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IDAHO PUBLIC
UTILITIES COMMISSION

**BEFORE THE**

**IDAHO PUBLIC UTILITIES COMMISSION**

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| IN THE MATTER OF IDAHO POWER COMPANY'S PETITION FOR DECLARATORY ORDER REGARDING PURPA JURISDICTION | **CASE NO. IPC-E-11-14**<br><br>**ANSWER AND MOTION TO DISMISS OF WESTERN DESERT ENERGY, LLC AND TUMBLEWEED ENERGY, LLC** |

**COMES NOW,** Western Desert Energy, LLC and Tumbleweed Energy, LLC ("Western Desert" "Tumbleweed" or collectively "Respondents") and hereby file their collective Answer to Idaho Power Company's ("Idaho Power") Petition for a Declaratory Order Regarding PURPA Jurisdiction ("Petition") and Motion to Dismiss the same. This Answer is filed pursuant to Rule 57(2) of the IPUC Rules of Procedure. This Motion to Dismiss is filed pursuant to Rule 56 of the IPUC Rules of Procedure.

## INTRODUCTION

Respondents are non-utility power producers known as "qualifying small power production facilities" ("QFs"), see 16 U.S.C. Sec. 796(17)(C), (18)(B). QFs are a class of facilities, defined by their size, fuel use, efficiency, and ownership, see *FERC v. Mississippi*, 456 U.S. 742, 750 & n. 11, 102 S.Ct. 2126, 2132 & n. 11, 72 L.Ed.2d 532 (1982).

Western Deseret is, as described in Idaho Power's Petition, developing a five megawatt wind QF in Owyhee County, Idaho. It had a power purchase agreement ("PPA") with Idaho Power Company that was rejected by the Idaho Public Utilities Commission ("Commission") on June 8, 2011 in Order No. 32258. The PPA was rejected because the proposed project exceeds the newly established ceiling of 100 kw for wind projects in Idaho to be entitled to published avoided cost rates. Western Desert has spent considerable time and money developing its project. Western Desert has investigated the possibility of obtaining a PURPA contract in Idaho under the IRP methodology. Although it has not asked Idaho Power to run an IRP model of its project, Western Desert understands that IRP modeling results are not favorable for the development of wind projects in Idaho. It has decided not to sell the output from its QF wind project to any utility that is operating under the jurisdiction of the Idaho Public Utilities Commission.

Tumbleweed is, as described in Idaho Power's Petition, developing a ten megawatt wind QF in Elmore County, Idaho. It did not have a power purchase agreement ("PPA") with Idaho Power Company but has been in negotiations with Idaho Power for a PPA. In light of the newly established ceiling of 100 kw for wind projects in Idaho to be entitled to published avoided cost rates, Tumbleweed has decided not to sell the output from its QF wind project to any utility that is operating under the jurisdiction of the Idaho Public Utilities Commission.

Your Respondents' Answer and Motion to Dismiss is based on the following arguments showing that Idaho Power's Petition is fatally flawed. Idaho Power fails to cite to any order, law or rule upon which it is based, as required by Commission rule. Furthermore, the Commission is prohibited by federal law from regulating QFs, and hence does not have authority to restrict their access to markets. Granting the Petition would violate the Commerce Clause of the United States Constitution by restricting QFs from access to markets outside of the boundaries of Idaho. Finally, FERC rules specifically require utilities to wheel (even involuntarily) QF output to third party purchasers and prohibit utility-type regulation of QFs.

## IDAHO POWER'S REQUEST

Idaho Power makes a seemingly simple and direct request for a declaratory order from this Commission:

> More specifically, Idaho Power requests findings by the Commission stating that a QF located in Idaho Power's service territory in the state of Idaho, interconnecting with Idaho Power's system in the state of Idaho, must contract, with Idaho Power pursuant to the Idaho Commission's PURPA rules, rates, and regulations.

Petition at 12.

## IDAHO POWER'S PETITION VIOLATES THE COMMISSION'S RULES BY FAILING TO CITE TO CONTROLLING OR SUPPORTING LAW

Idaho Power filed its Petition "pursuant to RP 101."[1] That Rule requires all petitions for declaratory rulings to "Indicate the statute, order, rule, or other controlling, law . . . on which the petitioner relies to support its petition." Idaho Power does not cite to a single statute or rule

[1] Petition at 1. RP is a reference to the Rules of Procedure of the Idaho Public Utilities Commission.

anywhere in its twelve page Petition. No state statute or rule conferring the Commission with jurisdiction over to whom a QF may sell its output is cited. No federal statute or rule conferring the Commission with jurisdiction over to whom a QF may sell their output is cited. Obviously no such statute or rule exists.

