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BEFORE THE IDAHO

PUBLIC UTILITIES COMMISSION

IN THE MATTER OF THE APPLICATION OF IDAHO POWER COMPANY FOR A DETERMINATION REGARDING THE FIRM ENERGY SALES AGREEMENT FOR THE SALE AND PURCHASE OF ELECTRIC ENERGY BETWEEN IDAHO POWER COMPANY AND GROUSE CREEK WIND PARK, LLC	)	**CASE NO. IPC-E-10-61** COMMENTS OF GROUSE CREEK WIND PARK, LLC IN SUPPORT OF APPROVAL OF THE ENERGY SALES AGREEMENT
IN THE MATTER OF THE APPLICATION OF IDAHO POWER COMPANY FOR A DETERMINATION REGARDING THE FIRM ENERGY SALES AGREEMENT FOR THE SALE AND PURCHASE OF ELECTRIC ENERGY BETWEEN IDAHO POWER COMPANY AND GROUSE CREEK WIND PARK II, LLC	)	**CASE NO. IPC-E-10-62** COMMENTS OF GROUSE CREEK WIND PARK II, LLC IN SUPPORT OF APPROVAL OF THE ENERGY SALES AGREEMENT

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 ("Commission's") Notice of Modified Procedure and Order No. 32191, hereby files these Comments in the above-captioned matters.[1] For the reasons set forth below, the Grouse Creek QFs respectfully request that the Commission approve the Firm Energy Sales Agreements ("FESAs") with Idaho Power for both projects.

INTRODUCTION

The Grouse Creek QFs are each located on privately-owned land near Lynn, Utah, close to the Utah-Idaho Border, and are each qualifying facilities ("QFs") entitled to contracts with rates set at Idaho Power's full avoided costs, under the Public Utility Regulatory Policies Act of 1978 ("PURPA"), as implemented by the Idaho Public Utilities Commission. Each will have a nameplate capacity of 21 megawatts ("MW") but generate 10 average monthly megawatts ("aMW") or less. The Grouse Creek QFs and their predecessors and parent companies began developing these wind projects in 2007, have possessed rights to use all private lands for the project sites since February 2008, and have over two years of wind data supporting the output projections.

Under a Large Generator Interconnection Agreement with Raft River Rural Electric Cooperative that has been in effect since March 2010, the Grouse Creek QFs have finalized the Facilities Study Agreement and have even taken steps to commence construction of interconnection facilities for a June 2013 online date. The Grouse Creek QFs have had

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[1] The relevant facts for each of these projects are substantially similar. Counsel for the Grouse Creek QFs has therefore filed a single set of Comments applicable to both projects to save the Commission and other interested parties from the need to review two separate sets of Comments.

communications with Bonneville Power Administration since early 2010 indicating that point to point ("PTP") transmission to Idaho Power's Minidoka substation is available, and have been engaged in the process of entering into a PTP service agreement. BPA has indicated that it will forward a 20-year PTP transmission service agreement for each project by the end of March 2011. The developers of the two projects have spent $467,000 on interconnection, transmission, and wildlife studies alone.

The Grouse Creek QFs have been engaged in negotiations with Idaho Power for purchase of the output since early 2010. Wasatch Wind initially discussed a single project up to 65 MW in size with Idaho Power, which would have encompassed federal lands. Idaho Power's initial response to the request for a power purchase agreement in March 2010 stated that Wasatch Wind must have a final Interconnection Agreement, firm PTP transmission to Idaho Power's system, and firm rights to deliver the output over Idaho Power's system to its load center, all prior to execution of a FESA. Wasatch Wind subsequently took steps to proceed towards finalization of those processes, as described above. Due to difficulties in federal permitting, Wasatch Wind reduced the overall project footprint and amended its request to Idaho Power to requests for two standard PURPA contracts for QFs under 10 aMW in June 2010. Wasatch Wind clearly described its executed Interconnection Agreement, discussions with BPA establishing availability of transmission, and requested that Idaho Power commence the investigation of transmission availability on its own system. Through the fall of 2010, the Grouse Creek QFs continued to request two standard PURPA contracts, and for Idaho Power to study transmission availability on its system. After Idaho Power, along with Avista Utilities and

Rocky Mountain Power, filed the Joint Motion to Reduce the Published Rate Eligibility Cap on November 5, 2010, the Grouse Creek QFs each filed complaints against Idaho Power on November 8, 2010.

