

BEFORE THE IDAHO PUBLIC UTILITIES COMMISSION

IN THE MATTER OF THE APPLICATION OF)	
IDAHO POWER COMPANY FOR A)	SUPREME COURT
DETERMINATION REGARDING THE FIRM)	DOCKET NO. 39151-2011
ENERGY SALES AGREEMENT FOR THE)	
SALE AND PURCHASE OF ELECTRIC)	
ENERGY BETWEEN IDAHO POWER)	IPUC CASE NOS. IPC-E-10-61
COMPANY AND GROUSE CREEK WIND)	IPC-E-10-62
PARK, LLC (10-61) AND GROUSE CREEK)	
WIND PARK II, LLC (10-62).)	
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GROUSE CREEK WIND PARK, LLC and)	
GROUSE CREEK WIND PARK II, LLC,)	
)	
Petitioners/Appellants,)	
)	ORDER NO. 32635
v.)	
)	
IDAHO PUBLIC UTILITIES COMMISSION,)	
)	
Respondent, Respondent on Appeal,)	
)	
and)	
)	
IDAHO POWER COMPANY,)	
)	
Respondent-Intervenor/Respondent)	
on Appeal.)	

On July 27, 2011, the Commission issued Final Order on Reconsideration No. 32299 affirming its initial decision to not approve two Power Purchase Agreements (“PPAs” or “Agreements”) entered into between the Grouse Creek Wind Park projects (collectively referred to as “Grouse Creek”) and Idaho Power Company pursuant to the federal Public Utility Regulatory Policies Act of 1978 (PURPA). 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 (QFs). Final Order No. 32257. 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 not available to the wind projects.

On September 7, 2011, Grouse Creek appealed the Commission's Orders to the Idaho Supreme Court. On October 4, 2011, the Federal Energy Regulatory Commission (FERC) issued a Declaratory Order in what appeared to be a similarly situated case ("the Cedar Creek Case") stating that the Idaho Commission's decision not to approve Cedar Creek's PPAs was inconsistent with PURPA and FERC's regulations. *Notice of Intent Not to Act and Declaratory Order*, 137 FERC ¶ 61,006 (Oct. 4, 2011). On November 3, 2011, in response to FERC's Declaratory Order, Grouse Creek, this Commission and Idaho Power filed a Stipulated Motion with the Idaho Supreme Court to suspend the appeal and remand the matter to the PUC. The Court granted the Motion on November 22, 2011.

Grouse Creek, Idaho Power and Commission Staff met to discuss settlement of the issues on December 9, 2011, and December 22, 2011. Settlement discussions were unfruitful. The Commission directed the parties to file legal briefs and oral argument was held on March 7, 2012. After reviewing the underlying record, arguments of the parties and controlling statutory and case law, we decline to approve the two Power Purchase Agreements between Grouse Creek and Idaho Power based on the avoided cost rates contained in the Agreements, and as more fully described herein.

BACKGROUND

A. The Power Purchase Agreements (PPAs)

On December 28, 2010, Idaho Power and the two Grouse Creek wind projects entered into their respective PPAs. Under the terms of the PPAs, each wind project agrees to sell electric energy to Idaho Power for a 20-year term using 10 aMW non-levelized published avoided cost rates. Applications at 4. The nameplate rating of each project is 21 MW. Under normal and/or average conditions, each wind QF will not sell more than 10 aMW on a monthly basis to Idaho Power. The projects are located near Lynn, Utah.

Each project selected June 1, 2013, as the "Scheduled First Energy Date" and December 1, 2013, as the "Scheduled Operation Date." Applications at 5. Idaho Power asserted that it advised each project of the project's responsibility to work with Idaho Power's delivery business unit to ensure that sufficient time and resources would be available for the delivery unit to construct the necessary interconnection facilities, and transmission upgrades if required, in time to allow the projects to achieve their December 1, 2013, Scheduled Operation Date. The Applications state that the projects have been advised that delays in the interconnection or

transmission process do not constitute excusable delays and if a project fails to achieve its Scheduled Operation Date, delay damages will be assessed. *Id.* at 6. The Applications further maintain that Grouse Creek has acknowledged and accepted the risks inherent in proceeding with its PPAs without knowledge of the actual requirements for interconnection facilities and possible transmission upgrades. *Id.* at 7. In each PPA, the parties have agreed to liquidated damage and security provisions of \$45 per kW of nameplate capacity. Agreements ¶¶ 5.3.2, 5.8.1. Idaho Power also maintained that each project was aware of and accepted the provisions in the Agreements and Idaho Power’s approved Schedule 72 regarding non-compensated curtailment or disconnection of the project should certain operating conditions develop on Idaho Power’s system.

