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February 6, 2012

VIA HAND DELIVERY

Jean D. Jewell, Secretary
Idaho Public Utilities Commission
472 West Washington Street
Boise, Idaho 83702

Re: Case No. IPC-E-10-62
IN THE MATTER OF THE APPLICATION OF IDAHO POWER COMPANY FOR A DETERMINATION REGARDING A FIRM ENERGY SALES AGREEMENT BETWEEN IDAHO POWER AND GROUSE CREEK WIND PARK II, LLC

Dear Ms. Jewell:

Enclosed for filing please find an original and seven (7) copies each of Idaho Power Company's Memorandum on Remand and the Affidavit of Randy Allphin in Support of Idaho Power Company's Memorandum on Remand in the above matter.

Very truly yours,

Donovan E. Walker

DEW:csb
Enclosures

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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 GROUSE CREEK WIND PARK, LLC	CASE NO. IPC-E-10-61 IDAHO POWER COMPANY'S MEMORANDUM ON REMAND
IN THE MATTER OF THE APPLICATION OF IDAHO POWER COMPANY FOR A DETERMINATION REGARDING A FIRM ENERGY SALES AGREEMENT BETWEEN IDAHO POWER AND GROUSE CREEK WIND PARK II, LLC	CASE NO. IPC-E-10-62 IDAHO POWER COMPANY'S MEMORANDUM ON REMAND

Idaho Power Company ("Idaho Power" or "Company"), in response to Order No. 32430, hereby respectfully submits the following Memorandum on Remand:

I. INTRODUCTION

The relevant background is recited by the Idaho Public Utilities Commission ("IPUC" or "Commission") in its Notice of Scheduling and Notice of Oral Argument for this matter, Order No. 32430, Case Nos. IPC-E-10-61 and IPC-E-10-62. On July 27, 2011, the Commission issued a Final Order on Reconsideration affirming its prior

decision to not approve two Power Purchase Agreements ("PPAs" or "Agreements") entered into between Grouse Creek Wind Park, LLC, and Grouse Creek Wind Park II, LLC ("Grouse Creek" or "Projects") and Idaho Power pursuant to the Public Utility Regulatory Policies Act of 1978 ("PURPA"). Order No. 32299. Based upon the express terms of the Agreements, the Commission found that the PPAs were not effective prior to December 14, 2010, the date on which the eligibility for PURPA published avoided cost rates in Idaho changed from 10 average megawatts ("aMW") to 100 kilowatts ("kW") for wind and solar qualifying facilities ("QF"). Because each of the PPAs requested published avoided cost rates but the Projects were in excess of 100 kW, the Commission found that the published rates were no longer available to the Projects.

On September 7, 2011, the Projects filed a Notice of Appeal of the Commission's Order to the Idaho Supreme Court. On October 4, 2011, the Federal Energy Regulatory Commission ("FERC") issued an Order in a similarly situated case that the IPUC's decision to not approve the PPAs was inconsistent with PURPA and FERC's regulations implementing PURPA. *Notice of Intent Not to Act and Declaratory Order*, 137 FERC 61006 (Oct. 4, 2011). On November 3, 2011, in response to FERC's Order, the Projects, the IPUC, and Idaho Power ("Parties") filed a Stipulated Motion to Suspend Appeal and Remand to the Administrative Agency with the Idaho Supreme Court. That Motion was granted and the appeal was suspended until March 15, 2012, or until the IPUC has completed its review on remand. Order Granting Stipulated Motion to Suspend Appeal and Remand to the Administrative Agency, Supreme Court Docket No. 39151-2011, (Nov. 22, 2011).

As indicated in the Stipulated Motion, the Parties asked that the appeal be suspended: (1) to allow the IPUC to reconsider its Order in this matter in light of the FERC Order and (2) to provide the Parties with an opportunity to discuss the possibility of settling the appeal. The Commission stated in its Notice of Scheduling, Order No. 32430, "Given the agreement of the Parties, we find that settlement discussions are reasonable and in the public interest . . . . The Commission also finds that it is appropriate to grant a further rehearing so that the Commission may reconsider its Order No. 32299 issued July 27, 2011." Order No. 32430, p. 2.

