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IDAHO PUBLIC  
UTILITIES COMMISSION

**JASON B. WILLIAMS**  
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March 22, 2012

**VIA HAND DELIVERY**

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

Re: Case No. IPC-E-12-11  
*IN THE MATTER OF THE PETITION OF RAINBOW RANCH WIND LLC  
AND RAINBOW WEST WIND LLC TO MODIFY ORDER NO. 32300 OR  
IN THE ALTERNATIVE APPLICATION FOR APPROVAL OF FIRM  
ENERGY SALES AGREEMENT*

Dear Ms. Jewell:

Enclosed for filing please find an original and seven (7) copies of Idaho Power Company's Answer and Motion to Dismiss in the above matter.

Very truly yours,



Jason B. Williams

JBW:csb  
Enclosures

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Attorneys for Idaho Power Company

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IDAHO PUBLIC  
UTILITIES COMMISSION

BEFORE THE IDAHO PUBLIC UTILITIES COMMISSION

IN THE MATTER OF THE PETITION OF )	
RAINBOW RANCH WIND LLC AND )	CASE NO. IPC-E-12-11
RAINBOW WEST WIND LLC TO )	
MODIFY ORDER NO. 32300 OR IN THE )	IDAHO POWER COMPANY'S
ALTERNATIVE APPLICATION FOR )	ANSWER AND MOTION TO
APPROVAL OF FIRM ENERGY SALES )	DISMISS
AGREEMENT. )	
_____ )	

COMES NOW, Idaho Power Company ("Idaho Power" or "Company") and, pursuant to RP 057 hereby answers the Petition and Application of Rainbow Ranch Wind, LLC, and Rainbow Ranch West Wind, LLC ("Rainbow") to Modify Order No. 32300 ("Petition and Application") and to approve the previously disapproved Firm Energy Sales Agreements ("FESA") between Rainbow and Idaho Power.

In addition, Idaho Power, pursuant to RP 56, hereby respectfully moves the Idaho Public Utilities Commission ("Commission") to dismiss Rainbow's Petition and Application.

**I. ANSWER**

Any allegation not specifically admitted herein shall be considered to be denied.

See RP 57.02.a.

1. Idaho Power admits that the Petition identifies Idaho Power Company as the person petitioned against but denies all other allegations of paragraph 1 of the Petition.

2. Idaho Power admits that the Commission issued Order No. 32300 and that the Federal Energy Regulatory Commission ("FERC") issued an order on October 4, 2011, 137 FERC ¶ 31,006 ("Cedar Creek Order"), but does not agree with the the Petition's characterization of those orders and therefore denies those allegations. Idaho Power affirmatively asserts the orders speak for themselves.

3. Idaho Power admits that Order No. 32300 is a final, conclusive non-appealable order of the Commission. Idaho Power denies the remaining allegation in paragraph 3 of the Petition.

4. Idaho Power admits that Rainbow Ranch's Petition is alternatively styled as an "Application." The first and second sentences of paragraph 4 of the Petition are legal conclusions and require no response from Idaho Power. Idaho Power denies all other allegations of paragraph 4 of the Petition.

5. Idaho Power has insufficient information or knowledge to admit or deny the truth as to the allegations in paragraph 5 of the Petition and therefore denies those allegations.

6. Idaho Power affirmatively asserts that it submitted Applications in Case Nos. IPC-E-10-59 and IPC-E-10-60 related to the Rainbow Ranch projects and that those Applications speak for themselves and require no further response by Idaho Power herein.

7. Idaho Power affirmatively asserts that it submitted Applications in Case Nos. IPC-E-10-59 and IPC-E-10-60 related to the Rainbow Ranch projects and that those Applications speak for themselves and require no further response by Idaho Power herein.

8. Idaho Power admits that the Commission issued Order Nos. 32256 and 32300 but does not agree with the Petition's characterization of those Orders and therefore denies those allegations. Idaho Power affirmatively asserts that the Orders speak for themselves and require no further response by Idaho Power herein.

9. Idaho Power admits that FERC issued the Cedar Creek Order but does not agree with the Petition's characterization of that order and therefore denies those allegations. The FERC Order speaks for itself and requires no further response by Idaho Power herein.

10. Idaho Power admits that Rainbow Ranch filed a Petition for Enforcement at FERC ("FERC Petition") but does not agree with the Petition's characterization of such filing and therefore denies the remainder of the allegations in paragraph 10 of the Petition. Idaho Power affirmatively asserts that the FERC Petition speaks for itself and requires no further response by Idaho Power herein.

11. Idaho Power admits that Order No. 32300 is a final, conclusive, non-appealable Commission Order and, pursuant to Idaho Code § 61-625, that Order is not subject to collateral attack.

12. Paragraph 12 of the Petition is a legal conclusion and requires no response from Idaho Power.

13. Paragraph 13 of the Petition is a legal conclusion and requires no response from Idaho Power.

14. Paragraph 14 of the Petition is a legal conclusion and requires no response from Idaho Power.

15. Paragraph 15 of the Petition is a legal conclusion and requires no response from Idaho Power. Order No. 32300 speaks for itself.

16. Paragraph 16 of the Petition is a legal conclusion and requires no response from Idaho Power.

17. Idaho Power denies all of the allegations of paragraph 17 of the Petition.

18. Idaho Power admits the allegations of paragraph 18 of the Petition.

19. Idaho Power admits that a meeting took place on November 4, 2010, but does not agree with the Petition's characterization of the discussion that occurred at the meeting and therefore denies those allegations.

20. Idaho Power admits that it provided Rainbow Ranch with initial contracting information on November 5, 2010. Idaho Power admits that it filed a Joint Petition with the Commission in Case No. GNE-E-10-4 on November 5, 2010, but does not agree with the Petition's characterization of that Joint Petition and therefore denies those allegations. Idaho Power affirmatively asserts the Joint Petition speaks for itself. Idaho Power denies the remaining allegations in paragraph 20 of the Petition.

21. Idaho Power admits that it received information from Rainbow Ranch on November 9, 2010, but denies that Rainbow Ranch provided Idaho Power with "finalized FESAs" as such documents were not final.

22. Idaho Power has insufficient knowledge or information related to the actions of Brian Jackson on November 15, 2010, and therefore denies those allegations. Idaho Power admits that Idaho Power's Randy Allphin exchanged e-mail correspondence with Rainbow Ranch's Brian Jackson but does not agree with the characterization of the correspondence that took place and therefore denies those allegations.

23. Idaho Power admits that Brian Jackson sent an e-mail to Idaho Power's Randy Allphin and Donovan Walker on November 17, 2010, and that Donovan Walker spoke with Brian Jackson on November 17, 2010, but does not agree with the Petition's characterization of that correspondence and discussion and therefore denies those allegations.

24. Idaho Power admits that a meeting between representatives from Idaho Power and Rainbow Ranch occurred on November 19, 2010, but does not agree with the Petition's characterization of the discussion that occurred at the meeting and therefore denies those allegations.

25. Idaho Power admits that on November 23, 2010, it provided Rainbow Ranch with a draft FESA, but denies the Petition's characterization of those documents and therefore denies those allegations.

26. Idaho Power admits that it received documents from Rainbow Ranch on December 3, 2010, but denies the Petition's characterization of those documents and therefore denies those allegations.

27. Idaho Power admits that the Commission issued Order No. 32313 on December 3, 2010, but denies the Petition's characterization of that Order, and affirmatively asserts that the Order speaks for itself.

28. Idaho Power has insufficient knowledge or information related to the first sentence of paragraph 28 of the Petition and therefore denies that allegation. Idaho Power admits that it provided draft FESAs to Rainbow Ranch on December 8, 2010, but does not agree with the Petition's characterization that such FESAs were "final" and therefore denies such allegation.

29. Idaho Power admits that Brian Jackson of Rainbow Ranch sent an e-mail to Idaho Power on December 9, 2010, but does not agree with the Petition's characterization of the e-mail and therefore denies the allegation. Idaho Power affirmatively asserts that the e-mail communication speaks for itself.

30. Idaho Power admits that it e-mailed representatives of Rainbow Ranch with final, executable FESAs on December 13, 2010, but does not agree with the Petition's characterization of that email and therefore denies that allegation. Idaho Power affirmatively asserts that the e-mail speaks for itself. Idaho Power has insufficient knowledge or information as to whether "Rainbow was puzzled" and therefore denies that allegation.

31. Idaho Power admits that representatives of Rainbow Ranch came to Idaho Power's corporate offices in downtown Boise to pick up copies of the FESAs on December 13, 2010, but has insufficient knowledge or information as to which Rainbow Representatives picked up copies of the FESAs and therefore denies those allegations. Idaho Power has insufficient knowledge or information as to where the "Rainbow team"

went to sign the FESA and therefore denies that allegation. Idaho Power admits representatives from Rainbow Ranch returned to Idaho Power's offices late in the afternoon of December 13, 2010, with signed copies of the FESAs.

32. Idaho Power admits that Rainbow returned documents to Idaho Power on December 13, 2010, but denies the characterizations and remaining allegations in paragraph 32.

33. Idaho Power admits that representatives from Rainbow spoke with representatives from Idaho Power on December 14, 2010, but does not agree with the Petition's characterization of those conversations and therefore denies the allegations in paragraph 33 of the Petition. Idaho Power denies that the FESAs had been finalized on December 9, 2010.

34. Idaho Power admits that it negotiated FESAs with Rainbow Ranch but does not agree with the Petition's characterization of those negotiations and that Rainbow Ranch had committed itself to sell electricity to Idaho Power through a legally enforceable obligation or otherwise and therefore denies those allegations of paragraph 34 of the Petition.

35. Idaho Power denies the allegations of paragraph 35 of the Petition.

36. Idaho Power admits the allegations on paragraph 36 of the Petition.

37. For each allegation made in the Petition not specifically addressed above, Idaho Power hereby denies each such allegation.

## **II. MOTION TO DISMISS**

Rainbow Petitions the Commission to modify its final Orders in Case Nos. IPC-E-10-59 and IPC-E-10-60, and alternatively Applies to the Commission for approval of the

FESA that the Commission denied in those final Orders. Rainbow states, "In Rainbow's view, the procedural vehicle by which such approval is accomplished could either be modification of prior Order No. 32300, or approval of a new Application for approval of the Agreements." Rainbow's Petition and Application at 2-3.

Under either procedure, Rainbow's Petition and Application is an impermissible collateral attack upon the final Orders of the Commission, is barred by the doctrines of res judicata and collateral estoppel, is contrary to the public interest, and, therefore, Idaho Power respectfully moves the Commission to dismiss Rainbow's Petition and Application.

**A. Rainbow's Petition Is an Impermissible Collateral Attack on Final Orders of the Commission.**

On June 8, 2011, the Commission determined that the Rainbow projects did not create a legally enforceable obligation prior to December 14, 2010, and denied approval of the FESAs. Order No. 32256 ("June 8 Rainbow Order"). On July 27, the Commission denied Rainbow's Petition for Reconsideration. Order No. 32300 ("July 27 Rainbow Order"). Forty-two days later (September 8, 2011), because Rainbow chose not to appeal the Commission's determinations, the June 8 Rainbow Order and the July 27 Rainbow Order became final and non-appealable. I.A.R. 14(b) ("An appeal as a matter of right from an administrative agency may be made only by physically filing a notice of appeal with the Public Utilities Commission within 42 days... from when an application for rehearing is denied."); I.A.R. Rule 21 ("The failure to physically file a notice of appeal... within the time limits prescribed by these rules shall be jurisdictional and shall cause automatic dismissal of such appeal or petition.").

Commission Orders must be appealed within 42 days of the Commission's action. I.A.R. 14(b). Rule 14(b) of the Idaho Appellate Rules reads:

An appeal as a matter of right from an administrative agency may be made only by physically filing a notice of appeal with the Public Utilities Commission or the Industrial Commission within 42 days from the date evidenced by the filing stamp of the clerk or secretary of the administrative agency on any decision, order or award appealable as a matter of right. \*\*\* The time for an appeal from such decision, order or award of the public utilities commission begins to run when an application for rehearing is denied, or, if the application is granted, after the date evidenced by the filing stamp on the decision on rehearing.

I.A.R. 14(b); see *Neal v. Harris*, 100 Idaho 348, 350 (1979) (noting that Rule 14 limits time to appeal decisions of Commission). The Commission issued its order on reconsideration of the June 8 Rainbow Order on July 27, 2011. Rainbow did not file a Notice of Appeal to the Idaho Supreme Court within the required time, nor has Rainbow otherwise challenged the Rainbow Orders in court. Consequently, under the applicable state limitations period, the Rainbow Orders became final and no longer subject to review on September 8, 2011. I.A.R. 21 (2011) ("*Effect of failure to comply with time limits. The failure to physically file a notice of appeal . . . with the . . . administrative agency... within the time limits prescribed by these rules, shall be jurisdictional and shall cause automatic dismissal of such appeal or petition . . .*"); Idaho Code § 61-625 (2011) ("*All orders and decisions of the [Idaho Public Utilities C]ommission which have become final and conclusive shall not be attacked collaterally.*"); see *Welch v. Del Monte Corp.*, 128 Idaho 513, 516 (1996) (applying I.A.R. 14(b) to un-appealed order of Idaho Industrial Commission; holding that findings of fact and conclusions of law contained in

agency's order are conclusive and preclude further adjudication of those facts and issues).

