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IDAHO PUBLIC
UTILITIES COMMISSION

DONOVAN E. WALKER
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January 10, 2013

VIA HAND DELIVERY

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

Re: Case Nos. IPC-E-12-25 and IPC-E-12-26
Complaints and Petitions of Idaho Power Company for Declaratory Order
New Energy Two, LLC (Swager Farms) and New Energy Three, LLC
(Double B Dairy) – Idaho Power Company's Response to Respondents'
Motion to Dismiss

Dear Ms. Jewell:

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

Very truly yours,

A handwritten signature in black ink, appearing to read "Donovan E. Walker", written in a cursive style.

Donovan E. Walker

DEW: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 COMPLAINT)
AND PETITION OF IDAHO POWER)
COMPANY FOR A DECLARATORY)
ORDER REGARDING THE FIRM ENERGY)
SALES AGREEMENT AND GENERATOR)
INTERCONNECTION AGREEMENT WITH)
NEW ENERGY TWO, LLC.)

CASE NO. IPC-E-12-25

IN THE MATTER OF THE COMPLAINT)
AND PETITION OF IDAHO POWER)
COMPANY FOR A DECLARATORY)
ORDER REGARDING THE FIRM ENERGY)
SALES AGREEMENT AND GENERATOR)
INTERCONNECTION AGREEMENT WITH)
NEW ENERGY THREE, LLC.)

CASE NO. IPC-E-12-26

IDAHO POWER COMPANY'S
RESPONSE TO RESPONDENTS'
MOTION TO DISMISS

The Petitioner/Complainant, Idaho Power Company ("Idaho Power"), pursuant to the Idaho Public Utilities Commission's ("Commission") Rules of Procedure, including, but not limited to, RP 57, hereby files this Response to New Energy Two, LLC, and New Energy Three, LLC's ("Respondents") Motion to Dismiss for Lack of Subject Matter Jurisdiction ("Motion to Dismiss").

I. SUMMARY OF THE CASE

Idaho Power filed Complaints and Petitions for a Declaratory Order in the above-captioned cases due to Respondents' failure to take the necessary steps required to bring its facilities on-line by the dates required in Respondents' Firm Energy Sales Agreements ("FESA"). Specifically, instead of taking steps to move forward with the development of their projects and the required generator interconnection to meet their Scheduled Operation Dates as required by the FESAs, Respondents chose to assert claims of *force majeure*, alleging that proceedings at the Commission excuse its performance because renewable project lenders were unwilling to lend in Idaho pending the outcome of those proceedings. Idaho Power maintains that challenges facing lending cannot constitute the type of unanticipated or unforeseeable events that lead to a valid event of *force majeure*. In its Complaints, Idaho Power requested that the Commission find: (1) that it has jurisdiction over the case; (2) that the claims of *force majeure* do not exist and do not excuse Respondents' failure to meet its Scheduled Operation Dates; (3) that Idaho Power is entitled to damages under the FESAs; and (4) that Idaho Power may terminate if and when Respondents do not achieve the required Operation Dates. Respondents filed a Motion to Dismiss, alleging that Idaho law deprives the Commission of jurisdiction over interpretation or enforcement of the FESAs. Idaho Power asserts that the Commission does indeed have jurisdiction over the interpretation of the contracts at issue.

II. ARGUMENT

Respondents misrepresent the law in the state of Idaho claiming that "Idaho law deprives the Commission of jurisdiction to adjudicate a contract dispute, and the Commission must therefore dismiss Idaho Power's claims requesting interpretation and

enforcement of the FESAs. Those claims may only be heard in a court of competent jurisdiction.” Motion to Dismiss at 4. As set forth below, there are instances in which the Commission can, and does, interpret contracts entered into by public utilities that it regulates, and has the jurisdiction to do so. Again, contrary to the representations of Respondents, this is true whether or not the other party to the contract is regulated by the Commission.

A. The Commission Has Jurisdiction to Hear These Cases.

The Idaho Supreme Court has specifically found that despite language that contract interpretation is for the courts, the Commission does have jurisdiction, and the right, to interpret contracts. *McNeal v. Idaho Public Utilities Commission*, 142 Idaho 685, 689, 132 P.3d 442, 446 (2006). In *McNeal*, the Commission’s interpretation of an arbitration provision in a Commission-approved contract between PageData, an unregulated paging provider, and Qwest, at that time a regulated public utility, was found to be properly within the jurisdiction of the Commission. *Id.*

In its Motion to Dismiss, Respondents allege that the Commission does not have jurisdiction because the Commission’s powers are limited to those powers that are expressly granted to it. Motion to Dismiss at 5. While this is correct as a general rule, the Court has routinely tempered such statements and recognizes that there are instances in which the Commission does have jurisdiction and authority to interpret contracts.

Idaho Case law indicates in general that contract interpretation is for the courts, not the Commission, but has not determined that interpretation and enforcement of an interconnection agreement is solely for the courts. The cases have been careful to use words such as “generally” and “normally” and also, to provide for exceptions to the norm.