Factual information regarding Idaho Power's processes for receiving requests, negotiating, and executing power purchase agreements pursuant to PURPA and generator interconnect agreements is contained in the Company's Reply Comments filed in this proceeding on March 31, 2011. With this Memorandum on Remand, the Company submits factual information regarding the negotiation and processing of the Projects' PURPA power purchase agreements, and considers the same in the context of FERC's *Notice of Intent Not to Act and Declaratory Order*, 137 FERC 61006 (Oct. 4, 2011) ("Cedar Creek Order"). Upon the Commission's reconsideration of Order No. 32299, the record establishes that Idaho Power negotiated with the Projects in good faith, did not unreasonably delay or hinder the Projects' ability to obtain a PURPA PPA, did not refuse to sign a contract with the QF, and that a legally enforceable obligation to receive published avoided cost rates for the Projects did not exist prior to December 14, 2010. Consequently, the decision not to approve the submitted PPAs in Order No. 32257 should be affirmed.

II. THE FERC CEDAR CREEK ORDER

Although Grouse Creek was not a party to FERC Docket No. EL 11-59-000, nor Cedar Creek Wind, LLC's Petition for Enforcement against the IPUC, Cedar Creek's Petition concerned the IPUC's disapproval of its PPAs with Rocky Mountain Power in a similar manner as Grouse Creek's PPAs with Idaho Power that were also disapproved by the IPUC. Initially, it is important to note that FERC's Cedar Creek Order declines to initiate an enforcement action against the IPUC. *Notice of Intent Not to Act and Declaratory Order*, 137 FERC 61006, p. 1 (Oct. 4, 2011). The Cedar Creek Order is not directly controlling as to Grouse Creek, as Grouse Creek did not seek enforcement at FERC. The factual situation of Grouse Creek is distinct from that of Cedar Creek. That said, the Cedar Creek Order may be instructive to this Commission in a similar manner as dicta appearing in the decision of an appellate court, as it contains FERC's understanding of some issues related to legally enforceable obligations.

Subsequent to declining the requested enforcement action against the IPUC, FERC went on to comment about the IPUC's decision disapproving the Cedar Creek PPAs in its declaratory order. FERC addressed the portion of the IPUC's Order that found, "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." 137 FERC 61006, p. 6, *see also* Order No. 32257, p. 10. In response to Cedar Creek's request to declare that a state commission may not limit legally enforceable obligations to fully executed contracts, FERC stated, "we find that the Idaho PUC decision denying Cedar Creek a legally enforceable obligation, specifically the requirement in the June 8 Order that a Firm Energy Sales

Agreement/Power Purchase Agreement must be executed by both parties to the agreement before a legally enforceable obligation arises, is inconsistent with PURPA and our regulations implementing PURPA." 137 FERC 61006 p. 7.

FERC acknowledged that certainly a legally enforceable obligation exists at the point in time when both parties have executed the PPA. *Id.*, at p. 9 ("a legally enforceable obligation includes, but is not limited to, a contract."). In addition FERC goes on to describe that the main reason why the "legally enforceable obligation" language exists in its PURPA regulations, and the reason why a legally enforceable obligation cannot be limited only to when both parties have signed the contract, are the same. That reason is to address "the problem of an electric utility avoiding PURPA requirements simply by refusing to enter into a contract with a QF." *Id.*, at pp. 9, 7, 10.

FERC next turns to the facts of Cedar Creek's particular contracts and their negotiation. Although FERC finds, "that Idaho PUC's June 8 Order ignores the fact that a legally enforceable obligation may be incurred before the formal memorialization of a contract to writing" it also states, "Whether the conduct of Cedar Creek and Rocky Mountain Power constituted a legally enforceable obligation subject to the Commission's [FERC's] PURPA regulations is not before us." *Id.* at pp. 9-10. FERC then goes on to recite an abbreviated timeline of the contract negotiations as submitted by Cedar Creek. *Id.*, at p. 10. FERC ends this recitation with a particular statement that significantly distinguishes Cedar Creek's facts from those of Grouse Creek. "Cedar Creek executed and delivered the Agreements to Rocky Mountain Power on December 13, 2011; notwithstanding having documents signed by Cedar Creek, ***Rocky Mountain Power management refused to sign***. Rocky Mountain Power held the Agreements for

over a week, making no changes, before they signed them on December 22, 2010." *Id.* at p. 10 (emphasis added).