The only legal authorities contained in the Petition are three complaint cases that were heard by the Idaho Commission and one Idaho Supreme Court case: *Earth Power Minerals, Inc. v. Idaho Power Company,* IPC-E-92-29 (1993); *Island Power Company, Inc. v. PacifiCorp,* UPL-E-93-4; *Vaagen Brow. Lumber, Inc. v. The Washington Water Power Company,* WWP-E-94-6; and *Afton Energy Inc., v. Idaho Power Company* 107 Idaho 781, 693 P.2d 427 (1984); 111 Idaho 925 729 P.2d 400 (1986); 114 Idaho 852, 761 P.2d 1204 (1988); 122 Idaho 333, 834 P.2d 850 (1992). The three IPUC complaint cases and the Idaho Supreme Court's *Afton* decision comprise the full extent of Idaho Power's legal authority relied upon in its Petition. As discussed below, none of the four cited legal authorities provide even a modicum of support for the incredible request that the Commission close Idaho's borders to exported wholesale electric power.

## THE IDAHO PUBLIC UTILITIES COMMISSION DOES NOT HAVE JURISDICTION OVER QFs AND HENCE CANNOT ORDER QFs TO SELL THEIR ELECTRIC OUTPUT TO A UTILITY OF IDAHO POWER'S CHOOSING

The fundamental premise of Idaho Power's request is that the Commission has the requisite legal authority to act upon that request. The Commission must have regulatory authority over QFs before it can legally order them to sell their output to Idaho Power. As noted above, Idaho Power cites to no rule or law conferring that jurisdiction on the Commission. In

addition, none of the three PUC cases Idaho Power cites, nor the Idaho Supreme court case it cites, confer that jurisdiction.

Of course, it would be absurd on its face to rely on any of the IPUC complaint cases cited by Idaho Power as the foundational source of the Commission's jurisdiction over QFs – if that were so, then the Commission would be conferring jurisdiction on itself. It is well settled that the Commission is a creation of the legislature -- not the legislature itself. As early as 1921, the Idaho Supreme Court made clear that the Commission only has jurisdiction over public utilities:

> [Y]et in every case before the Public Utilities Commission, it must in the first instance determine from the evidence before it whether the utility with which it is seeking to deal is a public utility, for unless it be a public utility, the commission is without any jurisdiction over it whatsoever...

Natatorium Co. v. Erb, 34 Idaho 209, 215, 200 P. 348 (1921).

The Commission's jurisdiction is statutorily derived and cannot be expanded without legislative action. "The Public Utilities Commission has no inherent power; its powers and jurisdiction derives in its entirety from the enabling statutes, and nothing is presumed in its jurisdiction." Lemhi Telephone Co. v. Mt. States Tele. & Tele. Co., 98 Idaho 692, 696, 571 P. 2d 753 (1977). "The power which the Commission has is that given by the legislature. It has no other. It exercises a limited jurisdiction; nothing is presumed in favor of its jurisdiction." (Citations omitted). The general rule is stated in 42 Am.Jur. 440, § 109, as:

> Administrative authorities are tribunals of limited jurisdiction. Their jurisdiction is dependent entirely upon the provisions of the statutes reposing power in them; they cannot confer it upon themselves, although they may determine whether they have it. If

> the provisions of the statutes are not met and complied with, they have no jurisdiction." Arrow Transportation Co. v. Idaho Public Utilities Comm'n, 85 Idaho 307, 313-314, 379 P.2d 422 (1963), citing Malone v. Van Etten, 67 Idaho 294, 178 P.2d 382, 383; In the Matter of the Jurisdiction of the Oregon P. U. C., 201 Or. 1, 268 P.2d 605; 42 Am. Jur., Pub.Ad.Law., secs. 109, 157; I.C. § 61-808; 49 U.S.C. § 312(a).

The enabling statute for the Commission is clear and unequivocal, and narrowly circumscribes the Commission's jurisdiction:

> 61-501. INVESTMENT OF AUTHORITY. The public utilities commission is hereby vested with power and jurisdiction to supervise and regulate every public utility in the state and to do all things necessary to carry out the spirit and intent of the provisions of this act.

