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2012 APR -3 PM 4:03  
IDAHO PUBLIC  
UTILITIES COMMISSION

Chas. F. McDevitt  
Dean J. (Joe) Miller

April 3, 2012

*Via Hand Delivery*

Jean Jewell, Secretary  
Idaho Public Utilities Commission  
472 W. Washington St.  
Boise, Idaho 83720

**Re: In the Matter of the Application of Rainbow Ranch Wind LLC  
of Rainbow West Wind LLC  
IPC-E-12-11**

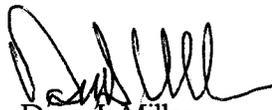
Dear Ms. Jewell:

Enclosed for filing, please find an original and seven (7) copies of Rainbow Ranch Wind, LLC and Rainbow West Wind, LLC's Answer to Idaho Power Company's Motion to Dismiss.

Kindly return a file stamped copy to me.

Very Truly Yours,

McDevitt & Miller LLP



Dean J. Miller

DJM/hh  
Encl.

ORIGINAL

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2012 APR -3 PM 4: 03

IDAHO PUBLIC  
UTILITIES COMMISSION

*Attorneys for Rainbow Ranch Wind LLC*  
*Attorneys for Rainbow West Wind LLC*

BEFORE THE IDAHO PUBLIC UTILITIES COMMISSION

IN THE MATTER OF THE PETITION  
AND OF RAINBOW RANCH WIND LLC  
AND RAINBOW WEST WIND LLC TO  
MODIFY PRIOR ORDER No. 32300 AND  
APPROVE FIRM ENERGY  
SALES AGREEMENTS

**Case No. IPC-E-12-11**

**RAINBOW'S ANSWER TO IDAHO  
POWER COMPANY'S MOTION TO  
DISMISS**

COME NOW Rainbow Ranch Wind LLC and Rainbow West LLC (collectively referred to as "Rainbow") and, pursuant to RP 57.03, submits the following Answer to Idaho Power Company's ("Idaho Power" or "IPCo") Motion to Dismiss (Motion) dated March 23, 2012. Rainbow respectfully requests that the Motion be denied, and in support thereof respectfully shows as follows, to wit:

## STANDARD OF REVIEW

The standard of review upon a motion to dismiss is well settled. A motion to dismiss should not be granted unless it appears beyond doubt that the claimant can prove no set of facts in support of his claim that would entitle him to relief. *Hadfield v. State*, 86 Idaho 561, 388 P.2d 1018 (1963). A motion to dismiss admits the truth of facts alleged, and all intendments and inferences that reasonably may be drawn therefrom, and such will be considered in light most favorable to the plaintiff. *Walenta v. Mark Means*, 87 Idaho 543, 394 P.2d 329 (1964). *See also*, IRCP 12 (b)(6).

## ARGUMENT

### 1. Rainbow's Petition is Not a Collateral Attack Upon Order No. 32256.

At pages 8-12 of the Motion, Idaho Power argues that Rainbow's Petition is an impermissible collateral attack upon Order No. 32256. As demonstrated below, Idaho Power misunderstands the doctrine of collateral attack.

First, Idaho Power overlooks and fails to analyze Idaho Code §61-624, which provides:

**“Rescission or change of orders.** The commission may at any time, upon notice to the public utility affected, and after opportunity to be heard as provided in the case of complaints, rescind, alter or amend any order or decision made by it. Any order rescinding, altering or amending a prior order or decision shall, when served upon the public utility affected, have the same effect as is herein provided for original orders or decisions.”

On several occasions the Commission has used its authority under Idaho Code §61-624 to modify or amend existing final orders even when no appeal was taken from the initial order. Three examples follow:

In Case No. PAC-E-01-14, *In Re: Petition of PacifiCorp to Modify Order No. 28213*, the Commission had previously approved the merger of PacifiCorp and Scottish Power PLC, subject to various terms and conditions, including performance standards and customer guarantees. One condition was that 80% of customer calls to PacifiCorp call centers be answered within 10 seconds (the 80/10 Standard). In Case PAC-E-01-14, PacifiCorp petitioned to modify Order No. 28213, by eliminating the 80/10 based on new information or changed circumstances. PacifiCorp asserted there was an unanticipated increase in the number and complexity of calls to call centers that were not envisioned when it agreed to the conditions in Order No. 28213. The Commission found this new information was sufficient to justify modification of the previous Order. *See* Order No. 28999.