Notably, FERC specifically states that it is "not ruling on the issue of whether a legally enforceable obligation was incurred." *Id.* at p. 11. FERC also acknowledges that prior precedent establishes that FERC "gives deference to the states to determine the date on which a legally enforceable obligation is incurred," albeit subject to the terms of FERC's regulations. *Id.*, at p. 9. Consequently, while FERC provides guidance in the Cedar Creek Order that it is inconsistent with FERC's regulations for a state commission to limit a legally enforceable obligation only to when a fully-executed contract exists, FERC specifically declined to state ***whether*** a legally enforceable obligation exists under the facts as presented by Cedar Creek. Additionally, FERC acknowledged that a state commission is entitled deference as to ***when*** a legally enforceable obligation arises when one does exist.

Since the stated purpose of this remand is for the IPUC to reconsider its Final Order on Reconsideration related to the Grouse Creek Projects in light of the FERC's Cedar Creek Order, the remaining question is whether a legally enforceable obligation arose, under the particular facts applicable to Grouse Creek's PPAs, prior to December 14, 2010, when the published rate eligibility cap changed from 10 aMW to 100 kW. Examination of Grouse Creek's facts shows that a legally enforceable obligation did not arise prior to December 14, 2010. As noted above, of particular distinction is the fact that Idaho Power did not cause the December 14, 2010, date to pass by refusing to sign Grouse Creek's PPAs. In fact, Idaho Power did not receive complete information from Grouse Creek until after December 14, 2010. Additionally, 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.[1] Consequently, the decision not to approve Grouse Creek's PPAs in Order No. 32257 should be affirmed.

III. NEGOTIATION OF GROUSE CREEK'S POWER PURCHASE AGREEMENTS

Idaho Power had numerous and frequent contacts and communications with Grouse Creek regarding several iterations of its proposed project and projects over the course of most of 2010. Idaho Power negotiated and proceeded with Grouse Creek in good faith negotiations and attempts to move Grouse Creek's proposed projects to final agreements pursuant to its PURPA obligations. Any delay was not attributable to a refusal by Idaho Power to negotiate nor any refusal by Idaho Power to execute a contract. Any delay that occurred was attributable to the fact that Grouse Creek changed the configuration of its project numerous times, did not agree to previously approved standard contract terms and conditions until December 9, 2010, did not provide final and complete information about its projects' configuration until December 15, 2010, and did not commit itself to sell its output to Idaho Power until December 21, 2010.

The course of dealings and many of the written communications between Grouse Creek and Idaho Power are set forth in the accompanying Affidavit of Randy Allphin. The totality of these communications demonstrate that Idaho Power proceeded in good faith and fair dealings with Grouse Creek through many iterations of its proposed Projects and did not unreasonably delay the Projects. Idaho Power was first contacted

[1] One need only look to another open docket currently before this Commission, Case No. IPC-E-11-23, to see an example of where a QF, Kootenai Electric, backed out of a negotiated agreement, after substantial development and negotiations with the utility, Avista, to seek an agreement with a different utility, Idaho Power, in a different jurisdiction, Oregon, pursuant to PURPA.

by Grouse Creek in late February 2010. Idaho Power records indicate it was initially contacted by Wasatch Wind, the developer behind the Projects, on February 26, 2010. Affidavit of Randy Allphin, Attachment No. 1. The initial Wasatch Wind project was a single 150 megawatt ("MW") project spread across 4,000 acres of private and public land located in northern Utah. Grouse Creek Comments at 8. Discussions between Wasatch Wind and Idaho Power on the single 150 MW project continued until April 2010, when Wasatch Wind informed Idaho Power that it was now considering a single 65 MW project instead of the previously discussed 150 MW project. Because this proposed project was a QF larger than 10 aMW, Idaho Power prepared pricing for the proposed project based upon its Integrated Resource Plan ("IRP")-based pricing methodology, pursuant to Commission requirements. *See* Order No. 32176. Idaho Power analyzed this proposal pursuant to the IRP-based methodology and provided Wasatch Wind with the results, including a proposed price. Affidavit of Randy Allphin, Attachment No. 4.