I.C. § 61-501 (emphasis supplied). The express scope of the Public Utilities Law is limited to the supervision and regulation of public utilities in Idaho. There is no provision in the Public Utilities Law that requires or permits the Commission to regulate QFs and such authority is not "necessary" to carry out the "spirit and intent" of the Commission's regulatory and supervisory authority over public utilities.

In all three of the IPUC cases cited by Idaho Power, the Commission was asked to exercise jurisdiction over an Idaho utility in order to require the utility to purchase QF power pursuant to the Idaho Commission's jurisdictional authority over utilities operating in Idaho. In none of those cases did the Commission exercise jurisdiction over the QF that was seeking a PURPA contract with an Idaho utility over which the Idaho PUC had jurisdiction.

The Idaho Supreme Court case cited by Idaho Power likewise does not confer jurisdiction on the Commission over QFs. The *Afton* line of case were about whether an Idaho utility under the Idaho Commission's regulatory authority could be required to purchase QF power generated outside of the State of Idaho. It certainly was not about granting the Commission jurisdiction over QFs.

It is clear from the above, that; (1) Idaho Power has not complied with IPUC Rule of Procedure 101 that it, "Indicate the statute, order, rule or other controlling law . . .upon which the petitioner relies;" and (2) the Commission does not have jurisdiction over QFs.

**THE COMMISSION IS PROHIBITED FROM REGULATING QFS**

In addition to having no jurisdiction over QFs, the Idaho Commission is prohibited from regulating QFs by federal law. QFs are entitled to special treatment under federal and state laws regulating power producers. See 16 U.S.C. Sec. 824a-3(e)(1); 18 C.F.R. Sec. 292.602(c)(1). The Federal Energy Regulatory Commission (FERC) promulgates regulations affecting QFs. State utility regulatory commissions such as the Idaho PUC implement FERC's regulations on the purchases and sales of power between utilities and QFs. In passing the legislation authorizing special rules for QFs, the Public Utility Regulatory Policies Act of 1978 (PURPA), Congress viewed QFs as desirable alternatives to traditional electric utility generating facilities. See *FERC v Mississippi*, 456 U.S. at 750, 102 S.Ct. at 2132. At that time, Congress perceived two impediments to QF development: the reluctance of public utilities to sell power to and buy power from QFs; and the financial burdens imposed on QFs by state and federal laws designed to regulate utilities providing electricity to the public. See id. at 750-51, 102 S.Ct. at 2132-34. To overcome the first impediment, Congress mandated that FERC promulgate regulations, for states

to implement, governing transactions between utilities and QFs, including a requirement that utilities purchase electricity from QFs at a rate up to the utility's avoided cost (i.e., the utility's cost if it generated the power itself, or purchased it from another source). See 16 U.S.C. Sec. 824a-3(b), -3(d). To solve the second problem, Congress eased the financial burdens on QFs by authorizing FERC to exempt QFs from certain federal laws, and from state laws or regulations "respecting the rates, or respecting the financial or organizational regulation, of electric utilities," if necessary to encourage QFs. Id. Sec. 824a-3(e). FERC's exemptions for QFs are codified at 18 C.F.R. §§ 292.601 and .602. Because QFs are exempt from utility-type regulation pursuant to federal law, the Idaho Commission is precluded from regulating when or where a QF chooses to make sales for resale under PURPA.

## PROHIBITING QFS FROM SELLING THEIR OUTPUT IN OTHER STATES VIOLATES THE INTERSTATE COMMERCE CLAUSE

Idaho Power requests an order from the Commission that the power produced in its service territory by QFs should remain in Idaho Power's service territory. This request directly implicates the Commerce Clause of the United States Constitution, Art. I, § 8 Clause 3. Essentially, the result of Idaho Power's request would be the restriction of the flow of privately owned and produced electricity in interstate commerce.

It has been clearly established that the buying and selling of power is a matter covered by the Commerce Clause. *FERC v. Mississippi* supra; *Re: Orange & Rockland Utilities, Inc.* 92 P.U.R. 4th 1 (FERC Docket No. EL87-53-000 April 14, 1988.) (Purchase of electricity by any

utility is a transaction in interstate commerce so long as the purchased electricity enters an interstate grid.)