By its own terms, the “Effective Date” for each PPA is “[t]he date stated in the opening paragraph of this Firm Energy Sales Agreement representing the date upon which this Firm Energy Sales Agreement was fully executed by both Parties.” Agreements ¶ 1.11. The opening paragraph of each Agreement reflects that they were “entered into” on December 28, 2010. *Id.* at p. 1. Each Agreement further states that it will not become effective until the Commission has approved all of the terms and conditions and declares that all payments made by Idaho Power to Grouse Creek for purchases of energy will be allowed as prudently incurred expenses for ratemaking purposes. Agreements ¶ 21.1.

B. Order No. 32257

On June 8, 2011, the Commission issued final Order No. 32257 disapproving the two Agreements between Idaho Power and each of the wind projects – Grouse Creek Wind Park and Grouse Creek Wind Park II.¹ The Commission determined that the Agreements were not fully executed (signed by both parties) prior to December 14, 2010, the date upon which the eligibility for published avoided cost rates changed from 10 aMW to 100 kW for wind and solar projects. Order No. 32176. Consequently, the Commission found that the rates contained in the Agreements were no longer available because each of the projects requested published avoided cost rates and each QF was larger than 100 kW. Order No. 32257 at 10.

The Commission found that Grouse Creek signed each Agreement on December 20, 2010, and Idaho Power signed on December 28, 2010. *Id.* at 9. The Commission also noted that

¹ The two projects had previously filed consolidated comments maintaining that the “relevant facts for each of these two projects are substantially similar.” Project Comments at n.1. Consequently, the Commission found it reasonable and appropriate to consolidate the cases and issue a consolidated final Order. Order No. 32257 at n.1.

the Agreements contain language regarding the effective date. The terms of the Agreements unequivocally state that the “Effective Date” of the Agreements 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 ¶ 1.10. The opening paragraph is dated “this 28 day of December, 2010.”

The Commission stated that “[t]he Commission does not consider a utility and its ratepayers obligated until both parties have completed their final reviews and signed the agreement.” Order No. 32257 at 9. The Commission observed that “a thorough review is appropriate and necessary prior to signing Agreements that obligate ratepayers to payments in excess of \$230 million” over the 20-year term of the Agreements. *Id.* The Commission established a bright line rule that for a wind or solar QF larger than 100 kW to be eligible for published avoided cost rates, the Power Purchase Agreement must have been executed, i.e., signed by both parties, prior to the December 14, 2010, effective date of the change in eligibility criteria. *Id.* at 10. The Commission concluded that it was “not in the public interest to allow parties with contracts executed on or after December 14, 2010, to avail themselves of an eligibility cap that is no longer applicable.” *Id.*

C. Reconsideration of Order No. 32257

On June 29, 2011, Grouse Creek filed a timely Petition for Reconsideration of the Commission’s final Order No. 32257. Grouse Creek argued that, pursuant to 18 C.F.R. § 292.304(d)(2)(ii), a QF is entitled to the rates that are in effect on the date the QF incurred a legally enforceable obligation to provide energy. The projects maintained that the “obligation to purchase a QF’s output is created by the QF committing itself to sell to an electric utility, which also commits the electric utility to buy from the QF.” Reconsideration Petition at 5. Based on this premise, Grouse Creek argued that the Commission’s final Order was arbitrary and capricious and not in conformity with controlling federal law because it requires a utility’s signature to establish a legally enforceable obligation.

On July 6, 2011, Idaho Power filed an Answer to the Petition for Reconsideration. Idaho Power maintained that the Commission’s final Order is based on substantial and competent evidence. The utility asserted that it was “not in the public interest to allow parties with contracts executed on or after December 14, 2010, to avail themselves of [a published rate] that is no longer applicable.” Answer at 6 *quoting* Order No. 32257 at 9. Idaho Power asserted

that the Commission was acting within its discretion and, therefore, reconsideration should be denied. *Id.* at 8-9.

On July 27, 2011, the Commission issued Order No. 32299 denying the projects' Petition for Reconsideration. The Order stated that the parties entered into a legally enforceable obligation at the time that both parties executed the Power Purchase Agreements. By their very terms, the Agreements were not effective until December 28, 2010. Agreements ¶ 1.11. On that date, wind projects larger than 100 kW were no longer entitled to the 10 aMW published avoided cost rate. This Commission explained that "FERC regulations grant the states latitude in implementing the regulation of sales and purchases between QFs and electric utilities." Order 32299 at 7 citing *Federal Energy Regulatory Commission v. Mississippi*, 456 U.S. 742, 102 S.Ct. 2126, 72 L.Ed.2d 532 (1982). In determining when the parties incurred a legally enforceable obligation, the Commission properly exercised the authority granted us by FERC. *Id.*

The Commission further explained that nothing cited by Grouse Creek demonstrated that the Commission's Order is arbitrary, capricious or inconsistent with federal law. The Commission noted that FERC specifically delegated authority to the state commissions to determine when and how a legally enforceable obligation is created. The Commission also determined that its decision is in the public interest and strikes a balance between "the local public interest of a utility's electric consumers and the national public interest in development of alternative energy sources." *Rosebud Enterprises v. Idaho PUC*, 128 Idaho 609, 613, 917 P.2d 766, 770 (1996).