The law of the case is now settled, and may not be attacked on appeal or collaterally. This is true even if the Commission's application of the law later is determined to be incorrect.

A final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action . . . . Nor are the *res judicata* consequences of a final, unappealed judgment on the merits altered by the fact that the judgment may have been wrong or rested on a legal principle subsequently overruled in another case . . . . As this Court explained in *Baltimore S.S. Co. v. Phillips*, 274 U.S. 316, 325 (1927) ... "A judgment merely voidable because based upon an erroneous view of the law is not open to collateral attack, but can be corrected only by a direct review and not by bringing another action upon the same cause [of action]."

*Federated Dept. Stores v. Moitie*, 452 U.S. 394, 398 (1981); see also Idaho Code § 61-625 ("All orders and decisions of the commission which have become final and conclusive shall not be attacked collaterally.").

The legal proscriptions barring collateral attack are supported by strong policy considerations, as explained by the Idaho Supreme Court:

The legislature has afforded the orders of the [Idaho Public Utilities] Commission a degree of finality similar to that possessed by judgments made by a court of law. I.C. § 61-625 ... Final orders of the [Idaho Public Utilities] Commission should ordinarily be challenged either by petition to the [Idaho Public Utilities] Commission for rehearing or by appeal to this Court as provided by I.C. § 61-626 and 627; Id. Const. Art. 5, § 9. *A different rule would lead to endless consideration of matters previously presented to the Commission and confusion about the effectiveness of Commission orders.*

*Utah-Idaho Sugar Co. v. Intermountain Gas Co.*, 100 Idaho 368, 373-374 (1979) (emphasis added). Such policy concerns are highly relevant here because, in addition to Rainbow, there are three similarly situated developers whose power purchase agreements the Commission rejected on June 8, 2011, and who chose not to appeal. See *supra* note 3. The three other developers together with Rainbow represent eleven projects with a combined capacity over 270 MW. Uncertainty regarding whether those three developers and Rainbow remain eligible for standard rate power purchase agreements would frustrate the ability of the Commission to ensure that published rates are just and reasonable and would frustrate Idaho Power's ability to accurately plan how it will serve its load. If the remaining parties could retain their right to appeal their June 8 Order for an indefinite future period, Idaho Power and the Commission would have to plan as though the power purchase agreements do not exist and yet run the risk of overabundance in the event they do materialize. Such a situation ultimately would result in additional cost to Idaho Power's customers and is a good example of the kind of harm prevented by Idaho's prohibition on collateral attacks of Commission orders.

Rainbow, without explanation, choose not to file an appeal of the Commission's final Orders to the Idaho Supreme Court. The subsequent declaratory order issued by FERC in the Cedar Creek cases does not entitle Rainbow to now, more than six months after the deadline to appeal, and more than 5 months after the issuance of FERCs Cedar Creek Order, challenge the final Commission Orders disapproving its FESAs.

Consequently, the Commission should dismiss Rainbow's Petition and Application as it is an impermissible collateral attack upon the final orders of the Commission.<sup>1</sup>

**B. Rainbow's Petition Is Barred By the Doctrines of Collateral Estoppel and Res Judicata.**

Rainbow's claims were fully considered by the Commission, a final judgment was rendered on the merits, Rainbow failed to appeal such decision, and Rainbow's claims rely upon the same operative facts that were before the Commission for the initial determination. Rainbow's claims are barred by collateral estoppel (issue preclusion) and res judicata (claim preclusion).

Idaho courts require five factors be met for collateral estoppel to bar re-litigation of an issue decided in an earlier proceeding: (1) the party against whom the earlier decision was asserted had a full and fair opportunity to litigate the issue decided in the earlier case; (2) the issue decided in the prior litigation was identical to the issue presented in the present action; (3) the issue sought to be precluded was actually decided in the prior litigation; (4) there was a final judgment on the merits in the prior litigation; and (5) the party against whom the issue is asserted was a party or in privity with a party to the litigation. *Ticor Title Co. v. Stanion*, 144 Idaho 119, 124 (2007) (internal citations omitted).

All five factors are satisfied by the Commission's June 8 and July 27 Rainbow Orders. Rainbow had ample opportunity to make its case to the Commission prior to

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<sup>1</sup> Filed contemporaneously with the Petition and Application before this Commission, Rainbow also filed a Petition for Enforcement Under the Public Utility Regulatory Policies Act of 1978, along with an alternative request for a declaratory order, with the Federal Energy Regulatory Commission ("FERC"). Idaho Power has filed, contemporaneously with this Answer and Motion to Dismiss, a Motion to Intervene and Protest in the FERC proceeding. Idaho Power, in its Motion to Intervene and Protest makes similar arguments to FERC as those presented herein to this Commission, and states additional grounds as to why Rainbow's requested relief at FERC is improper. Idaho Power's Motion to Intervene and Protest is attached hereto as Attachment No. 1, and incorporated herein by this reference.

the June 8 Order, and in its petition for reconsideration. Rainbow's requested relief seeks a determination that it is eligible for standard rates, and seeks approval of the identical FESAs previously disapproved by the Commission—the identical issue the Commission ruled on in the June 8 and July 27 Rainbow Orders. Rainbow Petition Application at 1. The Commission reached a final judgment on Rainbow's eligibility in the June 8 and July 27 Rainbow Orders. And Rainbow is the same party as, or has privity with, the party bound by the June 8 and July 28 Rainbow Orders. Rainbow, therefore, is collaterally estopped from being heard on the same issues again before this Commission.

Rainbow's petition also is barred by claim preclusion, or *res judicata*. In Idaho, "*res judicata* means that in an action between the same parties upon the same claim or demand, the former adjudication concludes parties and privies not only as to every matter offered and received to sustain or defeat the claim but also every matter which might and should have been litigated in the first suit." *Magee v. Thompson Creek Mining Co.*, 268 P.3d 464, 470 (Idaho 2012) (internal citations and quotations omitted). *Res judicata* applies to decisions of administrative agencies. *Id.*; see Idaho Code § 61-625 ("All orders and decisions of the [Commission] which have become final and conclusive shall not be attacked collaterally.").

"The "sameness" of a cause of action for purposes of application of the doctrine of *res judicata* is determined by examining the operative fact underlying the two lawsuits." *Farmers Nat'l Bank v. Shirey*, 126 Idaho 63, 69 (1994) (internal citations and quotation marks omitted). In its petition, Rainbow essentially seeks a determination from the Commission that it formed a legally enforceable obligation to sell output from

its two QFs prior to December 14, 2010. This is the same claim by Rainbow that the Commission considered and rejected, in the June 8 Rainbow Order and the July 27 Rainbow Order, and which Rainbow elected not to appeal to the Idaho Supreme Court. Because Rainbow already brought an identical claim before the Commission, and that claim resulted in a final judgment, Rainbow is barred by *res judicata* from bringing that same claim to this Commission again. The existence of FERC's Cedar Creek declaratory Order does not constitute authority to, nor require the Commission to set aside Idaho Code §§ 61-625, 61-627 and I.A.R. 14(b) and 21, and resuscitate a conclusive order in a closed docket.

C. **Rainbow's Suggestions That Idaho Power Dragged Out or Delayed Negotiations of the Power Purchase Agreements Are False.**

Notwithstanding, and without waiving Idaho Power's arguments above that Rainbow's Petition and Application is barred as an impermissible collateral attack on a final Commission Order, and that it is barred by *res judicata* and collateral estoppels, Assuming arguendo that the Commission were to consider Rainbow's claims, they do not prevail. In its Petition and Application, Rainbow implies through its presentation of facts that Idaho Power delays in contract negotiations and final signature of the FESAs prevented Rainbow from obtaining a legally enforceable obligation prior to December 14, 2010. Rainbow's insinuation is unfounded. Rainbow did not request FESAs from Idaho Power until November 5, 2010, and in spite of the very high volume of QF requests Idaho Power had to process during that same period, it completed contract negotiations and due diligence for Rainbow's two 20-MW, new 20-year contracts in less than six weeks.

Idaho Power records indicate that initial contact with Rainbow (where Idaho Power sent Rainbow a set of initial contracting information requests) occurred on November 5, 2010. Idaho Power Reply Comments at 6 (March 25, 2011) Case Nos. IPC-E-10-59 and IPC-E-10-60. Idaho Power received the requested information from Rainbow on November 9, 2010. *Id.* Multiple discussions commenced with Rainbow, and first draft contracts were provided to Rainbow on November 23, 2010. *Id.* Idaho Power continued to receive e-mail and communications from Rainbow as late as December 9, 2010, that Rainbow was still attempting to determine the project sizes and finalize the agreements. *Id.*

Idaho Power began its required internal Sarbanes-Oxley Act review process on December 8, 2010. *Id.* On December 13, 2010, the unsigned, final execution versions of the contracts were delivered to Rainbow. *Id.* Rainbow signed the agreements and returned them to Idaho Power later that afternoon on December 13, 2010. *Id.* at 6-7. Idaho Power signed the agreements on December 14, 2010, and filed them with the Commission for review on December 16, 2010. *Id.* at 7. Idaho Power had no opportunity to execute the contracts prior to December 14, 2010 because the contracts were not returned to Idaho Power by Rainbow until late in the afternoon on December 13, 2010. *Id.* Idaho Power did sign the agreements the next day at the first opportunity it had with the appropriate Company executive. *Id.*

Idaho Power negotiated and executed two 20-year PPAs with an estimated value of \$209 million<sup>2</sup> in only 38 days. 38 days is rapid processing for two contracts of this size during normal times; during November and December of 2010 when Idaho Power was handling an unusually large number of QF applications totaling 315 MW of capacity, it was exceptionally fast. Finally, any assertion that Idaho Power unreasonably refused to sign the FESAs it tendered on December 13, 2010 goes against common sense. To imply that PURPA requires Idaho Power's Vice-President to sign contracts valued at \$209 million within minutes of being tendered is patently unreasonable. Signing and returning the contracts one day later, as Idaho Power did, was diligent and timely.

**D. The Commission Found Rainbow's Contracts to Be Contrary to the Public Interest.**

The Commission, in its review of the executed Rainbow FESAs, found that approval of the contracts would be contrary to the public interest and refused to approve them. See June 8 Rainbow Order at 8; July 27 Rainbow Order at 12 ("This Commission specifically stated that it was not in the public interest to approve the Projects' Agreements because they were executed after a new, lower eligibility to published rates became effective."). Under PURPA's regulatory scheme, "state regulatory agencies have the authority to implement PURPA in reviewing and approving contracts for the sale of electricity." *Wheelabrator Lisbon, Inc. v. State of Conn. Dept. of Pub. Util. Control*, 531 F.3d 183, 188 (2d. Cir. 2008) (citing *Freehold Cogeneration Assocs., L.P.*

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<sup>2</sup> See Comments of the Commission Staff at 3-4 (March 17, 2011) in *In the Matter of the Application of Idaho Power Co. for a Determination of Regarding Firm Energy Sales Agreement Between Idaho Power and Rainbow Ranch Wind, LLC; In the Matter of the Application of Idaho Power Co. for a Determination of Regarding Firm Energy Sales Agreement Between Idaho Power and Rainbow West Wind, LLC*, IPUC Case Nos. IPC-E-10-59-60 (stating that over the 20 year period of the two FESAs, the total combined amount paid by Idaho Power would be \$200.8 million).

*v. Bd. Of Reg. Comm'rs of State of N.J.*, 44 F.3d 1178, 1192 (3d. Cir. 1995)); see also *A.W. Brown*, 121 Idaho at 816 ("The Commission, as part of its statutory duties, determines reasonable rates and investigates and reviews contracts. I.C. §§ 61-502, -503." (quoting *Empire Lumber Co. v. Wash. Water Power Co.*, 114 Idaho 191, 193 (1988))). The Commission, in its role as the regulatory authority for implementing PURPA in the state of Idaho, has an independent obligation and duty to assure that all PURPA contracts entered by Idaho Power are in the public interest. See *Rosebud Enters, Inc. v. Idaho PUC*, 128 Idaho 609, 613-14 (1996) (The Commission, in acting pursuant to PURPA, must strike a balance between "the local public interest of a utility's electric consumers and the national public interest in development of alternative energy resources."); see also *Agric. Prods. Corp. v. Utah Power & Light Co.*, 98 Idaho 23, 29 (1976) ("Private contracts with utilities are regarded as entered into subject to reserved authority of the state to modify the contract *in the public interest.*" (Emphasis added)).

The duty to ensure the public interest even supersedes the State Constitution of Idaho's protection of private contracts. In the State of Idaho, contracts are afforded constitutional protection against interference from the state. Idaho Const. Art. I § 16 (2011). However, despite this constitutional protection, the Commission may annul, supersede, or reform the contracts of the public utilities it regulates in the public interest. *Agric. Prods. Corp.*, 98 Idaho at 29 ("Interference with private contracts by the state regulation of rates is a valid exercise of the police power, and such regulation is not a violation of the constitutional prohibition against impairment of contractual obligations."). The Commission may interfere with the contracts of a public utility and disregard Idaho

Constitutional protections of contract only to prevent an adverse affect to the public interest. *Agric. Prods. Corp.*, 98 Idaho at 29.