Id. The Court then went on to cite several of the very statements relied upon by Respondents.

In *Lemhi Telephone Co. v. Mountain States Telephone & Telegraph Co.*, 98 Idaho 692, 696, 571 P.2d 753, 757 (1977) this court stated: "Generally, construction and enforcement of contract rights is a matter which lies in the jurisdiction of the courts and not in the Public Utilities Commission." In *Idaho Power Co. v. Cogeneration, Inc.*, 134 Idaho 738, 748, 9 P.3d 1204, 1214 (2000) this Court cited *Afton Energy Inc. v. Idaho Power Co.*, 111 Idaho 925, 929, 729 P.2d 400, 404 (1986), stating: "Questions of contract interpretation and enforcement are normally the sole province of the courts."

Id. However, the Court in *McNeal* then found that "Because of federal law interconnection agreements fall outside the norm." *Id.*

In *McNeal*, the Commission was tasked with implementation of federal regulations, which led to an interconnection agreement, a contract, between PageData and Qwest. PageData filed a complaint alleging that Qwest was not in compliance with certain provisions of the agreement. The Commission dismissed the complaint, finding that under the arbitration clause of the contract that the parties were to first submit the matter to arbitration. The Supreme Court held that the Commission had authority to interpret the arbitration provision in the contract. *Id.* Similarly, in this case, the Commission is tasked with implementation of the Public Utility Regulatory Policies Act of 1978 ("PURPA") federal regulatory scheme, which led to an agreement between Idaho Power, a regulated utility, and Respondents, non-regulated PURPA qualifying facilities ("QFs"). Here, Idaho Power has also filed complaints due to Respondents' failure to meet its contractual commitments in that agreement, where Respondents claim its non-performance is excused by the *force majeure* clause in the contract. Similarly, just as the Commission had the jurisdiction and authority to interpret the

arbitration clause in *McNeal*, the Commission here has the jurisdiction and authority to interpret the *force majeure* clause in the FESA.

B. The Parties Agreed to Submit Disputes to the Commission.

Additionally, the Commission may have jurisdiction over the interpretation of contracts where the parties have agreed to submit a dispute involving contract interpretation to the Commission. *Afton Energy, Inc. v. Idaho Power Co.*, 111 Idaho 925, 929, 729 P.2d 400, 404 (1986) 929, 729 P.2d at 404 (citing *Bunker Hill Co. v. Wash. Water Power Co.*, 98 Idaho 249, 252, 561 P.2d 391, 394 (1977)). Despite their claims to the contrary, Respondents agreed to submit claims to the Commission in their agreement. Both FESAs contain identical language regarding Commission jurisdiction. Paragraph 7.7 of the FESAs provides for continuing jurisdiction of the Commission.

Continuing Jurisdiction of the Commission. This Agreement is a special contract and, as such, the rates, terms and conditions contained in this Agreement will be construed in accordance with Idaho Power Company v. Idaho Public Utilities Commission and Afton Energy, Inc., 107 Idaho 781, 693 P.2d 427 (1984), Idaho Power Company v. Idaho Public Utilities Commission, 107 Idaho 1122, 695 P.2d 1 261 (1985), Afton Energy, Inc. v. Idaho Power Company, 111 Idaho 925, 729 P.2d 400 (1986), Section 210 of the Public Utility Regulatory Policies Act of 1978 and 18 CFR §292.303-308.

(Double B Complaint, Attachment 1 at p. 17; Swager Complaint Attachment 1 at p. 17.)

Paragraph 19.1 of the FESAs also demonstrates that the parties have agreed to the Commission's jurisdiction regarding any and all disputes, providing that all disputes relating to the Agreement will be submitted to the Commission.

Disputes – All disputes related to or arising under this Agreement, including, but not limited to, the interpretation of the terms and conditions of this Agreement, will be submitted to the Commission for resolution.

Id. While not dispositive of Commission jurisdiction in and of itself, nonetheless, it is clear that these are contracts which were entered into by the parties with the understanding that disputes or interpretation would be submitted to the Commission.

C. The Commission's Grant of Authority Over Ratemaking Functions and its Implementation of Federal Law Provides Express Authority and Creates a Duty for the Commission to Hear the Present Dispute.

Respondents additionally claim that the Commission does not have an express grant of authority which would allow them jurisdiction, defining the issue as one that requires a grant of authority for the Commission to "interpret or enforce civil contracts." Motion to Dismiss at 6. However, Respondents draw this incorrect conclusion by failing to account for the types of contracts at issue and how they relate to Commission duties. The answer is very different when the issue is given additional detail and context because the Commission rightly has jurisdiction over interpretation of contracts relating to utility rates, which contracts, when entered into pursuant to PURPA, it is required to implement and oversee under a federal regulatory scheme and pursuant to state law. The Commission is granted the requisite authority under both Idaho and federal law to do so.