Three months later, Wasatch Wind once again changed the configuration of its proposed project and informed Idaho Power on July 14, 2011, that it "intended to reduce its overall footprint and wished to discuss power sales contracts for two single 10 aMW projects, instead of a large 65 MW project." Grouse Creek Comments at 13. Idaho Power records indicate that initially Wasatch Wind was anticipating two projects, one with a 30 MW nameplate capacity and the other with a 21 MW nameplate capacity. Consistent with its existing processes, Idaho Power began drafting PPAs for these two projects. During negotiations, Wasatch Wind continued to object to certain terms in the PPAs related to Idaho Power's standard security deposit requirements. Grouse Creek

Comments at 15. In addition, and consistent with prudent utility business practices, Idaho Power required confirmation from Wasatch Wind that since its proposed projects were located off Idaho Power's system, the Projects would need to provide sufficient evidence of the proper arrangements to deliver its output to Idaho Power's system. As Grouse is an off-system QF, Idaho Power's obligation to contract with the Projects pursuant to PURPA does not arise until the Projects demonstrate a firm delivery to a point on Idaho Power's system.

Discussions continued between the parties and during August communications were exchanged regarding clarification as to the Project configuration, the number of proposed Projects, accuracy of the data, and the requirements of 10 aMW and one-mile separation. Affidavit of Randy Allphin, Attachment No. 6. On October 1, 2010, Grouse Creek sent formal correspondence through legal representation for now two Projects, Grouse Creek Wind and Grouse Creek Wind II. The letter requests PPAs, provides information, objects to the posting of security required by the contracts, changes the project from 30 MW to 21 MW, and requests revision of the transmission service request ("TSR") from 30 MW to 21 MW, among other things. *Id.*, Attachment No. 7. On November 1, formal correspondence was sent to counsel for Grouse Creek responding to the October 1 letter and pointing out several of the open items remaining with the various proposed projects. Also forwarded with these letters were copies of: required Network Resource Integration Study Agreements, required Transmission Capacity Application Questionnaires, and Draft Firm Energy Sales Agreements. *Id.*, Attachment No. 8. On November 4, Idaho Power notified the Projects that the submitted TSRs were rejected because the information provided by the Project did not sync up with the

Project's transmission requests on BPA's system. The communication asks for updated transmission information from the Project that was needed to proceed with the TSRs, and advised of the need for ancillary services. *Id.*, Attachment No. 9. On November 24, Idaho Power sent correspondence confirming a prior letter and meeting between the Project and Idaho Power, and summarizing the current status of negotiations as to some of the previously contested terms and conditions. *Id.*, Attachment No. 9.

On December 2, 2010, Wasatch Wind sent marked-up versions of Draft PPAs previously sent by Idaho Power. *Id.*, Attachment No. 10; Grouse Creek Comments at 17. These mark-ups were the first time Idaho Power was definitively informed of the Projects' size and configuration (i.e., two 21 MW projects). Negotiations continued between the parties, and on December 6, Idaho Power received a revised Transmission Questionnaire from the Projects containing corrected information for re-submission of the TSRs, which was forwarded to Idaho Power transmission on the same day. Affidavit of Randy Allphin, p. 5. On December 7, Idaho Power forwarded updated Draft PPAs for the Projects, incorporating the information provided by the Projects, and working toward executable versions of the FESAs. This communication also notifies the Projects of missing information from the Projects necessary to confirm the required one-mile separation between the Projects and necessary to complete the Draft FESAs. Also on December 7, Idaho Power began the internal review process on the Draft FESAs, even though they were not yet complete, nor accepted by the Projects, so as not to unduly impede the ultimate execution of the FESAs once accepted by the Projects, since the December 14, 2010, date previously set by the Commission as the effective

date for the reduction in the published rate eligibility cap to 100 kilowatts was drawing near. *Id.*, Attachment No. 12.

On December 9, 2011, Grouse Creek sent communication confirming the Projects' agreement to the security provisions of the contract and requesting a change in the Scheduled First Energy Dates as well as the Scheduled Operation Dates. *Id.*, Attachment No. 12. On December 14, 2010, Idaho Power sent communications to Grouse Creek requesting that the Projects provide missing necessary information required for completion of the Draft FESAs. This information included naming the proper transmission entity, as previous communications from the Projects had indicated at different times both BPA and PacifiCorp. This communication also requested, again, that the Project provide a complete location designation, which is necessary to establish the proper one-mile separation and legal description of the Projects' location. *Id.*, Attachment No. 13.

On December 15, 2010, Idaho Power sent an e-mail confirming Idaho Power's receipt and acceptance of the Projects' revised First Energy and Scheduled Operation dates, and indicating the same would be incorporated into the final Draft FESAs. This communication also reiterates Idaho Power's December 14 request from the previous day for additional required information regarding the Transmitting Entity and completion of the location description for the Projects. The Projects were informed that this information was required to continue processing the proposed agreements. *Id.*, Attachment No. 14.