D. Appeal and Remand

On September 7, 2011, Grouse Creek appealed the Commission's Orders to the Idaho Supreme Court. On October 4, 2011, while the appeal was pending, FERC issued a Declaratory Order in the Cedar Creek case that the PUC's decision not to approve Cedar Creek's PPAs was inconsistent with PURPA and FERC's regulations implementing PURPA. *Notice of Intent Not to Act and Declaratory Order*, 137 FERC ¶ 61,006 (Oct. 4, 2011). FERC construed this Commission's final Order in the Cedar Creek case as "limiting the creation of a legally enforceable obligation only to QFs that have [PPAs] . . . signed by both parties to the agreement." *Id.* at ¶ 26. FERC interpreted our Order as requiring a fully-executed contract as a condition precedent to the creation of a legally enforceable obligation between the parties. *Id.* at ¶¶ 30, 35. FERC concluded that our Cedar Creek Orders did not recognize that "a legally

enforceable obligation may be incurred before the formal memorialization of a contract to writing.” *Id.* at ¶ 36.

On November 3, 2011, in response to FERC’s Order, Grouse Creek, this Commission and Idaho Power filed a Stipulated Motion to suspend the Idaho Supreme Court appeal and remand the matter to the Commission for further consideration. The Motion stated that there “is good cause for the Court to grant this Motion in order for the Parties to consider a recent decision issued by the Federal Energy Regulatory Commission (“FERC”) regarding the subject matter of the appeal.” Motion at 2. Moreover, *Idaho Code* § 61-624 provides that the Commission “may at any time, upon notice to the public utility affected, and after opportunity to be heard . . . , rescind, alter or amend any order or decision made by it.” The Court granted the Stipulated Motion on November 22, 2011.

On remand, the Commission invited the parties to participate in settlement negotiations. *See* IPUC Rule 353, IDAPA 31.01.01.353; Order No. 32430. Grouse Creek, Idaho Power and Commission Staff met to discuss settlement of the issues on December 9 and December 22, 2011. Settlement negotiations were ultimately unsuccessful. Consequently, the Commission directed the parties to file legal briefs and scheduled an oral argument for March 7, 2012. Order No. 32430. The parties’ arguments on remand are set out below.

1. The Grouse Creek Projects

Grouse Creek maintains that it attempted to secure PPAs with Idaho Power for several months prior to December 14, 2010. Initially, in April 2010, the developer requested a PURPA contract for a 65 MW project. Grouse Creek Brief at 9. In June 2010, Grouse Creek indicated that, due to federal permitting issues, it intended to reduce the overall footprint of the project and wanted to discuss two 10 aMW projects, instead of the larger 65 MW project. *Id.* at 6, 9-10.

Grouse Creek maintains that, on July 14, 2010, it submitted a formal request to Idaho Power for two 10 aMW PURPA contracts. *Id.* at 9-10. The projects reiterated their request for two PURPA contracts on August 17, 2010. *Id.* at 11. Grouse Creek asserts that, on October 1, 2010, it sent a letter to Idaho Power “for each Grouse Creek QF, expressing [the projects] intent to obligate the QFs to two power sales agreements for the two QF projects.” *Id.* Grouse Creek insists that the letters “listed several standard terms applicable through Commission orders,” including the load shape price adjustments, wind integration charge, mechanical availability

guarantee, and wind forecasting and cost sharing provisions. *Id.* However, the projects were disputing the legality of a \$45/kW delay liquidated damages provision. *Id.* at 12. On or about November 1, 2010, Idaho Power provided draft PPAs for the projects. The utility insisted on the inclusion of the standard \$45/kW delay security deposit. *Id.*

Grouse Creek observed that on November 5, 2010, Idaho Power, Rocky Mountain Power and Avista filed a Joint Motion to Reduce the Published Rate Eligibility Cap. *See generally* Case No. GNR-E-10-04. In response, on November 8, 2010, the Grouse Creek projects each filed a complaint against Idaho Power for failing to negotiate in good faith. In these complaints, Grouse Creek alleged that Idaho Power had acted in bad faith by requiring completion of unnecessary interconnection processes and transmission requests and by refusing to enter into an agreement without a \$45/kW delay liquidated damages security provision. *Id.* at 13. Grouse Creek and Idaho Power subsequently settled the disputes asserted in the complaints and entered into the two PPAs whose terms are at issue in this case.