After the Commission did not immediately reduce the eligibility cap, Idaho Power and the Grouse Creek QFs agreed on November 19, 2010, to stay the complaint proceedings and execute standard QF wind contracts containing the $45/kw delay security but not containing the precondition of firm transmission rights prior to execution. The terms and conditions were materially complete at this point. The Grouse Creek QFs provided Idaho Power with contracts containing the project specifics for each project on December 2, 2010, and on December 9, 2010, clarified the online date to comply with the BPA transmission service request. After Idaho Power's final processing of execution-ready FESAs, the Grouse Creek QFs executed the agreements on December 21, 2010, and sent them to Idaho Power, which executed them on December 28, 2010, and filed the contracts for Commission approval on December 29, 2010.

Because the Grouse Creek QFs had meritorious complaints on file on November 8, 2010, and because all project specifics and material terms of the contracts to which the Grouse Creek QFs have obligated themselves were final before December 14, 2010, the Commission should approve both FESAs containing the published avoided cost rates.[2]

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[2] The Grouse Creek QFs note that several parties to GNR-E-10-04 have disputed whether the effective date of Order No. 32176 could be retroactively effective on December 14, 2010. For purposes of these comments, the Grouse Creek QFs will use December 14, 2010, as the effective date, without conceding that the Commission had the authority to make the reduction in the eligibility cap retroactively effective.

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). "Traditional electric utilities were reluctant to purchase power from, and sell power to, the nontraditional facilities." *FERC v. Mississippi,* 456 U.S. 742, 750, 102 S.Ct. 2126, 2132-2133 (1982). To overcome this problem, "§ 210(a) [of PURPA] directs the [Federal Energy Regulatory Commission ("FERC")], in consultation with state regulatory authorities, to promulgate such rules as it determines necessary to encourage cogeneration and small power production, including rules requiring utilities to offer to sell electricity to, and purchase electricity from, qualifying cogeneration and small power production facilities." *Id.*, 456 U.S. at 750-51, 102 S.Ct. at 2133.

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 promulgated regulations requiring utilities to compensate QFs for the utilities' *full* avoided cost. 18 C.F.R. § 292.304(a), (b); *Small Power Production and Cogeneration Facilities; Regulations*

Implementing Section 210 of the Public Utility Regulatory Policy Act of 1978, 45 Fed. Reg. 12,214, 12,222-12,223 (Feb. 25, 1980). The U.S. Supreme Court directly affirmed FERC's "full-avoided-cost rule," *American Paper Institute, Inc. v. FERC*, 461 U.S. 402, 417-18, 103 S.Ct. 1921, 1930 (1983), and that rule is still in effect today.

FERC's regulations entitle QFs to long term contract rates set at the utilities' full avoided costs at the time the QF commits itself to a legally enforceable obligation to deliver its project's output. 18 C.F.R. § 292.304(a), (b), (d)(2)(ii); *JD Wind 1, LLC*, "Order Denying 'Request for Rehearing, Reconsideration or Clarification,'" 130 FERC ¶ 61,127, ¶ 23 (February 19, 2010). With regard to off-system QFs, "Any electric utility to which such energy or capacity is delivered must purchase this energy under the obligations set forth in these rules as if the purchase were made directly from the qualifying facility." 45 Fed. Reg. at 12,220, *codifying* 18 C.F.R. § 292.303(a)(2).

Further, 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 Idaho Commission requires utilities in Idaho to make the rates in the published rate schedule available to QFs that generate less than 10 aMW. *See U.S. Geothermal, Inc. v. Idaho Power Company*, Case No. IPC-E-04-8, Order No. 29632, p. 14 (2004). On February 7, 2011, however, the Commission reduced the eligibility cap to 100 kw for wind and solar QFs and stated the effective date of this reduction would be December 14, 2010. *See* Order No. 32176, at pp. 11-12.

B. PURPA Grandfathering Criteria

When 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." *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); *Snow Mountain Pine v. Maudin*, 84 Or. App. 590, 600, 734 P.2d 1366, 1371 (1987).