On December 15, Idaho Power requested Grouse Creek's confirmation that the Scheduled First Energy and Scheduled Operation Dates, as well as the location

description for the Projects, were correct. This information was confirmed on December 16, by the Projects. *Id.*, Attachment No. 15. On that same day, Idaho Power provided execution copies of the PPA that were picked up from Idaho Power's office by the Projects' counsel. From December 16 through December 21, Grouse Creek reviewed the Draft Agreements, and on December 21, 2011, Grouse Creek executed the PPAs and sent them via overnight mail to Idaho Power. Idaho Power executed the PPAs on December 28, 2010, and filed them at the Commission the next day.

IV. CONCLUSION

Idaho Power did not refuse to sign a contract with Grouse Creek. As FERC stated:

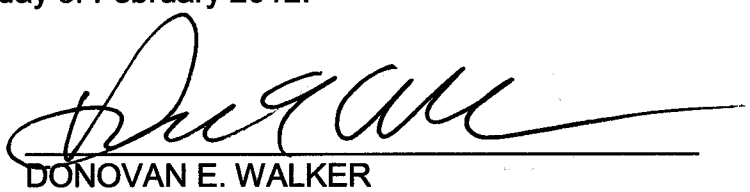
> Thus under our regulations, a QF has the option to commit itself to sell all or part of its electric output to an electric utility. While this may be done through a contract, if the electric utility refuses to sign a contract, the QF may seek state regulatory authority assistance to enforce the PURPA-imposed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

137 FERC 61006 p. 8.

Not only is it clear that Idaho Power did not refuse to sign a contract with Grouse Creek, the record demonstrates that Idaho Power proceeded reasonably and in good faith in the negotiation and eventual signing and execution of the published avoided cost rate 10 aMW PURPA contracts with the Projects as required by the then current applicable law, rules, and regulations. Examination of Grouse Creek's facts shows that a legally enforceable obligation did not arise prior to December 14, 2010. As noted above, of particular distinction is the fact that Idaho Power did not cause the December

14, 2010, date to pass by refusing to sign Grouse Creek's PPAs, nor by refusing to negotiate with the QF. In fact, Idaho Power did not receive complete information, required to finalize the PPAs, from Grouse Creek until after December 14, 2010. Additionally, Grouse Creek did not obligate itself to sell its electricity to Idaho Power until well after December 14, 2010, when it eventually signed the PPAs on December 21, 2010. The main concern of FERC in the Cedar Creek Order – that a utility would avoid the requirements of PURPA by refusing to enter into a contract with a QF is not implicated by the above facts. Grouse Creek did not obligate itself to sell its output to Idaho Power until it signed the PPAs on December 21, 2010, and thus a legally enforceable obligation did not exist prior to the December 14 effective date. In fact Grouse Creek reviewed and considered said draft PPAs from December 16, when it picked up execution drafts from Idaho Power, until its eventual signature on December 21. Consequently, the decision not to approve Grouse Creek's PPAs in Order No. 32257 should be affirmed.

DATED at Boise, Idaho, this 6th day of February 2012.



DONOVAN E. WALKER
Attorney for Idaho Power Company

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 6th day of February 2012 I served a true and correct copy of IDAHO POWER COMPANY'S MEMORANDUM ON REMAND upon the following named parties by the method indicated below, and addressed to the following:

Commission Staff Kristine Sasser Deputy Attorney General Idaho Public Utilities Commission 472 West Washington (83702) P.O. Box 83720 Boise, Idaho 83720-0074	_X_ Hand Delivered ____ U.S. Mail ____ Overnight Mail ____ FAX _X_ Email Kris.Sasser@puc.idaho.gov
Grouse Creek Wind Park, LLCs Brett Woodard Wasatch Wind Intermountain, LLC 2700 Homestead Road, Suite 210 Park City, Utah 84098	____ Hand Delivered _X_ U.S. Mail ____ Overnight Mail ____ FAX _X_ Email bwoodard@wasatchwind.com
Peter J. Richardson Gregory M. Adams RICHARDSON & O'LEARY, PLLC 515 North 27th Street (83702) P.O. Box 7218 Boise, Idaho 83707	____ Hand Delivered _X_ U.S. Mail ____ Overnight Mail ____ FAX _X_ Email peter@richardsonandoleary.com greg@richardsonandoleary.com

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