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UTILITIES COMMISSION

**DONOVAN E. WALKER**  
Lead Counsel  
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November 21, 2012

**VIA HAND DELIVERY**

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

Re: Case No. IPC-E-12-26  
Complaint and Petition of Idaho Power Company for Declaratory Order  
New Energy Three, LLC – Double B Dairy

Dear Ms. Jewell:

Enclosed for filing in the above matter are an original and seven (7) copies of the Complaint and Petition of Idaho Power Company for Declaratory Order.

Pursuant to our previous conversation, it is Idaho Power Company's understanding that you, the Idaho Public Utilities Commission Secretary, has authorized Idaho Power Company, pursuant to RP 61.04, to modify the number of copies and form of the filing as follows:

1. Reduce the number of attachment copies that must be filed to four (4) copies; and
2. That the filed materials be provided to the Idaho Public Utilities Commission in electronic format.

Thank you for your prompt attention and consideration.

Very truly yours,

Donovan E. Walker

DEW:evp  
Enclosures

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UTILITIES COMMISSION

Attorney for Idaho Power Company

BEFORE THE IDAHO PUBLIC UTILITIES COMMISSION

IN THE MATTER OF THE COMPLAINT	)	
AND PETITION OF IDAHO POWER	)	CASE NO. IPC-E-12-26
COMPANY FOR A DECLARATORY	)	
ORDER REGARDING THE FIRM ENERGY	)	IDAHO POWER COMPANY'S
SALES AGREEMENT AND GENERATOR	)	COMPLAINT AND PETITION FOR
INTERCONNECTION AGREEMENT WITH	)	DECLARATORY ORDER
NEW ENERGY THREE, LLC.	)	
	)	

COMES NOW the Petitioner/Complainant, Idaho Power Company ("Idaho Power"), by and through its attorney, Donovan Walker, and pursuant to this Commission's Rules of Procedure, including but not limited to RP 54 and RP 101, hereby files this Complaint and Petition for Declaratory Order.

Communications regarding this Complaint and Petition for Declaratory Order should be sent to:

Donovan Walker  
Idaho Power Company  
1221 West Idaho Street (83702)  
P.O. Box 70  
Boise, Idaho 83703  
Telephone: (208) 388-5317  
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[dwalker@idahopower.com](mailto:dwalker@idahopower.com)

### **SUMMARY OF THE CASE**

1. This is a dispute between Idaho Power Company ("Idaho Power") and New Energy Three, LLC ("New Energy Three") a special purpose entity that intends to own and control a biogas generation facility identified as the Double B Dairy Anaerobic Digester Project ("Double B") to be developed by Exergy Development Group of Idaho, LLC ("Exergy Development"). Over the course of Double B's contacts with Idaho Power there have been at least three special purpose entities involved representing Double B's project development/management: The New Energy Company, LLC; New Energy Three, LLC; and Exergy New Energy, LLC. In May of 2010 Idaho Power and one of the special purpose entities, New Energy Three, entered into a Firm Energy Sales Agreement ("FESA") pursuant to the Public Utility Regulatory Policies Act of 1978 ("PURPA"), which provides that New Energy Three will design, construct, own, maintain and operate a biogas generation facility as a PURPA qualifying facility ("QF") and that Idaho Power will buy the electric energy produced by the facility at avoided cost rates. (See Attachment 1.)

2. The FESA requires, among other things, that New Energy Three meet certain construction deadlines, such as placing the project in service by the Scheduled

Operation Date of December 1, 2012. New Energy Three selected the Scheduled Operation Date of December 1, 2012. New Energy Three will not achieve the Scheduled Operation Date of December 1, 2012, and will likely not achieve the Operation Date by March 1, 2013. New Energy Three has failed to take the necessary steps required to bring the facility online and operational by the dates required in the FESA including, but not limited to, failing to take the steps required to secure the interconnection of its proposed facility to Idaho Power's system. Rather than pursue the necessary generator interconnection system upgrades required to connect its proposed project to Idaho Power's system and bring the project online and operational, New Energy Three chose to pursue a claim of force majeure based upon other pending proceedings at the Idaho Public Utilities Commission ("Commission"), claiming such proceedings excuses its performance under the FESA. Exergy Development, on behalf of New Energy Three, asserts that because of pending PURPA proceedings at the Commission, renewable project lenders are unwilling to lend in Idaho pending the outcome of those proceedings. Exergy Development claims that its lack of ability to finance its project is an event of force majeure excusing its performance under the FESA. Idaho Power does not agree that Exergy Development has identified a valid event of force majeure. Idaho Power disagrees that the claimed events excuse New Energy Three from meeting its operational requirements pursuant to the Commission approved FESA, and seeks authorization to assess damages and terminate the FESA.