While the Commission may not annul, supersede, or revise a PURPA contract during its term because such action would constitute utility-type regulation of a QF in violation of 18 C.F.R. § 292.602(c)(1), the Commission may review and approve a PURPA contract at the time it is submitted by the parties for final approval, in furtherance of its state duty to ensure that the agreement is consistent with the public interest. *Crossroads Cogeneration Corp.*, 159 F.3d at 138 (“In other words, while PURPA allows the appropriate state regulatory agency to approved a power purchasing agreement, once such an agreement is approved, the state agency is not permitted to modify the terms of the agreement.”).

The Rainbow FESAs were subject to the Commission’s public interest review of PURPA contracts upon submission to the Commission for approval. Each Rainbow FESA specifically states:

This Agreement shall become finally effective upon the Commission's approval of all terms and provisions hereof without change or condition and declaration that all payments to be made to Seller hereunder shall be allowed as prudently incurred expenses for ratemaking purposes.

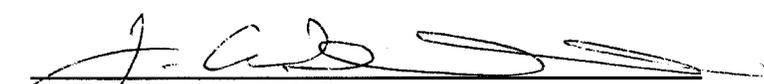
Idaho Power’s Application, Attachment No. 1 “Firm Energy Sales Agreement” at 27, Case Nos. IPC-E-10-59 and IPC-E-10-60. Upon the parties’ submittal and Commission review, the Commission specifically found that approval of the Rainbow FESAs would be contrary to the public interests of the citizens of Idaho, even when weighed against the national public interest in developing alternative energy resources. June 8 Rainbow Order at 8; July 27 Rainbow Order at 13 (*citing Rosebud*, 128 Idaho at 613). The

Commission acted pursuant to its discretion and obligation to protect the public interest of Idaho by denying the Rainbow FESAs. Rainbow's request to disturb and to collaterally attack the Commission's findings and final Orders is contrary to the public interest, should be denied, and its Petition and Application be dismissed.

### **III. CONCLUSION**

For the reasons set forth above, Idaho Power respectfully requests that the Commission dismiss Rainbow's Petition and Application. Rainbow's petition is an impermissible collateral attack on the June 8 and July 27 Rainbow Orders. Rainbow's petition is barred by collateral estoppel and res judicata. Additionally, Rainbow's FESAs were found to be contrary to the public interest, and their request now to impermissibly attack those final Orders, when they have failed to pursue an appeal of the same to the Idaho Supreme Court is likewise contrary to the public interest. Idaho Power respectfully requests that Rainbow's Petition and Application be dismissed.

Respectfully submitted this 22<sup>nd</sup> day of March 2012.



**JASON B. WILLIAMS**  
Attorney for Idaho Power Company

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this 22<sup>nd</sup> day of March 2012 I served a true and correct copy of IDAHO POWER COMPANY'S ANSWER AND MOTION TO DISMISS upon the following named parties by the method indicated below, and addressed to the following:

**Commission Staff**

Kristine A. Sasser  
Deputy Attorney General  
Idaho Public Utilities Commission  
472 West Washington (83702)  
P.O. Box 83720  
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**Rainbow Ranch Wind, LLC, and  
Rainbow West Wind, LLC**

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Chas. F. McDevitt  
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Jason B. Williams

**BEFORE THE  
IDAHO PUBLIC UTILITIES COMMISSION**

**CASE NO. IPC-E-12-11**

**IDAHO POWER COMPANY**

**ATTACHMENT NO. 1**

UNITED STATES OF AMERICA  
BEFORE THE  
FEDERAL ENERGY REGULATORY COMMISSION

Rainbow Ranch Wind, LLC	)	Docket Nos. EL12-41-000
Rainbow West Wind, LLC	)	QF11-44-001
	)	QF11-45-001

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**MOTION TO INTERVENE AND PROTEST OF IDAHO POWER COMPANY**

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Pursuant to Rules 211, 212, and 214 of the Federal Energy Regulatory Commission's ("FERC" or "Commission") Rules of Practice and Procedure, 18 C.F.R. §§ 385.211, 212, and 214, and the Commission's March 2, 2012, Notice of Petition for Enforcement in the above-captioned docket, Idaho Power Company ("Idaho Power") hereby moves to intervene in this proceeding, as well as to submit comments and to protest Rainbow Ranch Wind, LLC, and Rainbow West Wind, LLC's ("Petitioners" or "Rainbow") request to institute an enforcement action against the Idaho Public Utilities Commission ("Idaho PUC" or "IPUC") under the Public Utility Regulatory Policies Act of 1978 ("PURPA").

**I. SUMMARY**

Idaho Power protests Rainbow's requested relief because: (1) Commission enforcement in this matter is time-barred; (2) "as-applied" challenges to the Idaho PUC's implementation of PURPA alleged by Rainbow in its petition are beyond the Commission's jurisdiction to decide; (3) Rainbow's petition is an impermissible collateral attack on final orders of the IPUC; and (4) Rainbow's petition is barred by collateral estoppel and res judicata. Additionally, a declaratory order is improper in this instance as the Commission has spoken with regard to Rainbow's

requested relief in *Cedar Creek Wind, LLC*, 137 FERC ¶ 61,006 (2011) (the “*Cedar Creek Order*”), and the Idaho PUC has recognized the Commission’s guidance regarding the implementation of PURPA set forth in the *Cedar Creek Order*. Therefore, an enforcement action, or a further declaratory order, is unnecessary, and Rainbow’s petition should be denied.

Alternatively, should the Commission decide to declare its position on the issues presented by Petitioners, Idaho Power submits that it is properly within the state commission’s authority to implement rules regarding, and to administer, the creation of legally enforceable obligations under PURPA and pursuant to the Commission’s rules implementing PURPA. Idaho Power also responds to and rebuts Rainbow’s implication that Idaho Power was anything but diligent and timely in its negotiations with Rainbow. Finally, Idaho Power submits that the Idaho PUC denied approval of Rainbow’s contracts because it specifically found those contracts to be contrary to the public interest of the citizens of the state of Idaho, a determination soundly within its discretion and duty, and supported by the record before it.

## **II. CORRESPONDENCE AND COMMUNICATIONS**

Communications regarding this Motion should be addressed to the following:<sup>1</sup>

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<sup>1</sup> Idaho Power respectfully requests that the Commission allow more than two persons to receive service on behalf of Idaho Power. 18 CFR § 185.203(b)(3) (2011). In the event the Commission does not permit all four persons to be on the official service list, Idaho Power’s preference is for Jason Williams and Donovan Walker.

### **III. BASES FOR INTERVENTION**

Idaho Power, an Idaho corporation, is a vertically integrated electric utility engaged in the business of generating, purchasing, transmitting, and distributing electrical energy. Idaho Power uses an interconnected grid to provide wholesale and retail electric service throughout approximately 24,000 square miles of service territory in southern Idaho and eastern Oregon. As a public utility providing retail electric distribution and supply service, Idaho Power is regulated by the Idaho PUC and the Public Utility Commission of Oregon. As a public utility under Part II of the Federal Power Act, Idaho Power has market-based rate authority for wholesale energy sales under its Commission tariff and provides transmission services under its Commission-approved Open Access Transmission Tariff.

Idaho Power is subject to the provisions of PURPA as implemented by the rules and regulations of the Idaho PUC and the Commission. Pursuant to its PURPA obligations, Idaho Power has entered into Idaho PUC-approved power purchase agreements with numerous qualifying facilities (“QFs”) for the output from those projects at published avoided costs rates. As a utility that purchases a sizeable amount of energy from QFs pursuant to PURPA, and in particular as Rainbow’s counterparty to the agreements at issue in this docket, Idaho Power has a direct interest in the outcome of this proceeding that cannot be adequately represented by any other party. Further, Idaho Power’s intervention is in the public interest and the information provided herein will aid the Commission in reaching an informed resolution of this matter. For these reasons, Idaho Power respectfully moves to intervene in this proceeding.

### **IV. BACKGROUND**

The Idaho PUC has long exercised its prerogative under PURPA to provide standard avoided cost (“published”) rates to QFs with capacity greater than 100 kilowatt (“kW”). 18 C.F.R. § 292.304(c)(2) (2011) (“There may be put into effect standard rates for purchases

from qualifying facilities with a design capacity of more than 100 kilowatts.”). Since 2004, QFs that show they are likely to generate no more than ten average megawatts (“aMW”), measured on a monthly basis, have been eligible for published rates in Idaho. *U.S. Geothermal, Inc. v. Idaho Power Co.*, Idaho PUC Order No. 29632, 14, Case Nos. IPC-E-04-08, IPC-E-04-10 (2005). QFs that meet the published rate eligibility criteria may sell to an Idaho electric utility at the published avoided cost rate. A QF with an output capacity that exceeds the published avoided cost rate eligibility cap (currently 100 kW for wind and solar QFs, and 10 aMW for all other QF resource types) is only eligible for a project specific, negotiated avoided cost rate based upon the Idaho PUC approved Integrated Resource Plan (“IRP”) methodology. Alternatively, any QF may request a project specific rate that the utility then determines using its Idaho PUC-approved IRP methodology. *In the Matter of the Joint Petition of Idaho Power Co., Avista Corp., and PacifiCorp dba Rocky Mountain Power to Address Avoided Cost Issues and Adjust the Published Avoided Cost Rate Eligibility Cap*, Idaho PUC Order No. 32176, Case No. GNR-E-10-04, 10 (2011). A QF and the utility also may negotiate non-standard, non-IRP rates. 18 C.F.R. 292.301(b) (2011) (“Negotiated rates or terms. Nothing in this subpart: (1) Limits the authority of any electric utility or any qualifying facility to agree to a rate for any purchase, or terms or conditions relating to any purchase, which differ from the rate or terms or conditions which would otherwise be required by this subpart.”).

In 2010, QF interest in published rate contracts in Idaho increased dramatically. A large majority of the QFs (in terms of capacity) seeking published rate PURPA contracts were large-scale wind projects that developers were disaggregating<sup>2</sup> into 10 aMW projects in order to

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<sup>2</sup> In the context of what is occurring in Idaho, “disaggregation” occurs when a large-scale QF project intentionally divides itself into smaller subsidiaries in order to qualify for published avoided cost rates reserved for smaller projects, rather than using the IRP-based avoided cost methodology authorized by the Idaho PUC for larger QF projects.

qualify for published avoided cost rates. Joint Petition to Address Avoided Cost Issues and Joint Motion to Adjust the Published Avoided Cost Rate Eligibility Cap at 3-5, Idaho PUC Case No. GNR-E-10-04 (Nov. 5, 2010). The electric utilities regulated by the Idaho PUC—Idaho Power, Avista Corporation, and PacifiCorp dba Rocky Mountain Power (collectively, the “Utilities”)—became concerned that the rapid addition of so much new QF power so quickly had rendered, or was about to render, the published avoided cost rates unjust and unreasonable. On November 5, 2010, the Utilities filed a joint petition requesting that the Idaho PUC initiate an investigation to address various avoided cost issues related to the Idaho PUC’s implementation of PURPA. At the same time, the Utilities moved for an *immediate* reduction in the published avoided cost rate eligibility cap, from 10 aMW down to 100 kW.

The Idaho PUC did not immediately lower its eligibility cap for published rates, but, on December 3, 2010, gave notice that it would investigate the Utilities’ allegations that the standard rates were not just and reasonable for QFs over 100 kW and that its decision on the matter would become effective as of December 14, 2010. *In the Matter of the Joint Petition of Idaho Power Co., Avista Corp., and Rocky Mountain Power*, Idaho PUC Order No. 32131, 9, Case No. GNR-E-10-04 (2010). On February 7, 2011, the Idaho PUC found that the Utilities had made a convincing case that the eligibility cap for standard rates should be reduced from 10 aMW down to 100 kW for wind and solar QF projects. Idaho PUC Order No. 32176. As it said it would do in the December 3 notice, the Idaho PUC made that change effective December 14, 2010. *Id.* at 11-12.

The December 3 notice precipitated a rush of QFs seeking to lock in their eligibility for published rates prior to the December 14, 2010, deadline. Between December 16, 2010, and January 10, 2011, Idaho Power filed with the Idaho PUC thirteen published avoided cost rate firm energy sales agreements (“FESAs”) comprising 315 megawatts (“MW”) of new generation,

all of which were fully executed *after* the reduced eligibility cap took effect. Under Idaho's implementation of PURPA, those signed contracts do not become effective, and the rates therein do not lock in, until the Idaho PUC approves them. *See A.W. Brown Co. v. Idaho Power Co.*, 121 Idaho 812, 814, 828 P.2d 841, 843 (1992) ("The [Idaho PUC] established a rule that power purchase contracts, once negotiated, be presented to the [Idaho PUC] for approval.").

On June 8, 2011, the Idaho PUC rejected all thirteen FESAs. Idaho PUC Order No. 32256 rejected the two Rainbow FESAs ("June 8 Rainbow Order"). Exhibit A to Rainbow Petition. The Idaho PUC issued four other orders rejecting eleven other FESAs executed by Idaho Power,<sup>3</sup> and one order rejecting five FESAs executed by PacifiCorp<sup>4</sup> (collectively, the "June 8 Orders").