In Case No. QWE-T-04-11, *In Re: Petition of Qwest Corporation to Modify Rate Consolidation Order No. 28943*, two local exchanges were originally consolidated as a rate center to facilitate possible extended area service (EAS). In its Petition, Qwest asserted that in the two years since the initial order, EAS activity relating to the exchanges had not materialized and other new facts justified consolidating the two exchanges into the Idaho Falls rate center. The Commission found this new information sufficient to justify amendment of the prior Order. *See*, Order No. 29525.

In Case No. IPC-E-10-28, *In Re: Application of Idaho Power Company to Amend Accounting Order No. 30940*, the Commission had previously entered an order authorizing Idaho Power to record and defer unrecovered transmission-related revenues that were disallowed in a rate case before the FERC. Subsequent activity at FERC, and the associated time to accomplish it, resulted in a new deferral amount and the need for a

new beginning date for the amortization period. The Commission found these new facts to be a sufficient basis to modify the previous order. See, Order No. 32177<sup>1</sup>.

These cases have three things in common. First, in each case there was not an appeal of the initial order. Second, in each case new facts or circumstances justified modification of the existing order. Third, there was no suggestion by the Commission in any of the cases that modification based on new facts constituted a collateral attack on the previous orders.

Here, the FERC *Cedar Creek Order* is a new fact or circumstance similar to those discussed above justifying modification of Order No. 32256, which held, in essence, that a legally enforceable obligation may be created only by a fully executed contract. The *Cedar Creek Order* provides a clarification to the law relating to legally enforceable obligations that was unavailable to the Commission when it issued Order No. 32256, and is thus a new circumstance. Accordingly, whether the Rainbow Petition is considered as a motion to modify Order No. 32256 or as a new application, it is not barred by the doctrine of collateral attack.

Idaho Power's Motion also fails to cite or analyze relevant Idaho Supreme Court precedent, specifically the case of *Associated Pac. Movers v. Rowley*, 97 Idaho 663, 551 P.2d 618 (1976). As Rainbow explained in its Petition, in *Rowley*, the Commission entered an order denying a motor carrier permit, and the applicant neither filed a petition for reconsideration nor filed a notice of appeal. Later the applicant filed a second application seeking the same authority, which the Commission granted. The second

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<sup>1</sup> In Staff's Comments filed in this case, Staff argued Idaho Power's failure to appeal the initial order was a bar to the subsequent proceeding. The Commission was apparently not impressed with the argument, as it was not discussed in the findings and conclusions of Order No. 32177.

application was supported by testimony of witnesses who were unavailable to the applicant in the earlier proceeding. 97 Idaho at 665.

On appeal, the Protestants to the application argued that the award of the permit in the second application amounted to a collateral attack on the first order and thereby violated Idaho Code §61-625. The Court rejected this argument, noting “Any modification of an existing order under Idaho Code §61-624 arguably could be a collateral attack on that order, but such an interpretation would bring those two consecutive statutory sections into direct conflict, a result we cannot support”. 97 Idaho at 664-665. Relying on an Arizona Supreme Court case considering a similar statutory scheme, the court clarified that “collateral attack” means an attack such as an application to a court for injunctive relief against an order of the Commission, but it does not include an application to the Commission to modify an existing order based on new facts or information. Thus, whether considered a petition to modify an existing order or as a new application—like in *Rowley*—this pleading does not violate Idaho Code §61-625.

Here, in Order No. 32256, based on the terms of the agreements, the Commission determined that the projects were not entitled to published avoided cost rates because, at the time the agreements became effective, published rates were available only to wind and solar projects with a design capacity of 100kW or less. (Order No 32256 at 14).

The *Cedar Creek Order*, however, reaffirms FERC's regulations providing that entitlement of published rates may arise from an executed contract or from a “non-contractual, but still legally enforceable obligation”:

“[w]hile 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." 137 FERC 61,006 at pg. 13.