3. The FESA provides clear remedies for a party's failure to achieve construction deadlines, among them termination of the FESA and delay damages. With this Complaint and Petition, Idaho Power is requesting the Commission to issue an

order declaring that Idaho Power is authorized to apply such remedies against New Energy Three and the special purpose entities in the event that the Double B Project is not completed by March 1, 2013. More specifically, Idaho Power asks the Commission to make findings and enter a declaratory order that: 1) the Commission has jurisdiction over the interpretation and enforcement of the FESA and the Generator Interconnection Agreement (“GIA”); 2) New Energy Three’s claim of force majeure does not exist so as to excuse the Double B Project’s failure to meet the Scheduled Operation Date; 3) if Double B fails to achieve its Scheduled Operation Date of December 1, 2012, Idaho Power may collect Delay Damages; and 4) if Double B fails to achieve its Operation Date by March 1, 2013, Idaho Power may terminate the FESA.

#### **FACTUAL ALLEGATIONS**

4. Idaho Power is an Idaho public utility subject to the jurisdiction of the Commission.

5. The New Energy Company, LLC (“New Energy”) is an Idaho limited liability company.

6. New Energy Three, LLC is an Idaho limited liability company.

7. Exergy New Energy, LLC (“Exergy”) is an Idaho limited liability company.

8. On October 12, 2009, New Energy filed a Small Generator Interconnection Request for a proposed 1.2 MW biogas generator project for Double B. At the time the application was filed, the Legal Name of the Interconnection Customer was identified as “Owner/Operator Company being formed. Please see contact information below.” The application was executed by Laura Knothe. According to the Certificate of Organization filed with the Idaho Secretary of State on September 16, 2008, Laura Knothe is the

Registered Agent for RETRO-comm, LLC which was changed to New Energy in February 2009. The Annual Report Form filed in August 2010 listed Leslie White as the Manager of New Energy. On May 24, 2010, New Energy Three entered into a FESA for a 15-year term for energy deliveries of less than 10 aMW. Laura Knothe executed the FESA on behalf of New Energy Three. According to the Certificate of Organization filed with the Idaho Secretary of State on March 25, 2010, Leslie White is the Registered Agent and Manager of New Energy Three. The Annual Report Form filed in April 2012 listed Laura Knothe as the Managing Partner of New Energy Three. In May 2011 Laura Knothe gave permission for Collin Rudeen of Exergy Development to be involved in team meetings, discussions, and be provided information relating to the Double B Projects. According to the Certificate of Organization filed on April 5, 2011, Exergy New Energy, LLC was recorded with the Idaho Secretary of State listing James Carkulis as the Registered Agent. Throughout the length of New Energy's application for interconnection all three companies have been involved, whether it is from executing Agreements or making decisions relating to the Double B Projects.

9. On October 12, 2009, New Energy submitted a Small Generator Interconnection Request for a proposed 1.2 MW methane gas generating project for Double B. A true and correct copy of the Small Generator Interconnection Request for Double B is attached hereto as Attachment 2 and incorporated herein by reference. Idaho Power assigned a Generator Interconnection Queue Number ("GI #") to Double B of #308.

10. On October 14, 2009, Luis Bettencourt of Double B, LLC authorized New Energy to act on Double B's behalf in negotiations with Idaho Power concerning the

anaerobic digester project on the Double B Dairy. Idaho Power was directed to provide New Energy the information to complete the negotiations of the necessary agreements. However, all final agreements would be subject to the approval and execution of Double B Dairy, LLC.

11. On October 19, 2009, Idaho Power acknowledged receipt of New Energy's Small Generator Interconnection Request and tendered to New Energy a form Small Generator Feasibility Study Agreement for Double B GI #308. A true and correct copy of the letter sending the form Small Generator Feasibility Study Agreement for Double B GI #308 tendered by Idaho Power is attached hereto as Attachment 3 and incorporated herein by reference.

12. On October 27, 2009, Idaho Power and New Energy conducted a scoping meeting. Attached hereto as Attachment 4 and incorporated herein by this reference is a true and correct copy of an October 27, 2009, Feasibility Study Agreement for Double B GI #308, executed by Idaho Power and New Energy. Idaho Power acknowledged the executed Feasibility Study Agreement on November 2, 2009.

13. Attached hereto as Attachment 5 and incorporated herein by this reference is a true and correct copy of the December 9, 2009, Draft Generator Interconnection Feasibility Study Report for the Double B interconnection. This report was for New Energy's requested configuration of GI #308 located in Idaho Power's Southern Idaho service territory in Cassia County, for 1.2 MW at a 12.5 kV connection, with estimated interconnection cost of \$225,000.