The most onerous test the Commission 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 Idaho Supreme Court has never mandated this test as the Commission's only available way to test whether a QF had effected a legally enforceable obligation, and the Commission has not applied this onerous pre-filed complaint test consistently. *See, e.g., Blind Canyon Aquaranch,* Order No. 25802; *Earth Power Resources, Inc.*, Order No. 27231.

PROCEDURAL AND FACTUAL BACKGROUND

A. General Background on the Projects and Development

Wasatch Wind initially intended to place a 150 MW project on a combination of over 3,000 acres of private land and approximately 1,000 acres of land managed by the Bureau of Land Management ("BLM") in Northern Utah, near Utah-Idaho border. *Affidavit of Christine Mikell*, at ¶ 4.[3] Wasatch Wind began wind monitoring on the private lands 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. *Id.* at ¶¶ 4, 6, 11. Wasatch Wind obtained a right-of-way from the BLM to conduct wind monitoring in August 2008, and began wind monitoring activities on BLM lands. *Id.* at ¶ 7. Ultimately, the costs and complexities of the federal permitting process resulted in removal of the BLM lands from the project area on March 15, 2010, and Wasatch Wind eventually scaled the initial 150 MW project down to the two smaller 21 MW QFs separated by at least one mile. *Id.* at ¶ 10. From the $275,000 in wildlife and vegetation surveys and studies conducted, Wasatch Wind has identified no wildlife issues that would preclude development of the QFs on private lands. *Id.* at ¶ 12. Wind data collected for over two years indicates that the wind resource is very good, and has allowed Wasatch Wind to accurately predict the electrical output of the Grouse Creek QFs. *Id.* at ¶ 13.

Should the Commission approve the FESAs, Wasatch Wind expects that there will be an

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[3] The *Affidavit of Christine Mikell* and its Exhibits provide a detailed narrative of the Grouse Creek QFs development and contracting efforts in greater detail than these Comments.

average of 96 on-site construction workers over the six months of the wind park construction, with as many as 168 workers at one point. *Id.* at ¶ 14. Once the Projects are built, there would also be between 3-5 workers on site. Many of the workers and employees are expected to be Idaho residents because the closest city of substantial size is in Idaho. *Id.*

B. Interconnection and Transmission Rights

Grouse Creek Wind Park, LLC submitted a Large Generation Interconnection Application to BPA for 150 MW on May 5, 2008, for interconnection to a 138 kilovolt line leased to BPA by Raft River Rural Electric Cooperative. *Id.* at ¶ 16. The Feasibility and System Impact Studies both indicated that 93 MW was available for interconnection. *Id.* at ¶¶ 17-19. With BPA's agreement, the Grouse Creek QF signed an Interconnection Agreement with Raft River Rural Electric Cooperative on March 31, 2010. *Id.* at ¶ 20. In June 2010, BPA issued the Facility Study Agreement, and Raft River Rural Electric Cooperative agreed to amend the Interconnection Agreement to accommodate the two smaller projects, which will still use the same single point of interconnection. *Id.* at ¶¶ 21-22. Most recently, on February 24, 2011, Wasatch Wind met with Raft River Rural Electric Cooperative and an engineering firm to commence the procedures necessary to design the project and interconnection substations. *Id.* at ¶ 24.

With regard to PTP transmission to Idaho Power's system, 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 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. But Wasatch Wind understands that 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 its 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 has proceeded well in advance of the projected online date, and on March 18, 2011, BPA stated it will send two Firm PTP agreements for the 21 MW Grouse Creek QF and the 21 MW Grouse Creek II QF by the end of the March 2011. *Id.* at ¶ 31. At that point, the QFs will have 15 days to obligate themselves to the two 20-year PTP transmission agreements, or again lose their position in the queue. *Id.* at ¶¶ 31-33.