The Idaho PUC's basis for rejecting the FESAs in the June 8 Orders was generally the same. The Idaho PUC found that since the contracts were not fully executed until *after* the 100 kW eligibility cap went into effect, the QFs were not eligible for published rates, and therefore it found the rates to be unjust and unreasonable and not in the public interest. *See, e.g.*, June 8

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<sup>3</sup> *In the Matter of the Application of Idaho Power Co. for a Determination regarding a Firm Energy Sales Agreement*, Idaho PUC Order No. 32254, Case Nos. IPC-E-10-51 to -55 (2011) (disapproving Idaho Power's FESAs with Alpha Wind, LLC (29.9 MW), Bravo Wind, LLC (29.9 MW), Charlie Wind, LLC (27.6 MW), Delta Wind, LLC (29.9 MW), and Echo Wind, LLC (29.9 MW)); *In the Matter of the Application of Idaho Power Co. for a Determination regarding a Firm Energy Sales Agreement*, Idaho PUC Order No. 32255, Case Nos. IPC-E-10-56 to -58 (2011) (disapproving Idaho Power's FESAs with Murphy Flat Mesa, LLC (25 MW), Murphy Flat Energy, LLC (25 MW), and Murphy Flat Wind, LLC (25 MW)); *In the Matter of the Application of Idaho Power Co. for a Determination regarding a Firm Energy Sales Agreement*, Idaho PUC Order No. 32256, Case Nos. IPC-E-10-59 and -60 (2011) (disapproving Idaho Power's power purchase agreements with Rainbow Ranch Wind, LLC (23 MW) and Rainbow West Wind, LLC (23 MW)); *In the Matter of the Application of Idaho Power Co. for a Determination regarding a Firm Energy Sales Agreement*, Idaho PUC Order No. 32257, Case Nos. IPC-E-10-51 and -62 (2011) (disapproving Idaho Power's power purchase agreements with Grouse Creek Wind Park, LLC (21 MW) and Grouse Creek Wind Park II, LLC (21 MW)); *In the Matter of the Application of Idaho Power Co. for a Determination regarding a Firm Energy Sales Agreement*, Idaho PUC Order No. 32258, Case No. IPC-E-11-01 (disapproving Idaho Power's power purchase agreements with Western Desert Energy, LLC (5 MW)).

<sup>4</sup> *In the Matter of the Application of PacifiCorp, dba Rocky Mountain Power for a Determination Regarding a Firm Energy Sales Agreement*, Idaho PUC Order No. 32260, Case Nos. PAC-E-11-01 to -05, (2011) (disapproving Rocky Mountain Power's power purchase agreement with Cedar Creek Wind's Rattlesnake Canyon Project (27.6 MW), Coyote Hill Project (27.6 MW), North Point Project (27.6 MW), Steep Ridge Project (25.2 MW), and Five Pine Project (25.2 MW)).

Rainbow Order at 8-9. Several of the QFs sought reconsideration of the June 8 Orders, but in each case the Idaho PUC reaffirmed the June 8 Order.<sup>5</sup> The order denying reconsideration of the June 8 Rainbow Order, Idaho PUC Order No. 32300, is referred to as the “July 27 Rainbow Order.” Exhibit A to Rainbow Petition. Under Idaho law, final orders of the Idaho PUC must be appealed to the Supreme Court of Idaho within 42 days after the Idaho PUC’s final order on reconsideration. Idaho Appellate Rule, Rule 14. Rainbow did not timely appeal the June 8 Rainbow Order or the July 27 Rainbow Order.

On August 5, 2011, Cedar Creek petitioned the Commission for relief from the June 8 Orders, in the form of enforcement or declaratory relief under Section 210(h) of PURPA (“Section 210(h)”). FERC Docket No. EL11-59-000. Cedar Creek also filed a timely Notice of Appeal of the Idaho PUC’s orders with the Idaho Supreme Court on August 31, 2011. The Commission declined Cedar Creek’s request to initiate an enforcement action pursuant to Section 210(h), but concluded that the Idaho PUCs order rejecting the Cedar Creek FESAs was inconsistent with PURPA because a state commission could not limit a legally enforceable obligation to incur only upon a fully executed contract:

In conclusion, we find that the Idaho PUC’s June 8 Order, limiting the methods by which a legally enforceable obligation may be incurred to only a fully-executed contract, is inconsistent with our regulations implementing PURPA.

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<sup>5</sup> *In the Matter of the Application of Idaho Power Co. for a Determination regarding a Firm Energy Sales Agreement*, Idaho PUC Order No. 32298, Case Nos. IPC-E-10-51 to -55 (2011); *In the Matter of the Application of Idaho Power Co. for a Determination regarding a Firm Energy Sales Agreement*, Idaho PUC Order No. 32300, Case Nos. IPC-E-10-59 and -60 (2011); *In the Matter of the Application of Idaho Power Co. for a Determination regarding a Firm Energy Sales Agreement*, Idaho PUC Order No. 32298, Case Nos. IPC-E-10-61 and -62 (2011); *In the Matter of the Application of PacifiCorp, dba Rocky Mountain Power for a Determination Regarding a Firm Energy Sales Agreement*, Idaho PUC Order No. 32302, Case Nos. PAC-E-11-01 to -05, (2011).

*Cedar Creek Order*, 137 FERC ¶ 61,006, P 41. The Commission also noted that the question of whether the conduct of Cedar Creek and Rocky Mountain Power (the utility counterparty to the FESAs) constituted a legally enforceable obligation was not before it. *Id.* at P 38.

Rainbow's facts are similar to those in the petition filed by Cedar Creek in that both involve the Idaho PUC's rejection of FESAs that were signed and delivered to the utility *before* December 14, 2010, but executed by the utility *after* December 14, 2010. But the similarities between Rainbow and Cedar Creek end there. Whereas Cedar Creek timely appealed to the Idaho Supreme Court for review of its June 8 Order, Rainbow did not. And, whereas Cedar Creek promptly petitioned the Commission to take enforcement action against the Idaho PUC after its petition for reconsideration of the June 8 Order was denied, Rainbow did not file its petition with the Commission until March 2012, nearly eight months after the Idaho PUC's order on reconsideration denying Rainbow's FESAs.

Idaho Power urges the Commission to deny Rainbow's requested relief for the reasons set forth below.

## V. ARGUMENT

### A. Rainbow's Requested Relief is Procedurally Barred.

Rainbow's petition is not properly before the Commission and is impermissible for several reasons. First, Rainbow did not file its petition within the applicable limitation period for appealing the Idaho PUC's action under state law. Second, Rainbow impermissibly seeks an "as applied" claim with the Commission, which is the sole province of the Idaho PUC and Idaho courts. Third, Rainbow's petition is an impermissible collateral attack upon final IPUC orders. Fourth, a declaratory order is improper in this instance as the Commission has spoken with regard to Rainbow's requested relief in the *Cedar Creek Order*, and the Idaho PUC has recognized the Commission's guidance regarding the implementation of PURPA set forth in the

*Cedar Creek Order*. Therefore, an enforcement action, or a further declaratory order is unnecessary, and Rainbow's petition should be denied.<sup>6</sup>

1. **Rainbow's Request for Enforcement is Barred Because it Was Not Brought Within the Applicable Limitations Period.**

A petition for enforcement under Section 210(h) of PURPA against a state administrative action is barred unless commenced within the limitations period for appealing the administrative action under state law. *N.Y. State Elec. & Gas Corp. v. Saranac Power Partners, LP*, 117 F. Supp. 2d 211, 246-47 (N.D. N.Y. 2000) ("*NYSEG*"), *aff'd* 267 F.3d 128 (2d Cir. 2001). For matters that come before the Idaho PUC that applicable limitations period is 42 days. Idaho Appellate Rules, Rule 14(b) (2011) ("I.A.R. 14(b)").

In *NYSEG*, the District Court for the Northern District of New York found that a Section 210(h) enforcement action against the New York Public Service Commission ("NY PSC") was barred by the New York State limitations period for challenging the NY PSC's actions, which was four months. In 1995, *NYSEG* petitioned FERC for, among other things, an order pursuant to Section 210(h) directing the NY PSC to relieve *NYSEG* from PURPA contracts approved by the NY PSC in 1989. *NYSEG*, 117 F. Supp. 2d at 220. After the Commission denied *NYSEG*'s petition, *NYSEG* sought enforcement in court. In considering whether *NYSEG*'s petition for Section 210(h) enforcement was time-barred, the *NYSEG* court found no directly applicable federal statute of limitations. *Id.* at 247. The court therefore applied the "well-settled" rule that "if Congress fails to include a statute of limitations in a statute, courts should – with few exceptions – impose a state limitations 'most closely analogous' to the federal act in need." *Id.* at 246 (noting that Section 210(h) falls squarely inside the rule; quoting *Reed v. United Transp.*

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<sup>6</sup> Rainbow filed a corresponding Petition/Application with the Idaho PUC on March 1, 2012, to modify the Idaho PUC's final orders in the underlying case. Idaho Power filed a Answer and Motion to Dismiss with the Idaho PUC based upon the same procedural bars outlined in this Intervention and Protest.

*Union*, 488 U.S. 319, 323 (1989)). The court then found that the most closely analogous state limitations statute was the New York law governing time for appeal of final agency action. *NYSEG*, 117 F. Supp. 2d at 247. Because NYSEG commenced its Section 210(h) proceeding before the Commission after the state statutory four-month window to appeal a final agency act, the court found NYSEG's action to be time-barred. *Id.*

In Idaho, Idaho PUC actions must be appealed within 42 days of the agency action.

I.A.R. 14(b). Rule 14(b) of the Idaho Appellate Rules reads:

An appeal as a matter of right from an administrative agency may be made only by physically filing a notice of appeal with the Public Utilities Commission or the Industrial Commission within 42 days from the date evidenced by the filing stamp of the clerk or secretary of the administrative agency on any decision, order or award appealable as a matter of right. \*\*\* The time for an appeal from such decision, order or award of the public utilities commission begins to run when an application for rehearing is denied, or, if the application is granted, after the date evidenced by the filing stamp on the decision on rehearing.

I.A.R. 14(b); *see Neal v. Harris*, 100 Idaho 348, 350 (1979) (noting that Rule 14 limits time to appeal decisions of Idaho PUC). The Idaho PUC issued its order on reconsideration of the June 8 Rainbow Order on July 27, 2011. Rainbow did not file a Notice of Appeal to the Idaho Supreme Court within the required time, nor has Rainbow otherwise challenged the Rainbow Orders in court. Consequently, under the applicable state limitations period, the Rainbow Orders became final and no longer subject to review on September 8, 2011. I.A.R. 21 (2011) ("*Effect of failure to comply with time limits*. The failure to physically file a notice of appeal . . . with the . . . administrative agency . . . within the time limits prescribed by these rules, shall be jurisdictional and shall cause automatic dismissal of such appeal or petition . . ."); Idaho Code § 61-625 (2011) ("All orders and decisions of the [Idaho Public Utilities C]ommission which have become final and conclusive shall not be attacked collaterally."); *see Welch v. Del Monte Corp.*,

128 Idaho 513, 516 (1996) (applying I.A.R. 14(b) to un-appealed order of Idaho Industrial Commission; holding that findings of fact and conclusions of law contained in agency's order are conclusive and preclude further adjudication of those facts and issues).

Rainbow filed its petition for Section 210(h) enforcement with the Commission seeking reversal of the Rainbow Orders on March 1, 2012, which was 218 days after the IPUC issued its order on reconsideration. Because Rainbow did not commence its petition for enforcement within the 42-day limitations period, Rainbow's petition for enforcement against the Rainbow Orders is now time-barred. *NYSEG*, 117 F. Supp. 2d at 246-47 (Section 210(h) enforcement time-barred against agency decision approving PURPA contracts because not brought within state limitations period for challenging agency decision); see *Appalachian Power Co.*, 96 FERC ¶ 61,074, 61,326 n.7 (2001) (“[A]s a general matter, we do not entertain pleadings, however styled, that in fact are untimely appeals or requests for rehearing.”). Consequently, Rainbow's requested relief is time barred and the Commission should dismiss Rainbow's Petition.

**2. Rainbow's Requested Relief Should be Denied Because This Commission Lacks Jurisdiction to Decide State As-Applied Claims Under PURPA.**

Rainbow's requested relief must be denied because it asks the Commission to decide matters committed to the exclusive jurisdiction of the state. Rainbow asks the Commission to find that:

the extensive negotiations between [Rainbow] and [Idaho Power] point to the reasonable conclusion that Petitioners committed themselves to sell electricity to [Idaho Power] on December 9, 2010, but in no event later than December 13, 2010, when [Rainbow] signed the FESAs on behalf of Petitioners.

Rainbow Petition at 16. Essentially, Rainbow asks the Commission to declare that, on the facts of the case, Petitioners established a legally enforceable obligation no later than December 13, 2010. The Commission has no jurisdiction to answer this “as applied” question. PURPA §

210(g), 16 U.S.C. § 824a-3(g) (2011); *Power Res. Group, Inc. v. Pub. Util. Comm'n of Tex.*, 422 F.3d 231, 235 (5th Cir. 2005); *Mass. Inst. of Tech. v. Mass. Dep't of Pub. Utils.*, 941 F. Supp. 233, 236-37 (D. Mass. 1996); *Greensboro Lumber Co. v. Ga. Power Co.*, 643 F. Supp. 1345, 1374 (N.D. Ga. 1986), *aff'd* 844 F.2d 1538 (11th Cir. 1988); *Policy Statement Regarding the Commission's Enforcement Role Under Section 210 of the Public Utility Regulatory Policies Act of 1978*, 23 FERC ¶ 61,304, 61,645 (1983), ("*FERC Policy Statement*") (Federal jurisdiction is "limited regarding questions of the proper application of [state rules made pursuant to PURPA] on a case-by-case basis."). Federal entities are barred by PURPA from intruding on state authority to determine whether a particular QF established a legally enforceable obligation under state rules. *Power Res. Group*, 422 F.3d at 235; *FERC Policy Statement*, 23 FERC ¶ 61,304, 61,645.