Following successful negotiations, on December 9, 2010, Grouse Creek “requested through e-mail” that the “First Energy Date” and the “Commercial Online Date” in the PPA for both projects be amended and deferred until June 2013 and December 2013, respectively. *Id.* at 14-15. On December 15, 2010, Idaho Power consented to the deferrals in the First Energy and Online Date. *Id.* at 15. Idaho Power forwarded the final PPAs to Grouse Creek for signatures on December 16, 2010. *Id.* at 15-16.

Grouse Creek argues that all material terms were well settled prior to December 14, 2010, despite the projects’ inability to obtain fully executed contracts until December 28, 2010. *Id.* at 16. It is on this basis that Grouse Creek asserts a legally enforceable obligation was formed that entitles the projects to the published avoided cost rates contained in Order No. 31025, and as reflected in their PPAs.

2. Commission Staff

Staff maintains that the Commission’s prior Orders relied only on the express terms of the Agreements between the projects and Idaho Power. Staff acknowledges the PURPA provisions for legally enforceable obligations. However, Staff argues that “the simple act of a QF requesting a PURPA contract from a utility cannot reasonably be interpreted as a commitment by the QF to sell electricity to the utility from which it requests a draft contract.

Something in furtherance of the QFs intent and ability to provide electricity is required.” Staff Brief at 5.

In considering whether and when a legally enforceable obligation was incurred, Commission Staff relied on the language in PURPA and the guidance of FERC in the Cedar Creek case. *See Notice of Intent Not to Act and Declaratory Order*, 137 FERC ¶ 61,006 (Oct. 4, 2011). Staff asserts that a legally enforceable obligation was incurred no later than December 9, 2010 – the date upon which the projects modified their on-line dates. Staff Brief at 5. “At that time, QF projects with a design capacity of 10 aMW and smaller were entitled to Idaho’s published avoided cost rates. Consequently, Grouse Creek Wind Park and Grouse Creek Wind Park II are entitled to published avoided cost PURPA contracts at published rates that were in effect on December 9, 2010.” *Id.* at 6.

3. Idaho Power Company

Idaho Power maintains that it pursued good faith negotiations with Grouse Creek and that any delay was not attributable to a refusal by Idaho Power to negotiate or execute a contract. Idaho Power argues that any delay was the result of Grouse Creek’s conduct. Idaho Power states that Grouse Creek changed the configuration of the project numerous times, did not agree to standard contract terms and conditions until December 9, 2010, did not provide final and complete information regarding the projects’ configuration until December 15, 2010, and did not commit itself to sell its output to Idaho Power until December 21, 2010. Idaho Power Brief at 11.

Idaho Power asserts that it forwarded updated draft PPAs to the projects on December 7, 2010, and notified Grouse Creek of missing information that was necessary for the Company to confirm the required one-mile separation between projects. On December 9, Grouse Creek agreed to the security provisions and requested a change in the Scheduled First Energy Date and Scheduled Operation Date for each Agreement. On December 14, 2010, Idaho Power maintains that it sent communications to Grouse Creek requesting that the projects provide missing necessary information to complete the draft PPAs.² Grouse Creek confirmed the operation dates and the legal descriptions on December 15, 2010. *Id.* at 11-12.

² Idaho Power maintains that the projects failed to name the transmission entity – the projects had indicated at different times that it would either be BPA or PacifiCorp. In addition, Idaho Power states that the projects failed to provide a complete location designation which is necessary to establish both compliance with the one-mile separation rule and provide a proper legal description of the projects’ locations.

Idaho Power states that it provided Grouse Creek with executable copies of two PPAs on December 15, 2010. Grouse Creek signed the Agreements on December 21, 2010, and returned the PPAs to Idaho Power via overnight mail. Idaho Power reviewed the Agreements and signed on December 28, 2010. *Id.* The Agreements were filed with the Commission on December 29, 2010. Idaho Power argues that the facts of this case are distinguishable from the Cedar Creek case. Because Idaho Power did not refuse to enter into a contract with Grouse Creek, the projects' legally enforceable obligation is incurred on the date that they signed the PPAs and obligated themselves to sell output to Idaho Power – on December 21, 2010. Based on these facts, Idaho Power concludes that Grouse Creek is not eligible for published rate contracts. Therefore, Idaho Power maintains that the Commission's decision not to approve the contracts should be affirmed.

FINDINGS AND CONCLUSIONS

The Idaho Public Utilities Commission has jurisdiction over Idaho Power, an electric utility, and the issues raised in this matter pursuant to the authority and power granted it under Title 61 of the Idaho Code and PURPA. The Commission has authority under PURPA and the implementing regulations of the Federal Energy Regulatory Commission (FERC) to set avoided costs, to order electric utilities to enter into fixed-term obligations for the purchase of energy from qualified facilities (QFs) and to implement FERC rules.