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, and 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.* at ¶ 34 and Exhibit A. 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, and on June 2, 2010, Idaho Power provided pricing it stated it had

generated with its AUROA model. *Id.* at ¶¶ 35-36 and Exhibit B.[4] 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

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[4] The contract prices provided in Idaho Power's June 2, 2010 letter appear to have been based entirely on the AURORA model. Recently, Idaho Power stated, in defense of its implementation of the IRP Methodology for projects not entitled to published avoided cost rates, that it first generates an avoided cost of energy with AURORA, and then "a capacity (fixed) cost credit using a CCCT is added to the value of energy calculated in the AURORA model." *Idaho Power's Answer to NIPPC's Petition for Reconsideration*, Case No. GNR-E-10-04, at p. 11 (March 7, 2011). Although Mr. Allphin's letter sent June 2, 2010 provided a detailed rate chart titled "Contract Price," it made no reference to any fixed cost addition to the AURORA rates calculated for the proposed 65 MW Grouse Creek project. *Affidavit of Christine Mikell*, at Exhibit B, p. 3. This evidence of Idaho Power's under-estimation of avoided cost rates with its implementation of the IRP Methodology calls into question any argument Idaho Power may raise that these two QFs were improperly "disaggregated" to obtain published rates because, as noted above, each QF is entitled rates set at the utility's full avoided costs.

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 large 65 MW project. *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, 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 17th 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 1st letters objected to any further delay in submitting both TSRs on Idaho Power's system. *Id.* The October 1st 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 1st 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.[5] *Id.* Mr. Allphin's November 1st letter also expressed Idaho Power's

[5] 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.

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 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. 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 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 1st FESA, including those regarding curtailment for system reliability purposes. *Id.* at ¶ 71 and Exhibit J. Idaho Power's November 24th letter requested that the QFs fill in project-specific information in the November 1st 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 1st contract for each project, containing all project specifics. *Id.* at ¶ 72 and Exhibit K.[6] Wasatch Wind's December 2nd 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 1st FESA highlighted in Idaho Power's November

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[6] The *Affidavit of Christine Mikell* contains a typo referring to Idaho Power's draft FESA provided November 1st as "Idaho Power's November 30th contract." *See id.* at ¶¶ 72.

24th 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, 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 2nd, 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 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 for 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 cartographic sections in the October 1st 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 9th would be included in the contracts, and later that day counsel for the QFs provided the

information regarding the transmitting entity and the sections, consistent with the prior communications. *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 21, 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, and filed them for Commission determination the next day.

COMMENTS

A. The Grouse Creek QFs each satisfy the grandfather tests.

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. Each QF's Complaint alleged 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.

The allegations in the Complaints were meritorious because Idaho Power agreed to execute standard PURPA contracts without regard to the status of the transmission processes.[7] 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 diligently initiated and have now essentially completed the interconnection and transmission 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 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.

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, pp. 2-4 (2006) (finding wind QF entitled to grandfathered rates based on maturity of

[7] 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.

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). Prior to the rate change date, the Grouse Creek QFs had entered into an Interconnection Agreement and proceeded to the Facilities Study stage, had obtained all necessary real property rights for the sites, collected over two years of wind data, conducted extensive wildlife and vegetation studies, and negotiated various aspects of the projects with Idaho Power for almost a year.

Finally, the QFs' demonstrated knowledge of the contract terms further evidences the intent of the QFs in this case to obligate themselves prior to the effective date. *See In the Matter of the Application of Idaho Power Company for Approval of a Firm Energy Sales Agreement with Yellowstone Power Company*, 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]" in part because the QF had "familiarity with PURPA projects and the standard terms of Idaho Power's power purchase agreements"). 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 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. All material terms and project specifics were well settled by December 14, 2010.

B. The Contract terms and Idaho Power's most-current wind integration study allay the concerns raised in Idaho Power's Application regarding system reliability and cost.

Idaho Power asserted in each of its Applications that "the request in this Application. . . is made with the specific reservation of rights and incorporation of the averments set forth in the Joint Petition and the Company's comments regarding the possible negative effects to the [sic] both the utility and its customers of additional and unfettered PURPA QF generation on system reliability, utility operations, and costs of incorporating and integrating such a large penetration level of PURPA QF generation into the utility's system." *Application*, at p. 3.[8] Because the terms of the FESAs in this case and the current wind integration charge protects ratepayers, and because the projects obligated themselves prior to the effective date of the eligibility cap reduction, the QFs submit that Idaho Power's concerns should not preclude Commission approval of the contracts.