The Commission tacitly confirmed this conclusion in its *Cedar Creek Order* when it noted that "[w]hether the conduct of Cedar Creek and Rocky Mountain Power constituted a legally enforceable obligation subject to the Commission's PURPA regulations is not before us." *Cedar Creek Order*, 137 FERC ¶ 61,006, P 38, and "we are not ruling on the issue of whether a legally enforceable obligation was incurred" *Id.* at P 39. However, the problems inherent in the Commission opining on matters beyond its jurisdiction are evident in the *Cedar Creek Order*. There, the Commission, after noting that it is not ruling on whether a legally obligation was incurred, stated that the "extensive negotiations between the parties are persuasive and point to the reasonable conclusion that Cedar Creek did commit itself to sell electricity to Rocky Mountain Power." *Cedar Creek Order*, 137 FERC ¶ 61,006, P 39 n.73. This statement creates confusion because it is not evident in the order that the Commission made any attempt to ascertain whether Cedar Creek properly followed procedures for establishing a legally enforceable obligation pursuant to Idaho state law. See *J.D. Wind I*, 129 FERC ¶ 61,148, P 26

(noting that J.D. Wind sought a legally enforceable obligation “pursuant to the procedures set forth in Texas law.”). The *Cedar Creek Order* also states, “it is highly probable that Cedar Creek and Rocky Mountain Power are bound by a contract that specifies the use of published avoided cost rates.” *Cedar Creek Order*, 137 FERC ¶ 61,006, P 39 n.74. This statement also creates confusion because it is not evident that the Commission considered: (1) that the Cedar Creek FESAs included a provision that they were not affective until the rates were approved by the Idaho PUC and (2) that under Idaho’s implementation of PURPA, rates in standard rate contracts are contingent on final approval by the Idaho PUC. The Commission should deny Rainbow’s requested relief because it is a question properly left to the Idaho PUC.

Rainbow’s “as applied” petition mirrors the “as applied” claims sought by the QF in 1996. *Mass. Inst. of Tech.*, 941 F. Supp. 233. There, the United States District Court of Massachusetts found that it lacked jurisdiction to hear a QF’s complaint concerning stranded-cost recovery charges (“CTC”). *Id.* at 234. The court reasoned that because the QF argued that the CTC violated PURPA as it applied to the QF, the QF’s challenge was “as applied.” *Id.* at 238 (“In other words, MIT’s claim is that the CTC, *as applied* to MIT, violates PURPA.” (Emphasis in original)). The court held that it lacked jurisdiction under the PURPA enforcement scheme and dismissed the QF’s complaint. *Id.* (citing PURPA § 210(h), 16 U.S.C. § 824a-3(h)). Applying a legally enforceable obligation rule to a particular QF’s circumstance and deciding whether a legally enforceable obligation arose is an “as applied” finding, just as a finding whether a particular QF may recover stranded costs is an “as applied” finding. *Mass. Inst. of Tech.*, 941 F. Supp. 233. Therefore, the decision of whether or not Rainbow obtained a legally enforceable obligation is reserved to the state of Idaho. The Commission should deny Rainbow’s requested relief because it seeks an impermissible “as applied” analysis from the Commission.

3. **Rainbow's Petition is an Impermissible Collateral Attack on Final Orders of the IPUC.**

On June 8, 2011, the Idaho PUC determined that the Rainbow projects did not create a legally enforceable obligation prior to December 14, 2010. June 8 Rainbow Order. On July 27, the Idaho PUC denied Rainbow's Petition for Reconsideration. July 27 Rainbow Order. Forty-two days later (September 8, 2011), because Rainbow chose not to appeal the Idaho PUC's determinations, the June 8 Rainbow Order and the July 27 Rainbow Order became final and non-appealable. I.A.R. 14(b) ("An appeal as a matter of right from an administrative agency may be made only by physically filing a notice of appeal with the Public Utilities Commission within 42 days . . . from when an application for rehearing is denied."); I.A.R. Rule 21 ("The failure to physically file a notice of appeal . . . within the time limits prescribed by these rules shall be jurisdictional and shall cause automatic dismissal of such appeal or petition.").

The law of the case is now settled, and may not be attacked on appeal or collaterally.

This is true even if the Idaho PUC's application of the law later is determined to be incorrect.

A final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action . . . . Nor are the *res judicata* consequences of a final, unappealed judgment on the merits altered by the fact that the judgment may have been wrong or rested on a legal principle subsequently overruled in another case . . . . As this Court explained in *Baltimore S.S. Co. v. Phillips*, 274 U.S. 316, 325 (1927) . . . . "A judgment merely voidable because based upon an erroneous view of the law is not open to collateral attack, but can be corrected only by a direct review and not by bringing another action upon the same cause [of action]."

*Federated Dept. Stores v. Moitie*, 452 U.S. 394, 398 (1981); *see also* Idaho Code § 61-625 ("All orders and decisions of the commission which have become final and conclusive shall not be attacked collaterally.").

The legal proscriptions barring collateral attack are supported by strong policy considerations, as explained by the Idaho Supreme Court:

The legislature has afforded the orders of the [Idaho Public Utilities] Commission a degree of finality similar to that possessed by judgments made by a court of law. I.C. § 61-625. . . . Final orders of the [Idaho Public Utilities] Commission should ordinarily be challenged either by petition to the [Idaho Public Utilities] Commission for rehearing or by appeal to this Court as provided by I.C. § 61-626 and 627; Id. Const. Art. 5, § 9. *A different rule would lead to endless consideration of matters previously presented to the Commission and confusion about the effectiveness of Commission orders.*

*Utah-Idaho Sugar Co. v. Intermountain Gas Co.*, 100 Idaho 368, 373-374 (1979) (emphasis added). Such policy concerns are highly relevant here because, in addition to Rainbow, there are three similarly situated developers whose power purchase agreements the Idaho PUC rejected on June 8, 2011, and who chose not to appeal. *See supra* note 3. The three other developers together with Rainbow represent eleven projects with a combined capacity over 270 MW. Uncertainty regarding whether those three developers and Rainbow remain eligible for standard rate power purchase agreements would frustrate the ability of the Idaho PUC to ensure that published rates are just and reasonable and would frustrate Idaho Power's ability to accurately plan how it will serve its load. If the remaining parties could retain their right to appeal their June 8 Order for an indefinite future period, Idaho Power and the Idaho PUC would have to plan as though the power purchase agreements do not exist and yet run the risk of overabundance in the event they do materialize. Such a situation ultimately would result in additional cost to Idaho Power's customers and is a good example of the kind of harm prevented by Idaho's prohibition on collateral attacks of Idaho PUC orders.

The Third Circuit found that federal common-law rules of preclusion may give preclusive effect to the factual findings and legal conclusions in an un-reviewed final decision by the New

York Public Service Commission (“NYPSC”) rendered pursuant to the NYPSC’s delegated authority under PURPA. *Crossroads Cogeneration Corp. v. Orange & Rockland Utils., Inc.*, 159 F.3d 129, 135 (1998). Importantly, the Court found “no provision of PURPA that seeks to limit common law rules of preclusions from applying to state agency decisions relating to utility regulation” and concluded that “in enacting PURPA, . . . Congress did not intend to prevent application of common law rules of preclusion.” *Id.* The Court then went on to give preclusive effect to the NYPSC decision “to the same extent as would the New York courts.” *Id.*

Under the Third Circuit’s analysis in *Crossroads*, the factual findings and legal conclusions of the Idaho PUC’s June 8 Order are entitled to preclusive effect before the federal court to the same extent that they would be in an Idaho state court. Under Idaho law, the orders of the Idaho PUC receives a degree of finality similar to that possessed by judgments made by a court of law. *Utah-Idaho Sugar Co.*, 100 Idaho at 373-374 (discussed *supra*). Consequently, the Commission should deny Rainbow’s requested relief as it is an impermissible collateral attack upon the final orders of the Idaho PUC.

4. **Rainbow’s Petition is Barred by the Doctrines of Collateral Estoppel and Res Judicata.**

Rainbow’s claims with the Commission were fully considered by the Idaho PUC, a final judgment was rendered on the merits, Rainbow failed to appeal such decision, and Rainbow’s claims with the Commission rely upon the same operative facts that were before the Idaho PUC. Rainbow’s claims with the Commission are barred by collateral estoppels (issue preclusion) and res judicata (claim preclusion).

Idaho courts require five factors be met for collateral estoppel to bar re-litigation of an issue decided in an earlier proceeding: (1) the party against whom the earlier decision was asserted had a full and fair opportunity to litigate the issue decided in the earlier case; (2) the

issue decided in the prior litigation was identical to the issue presented in the present action; (3) the issue sought to be precluded was actually decided in the prior litigation; (4) there was a final judgment on the merits in the prior litigation; and (5) the party against whom the issue is asserted was a party or in privity with a party to the litigation. *Ticor Title Co. v. Stanion*, 144 Idaho 119, 124 (2007) (internal citations omitted).

All five factors are satisfied by the Idaho PUC's June 8 and July 27 Orders. Rainbow had ample opportunity to make its case to the Idaho PUC prior to the June 8 Order, and in its petition for rehearing. Rainbow's requested relief seeks a determination that it is eligible for standard rates—the identical issue the Idaho PUC ruled on in the June 8 and July 27 Rainbow Orders. Rainbow Petition at 1. The Idaho PUC reached a final judgment on Rainbow's eligibility in the June 8 and July 27 Rainbow Orders. And Rainbow is the same party as, or has privity with, the party bound by the June 8 and July 28 Rainbow Orders. Rainbow, therefore, is collaterally estopped from being heard on the same issues again before this Commission.

Rainbow's Petition also is barred by claim preclusion, or *res judicata*. In Idaho, "*res judicata* means that in an action between the same parties upon the same claim or demand, the former adjudication concludes parties and privies not only as to every matter offered and received to sustain or defeat the claim but also every matter which might and should have been litigated in the first suit." *Magee v. Thompson Creek Mining Co.*, 268 P.3d 464, 470 (Idaho 2012) (internal citations and quotations omitted). *Res judicata* applies to decisions of administrative agencies. *Id.*; see Idaho Code § 61-625 ("All orders and decisions of the [Idaho PUC] which have become final and conclusive shall not be attacked collaterally.").

"The 'sameness' of a cause of action for purposes of application of the doctrine of *res judicata* is determined by examining the operative fact underlying the two lawsuits." *Farmers Nat'l Bank v. Shirey*, 126 Idaho 63, 69 (1994) (internal citations and quotation marks omitted).

In its petition, Rainbow essentially seeks a determination from the Commission that it formed a legally enforceable obligation to sell output from its two QFs prior to December 14, 2010. This is the same claim by Rainbow that the Idaho PUC considered and rejected, in the June 8 Rainbow Order and the July 27 Rainbow Order, and which Rainbow elected not to appeal to the Idaho Supreme Court. Whether a legally enforceable obligation arose prior to December 14, 2010, was a matter squarely within the Idaho PUC's jurisdiction. See *West Penn Power Co.*, 71 FERC ¶ 61,153, 61,495 (1995) ("It is up to the States, not this Commission, to determine . . . the date at which a legally enforceable obligation is incurred under State law."). The June 8 and July 27 Rainbow Orders conclusively resolved Rainbow's claims that a legally enforceable obligation arose before December 14, 2010. Rainbow's petition relies entirely on the record before the Idaho PUC when it entered those orders. Because Rainbow already brought an identical claim before the Idaho PUC, and that claim resulted in a final judgment, Rainbow is barred by *res judicata* from bringing that same claim to this Commission. Section 210(h) of PURPA does not permit the Commission or the Federal courts to use Section 210(h) enforcement authority to order the Idaho PUC to set aside Idaho Code §§ 61-625, 61-627 and I.A.R. 14(b) and 21, and resuscitate a conclusive order in a closed docket.

**5. Rainbow's Request for a Declaratory Order is Improper as the Cedar Creek Order has already Addressed the Issues Raised in Rainbow's Petition.**

There is no need for a declaratory order because there is no controversy or uncertainty regarding whether a state commission can limit a legally enforceable obligation to exist *only* when both parties have executed a FESA. Moreover, such an additional declaratory order as that requested by Rainbow would be an unnecessary duplication of effort leading to an inefficient and unnecessary allocation of limited agency resources. See *Midwestern Gas Users Asso'n v. Northwest Cent. Pipeline Corp.*, 34 FERC ¶ 61,301, 61,552 n.57 (1986) (where Commission has

already issued a declaratory order on issue within its special expertise, Commission refuses to engage in duplicative proceedings on the grounds that it would be an unneeded allocation of agency resources).<sup>7</sup>

The purpose of a declaratory order is to “terminate a controversy or remove uncertainty.” 18 C.F.R. § 385.207(a)(2) (2011). Petitioners’ request for declaratory order seeks, among other things, a declaration that “a state commission is prohibited under PURPA and the Commission’s regulations from holding that a legally enforceable obligation arises *only* when a QF and utility have entered into a fully-executed contract.” Rainbow Petition at 16 (emphasis added). Neither Idaho Power nor the Idaho PUC have disputed this point. In the case of Cedar Creek, after a stipulated remand from the Idaho Supreme Court, the Idaho PUC recognized that “FERC determined that the [Idaho PUC’s *Cedar Creek Order*] is inconsistent with FERC’s regulations implementing PURPA.” *In the Matter of the Application of PacifiCorp DBA Rocky Mountain Power for a Determination regarding a Firm Energy Sales Agreement between Rocky Mountain Power and Cedar Creek Wind, LLC*, Idaho PUC Order No. 32419, 5, Case Nos. PAC-E-11-01 through -05 (2011). The Idaho PUC then reviewed the facts of the case for evidence regarding the existence of a legally enforceable obligation outside the express terms of the agreements and found, despite that the agreements were not fully executed until December 22, 2010, that a legally enforceable obligation arose no later than December 13, 2010. *Id.* at 8 (“Based upon the Parties’ assertions in the Settlement Stipulation and our review of the record, we find that the record reveals that Cedar Creek had perfected a legally enforceable obligation no later than December 13, 2010.”).