This Commission has been granted authority to implement PURPA and is the appropriate state forum to review contracts and resolve disputes between QFs and electric utilities. *Idaho Code* §§ 61-502, 61-503; *A.W. Brown v. Idaho Power Co.*, 121 Idaho 812, 816, 828 P.2d 841, 845 (1992); *Empire Lumber Co. v. Washington Water Power Co.*, 114 Idaho 191, 755 P.2d 1229 (1987). Moreover, the Commission has the authority to engage in case-by-case analysis in setting out its standards and requirements for implementation of PURPA. *Power Resources Group v. PUC of Texas*, 422 F.3d 231, 237 (5th Cir. 2005) *citing* Policy Statement Regarding the Commission's Enforcement Role Under Section 210 of [PURPA], 23 FERC ¶ 61,304, 1983 WL 39627 (May 31, 1983); *Rosebud Enterprises v. Idaho PUC*, 128 Idaho 609, 917 P.2d 766 (1996). 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. Similarly, whether the particular facts applicable to an individual QF necessitate modifications of other terms and conditions of

the QF's contract with the purchasing utility is a matter for the States to determine.

West Penn Power Co., 71 FERC ¶ 61,153 at 61,495 (1995). *Accord: Jersey Central Power & Light Co.*, 73 FERC ¶ 61,092 at 61,297-61,298 (1995); *Metropolitan Edison Co.*, 72 FERC ¶ 61,015 at 61,050 (1995). FERC is not a forum for adjudicating the specific provisions of each individual QF contract. *Id.* The exercise of a State commission's discretion in the application of PURPA standards to particular contracts has long been recognized as outside the scope of FERC's enforcement authority.³

This case was remanded to the Commission from the Idaho Supreme Court based on the Stipulated Motion to Suspend the Appeal. The remand was intended to allow the Commission to consider the implication of FERC's Cedar Creek Declaratory Order on the specific facts of this case. Grouse Creek relies upon FERC's determination that this Commission's final Order – in the Cedar Creek case – limits “the creation of a legally enforceable obligation only to QFs that have [PPAs] . . . signed by both parties to the agreement.” *Notice of Intent Not to Act and Declaratory Order*, 137 FERC ¶ 61,006 at ¶ 26 (Oct. 4, 2011). Based on this premise, FERC stated that the Commission's decision to not approve the Cedar Creek PPAs was inconsistent with PURPA and FERC's regulations implementing PURPA. *Id.* Grouse Creek extrapolates from FERC's Declaratory Order that the Commission's decision to not approve its two PPAs is likewise inconsistent with PURPA and FERC's regulations implementing PURPA.

At the outset, we note that this Commission did not and has never made a determination that the creation of a legally enforceable obligation only occurs when a QF and a utility enter into a written and signed agreement. In our prior Orders in this case, we found that Grouse Creek and Idaho Power entered into Agreements with one another that specifically stated the terms and conditions of the Agreements – including the effective date. We recognized and chose to enforce the terms of the Agreements that the parties entered into voluntarily. We specifically noted that “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

³ *Policy Statement Regarding the Commission's Enforcement Role Under Section 210 of the Public Utility Regulatory Policies Act of 1978*, 23 FERC ¶ 61,304 at 61,645 (1983) (“ . . . the Commission's role is limited regarding questions of the proper application of these rules on a case-by-case basis”). *See Power Resource Group, Inc. v. Pub. Utils. Comm'n of Texas*, 422 F.3d 231, 238 (5th Cir. 2005); *Mass. Inst. Tech. v. Mass. Dept. of Pub. Utils.*, 941 F.Supp. 233, 236-237 (D. Mass. 1996).

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.” Order No. 32257 at 9; Agreements ¶ 5.1. We find that the Agreements were negotiated, agreed to and executed by both parties and clearly and unambiguously state that the effective date of the PPAs is December 28, 2010.

As we previously explained, “FERC regulations grant the states latitude in implementing the regulation of sales and purchases between QFs and electric utilities.” *FERC v. Mississippi*, 456 U.S. 742, 102 S.Ct. 2126, 72 L.Ed.2d 532 (1982). According to FERC, “it is up to the States, not [FERC] to determine the specific parameters of individual QF power purchase agreements.” *Rosebud Enterprises v. Idaho PUC*, 128 Idaho 609, 623, 5624, 917 P.2d 766, 781, 782 (1996) citing *West Penn Power Co.*, 71 FERC ¶ 61,153 (1995). This Commission determined that, by the clear and unambiguous terms of the Agreements themselves, the Agreements were not effective until December 28, 2010. Order No. 32299 at 7. Because the size of each Grouse Creek project exceeds 100 kW and each Agreement became effective after December 14, 2010, we found that the terms within the Agreements, i.e., published avoided cost rates, did not comply with Order No. 32176. Order No. 32257 at 9-10; Order No. 32299 at 7, 8-10. Our findings in this respect are supported by substantial and competent evidence – the request by Idaho Power and Grouse Creek to approve its PPAs and the unambiguous terms of the Agreements. We clearly did not make a finding that the creation of a legally enforceable obligation only occurs when a QF and a utility enter into a written and signed agreement. We found, based on the specific facts of the two Grouse Creek projects that the parties entered into Agreements that unequivocally state an effective date. We are simply recognizing the express terms of the executed Agreements. This finding is entirely consistent with Idaho law and the authority granted to us by PURPA and FERC.