First, the Commission should consider the system reliability and wind integration discussion in the Northwest and Intermountain Power Producers Coalition's ("NIPPC") Comments in GNR-E-10-04. *See NIPPC Opening Comments*, Case No. GNR-E-10-04, pp. 13-16 (Dec. 22, 2010). In those Comments, NIPPC pointed out that, despite Idaho Power's statements in the Joint Motion regarding 1100 MW being near Idaho Power's minimum loads, Idaho Power's own wind integration study concluded that even at 1200 MW of wind capacity on

[8] Because Idaho Power's Applications in Case Nos. IPC-E-10-61, IPC-E-10-62 are substantially the same, these Comments will refer to them interchangeably as the "Application."

the Company's system, wind would reach only 80% of its loads and it would do so only for a few hours per year. *See Enernex's Idaho Power 2007 Wind Study*, Case No. IPC-E-07-03, p. 34 (February 6, 2007). The settlement that resulted after conclusion of that wind integration study made the avoided cost rates available to wind developers at a rate reduced by $6.50/MWh for projects coming online when Idaho Power's cumulative wind power is "501 MW and above." *See* Order No. 30488, at p. 8. There is no upper cap contained in the order, and Idaho Power has not availed itself of the opportunity since to update its wind integration study. Further, Idaho Power's wind integration study did not consider the firming ability of any of the Company's 744 MW of gas combustion turbine capacity that will be online by the time Grouse Creek QFs are online in December 2013. *See NIPPC Opening Comments*, Case No. GNR-E-10-04, at p. 15. The Commission should also consider that the rates in these PURPA agreements are lower than those in contracts and self-built projects recently approved for Idaho Power. *See NIPPC Reply Comments*, Case No. GNR-E-10-04, pp. 15-20 (Jan. 21, 2011).

Further, the FESAs for each QF contain extensive protections for ratepayers which address the concerns raised by Idaho Power's application. Idaho Power warrants that the Agreements comport with the terms and conditions of the various Commission Orders applicable to PURPA agreements for a wind resource. *See Application*, at p. 4 (citing Order Nos. 30415, 30488, 30738 and 31025). According to those orders, the rate in the FESA for each of the projects is reduced by the Idaho Power's wind integration charge. Order No. 30488, at pp. 8-9. The FESAs also contain a Mechanical Availability Guarantee, which requires reduced payment to the QF if its turbines are unavailable for inexcusable reasons. *Id.* The FESAs require that the

QF share in the costs of wind forecasting. *Id.* The FESAs also provide for a reduced rate at times of the day and months of the year when the energy is worth less to Idaho Power due to demand and regional market conditions. *See* Order No. 30415.

Each QF has selected December 1, 2013, as its Scheduled Operation Date, and sections 5.3.2 and 5.8.1 of each FESA contains a liquidated damage and security provision of $45 per kw of nameplate capacity for failure to achieve that date. That will require the QFs to each post $945,000 as delay default security after Commission approval of the contracts.

The QFs have accepted the provisions in each FESA and Idaho Power's approved Schedule 72 regarding non-compensated curtailment or disconnection of the QF for system reliability purposes. This provides Idaho Power the right to exercise "non-compensated curtailment" at times "when the generation being provided by the Facility in certain operating conditions exceeds or approaches the minimum load levels of [Idaho Power's] system such that it may have a detrimental effect upon [Idaho Power's] ability to manage its thermal, hydro, and other resources in order to meet its obligation to reliably serve loads on its system." *Application* at p. 7. Thus, even if there were evidence that system reliability issues may evolve in the future, the contracts allow Idaho Power to take reasonable steps to ensure system integrity.

CONCLUSION

For the reasons set forth above, Grouse Creek Wind Park, LLC and Grouse Creek Wind Park II, LLC, respectfully request that the Commission approve the Firm Energy Sales Agreements.

Respectfully submitted this 24th day of March 2011,

RICHARDSON & O'LEARY, PLLC

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 24th day of March, 2011, a true and correct copy of the within and foregoing **COMMENTS OF THE GROUSE CREEK WIND PARK, LLC, GROUSE CREEK WIND PARK II, LLC** and the **AFFIDAVIT OF CHRISTINE MIKELL** was served as shown to the following parties:

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