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<sup>7</sup> Moreover, if Petitioners are to be allowed to seek a declaratory order on the questions they raise, notwithstanding that their questions were adequately addressed in the *Cedar Creek Order*, then Petitioners should be required to pay the filing fee associated with petition for declaratory order. See 18 C.F.R. § 381.302(a) (2011) (requiring a filing fee of \$24,860 for petitions requesting a declaratory order).

The Idaho PUC also acknowledged the *Cedar Creek Order* after it requested that the Idaho Supreme Court remand a pending appeal by Grouse Creek Wind Farm, LLC, a different developer that, similar to Cedar Creek, had FESAs that were not executed by both parties, nor effective, prior to December 14, 2010. *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*, Idaho PUC Order No. 32430, Case Nos. IPC-E-10-61, IPC-E-10-62 (2012). Idaho PUC Order No. 32430 set a schedule for briefing to reconsider its denial of the Grouse Creek PPAs in light of the *Cedar Creek Order*. *Id.*

The Idaho PUC's resolution of the Cedar Creek FESA applications and its actions in the Grouse Creek proceeding demonstrate that the Idaho PUC has recognized the Commission's guidance in the *Cedar Creek Order* and has taken action in its implementation of PURPA with that guidance in mind. It is hard to see what purpose would be served by reiterating the holding in the *Cedar Creek Order*. In considering whether there is an adequate case-in-controversy to support a declaratory proceeding regarding a PURPA claim, the Court of Appeals for the Third Circuit has applied a three part test considering: (1) the adversity of the parties' interests; (2) the conclusiveness of the judicial judgment; and (3) the utility of that judgment. *Cogeneration Assocs., LP v. Bd. of Regulatory Comm'rs of the State of New Jersey*, 44 F.3d 1178, 1188 (3rd Cir. 1995). Here, there is no adversity between the parties on the issue of whether a signed contract is necessary to form a legally enforceable obligation; the Commission's declaratory order is not conclusive with regard to an "as-applied" application of the *Cedar Creek Order* to facts of any particular QF, and, therefore, the utility of a declaration is limited. Consequently, the Commission should deny Rainbow's request for a declaratory order.

**B. In the Alternative, Should the Commission Decide to Declare its Position on the Issues Presented by Rainbow, the Facts Do Not Support Rainbow's Request.**

Notwithstanding, and without waiving Idaho Power's arguments above that it is improper for this Commission to consider the "as applied" facts of Rainbow's case pursuant to its declaratory order in Cedar Creek, the requested findings by Rainbow are premised on an inaccurate construction of Idaho state law concerning how legally enforceable obligations arise. Furthermore, Rainbow's suggestion that Idaho Power was not sufficiently prompt in processing Rainbow's FESA requests are unfounded. Idaho Power processed Rainbow's requests for power sales agreements in a diligent and timely manner; the Idaho PUC did not find unreasonable delay on the part of Idaho Power. Finally, the Idaho PUC properly rejected Rainbow's FESAs on the independent ground that they were contrary to the public interest.

**1. The Commission's Regulations Do Not Require the Conclusion that Petitioners Established a Legally Enforceable Obligation On or Before December 13, 2010.**

Rainbow's petition asks the Commission to make findings nearly identical to the findings the Commission made in the *Cedar Creek Order*.<sup>8</sup> Rainbow apparently has interpreted the *Cedar Creek Order* to require that the Idaho PUC find that a legally enforceable obligation arises when a QF tenders a signed FESA to the utility. See Rainbow Petition at 9. ("At the very latest,

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<sup>8</sup> Rainbow Petition at 15-16. Compare Rainbow request (1) that "the Idaho PUC Orders denying Petitioners a legally enforceable obligation, specifically the requirement in the June 8, 2010 order that a Firm Energy Sales Agreement/Power Purchase Agreement must be executed by both parties to the agreement before a legally enforceable obligation arises, is inconsistent with PURPA and the Commission's regulations implementing PURPA, particularly section 292.304(d)(2)," with *Cedar Creek Order*, 137 FERC ¶ 61,006, P 30; compare Rainbow request (2) that "the Idaho PUC's limitation of the methods through which a legally enforceable obligation may be created to only a fully-executed contract is inconsistent with PURPA and the Commission's regulations implementing PURPA," with *Cedar Creek Order*, 137 FERC ¶ 61,006, P 35; compare Rainbow request (3) that "the Idaho PUC's June 8, 2010 order ignores the fact that a legally enforceable obligation may be incurred before the formal memorialization of a contract in writing," with *Cedar Creek Order*, 137 FERC ¶ 61,006, P 36; compare Rainbow request (4) that "the Idaho PUC's requirement that an executed contract was necessary to create a legally enforceable obligation in the circumstances presented by Petitioners is inconsistent with PURPA and the Commission's regulations," with *Cedar Creek Order*, 137 FERC ¶ 61,006, P 37); and compare Rainbow request (5) that "the extensive negotiations between AWG and IPC point to the reasonable conclusion that Petitioners committed themselves to sell electricity to IPC on December 9, 2010, but in no event later than December 13, 2010, when AWG signed the FESAs on behalf of Petitioners," with *Cedar Creek Order*, 137 FERC ¶ 61,006, P 39.

Petitioners incurred legally enforceable obligations to sell electricity to IPC on December 13, 2010, when AWG executed the FESAs on behalf of Petitioners and delivered them to Michael Darrington at IPC's offices."'). Neither the *Cedar Creek Order* nor the Commission's regulations mandate that regardless of state law a QF may create a legally enforceable obligation merely by signing a power purchase agreement and tendering it to the utility.

Such a rule, if it existed, would make illegal, or invalidate, the PURPA implementation schemes in several states—implementation schemes that have been approved by state and federal courts as consistent with PURPA and the Commission's regulations. For example, the Court of Appeals for the Fifth Circuit upheld a Texas law requiring that a QF be within 90 days of commencing delivery of energy in order to create unilaterally a legally enforceable obligation. *Power Res. Group, Inc. v Pub. Util. Comm'n of Tex.*, 422 F.3d 231 (5th Cir. 2005). The court reasoned that neither PURPA nor 18 C.F.R. § 292.304(d) give QFs the right to create a legally enforceable obligation "at any time." *Power Res. Group, Inc.*, 422 F.3d at 238-39. Further, the court noted that, if FERC had determined that states must allow a QF to lock in rates prior to construction of a facility, it could have said so in its rules. *Id.* at 239.

The New Hampshire Supreme Court upheld an implementation scheme where a QF may unilaterally create a legally enforceable obligation by declaring its intent to obligate itself *and* filing a rate petition accompanied by a signed interconnection agreement. *Appeal of Pub. Serv. of N.H.*, 539 A.2d 275, 279 (N.H. 1988). The Oklahoma Supreme Court held that no legally enforceable obligation was created where a QF "did not . . . attempt to obtain a contract for construction, operation and maintenance of the proposed project or a contract for the purchase of natural gas." *Public Serv. Co. v. State ex rel. Okla. Corp. Comm'n*, 2005 OK 47, P 14 (2005). The Supreme Court of Idaho upheld the Idaho PUC's determination that before a QF can secure a rate, there must be a signed contract to sell at that rate or a meritorious complaint alleging that

the project was mature and that the QF had attempted and failed to negotiate a contract with the utility. *A.W. Brown*, 121 Idaho at 814.

The Commission has delegated to the states the responsibility to determine whether a QF has unilaterally established a legally enforceable obligation and, if so, when the obligation arose. *W. Penn Power Co.*, 71 FERC ¶ 61,153, 61,495 (1995); accord *Metropolitan Edison Co.*, 72 FERC ¶ 61,015, 61,050 (1995). The freedom of states to condition a QF's ability to unilaterally create a legally enforceable obligation is not without limits. The preamble to FERC's regulations state that "[u]se of the term 'legally enforceable obligation' is intended to prevent a utility from circumventing the requirement that provides capacity credit for an eligible qualifying facility merely by refusing to enter into a contract with the qualifying facility." *Small Power Production and Cogeneration Facilities; Regulations Implementing Section 210 of the Public Utility Regulatory Policies Act of 1978*, Order No. 69, FERC Stats. & Regs. ¶ 30,128, 45 Fed Reg. 12,214, 12,224 (Feb. 25, 1980). It follows that implementation schemes (such as the one disapproved by the Commission in the *Cedar Creek Order*) which may allow a utility to circumvent buying QF capacity merely by refusing (or delaying) to sign a power purchase agreement are preempted because they are inconsistent with PURPA and the Commission's regulations implementing PURPA. But it *does not* follow that states cannot place other preconditions on a QF's right to unilaterally establish a legally enforceable obligation, so long as those conditions do not allow the utility to block the QF's attempts to form a legally enforceable obligation. In fact, there are many existing and approved examples of just such preconditions.

A maturity test—e.g., a requirement that a QF must demonstrate certain indicia of project maturity—is one example of a precondition that is consistent with PURPA or the Commission's regulations. States have a legitimate interest in ensuring an orderly, efficient QF procurement process. This interest may be furthered by requiring that a QF show it has achieved certain

objective milestones indicating that the QF is more than a mere speculative venture. For example, the Idaho PUC has required that a QF, as a condition to a unilateral legally enforceable obligation, demonstrate that it is “substantially mature.” *A.W. Brown*, 121 Idaho at 814.

A filed complaint rule—e.g., a rule that a QF creates a legally enforceable obligation unilaterally on the date it files a complaint with the state commission alleging that the utility is dragging its feet—is another precondition that is consistent with PURPA and the Commission’s regulations. A state that has a maturity test might desire also to have a filed complaint rule, since the state commission ultimately must decide disputes between the utility and a QF regarding when the project achieved maturity. Equating the date a legally enforceable obligation arises to the date a QF files a meritorious complaint serves legitimate interests of the state by creating a bright line test for eligibility. Under such a scheme, a QF would create a legally enforceable obligation by filing a complaint alleging that it intends to obligate itself *and* that it has satisfied other preconditions (e.g., maturity) established by the state commission. Provided that the state commission concurs that the QF has met the preconditions, a legally enforceable obligation is deemed to have arisen on the date of the complaint. *See e.g. Rosebud Enters., Inc. v. Idaho PUC*, 131 Idaho 1, 9 (1997); *A.W. Brown*, 121 Idaho at 816.

Negotiation timelines—e.g., state commission-determined deadlines for a utility to respond to QF communications—are another precondition some states use that is consistent with PURPA and the Commission’s regulations. Oregon allows a utility to take up to fifteen days in each instance to respond to requests for an initial draft FESA, to respond to requests for a final draft FESA, and to execute and return a signed FESA tendered by the QF. *See e.g. PacifiCorp’s Oregon Tariff Schedule 37, Avoided Cost Purchases from Qualifying Facilities 10,000 kW or*

less (providing schedule for negotiation PURPA agreements).<sup>9</sup> Such a rule recognizes that a large volume of QF applications may slow down the turnaround time on QF requests, even if the request itself may take little time to process. It also benefits the QF because it establishes a limit on the amount of time that is reasonable for a utility to respond to the QF, regardless of the volume of pending QF requests.

Final approval of standard rates—e.g., standard rates are not locked in until approved by the state commission—is yet another precondition that is consistent with PURPA and the Commission’s regulations. PURPA regulations mandate that state commissions approve standard rates for QFs under 100 kW but give states the discretion to approve standard rates for QFs over 100 kW. 18 C.F.R. § 292.304(c). It has been said by the United States Supreme Court that “the state, having power to deny a privilege altogether, may grant it upon conditions as it sees fit to impose.” *Frost & Frost Trucking Co. v. Railroad Com. of California*, 271 U.S. 583, 593 (1926). The Court noted that the power is not unlimited—the state cannot impose conditions that require the relinquishment of constitutional rights. *Id.* at 593. However, QFs over 100 kW have no right to standard rates of which they can be deprived. *See* 18 C.F.R. § 292.304(c)(2) (states *may* approve standard rates for QFs over 100 kW). Therefore a state implementation that offers QFs a choice of project-specific modeled rates, negotiated rates, or standard rates subject to final state commission approval does not deprive QFs of a constitutional right. Accordingly, a state commission may elect to provide QFs greater than 100 kW an option of standard rates which the state commission may review and, if necessary disapprove, prior to a FESA becoming final.