It is also important to note that a declaratory order issued by FERC is not legally binding on this Commission. A declaratory order “that does no more than announce the [FERC’s] interpretation of the PURPA or one of the agency’s implementing regulations is of no legal moment unless and until a district court adopts that interpretation when called upon to enforce the PURPA.” *Niagara Mohawk Power Corp., v. FERC*, 117 F.3d 1485, 1488, 326 U.S.App.D.C. 135, 138 (1997).

Unlike the declaratory order of a court, which does fix the rights of the parties, this [FERC] Declaratory Order merely advised the parties of the [FERC's] position. It was much like a memorandum of law prepared by the FERC staff in anticipation of a possible enforcement action; the only difference is that the [FERC] itself formally used the document as its own statement of position. While such knowledge of the FERC's position might affect the conduct of the parties, the Declaratory Order is legally ineffectual apart from its ability to persuade (or to command the deference of) a [district] court that might later have been called upon to interpret the Act and the agency's regulations in an [sic] private enforcement action. . . .”

Industrial Cogenerators v. FERC, 47 F.3d 1231, 1235 (D.C. Cir. 1995).

In the matter before us, Grouse Creek relies on a FERC Declaratory Order, issued as the result of an enforcement petition filed with FERC by an entirely separate QF project – Cedar Creek. After the Declaratory Order was issued, the parties to the Cedar Creek case returned to this Commission with terms of a stipulated settlement and requested its approval. Based on the specific facts of the Cedar Creek case and the settlement proposal, we approved the settlement. Order No. 32419. The Grouse Creek projects are distinct in many ways. Grouse Creek has not petitioned FERC for an enforcement order, Grouse Creek has been unable to negotiate a settlement agreeable to all parties, and Grouse Creek is relying on a FERC Declaratory Order that is not binding on this Commission. In addition, Grouse Creek did not sign its PPAs until December 20, 2010 – after the change in eligibility on December 14. Agreements at p. 33. Furthermore, the language of FERC's Declaratory Order leads us to doubt whether FERC understood the basis upon which this Commission made its initial decision to disapprove the Agreements.

The Idaho Commission has aggressively and proactively enforced PURPA, as evidenced by the abundance of QF projects that now operate in our State. We have a long history of recognizing two methods by which a QF can obtain an avoided cost rate in Idaho: (1) by entering into a signed contract with the utility; or (2) by filing a meritorious complaint alleging that “a legally enforceable obligation” has arisen and, but for the conduct of the utility, there would be a contract. *Rosebud Enterprises v. Idaho PUC*, 131 Idaho 1, 951 P.2d 521 (1997); *see also A.W. Brown v. Idaho Power Company*, 121 Idaho 812, 816, 828 P.2d 841, 845 (1992). Our application of this framework conforms with FERC's analysis of its standards. In *JD Wind I*, FERC succinctly 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 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.*

JD Wind 1, 129 FERC ¶ 61,148 at 61,633 (Nov. 19, 2009) (emphases added). FERC determined that, regardless of whether the energy offered was firm or non-firm power, the QF was entitled to a legally enforceable obligation because the utility in *JD Wind* was refusing to enter into a contract with the QF. FERC reiterated its conclusions on reconsideration. *JD Wind 1*, 130 FERC ¶ 61,127 at 61,628. The matter before this Commission involves two parties who voluntarily entered into PPAs with negotiated terms and conditions.

Idaho's framework for determining whether and when a QF can obtain an avoided cost rate is entirely consistent with the federal standards as set out by FERC. Either the parties enter into a contract or, if the utility is failing to negotiate or refusing to enter into a contract with a QF, the QF can file a complaint with this Commission, at which time the Commission will make a determination as to whether and when a legally enforceable obligation arose. In this case, the parties negotiated and executed two Agreements. On December 29, 2010, the parties submitted their PPAs to the Commission for approval. A determination regarding whether and when a legally enforceable obligation arose – outside the specific contract terms – was wholly unnecessary. The Agreements submitted to the Commission for approval included all of the terms and conditions negotiated and agreed to by the parties – including the effective date of the Agreements.