The United States Supreme Court has consistently reiterated that the Commerce Clause "precludes a state from mandating that its residents be given a preferred right of access, over out-of-state consumers, to natural resources located within its borders or to the products derived therefrom." *New England Power Co. v. New Hampshire,* 455 U.S., 71 L.Ed.2d 188, 102 S. Ct. 1096 (1982); see also *City of Philadelphia v. New Jersey,* 437 U.S. 617, 57 L.Ed.2d 475, 98 S. Ct. 2531 (1978) (a state is powerless to prevent privately owned articles of trade from being shipped and sold in interstate commerce because those articles are required to satisfy local demands or are needed by the states' citizens.)

In *New England Power,* the New Hampshire public utility commission prohibited New England Power from selling its hydro electric output outside of the state of New Hampshire. The Supreme Court pointed out that the ban "is precisely the sort of protectionist regulation that the Commerce Clause declares off limits to the states...Moreover, it cannot be disputed that the commission's 'exportation ban' places direct and substantial burdens on transactions in interstate commerce." *New England Power,* 455 U.S. at 339, 71 L.Ed.2d at 195, 102 S.Ct. at 1101. The action of the commission violated the Commerce Clause because the burdens imposed by its order were justified by nothing more than a desire to advance simple economic protectionism.

If this Commission were to force the sale of power generated in Idaho Power's service territory to just Idaho Power, it would be essentially restricting Idaho based QFs from selling their power into any other state. The situation here is exactly on point with the facts in *New*

*England Power* because Idaho Power is asking this Commission to prohibit an Idaho based wind QF from transmitting its output across state lines. This restriction of the sale of power would burden transactions in interstate commerce, without serving any rational state purpose, and would be an unlawful restriction of the interstate sale of electricity.

## FERC RULES SPECIFICALLY REQUIRE UTILITIES TO WHEEL QF OUTPUT TO THIRD PARTY PURCHASERS

Idaho Power attempts to divert the Commission's attention by complaining that Idaho based QFs are taking advantage of Oregon's higher avoided cost rates by having their power delivered to Oregon. The short answer to this contention is that there is nothing unjust about an Idaho based QF seeking the best available market for its power. In fact, PURPA was enacted, in part, in order to create just such a market for independent power production. This purpose is clearly evidenced by the fact that PURPA, through FERC regulation, specifically gives QFs the legal right to deliver power to the market of their choice: 18 C.F.R. § 292.303(d) provides:

> *Transmission to other electric utilities.* If a qualifying facility agrees, an electric utility which would otherwise be obligated to purchase energy or capacity from such qualifying facility may transmit the energy or capacity to any other electric utility. Any electric utility to which such energy or capacity is transmitted shall purchase such energy or capacity under this subpart as if the qualifying facility were supplying energy or capacity directly to such electric utility. The rate for purchase by the electric utility to which such energy is transmitted shall be adjusted up or down to reflect line losses pursuant to § 292.304(e)(4) and shall not include any charges for transmission. [2]

The intent of this federal regulation is to give QFs the option to deliver power to utilities other than the utility to which the QF is physically interconnected. Furthermore in doing so, the QF

[2] According to FERC, "any person generating electric energy for sale for resale (including QFs) may obtain involuntary wholesale transmission service." *In Re Utah Power & Light* 62 FERC 61,236 (1993) p. 3.

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 29th day of July, 2011, a true and correct copy of the within and foregoing ANSWER AND MOTION TO DISMISS was served by ELECTRONIC MAIL and US MAIL, to:

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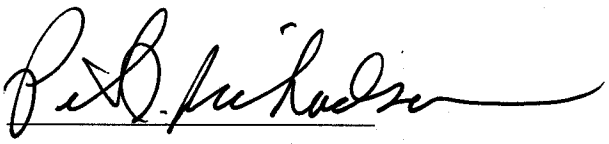
By: 

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does not have to sacrifice its right to demand that the utility purchasing the power do so at the established PURPA rates.

## CONCLUSION

Tumbleweed and Western Desert respectfully request the Commission issue its order in this matter summarily dismissing Idaho Power's Petition for a Declaratory Ruling, with prejudice. Tumbleweed and Western Desert do not believe either a hearing or oral argument will necessary for the Commission to grant their Motion to Dismiss. Nevertheless, both stand ready to participate in any oral argument or hearing should the Commission so decide.

**RESPECTFULLY SUBMITTED** this 29th day of July, 2011

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