Idaho Code § 61-501 provides the Commission with authority to supervise and regulate utilities and to do "all things necessary to carry out the spirit and intent" of the act. *Idaho Code* § 61-129 states that utilities are subject to the jurisdiction, control, and regulation of the Commission. *Idaho Code* § 61-502 provides jurisdiction over rates, including rates "or contracts . . . affecting such rates." The Commission is also granted the power "upon its own motion or upon complaint, to investigate a single rate . . . contract or practice." I.C. § 61-503. The FESAs at issue are utility contracts which affect rates as defined under § 61-502 and which the Commission has specific authority

to investigate under § 61-503. The payments made by Idaho Power, as well as any damages collected, under the FESA are directly assigned to Idaho Power's many customers through rates. As such, the contractual matters affecting the same fall directly under the express grant of authority to the Commission.

Furthermore, PURPA itself grants the Commission jurisdiction over the implementation of the federal statute. *Afton Energy, Inc. v. Idaho Power Co.*, 107 Idaho 781, 784-85, 693 P.2d 427, 430-31 (1984) (hereinafter "*Afton I/III*"). The Court recites the utility's federal obligations which require that "each State regulatory authority *shall* . . . implement such rule." *Id.* (citing PURPA § 210(f)). The Idaho Supreme Court states that "it is clear that PURPA was intended to confer upon state regulatory commissions responsibilities not conferred under state law." *Afton I/III*, 107 Idaho at 784-85, 693 P.2d at 430-31. "Moreover, the United States Supreme Court has interpreted PURPA as imposing requirements on state regulatory authorities in excess of their duties under state law." *Id.* The Federal Energy Regulatory Commission ("FERC") itself states that "state 'implementation may consist of the issuance of regulations, an undertaking to resolve disputes between qualifying facilities and electric utilities arising under Subpart C, or any other action reasonably designed to implement such subpart.'" *Id.* (citing 18 CFR § 292.401(a)(1980)).

This establishes a clear grant of authority to the Commission that confers upon it responsibilities under PURPA that are "in excess" of those that were granted under state law alone, and one which was anticipated to resolve disputes between qualifying facilities and utilities regarding PURPA matters. By extension, the present dispute between a utility and qualifying facilities over a PURPA matter is seemingly precisely what FERC envisioned when it promulgated 18 CFR § 292.401(a). The *Afton I/III* Court

cited language from the United States Supreme Court and federal laws which creates an additional basis of authority for the Commission's jurisdiction in these cases. This combined with the specific state authority previously discussed creates an explicit grant of authority to the Commission to interpret a PURPA contract.

The *Afton I/III* Court analogized *FERC v. Mississippi*, 102 S.Ct. 2126, 2137 (1982), to this situation concluding that the Commission's actions of reviewing a dispute over a PURPA contract were:

similar to its everyday ratemaking functions which necessarily entail reviewing contracts and transactions which affect those rates. I.C. § 61-307. *Contracts entered into by public utilities with CSPPs or decisions by utilities not to contract with CSPPs have a very real effect on the rates paid by consumers both at present and in the future.*

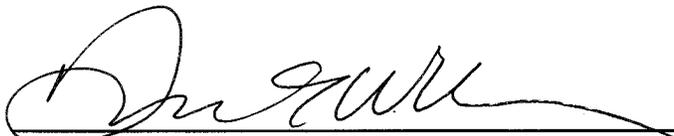
Afton I/III, 107 Idaho at 789, 693 P.2d at 435 (emphasis added). This grant of authority over ratemaking functions creates a duty for the Commission to hear the present dispute.

III. CONCLUSION

Idaho Power respectfully requests that the Commission deny Respondents' Motion to Dismiss. The Commission properly has jurisdiction over this matter. Such a finding is consistent with prior decisions, with state and federal regulations, and with Commission jurisdiction in other instances where it acts to implement federal regulations. Idaho Power asks the Commission to find that it has jurisdiction over the interpretation of the *force majeure* clause in Respondents' FESAs and, subsequently, to determine whether Respondents' claim of *force majeure* is a valid claim that excuses its performance under the FESAs. Idaho Power withdraws its request for the Commission to take any enforcement action pursuant to the FESAs, as those actions are clearly

defined by the FESAs, and it is not necessary for the Commission to take any action regarding enforcement. Upon the Commission's determination regarding the *force majeure* clause, Idaho Power will exercise the relevant rights and remedies it has as set forth within the FESA, which may include termination and damages.

Respectfully submitted at Boise, Idaho, this 10th day of January 2013.

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

DONOVAN E. WALKER
Attorney for Idaho Power Company

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 10th day of January 2013 I served a true and correct copy of IDAHO POWER COMPANY'S RESPONSE TO RESPONDENTS' MOTION TO DISMISS upon the following named parties by the method indicated below, and addressed to the following:

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