It would be unreasonable and arbitrary for us to supplant the agreed upon terms of a negotiated and signed contract with additional terms and/or conditions without a compelling reason. Moreover, Grouse Creek urged the Commission to approve the Agreements as submitted. When a contract has been entered into by the parties and submitted for approval, there is no need for a determination regarding any other legally enforceable obligation. FERC refers to a legally enforceable obligation in the disjunctive – either a contract is entered into OR a legally enforceable obligation is created. With regard to the subject PPAs between Idaho

Power and Grouse Creek, the legally enforceable obligations of the parties are contained within the four corners of the Agreements.

More importantly, Section 29.1 of each Agreement states that “[t]his Agreement constitutes the entire Agreement of the Parties concerning the subject matter hereof and supersedes all prior or contemporaneous oral or written agreements between the Parties concerning the subject matter hereof.” Agreements ¶ 29.1 (emphasis added). This integration clause⁴ is consistent with the general rule that “when a contract has been reduced to writing, which the parties intend to be a complete statement of their agreement, any other written or oral agreements or understandings . . . made prior to or contemporaneously with the written ‘contract’ and which relate to the same subject matter are not admissible to vary, contradict or enlarge the terms of the written contract.” *Chapman v. Haney Seed Co., Inc.*, 102 Idaho 26, 28, 624 P.2d 408, 410 (1981). Thus, Grouse Creek accepted that, by entering into the PPAs, all prior agreements would be replaced by the terms of the written and signed PPAs – including any agreement or understanding as to a prior legally enforceable obligation. Section 29.1 functions as an acknowledgement by the parties that the terms of the written Agreements supersede all prior oral or written agreements between the parties. *Thomas v. Thomas*, 150 Idaho 636, 644-645, 249 P.3d 829, 837-838 (2011); *Silver Syndicate v. Sunshine Mining Co.*, 101 Idaho 226, 235, 611 P.2d 1011, 1020 (1979).

Grouse Creek’s arguments on remand rely on the FERC Declaratory Order as support that Grouse Creek perfected a legally enforceable obligation “no later than November 8, 2010” (the date that Grouse Creek filed complaints against Idaho Power) or alternatively, it established a legally enforceable obligation “at the very latest on December 9, 2010.” Brief at 3. In either case, Grouse Creek asserts that it formed a legally enforceable obligation prior to December 14, 2010 – the date that the eligibility cap for published avoided cost rates decreased to 100 kW. *Id.* at 2. Even assuming, *arguendo*, that a legally enforceable obligation could somehow preempt the terms of subsequently written and signed Agreements between the parties, we find that a legally enforceable obligation did not exist prior to December 14, 2010.

Turning first to the November 8 date, we find this claim unsupported by the evidence for two reasons. First, we acknowledge that Grouse Creek filed a complaint on November 8,

⁴ In *Primary Health Network v. Idaho Dept. of Administration*, the integration clause stated that “the Agreement supersedes all prior and contemporaneous arrangements, understandings, negotiations and discussion.” 137 Idaho 663, 668 n.2, 52 P.3d 307 312 n.2 (2002).

2010 – just three days after the Joint Motion to Reduce the Published Rate Eligibility Cap was filed by the utilities. However, Grouse Creek subsequently requested that the Commission not serve a summons on Idaho Power because the parties were negotiating and had tentatively reached a settlement. Indeed, a summons was never issued and the parties filed two PPAs for approval with this Commission six weeks later. The complaint process did not need to be initiated because the parties were actively negotiating terms of their Agreements. Grouse Creek also urged the Commission in its written comments in the PPA cases to approve the PPAs – it did not pursue the complaints. Comments at 24. Second, the parties subsequently negotiated and executed PPAs that specifically included language about the written Agreements superseding all prior agreements. *See supra* pp. 13-14. Based on these facts, we cannot find that a legally enforceable obligation arose on or by November 8, 2010.

The utility did not refuse to sign a contract. In fact, ongoing negotiations led to the parties' voluntarily entering into two subsequent PPAs. Grouse Creek never initiated a complaint process because Agreements were negotiated and Grouse Creek urged the Commission to approve the terms of the Agreements. We find that no conduct by the utility unnecessarily delayed or impeded Grouse Creek's ability to enter into its Agreements. Because the utility did not impede Grouse Creek's ability to enter into PPAs, a determination regarding a legally enforceable obligation was never triggered. This Commission did not substitute a "fully executed contract" standard in place of a "legally enforceable obligation," nor did we require a fully executed contract as a condition precedent to the creation of a legally enforceable obligation. We simply acknowledged the distinction between the concepts and looked to the terms of the unambiguous Agreements signed by both parties and submitted to the Commission for approval. Grouse Creek cannot now argue against terms that are included in its contracts simply because those terms do not provide it with a favorable outcome.