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<sup>9</sup> [http://www.pacificcorp.com/content/dam/pacific\\_power/doc/About\\_Us/Rates\\_Regulation/Oregon/Approved\\_Tariffs/Rate\\_Schedules/Avoided\\_Cost\\_Purchase\\_From\\_Qualifying\\_Facilities\\_of\\_10,000\\_KW\\_or\\_Less.pdf](http://www.pacificcorp.com/content/dam/pacific_power/doc/About_Us/Rates_Regulation/Oregon/Approved_Tariffs/Rate_Schedules/Avoided_Cost_Purchase_From_Qualifying_Facilities_of_10,000_KW_or_Less.pdf).

None of the preconditions discussed above necessarily allow the utility to prevent a QF from creating a legally enforceable obligation. Nor do they necessarily expose the QF to lengthy regulatory delays or uncertainty. To the contrary, by setting forth clear rules and expectations, the above preconditions actually can facilitate a more efficient, less litigious negotiation process for all QFs.

In the *Cedar Creek Order*, the Commission offered the following explanation of its regulations regarding when a legally enforceable obligation arises:

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.

*Cedar Creek Order*, 137 FERC ¶ 61,006, P 32 (emphasis added). The passage is copied, *verbatim*, from the Commission's *J.D. Wind I, LLC*, decision. 129 FERC ¶ 61,148, P 25 (2009).

The italicized language in the above block quote omits that the QF, in committing itself to sell to an electric utility, must do so in accordance with the procedures set forth by the state. When the Commission applied the above standard in *J.D. Wind I*, its determination was premised on the Commission's finding that "JD Wind sought a legally enforceable obligation, *pursuant to the procedures set forth in Texas law.*" *Id.* at P 26 (emphasis added). This requirement, when combined with the language from the *Cedar Creek Order* in the above block quote, more completely describes the law of legally enforceable obligations, as set forth in PURPA and the Commission's regulations: A QF does *not* create a legally enforceable obligation merely by

tendering a signed power purchase agreement to the utility where a state has adopted other preconditions to establishing a legally enforceable obligation, and those preconditions are not inconsistent with PURPA or the Commission's regulations implementing PURPA.

PURPA and the Commission's regulations do not mandate that the Idaho PUC find a legally enforceable obligation occurred on or before December 13, 2010. The details of Idaho's legally enforceable obligation rule are to be established by the Idaho PUC within the bounds of PURPA and the Commission's regulations, and thus Rainbow's petition seeking such determination from the Commission should be denied.

2. **Rainbow's Suggestions that Idaho Power Dragged Out or Delayed Negotiations of the Power Purchase Agreements are False.**

In its petition to the Commission, Rainbow implies through its presentation of facts that Idaho Power delays in contract negotiations and final signature of the FESAs prevented Rainbow from obtaining a legally enforceable obligation prior to December 14, 2010. Rainbow's insinuation is unfounded. Rainbow did not request FESAs from Idaho Power until November 5, 2010, and in spite of the very high volume of QF requests Idaho Power had to process during that same period, it completed contract negotiations and due diligence for Rainbow's two 20-MW, new 20-year contracts in less than six weeks.

Idaho Power records indicate that initial contact with Rainbow (where Idaho Power sent Rainbow a set of initial contracting information requests) occurred on November 5, 2010. Idaho Power Company's Reply Comments at 6 (March 24, 2011) in *In the Matter of the Application of Idaho Power Co. for a Determination Regarding Firm Energy Sales Agreement Between Idaho Power and Rainbow Ranch Wind, LLC and Rainbow Ranch West, LLC*, Idaho PUC Case Nos. IPC-E-10-59 and IPC-E-10-60. (Attached hereto as Idaho Power Exhibit 101). Idaho Power received the requested information from Rainbow on November 9, 2010. *Id.* Multiple

discussions commenced with Rainbow, and first draft contracts were provided to Rainbow on November 23, 2010. *Id.* Idaho Power continued to receive e-mail and communications from Rainbow as late as December 9, 2010, that Rainbow was still attempting to determine the project sizes and finalize the agreements. *Id.*

Idaho Power began its required internal Sarbanes-Oxley Act review process on December 8, 2010. *Id.* On December 13, 2010, the unsigned, final execution versions of the contracts were delivered to Rainbow. *Id.* Rainbow signed the agreements and returned them to Idaho Power later that afternoon on December 13, 2010. *Id.* at 6-7. Idaho Power signed the agreements on December 14, 2010, and filed them with the Commission for review on December 16, 2010. *Id.* at 7. Idaho Power had no opportunity to execute the contracts prior to December 14, 2010, because the contracts were not returned to Idaho Power by Rainbow until late in the afternoon on December 13, 2010. *Id.* Idaho Power did sign the agreements the next day at the first opportunity it had with the appropriate Company executive. *Id.*

Idaho Power negotiated and executed two 20-year PPAs with an estimated value of \$209 million<sup>10</sup> in only 38 days. Thirty-eight days is rapid processing for two contracts of this size during normal times; during November and December of 2010 when Idaho Power was handling an unusually large number of QF applications totaling 315 MW of capacity, it was exceptionally fast. Finally, any assertion that Idaho Power unreasonably refused to sign the FESAs it tendered on December 13, 2010, goes against common sense. To imply that PURPA requires Idaho Power's Vice President to sign contracts valued at \$209 million within minutes of being tendered

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<sup>10</sup> See Comments of the Commission Staff at 3-4 (March 17, 2011) in *In the Matter of the Application of Idaho Power Co. for a Determination of Regarding Firm Energy Sales Agreement Between Idaho Power and Rainbow Ranch Wind, LLC; In the Matter of the Application of Idaho Power Co. for a Determination of Regarding Firm Energy Sales Agreement Between Idaho Power and Rainbow West Wind, LLC*, IPUC Case Nos. IPC-E-10-59-60 (stating that over the 20 year period of the two FESAs, the total combined amount paid by Idaho Power would be \$200.8 million).

is patently unreasonable. Signing and returning the contracts one day later, as Idaho Power did, was diligent and timely.

3. **The Idaho PUC Found Rainbow's Contracts to be Contrary to the Public Interest.**

The Idaho PUC, in its review of the signed Rainbow FESAs, found that approval of the contracts would be contrary to the public interest and refused to approve them. See June 8 Rainbow Order at 8; July 27 Rainbow Order at 12 (“This Commission specifically stated that it was not in the public interest to approve the Projects’ Agreements because they were executed after a new, lower eligibility to published rates became effective.”). Under PURPA’s regulatory scheme, “state regulatory agencies have the authority to implement PURPA in reviewing and approving contracts for the sale of electricity.” *Wheelabrator Lisbon, Inc. v. State of Conn. Dept. of Pub. Util. Control*, 531 F.3d 183, 188 (2d. Cir. 2008) (citing *Freehold Cogeneration Assocs., L.P. v. Bd. Of Reg. Comm’rs of State of N.J.*, 44 F.3d 1178, 1192 (3d. Cir. 1995)); see also *A.W. Brown*, 121 Idaho at 816 (“The Commission, as part of its statutory duties, determines reasonable rates and investigates and reviews contracts. I.C. §§ 61-502, -503.” (quoting *Empire Lumber Co. v. Wash. Water Power Co.*, 114 Idaho 191, 193 (1988))). The Idaho PUC, in its role as the regulatory authority for implementing PURPA in the state of Idaho, has an independent obligation and duty to assure that all PURPA contracts entered by Idaho Power are in the public interest. See *Rosebud Enters, Inc. v. Idaho PUC*, 128 Idaho 609, 613-14 (1996) (The Idaho PUC, in acting pursuant to PURPA, must strike a balance between “the local public interest of a utility’s electric consumers and the national public interest in development of alternative energy resources.”); see also *Agric. Prods. Corp. v. Utah Power & Light Co.*, 98 Idaho 23, 29 (1976) (“Private contracts with utilities are regarded as entered into subject to reserved authority of the state to modify the contract *in the public interest.*” (Emphasis added)).

The duty to ensure the public interest even supersedes the State Constitution of Idaho's protection of private contracts. In the State of Idaho, contracts are afforded constitutional protection against interference from the state. Idaho Const. Art. I § 16 (2011). However, despite this constitutional protection, the Idaho PUC may annul, supersede, or reform the contracts of the public utilities it regulates in the public interest. *Agric. Prods. Corp.*, 98 Idaho at 29 (“Interference with private contracts by the state regulation of rates is a valid exercise of the police power, and such regulation is not a violation of the constitutional prohibition against impairment of contractual obligations.”). The Idaho PUC may interfere with the contracts of a public utility and disregard Idaho Constitutional protections of contract only to prevent an adverse affect to the public interest. *Agric. Prods. Corp.*, 98 Idaho at 29.

While the Idaho PUC may not annul, supersede, or revise a PURPA contract during its term because such action would constitute utility-type regulation of a QF in violation of 18 C.F.R. § 292.602(c)(1), the Idaho PUC may review and approve a PURPA contract at the time it is submitted by the parties for final approval, in furtherance of its state duty to ensure that the agreement is consistent with the public interest. *Crossroads Cogeneration Corp.*, 159 F.3d at 138 (“In other words, while PURPA allows the appropriate state regulatory agency to approved a power purchasing agreement, once such an agreement is approved, the state agency is not permitted to modify the terms of the agreement.”).

The Rainbow FESAs were subject to the Idaho PUC's public interest review of PURPA contracts upon submission to the Idaho PUC for approval. Each Rainbow FESA specifically states:

This Agreement shall become finally effective upon the Commission's approval of all terms and provisions hereof without change or condition and declaration that all payments to be made to Seller hereunder shall be allowed as prudently incurred expenses for ratemaking purposes.

Idaho Power's Application, Attachment No. 1 "Firm Energy Sales Agreement" at 27 (December 16, 2010) in *In the Matter of the Application of Idaho Power Co. for a Determination Regarding Firm Energy Sales Agreement Between Idaho Power and Rainbow Ranch Wind, LLC and Rainbow Ranch West, LLC*, Idaho PUC Case Nos. IPC-E-10-59 and IPC-E-10-60. Upon the parties' submittal and Idaho PUC review, the Idaho PUC specifically found that approval of the Rainbow FESAs would be contrary to the public interests of the rate-paying citizens of Idaho, even when weighed against the national public interest in developing alternative energy resources. June 8 Rainbow Order at 8; July 27 Rainbow Order at 13 (*citing Rosebud*, 128 Idaho at 613). The Idaho PUC acted pursuant to its discretion and obligation to protect the public interest of Idaho by denying the Rainbow FESAs. This Commission should not disturb or collaterally attack the Idaho PUC's finding and intrude upon the public interests of Idaho by either pursuing an enforcement action on behalf of Rainbow or granting a declaratory order undermining the Idaho PUC's findings.

## **VI. CONCLUSION**

For the reasons set forth above, Idaho Power respectfully requests that the Commission deny Rainbow's requested relief because (1) Commission enforcement in this matter is time barred; (2) "as-applied" challenges to the Idaho PUC's implementation of PURPA are beyond the Commission's jurisdiction; (3) Rainbow's petition is an impermissible collateral attack on the June 8 and July 27 Rainbow Orders; and (4) Rainbow's petition is barred by collateral estoppel and res judicata. Additionally, a declaratory order is improper because the Commission has spoken on Rainbow's requested relief in the *Cedar Creek Order* and the Idaho PUC has recognized the Commission's guidance from that order.

Respectfully submitted this 22<sup>nd</sup> day of March 2012.



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## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 22<sup>nd</sup> day of March 2012 a true and correct copy of the within and foregoing MOTION TO INTERVENE AND PROTEST IDAHO POWER COMPANY was served electronically upon the following named parties:

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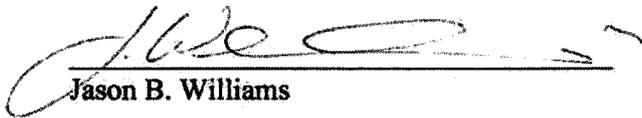
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\_\_\_\_\_  
Jason B. Williams

**BEFORE THE  
FEDERAL ENERGY REGULATORY COMMISSION**

**Docket Nos. EL12-41-000  
QF11-44-001  
QF11-45-001**

**Motion to Intervene and Protest  
of  
Idaho Power Company**

**EXHIBIT 101**

**Idaho Power Company's Reply Comments  
(March 24, 2011)**

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UTILITIES COMMISSION

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BEFORE THE IDAHO PUBLIC UTILITIES COMMISSION

IN THE MATTER OF THE APPLICATION )	
OF IDAHO POWER COMPANY FOR A )	CASE NO. IPC-E-10-59
DETERMINATION REGARDING A FIRM )	
ENERGY SALES AGREEMENT )	IDAHO POWER COMPANY'S REPLY
BETWEEN IDAHO POWER AND )	COMMENTS
RAINBOW RANCH WIND, LLC )	
_____ )	
IN THE MATTER OF THE APPLICATION )	
OF IDAHO POWER COMPANY FOR A )	CASE NO. IPC-E-10-60
DETERMINATION REGARDING A FIRM )	
ENERGY SALES AGREEMENT )	IDAHO POWER COMPANY'S REPLY
BETWEEN IDAHO POWER AND )	COMMENTS
RAINBOW WEST WIND, LLC )	
_____ )	

Idaho Power Company ("Idaho Power"), in response to Order No. 32190 and the Comments of the Idaho Public Utilities Commission ("IPUC" or "Commission") Staff, hereby submits the following Reply Comments:

**I. INTRODUCTION**

On December 16, 2010, Idaho Power filed with the Commission an Application for a determination regarding the Firm Energy Sales Agreements ("Agreement")

between Idaho Power and Rainbow Ranch Wind, LLC, and Rainbow West Wind, LLC ("Rainbow Wind" or "Projects"). On February 24, 2011, the Commission issued Notice of those Applications and Notice of Modified Procedure, Order No. 32190, setting forth a comment deadline of March 17, 2011, and a reply comment deadline of March 24, 2011.

