010, confirm the mutual understanding of the terms in the final FESAs. No terms or project specifics changed after December 9, 2010. All material terms and project specifics were well settled and agreed to by the Grouse Creek QFs and Idaho Power by December 9, 2010, and a LEO arose on or before that date.

**B. FERC's *Cedar Creek Wind* declaratory order compels the Commission to apply its customary grandfathering criteria, and determine that the Grouse Creek QFs formed a legally enforceable obligation prior to December 14, 2010.**

The remand from the Supreme Court in this matter provides the Commission with the opportunity to apply its prior grandfather criteria to the Grouse Creek QFs FESAs to determine

when a legally enforceable obligation arose, and modify its prior orders pursuant to I.C. § 61-624. In its prior orders, the Commission did not apply its existing grandfather precedent.

Rather, the Commission announced a “bright line rule” that “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. 32257 at 10.

The Commission stated as follows:

The primary issue to be determined in these cases is whether the Agreements which utilize the published avoided cost rate were executed before the eligibility cap for published rates was lowered to 100 kW on December 14, 2010, for wind and solar projects. “According to the FERC, ‘it is up to the States, not [FERC] to determine the specific parameters of individual QF power purchase agreements, including the date at which a legally enforceable obligation is incurred under State law.’” [*Rosebud Enterprises, Inc., v. Idaho Public Utilities Commission*, 128 Idaho 609, 623-24, 917 P.2d 766, 780-81 (1996)], citing *West Penn Power Co.*, 71 FERC ¶ 61, 153 (1995). We find that the Agreements were not fully executed (signed by both parties) prior to December 14, 2010. More specifically, each Firm Energy Sales Agreement states that the “Effective Date” of the Agreement is “The date stated in the opening paragraph of this Agreement representing the date upon which this [Agreement] was fully executed by both Parties.” Agreements ¶ 1.11. The opening paragraph is dated “this 28 day of December, 2010.” Agreements at 1. It is clear that the Projects signed the Agreements on December 20, and Idaho Power signed on December 28, 2010. *Id.* at 29. Thus, on the date the two Agreements became effective, published avoided cost rates were available only to wind and solar projects with a design capacity of 100 kW or less.

Order No. 32257 at 9.

The Commission acknowledged that “[t]he Projects also argue that ‘[w]hen the published rates change or become otherwise unavailable to a QF before the QF can obtain a contract, the QF is entitled to grandfathered rates if it can ‘demonstrate that but for the actions of [the utility, the QF] was otherwise entitled to a power purchase contract.’ Comments at 7.” *Id.* Notably, the

Commission did not expressly disagree with the Grouse Creek QFs that they had met all past grandfathering criteria utilized by Idaho's implementation of 18 C.F.R. § 292.304(d)(2)(ii). Rather, the Commission stated, "Because published avoided cost rates remain unchanged and only the eligibility size has changed, grandfathering criteria applied to rate changes are not applicable here." *Id.* Nothing precludes the Commission from applying its grandfather precedent at this time.

As noted above, a formal, final writing is clearly not required for a QF to form a LEO. Consistent with the IPUC's existing grandfather precedent implementing FERC's LEO rule and Idaho contract law, FERC declared that a final written agreement is not necessary to establish a legally enforceable obligation. *Cedar Creek Wind LLC*, 137 FERC ¶ 61,006 at ¶ 36 & n.62; *see also Evco Sound & Electronics, Inc. v. Seaboard Surety Company*, 148 Idaho 357, 365, 223 P.3d 740, 748 (2009); *Miller Construction Co. v. Stresstek*, 108 Idaho 187, 188-89; 697 P.2d 1201, 1202-04 (1985); *Re Approval of a Firm Energy Sales Agreement with Yellowstone Power Company*, Order 32104, at 12. Pursuant to the IPUC's LEO criteria, a LEO arose on November 8, 2011, on which date the Grouse Creek QFs' filed meritorious complaints alleging that they committed themselves to Idaho Power QF FESAs with standard terms and published rates approved by the IPUC. Alternatively, the Grouse Creek QFs established a LEO, at the very latest on December 9, 2011, by which time every word in the final contracts was known and not subject to any dispute or reasonable misunderstanding whatsoever.