We also find that the evidence and the conduct of the parties do not support that a legally enforceable obligation was formed no later than December 9, 2010. First, on December 9, 2010, Grouse Creek requested that the PPAs be amended to delay the two operational dates by six months. Brief at 14-15. In addition, Idaho Power notes that it requested information on both December 7 and December 14, 2010, and notified Grouse Creek that the projects failed to provide a complete location designation which is necessary to establish both compliance with the one-mile separation rule and provide a proper legal description of the projects' locations. Idaho

Power also maintains that the projects failed to name the transmission entity – Grouse Creek had indicated at different times that it would either be BPA or PacifiCorp. Grouse Creek confirmed the operation dates and the legal descriptions on December 15, 2010 – a day after the eligibility cap was reduced. *Id.* at 11-12. Idaho Power formally agreed to the delay on December 16, 2010. *Id.* at 15.

After receiving the final material terms, Idaho Power forwarded executable PPAs to Grouse Creek for signature on December 16, 2010. Brief at 15-16. Grouse Creek reviewed the documents and signed the PPAs four days later – on December 20, 2010.⁵ Idaho Power reviewed the documents and signed on December 28, 2010. Consequently, we find that negotiations were on-going and that material terms to the Agreements were still in flux on and after December 14, 2010 – the date upon which eligibility to published avoided cost rates became effective. Therefore, assuming that a determination regarding when a legally enforceable obligation arose is necessary, we find that a legally enforceable obligation did not arise prior to December 14, 2010, because material terms to the Agreements were still incomplete on that date.

Finally, this Commission determined that it was not in the public interest to approve the Agreements. Specifically, we found that “allowing a project to avail itself of an eligibility cap (and therefore published rates) that is no longer applicable could cause ratepayers to pay more than the utility’s avoided cost.” Order No. 32299 at 8. For this Commission to approve a rate in excess of the utility’s avoided cost would clearly be a violation of PURPA and FERC’s implementing regulations. *A.W. Brown*, 121 Idaho 812, 818, 828 P.2d 841, 847 (1992).

We find that Idaho Power and Grouse Creek were in the process of actively negotiating terms of two PPAs when the eligibility for published avoided cost rates changed. The parties entered into their contracts on December 28, 2010. By the express terms of the Agreements negotiated and signed by the parties, the Agreements’ “effective date” is December 28, 2010 – 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. Because the parties have existing contracts, and we find no undue or unreasonable delay on the part of Idaho Power, a determination of the existence of a legally enforceable obligation at another point in time is unnecessary. Moreover, the parties agreed that all prior agreements were superseded

⁵ The affidavit and comments both state that the PPAs were signed on December 21, 2010, but the PPAs themselves show the date as December 20, 2010.

by the December 28, 2010 PPAs. Here the Commission did not have to determine whether a legally enforceable obligation arose because the parties entered into written Agreements. Therefore, we affirm our prior decision that, because each PPA became effective on December 28, 2010, and each project is larger than 100 kW, published rates are not available to the projects.⁶ We also find that the Agreements expressly supersede all prior agreements, including any entitlement to an otherwise enforceable legal obligation. The rates in the Agreements, as written, do not comply with Commission Order No. 32176. These findings are consistent with the expressed intent and spirit of PURPA and the FERC regulations.

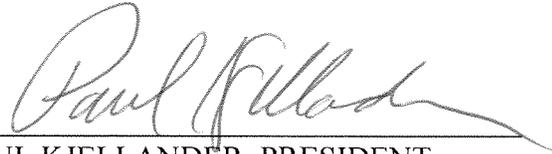
ORDER

IT IS HEREBY ORDERED that the Power Purchase Agreements between Idaho Power and Grouse Creek Wind Park and Grouse Creek Wind Park II are not approved because the rates included in the Agreements were no longer available at the time the Agreements were executed and became effective.

THIS IS A FINAL RECONSIDERATION ORDER ON REMAND. Any party aggrieved by this Order may appeal to the Supreme Court of Idaho as provided by the Public Utilities Law and the Idaho Appellate Rules. *See Idaho Code* § 61-627.

⁶ The same reasoning would apply if we were to use the date (December 20, 2010) that Grouse Creek signed the Agreement.

DONE by Order of the Idaho Public Utilities Commission at Boise, Idaho this 7th
day of September 2012.



PAUL KJELLANDER, PRESIDENT

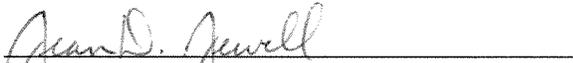


MACK A. REDFORD, COMMISSIONER



MARSHA H. SMITH, COMMISSIONER

ATTEST:



Jean D. Jewell
Commission Secretary

O:IPC-E-10-61_IPC-E-10-62_ks7