Idaho Power's Motion does cite one Idaho Supreme Court case, *Utah-Idaho Sugar Co., v. Intermountain Gas Co.*, 100 Idaho 368, 597 P.2d 1056 (1979). The facts of *Intermountain Gas*, however, detract from Idaho Power's argument, more than they help it. There, U & I had notice of a pending Intermountain Gas rate case but neither sought intervention nor petitioned for reconsideration from the Commission's final order, unlike Rainbow. Subsequently U & I filed a separate complaint alleging that the rates approved by the Commission in the rate case were unreasonable and the procedures followed in the rate case were improper. The Commission dismissed the complaint and the Supreme Court affirmed, holding the complaint was an impermissible collateral attack.

In *Intermountain*, the U & I complaint did not allege the existence of new information that should be taken into account; rather it argued the rate case order was wrongly decided. *Intermountain* thus makes clear that a subsequent direct challenge to the propriety of a final order that has become non-appealable is a collateral attack. *Rowley*, on the other hand, makes clear that a subsequent proceeding based on new information is not a collateral attack. *Rowley*, not *Intermountain*, controls the facts of this case.

2. Neither the Doctrine of Collateral Estoppel nor Res Judicata Bar the Rainbow Petition.

At pages 12-13, the Idaho Power Motion argues that the Rainbow Petition is barred by the doctrines of collateral estoppel and res judicata. This argument is easily disposed of by observing that the Rainbow Petition does not seek to re-litigate Order No. 32256. Rather, the Petition calls to the Commission's attention new facts and circumstances—the *Cedar Creek Order*—which facts and circumstances did not exist when Order No. 32256 was issued. Both the doctrines of collateral estoppel and res judicata require, as the IPCo Motion points out, that the issue decided in the prior litigation was identical to the issue presented in the present action. Here, the issues are not identical because the Petition is based on new facts and circumstances.

3. Whether Idaho Power Delayed Negotiations is Not an Issue Properly Before the Commission on a Motion to Dismiss.

At pages 14-16, Idaho Power presents factual allegations to support its contention it did not intentionally delay negotiations. As pointed out in Standard of Review, *supra*, the function of a motion to dismiss is to test the sufficiency of the pleading initiating a proceeding. It is not the function of a motion to dismiss to set forth additional factual allegations which are in the nature of an affirmative defense. Whether Idaho Power was guilty of foot-dragging, and whether that is relevant to whether a legally enforceable obligation arose, is an issue to be decided after an evidentiary hearing or such other procedure as the commission may adopt.

4. The Cedar Creek Order Clarifies the Proper Role of a Public Interest Analysis.

The final section of Idaho Power's Motion to Dismiss argues that Order No. 32256 found it would not be in the public interest to approve contracts that were not fully executed before December 14, 2010. This is true enough, but it does not help Idaho Power. The *Cedar Creek Order* makes it clear that a QF by committing itself to sell to an electric utility, also commits the electric utility to buy from the QF and the resulting legally enforceable obligation cannot be eradicated by a more general public interest analysis. 137 FERC 61,006 at pg. 13.

**CONCLUSION**

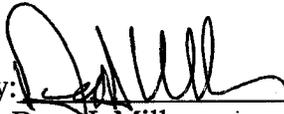
As noted *supra*, for the purpose of a motion to dismiss the allegations of the initial pleading must be taken as true. Of specific importance in this case are the allegations of paragraphs 32-35 of Rainbow's Petition that it incurred a legally enforceable obligation prior to December 14, 2010. Idaho Power does not seriously dispute these allegations. Rather, Idaho Power raises a series of procedural objections, all designed to prevent consideration of the substantive question of whether the guidance provided by the *Cedar Creek Order* compels a different conclusion than that reached in Order No. 32256. As demonstrated above all of these procedural objections are without merit.

Accordingly, Idaho Power's attempts to deflect attention from the merits the case should be rejected and the Motion to Dismiss should be denied.

ORAL ARGUMENT IS REQUESTED

DATED this 3 day of April, 2012.

**MCDEVITT & MILLER, LLP**

By:   
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Dean J. Miller

Attorney for Rainbow Ranch Wind LLC  
and Rainbow West Wind LLC

**CERTIFICATE OF SERVICE**

I hereby certify that on the 3rd day of April, 2012, I caused to be served, via the method(s) indicated below, true and correct copies of the foregoing document, upon:

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BY: Heather Houle  
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