Commission Staff filed Comments on March 17, 2011, recommending that the Commission not approve any of the Agreements between Idaho Power and the Projects because Staff does not consider any of the Agreements to be effective prior to the December 14, 2011, effective date of the Commission's Order No. 32176, which lowered the published avoided cost rate eligibility cap for wind and solar Qualifying Facilities ("QF") from 10 average megawatts ("aMW") to 100 kilowatts ("kW").

In these Reply Comments, Idaho Power submits factual information regarding the Company's processes for receiving requests, negotiating, and executing power purchase agreements pursuant to the Public Utility Regulatory Policies Act of 1978 ("PURPA"); factual information regarding the processing of the Projects' PURPA power purchase agreements; and contextual information regarding the review of the Projects' power purchase agreements by the Commission.

## **II. SUMMARY OF IDAHO POWER'S PROCESSES FOR PURPA AGREEMENTS**

### **A. Initial Project Inquiries.**

Idaho Power continuously receives numerous inquiries from various potential generation projects. Upon this initial contact, typically, a general discussion is had with each of the potential projects to explain the Power Purchase Agreement ("PPA") and Generation Interconnection Agreement ("GIA") process, which are two separate and

required processes that must be completed in order to sell generation to Idaho Power. The potential project is advised that to begin the official process of either the PPA or the GIA, that written documents and information will be required from the project.

In the case of the GIA process, a completed Generation Interconnection Application is required. In the case of a PURPA PPA, a document specifying information such as the location, contracting party, resource type, estimated nameplate rating, general description of the project, estimated on-line date, and other pertinent information is required so that a draft PPA may be created.

**B. Generator Interconnection and Transmission Availability.**

The GIA process is conducted by Idaho Power's Delivery business unit. Federal Energy Regulatory Commission ("FERC") regulations require Idaho Power to maintain separations between certain Idaho Power business units, in this case between Delivery, or the Company's Transmission Provider function, and Power Supply, or the Company's Merchant function. The first step in the interconnection process is the submission of a Generator Interconnection Application. Submittal by the project and acceptance of this application as complete establishes the proposed project's position in the interconnection queue and begins the engineering process of determining the feasibility and costs of interconnecting the proposed project to Idaho Power's electrical system. Additionally, the potential upgrades and/or availability of transmission capacity to move the projects energy from the point of interconnection within Idaho Power's system to Idaho Power's customer loads must also be determined.

After receipt and acceptance of the Generator Interconnection Application from the potential generation project Idaho Power Delivery works through a process of

inquires and meetings to obtain the required information to perform a Feasibility Study, a System Impact Study, and a Facility Study. The interconnection and transmission process is governed by Idaho Power's Tariff Schedule 72, filed with and approved by the Commission, and provisions of its Open Access Transmission Tariff ("OATT") filed with and approved by FERC. The potential project is informed of the progress of each step in this process. In addition, the potential project has various decision points and financial deposit requirements throughout this process. Failure by the potential generation project to make these decisions or make the deposit payments in a timely manner can lead to delays or termination of the interconnection process pursuant to Idaho Power's Tariff Schedule 72 and OATT.

**C. PURPA Power Purchase Agreement.**

Once a potential generation project has submitted written information on their proposed project that demonstrates the project is eligible for a PURPA purchase power agreement and wishes to move forward with the development of the proposed project, Idaho Power begins the process of drafting a PPA for the proposed project. Quite often a proposed project will send in incomplete and/or non-definitive information, which requires inquiries and exchanges between the Company and the project in order to obtain the information necessary to prepare a draft agreement. In many cases the potential projects never provide definitive information and never move forward with draft purchase power agreement discussions.

The schedule for processing a PPA can be affected by multiple factors, including the proposed project's responsiveness to information requests, the proposed project's provision of key decisions at key decision points, and the quantity of proposed projects

being processed by the Company. In the case of multiple PPA requests received by the Company, Idaho Power processes the requests on a "first-come, first-served" basis. This does not mean that multiple projects are not being processed at the same time. Multiple requests and draft contracts are often being processed simultaneously and are in various stages of the contract process.

Once the proposed project's draft PPA is agreed upon by the parties and in final draft form, an internal Idaho Power Sarbanes Oxley ("SOX") review is required. This review is required to achieve compliance with the SOX regulatory requirements. It involves a review and approval of the draft agreement by Idaho Power management, accounting, financial reporting (FAS133, Fin 46, etc), legal, and confirmation of the appropriate Idaho Power executive authorized to execute the agreement. As this review requires the involvement of numerous areas within the Company an expected completion time of this review is approximately 10 business days. Very rarely does this review result in any material changes to the draft PPA. Instead, the review process provides confirmation from all the necessary divisions within the Company that the contract meets each area's SOX requirements to enable Idaho Power to execute the PPA.

Upon completion of the internal SOX review, three executable copies of the PPA are prepared and sent to the project for signature and execution. The project is notified that the PURPA agreement must be executed within 10 days. In addition, the project is also notified that if any rules or regulations applicable to the agreement are modified or changed prior to both parties executing the agreement, that Idaho Power will be required to modify the agreement accordingly.

Upon return of the three agreements, signed and executed by the project, Idaho Power then schedules a time with the appropriate Idaho Power executive to sign and execute the agreement. Generally this is accomplished within one to two business days of when the executed agreement is received back from the project, but is dependent on the limited availability of the required Company executive with the requisite authority to execute contracts containing such large monetary obligations as those contained in the typical 20-year PURPA PPA.

Upon execution of the agreement by both parties, the executed agreement is forwarded to Idaho Power's legal department for preparation of an application and filing of the agreement with the Commission for its review. Generally, this application is prepared and submitted within five business days of the date that the Agreement is fully executed.

### **III. RAINBOW WIND'S POWER PURCHASE AGREEMENT PROCESS**

Idaho Power records indicate initial contacts with the Projects, where initial contracting information requests were sent to the Projects, on November 5, 2010. Requested information was received back from the Projects on November 9, 2010. Multiple discussions commenced with the Projects, and first draft contracts were provided to the Projects on November 23, 2010. Idaho Power continued to receive e-mail and communications from the Projects as late as December 9, 2010, that the Projects were still attempting to determine the project sizes and finalize the agreements.

Idaho Power began its internal SOX review process on December 8, 2010. On December 13, 2010, the unsigned, final execution versions of the contracts were hand delivered to the Projects. The Projects signed the agreements and returned them to

Idaho Power later that afternoon on December 13, 2010. Idaho Power signed the agreements on December 14, 2010, and filed them with the Commission for review on December 16, 2010. Idaho Power had no opportunity to execute the contracts prior to the December 14, 2010, effective date of Order No. 32176 because the contracts were not returned to Idaho Power by the Projects until late in the afternoon on December 13, 2010. Idaho Power did sign the agreements the next day at the first opportunity it had with the appropriate Company executive.

#### **IV. IDAHO POWER'S APPLICATION FOR REVIEW OF THE AGREEMENT**

As the Company did with all PURPA contracts that were executed subsequent to the filing of the Joint Petition of the three Idaho electric utilities in Case No. GNR-E-10-04, Idaho Power filed the Projects' PURPA contracts for review with the Commission specifically seeking the Commission's acceptance or rejection of the agreements. Idaho Power specifically did not ask for the Commission's approval, nor did the Company specifically ask for the Commission's rejection. Instead, the Company asked for and seeks the Commission's independent review of the agreement. The Commission's independent review of the agreement serves several functions including: (1) Commission approval as required by the terms of the contract in order for it be effective; (2) if accepted by the Commission, the Company seeks authorization that all payments for purchases of energy under the agreement be allowed as prudently incurred expenses for ratemaking purposes; and (3) a Commission determination as to whether such agreement(s) is/are in the public interest.

As stated in its Application, Idaho Power clearly understands its obligation under federal law, FERC regulations, and this Commission's Orders, that it has not been

relieved of, to enter into power purchase agreements with PURPA QFs. As stated in the Joint Petition filing, Idaho Power has received a very large amount, in terms of both number of projects and volume of MWs, of requests from PURPA QF developers in a very short time frame demanding to enter into published avoided cost rate PURPA contracts. The Company diligently and in good faith processed these requests, in the ordinary course of business and on an expedited basis, and filed the same for review with this Commission, as is its legal obligation. The Company executed these contracts in good faith and if those contracts are approved by the Commission, will honor and comply with the requirements therein.

However, the request for review of the Projects' Agreements, as well as several other executed PURPA agreements that were filed subsequent to the November 5, 2010, Joint Petition in Case No. GNR-E-10-04, were made with the specific reservation of rights and incorporation of the averments set forth in that Joint Petition regarding the possible negative effects to the both the utility and its customers of additional and unfettered PURPA QF generation on system reliability, utility operations, the costs of incorporating and integrating such a large penetration level of PURPA QF generation into the utility's system, and, most importantly, the dramatic increase in costs that must be borne by the Company's customers because of the disaggregation of large projects into 10 aMW increments and the inflated avoided cost rates obtained thereby from the use of the Surrogate Avoided Resource methodology.

Even though Idaho Power was legally obligated to continue to negotiate, execute, and submit PURPA QF contracts for Commission review containing published rates for projects at and below 10 aMW, the Company is also obligated to reiterate that

the continuing and unchecked requirement for the Company to acquire additional intermittent and other QF generation regardless of its need for additional energy or capacity on its system not only circumvents the Integrated Resource Plan ("IRP") planning process and creates system reliability and operational issues, but it also increases the price its customers must pay for their energy needs above the Company's actual avoided costs.

The Commission, in its role as the regulatory authority for all investor owned, public utilities in the state of Idaho, has an independent obligation and duty to assure that all contracts entered into by the public utilities it regulates are ultimately in the public interest. In the state of Idaho, contracts are afforded constitutional protection against interference from the State. Idaho Const. Art. I, § 16. However, despite this constitutional protection, the Commission may annul, supersede, or reform the contracts of the public utilities it regulates in the public interest. *Agricultural Products Corp. v. Utah Power & Light Co.*, 98 Idaho 23, 29, 557 P.2d 617, 623 (1976) ("Interference with private contracts by the state regulation of rates is a valid exercise of the police power, and such regulation is not a violation of the constitutional prohibition against impairment of contractual obligations."); see also *Federal Power Comm's v. Sierra Pac. Power Co.*, 350, U.S. 348, 76 S.Ct. 368, 100 L.Ed. 388 (1956); *United Gas Pipe Line Co. v. Mobile Gas Service Corp.*, 350 U.S. 332, 76 S.Ct. 373, 100 L.Ed. 373 (1956) (U.S. Supreme Court finding that rates fixed by contract could be modified only "when necessary in the public interest"). The Commission may interfere in such a way with the contracts of a public utility only to prevent an adverse affect to the public interest. *Agricultural Products*, 98 Idaho at 29. "Private contracts with utilities are regarded as entered into

subject to reserved authority of the state to modify the contract in the public interest.”

*Id.*

Idaho Power proceeded reasonably and in good faith in the negotiation and eventual signing and execution of a published rate, 10 aMW PURPA contracts with the Projects as required by the then current applicable law, rules, and regulations. Idaho Power will continue to meet its legal and regulatory requirements and obligations with regard to the Commission's implementation of PURPA. However, as also required by the Commission, Idaho Power has an additional obligation when contracting with QF projects, recently reiterated to it by the Commission: “We intend for the Company to assist the Commission in its gatekeeper role of assuring that utility customers are not being asked to pay more than the Company's avoided cost for QF contracts. We expect Idaho Power to rigorously review such contracts.” Order No. 32104.

#### **V. CONCLUSION**

While meeting its legal obligations to contract with QF projects pursuant to the Commission's implementation of PURPA, the Company also asks that the Commission review such contracts to assure that they comport with the public interest. The public interest implications raised in the GNR-E-10-04 proceeding are of similar magnitude as those contemplated and required by the *Sierra-Mobile* doctrine and *Agricultural Products* and its progeny, as to invoke and authorize the Commission – in the exercise of its legislative, state police power and authority to protect the public in the contractual rates that it sets and the public utility contracts that it reviews for the purchase of energy from QF projects under PURPA. Idaho Power respectfully reiterates its request for the

Commission to review the Projects' contracts as to whether they are in the public interest and issue its Order either accepting or rejecting the same.

DATED at Boise, Idaho, this 24<sup>th</sup> day of March 2011.

A handwritten signature in black ink, appearing to read "Donovan E. Walker", written over a horizontal line.

DONOVAN E. WALKER  
Attorney for Idaho Power Company

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on the 24<sup>th</sup> day of March 2011 I served a true and correct copy of the within and foregoing IDAHO POWER COMPANY'S REPLY COMMENTS upon the following named parties by the method indicated below, and addressed to the following:

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