Idaho Power's contrary position rests on one faulty legal premise and one faulty factual premise. Legally, Idaho Power's argument fails because Idaho Power incorrectly concludes,

despite *Cedar Creek Wind* and the IPUC's past precedent, that a LEO cannot be formed until a formal writing is signed. *See Idaho Power's Legal Brief* at 6-7 (asserting "Grouse Creek did not obligate itself to sell its electricity to Idaho Power until well after December 14, 2010, when it signed the PPA on December 21, 2010"). That is simply incorrect because a legally enforceable obligation may be formed before memorialization of a contract to a formal writing.

Factually, Idaho Power's argument fails because it rests on the mistaken position that Idaho Power did not know the projects' transmission provider or their precise locations until December 15, 2010. *See Idaho Power's Legal Brief* at 11-12; *Affidavit of Randy Allphin* at ¶¶ 17-19 and Exhibits 13-15. Idaho Power states these items were unknown because they were inadvertently omitted from the completed written contract sent to Idaho Power from the Grouse Creek QFs on December 2, 2010.

Again, Idaho Power's characterization is simply incorrect because Idaho Power possessed both of these items far in advance of December 2010. The Grouse Creek QFs previously provided the cartographic sections in the October 1, 2010 letters. *See Affidavit of Christine Mikell* at Exhibit G, pp. 5, 13. The sections in Exhibit B of the executed FESAs before the Commission are no different from those in the October 1<sup>st</sup> letters. And Wasatch Wind had stated that BPA would be the transmitting entity on multiple occasions. *See id.* at Exhibit A, p. 2 (February 26, 2010), Exhibit C, p. 9 (June 17, 2010); Exhibit D, pp. 1-2, 5, 7, 11, 13 (July 14, 2010); Exhibit F, p. 1, 7, 9, 13, 15 (August 17, 2010); Exhibit G, pp. 1, 6, 9, 15 (October 1, 2010); *Complaints*, Case Nos. IPC-E-10-29 and -30, at ¶ 7 (November 8, 2010). Idaho Power attempts to create confusion regarding whether BPA or PacifiCorp would be the transmitting

entity. See *Affidavit of Randy Allphin* at ¶ 17. But Idaho Power's alleged confusion is misleading, at best. Idaho Power points to no evidence – other than Mr. Allphin's allegation of his own confusion – to support the assertion that the Grouse Creek QFs ever envisioned using PacifiCorp's transmission system. Doing so would require building a 70 mile interconnection line from the projects to the nearest PacifiCorp line. PacifiCorp has no transmission or distribution lines anywhere near the projects. The record compels a conclusion that Idaho Power did understand BPA to be the transmitting entity, and no reasonable confusion existed on or after December 14, 2010. A LEO therefore existed before December 14, 2010.

### CONCLUSION

For the reasons set forth above, a legally enforceable obligation arose on November 8, 2010 with the filing of the meritorious Complaints, or alternatively, no later than December 9, 2010 when every word in the final written contracts was known and agreed to by the Grouse Creek QFs and Idaho Power. Therefore, the Grouse Creek QFs respectfully request that the Commission exercise its authority under I.C. § 61-624, and modify its prior orders to approve the Firm Energy Sales Agreements.

Respectfully submitted this 27<sup>th</sup> day of February 2012.

RICHARDSON & O'LEARY, PLLC



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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on the 27th day of February, 2012, a true and correct copy of the within and foregoing **REPLY LEGAL BRIEF OF THE GROUSE CREEK WIND PARK, LLC, GROUSE CREEK WIND PARK II, LLC** was served as shown to the following parties:

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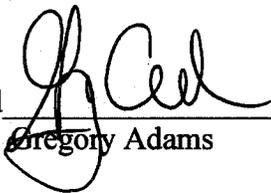
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