14. On December 15, 2009, Idaho Power sent a letter attaching a copy of the Draft Feasibility Study Report. This letter advises that the feasibility analysis indicates

that modification/addition of some facilities will be required to integrate the network/energy resource capacity addition of New Energy's Projects GI #307, #308, and #309 to Idaho Power's system. The letter advises that New Energy needs to schedule a technical meeting and/or provide comments to the Draft Feasibility Study Report within ten business days upon receipt of the Draft Feasibility Study Report. A true and correct copy of the December 15, 2009, letter is attached hereto as Attachment 6 and incorporated herein by reference.

15. Attached hereto as Attachment 7 and incorporated herein by this reference is a true and correct copy of the January 13, 2010, Final Generator Interconnection Feasibility Study Report for Double B GI #308 interconnection.

16. On January 13, 2010, Idaho Power sent a letter attaching a copy of the Final Feasibility Study Report. This letter advises that the feasibility analysis indicates the system is capable of integrating the Double B generator at the proposed location. However, the study also advises it does not provide any transmission rights which might be required for the sale of energy from Double B GI #308. Further, Idaho Power recommends New Energy contact Idaho Power's Power Supply Department to begin the study process for delivery of energy, and that additional network upgrades might be required which could have a significant financial impact. Idaho Power forwarded a form Facility Study Agreement for Double B GI #308 based on the fact a System Impact Study was not required. The letter advises that payment must be received by March 1, 2010, or the application will be deemed withdrawn. A true and correct copy of the January 13, 2010, letter is attached hereto as Attachment 8 and incorporated herein by reference.

17. On March 3, 2010, Idaho Power Energy Contracts submitted a Letter of Understanding for Double B GI #308 to New Energy. A true and correct copy of the form Letter of Understanding for Double B GI #308 is attached hereto as Attachment 9 and incorporated herein by reference. The Letter of Understanding informs New Energy that Double B GI #308 appears to be eligible for a purchase power agreement under the guidelines for a QF as defined by PURPA. (Attachment 9 at p. 1.) The Letter of Understanding also informs New Energy that Double B GI #308 must (i) complete the interconnection process and execute a GIA in accordance with the applicable state and federal requirements and (ii) be designated as a DNR to sell the energy from the projects to Idaho Power. (*Id.* at 2.)

18. On March 3, 2010, New Energy requested an extension for the execution of the Facility Study Agreement for Double B GI #308. On March 3, 2010, Idaho Power granted New Energy's request for extension based on the fact New Energy's request did not affect other parties in the generator interconnection queue. Idaho Power extended New Energy's return of the executed Facility Study Agreement to April 3, 2010, and noted that if prior to April 3, 2010, it appeared the extension could impact other projects, Idaho Power would request an earlier response from New Energy.

19. On April 1, 2010, New Energy returned an executed Letter of Understanding for Double B GI #308 to Idaho Power. A true and correct copy of the fully executed Letter of Understanding for Double B GI #308 is attached hereto as Attachment 10 and incorporated herein by reference. Subsequent to receipt of the executed Letter of Understanding for Double B GI #308, Idaho Power submitted a transmission service request ("TSR") for this project.

20. On April 2, 2010, New Energy returned to Idaho Power an executed Facilities Study Agreement for Double B GI #308. A true and correct copy of the fully executed Facilities Study Agreement for Double B GI #308 is attached hereto as Attachment 11 and incorporated herein by reference.

21. On May 4, 2010, Idaho Power, as transmission provider, notified Idaho Power, as transmission customer, that the TSR had been put into study and would be accepted upon receipt of a designated network resource ("DNR").

22. On May 7, 2010, Idaho Power sent a letter and PURPA purchase power agreement to New Energy. A true and correct copy of the May 7, 2010, communication is attached hereto as Attachment 12 and incorporated herein by reference. This letter addresses Order No. 31025 issued by the Commission on March 16, 2010, which revised the Published Avoided Cost Rates. Although the Order was specific in stating that any contracts executed after March 16, 2010, must have new energy pricing, Idaho Power was willing to execute a PURPA purchase power agreement that contained the energy prices that were in effect prior to the Order issued on March 16, 2010, as outlined in this letter, as long as New Energy returned fully executed agreements prior to 5 PM Mountain time, on May 24, 2010.

23. On May 24, 2010, Idaho Power and New Energy Three entered into a FESA for a 15-year term using the then-current non-levelized published avoided cost rates as established by the Commission for energy deliveries of less than 10 aMW. A true and correct copy of the FESA, dated May 24, 2010, between Idaho Power and New Energy Three is attached hereto as Attachment 1 and incorporated herein by reference.

New Energy Three selected October 1, 2011, as the Scheduled First Energy Date, and December 1, 2012, as the Scheduled Operation Date. (Attachment 1 at Appx. B.)

24. On May 25, 2010, Idaho Power filed an Application with the Commission in Case No. IPC-E-10-18 requesting approval of the 15-year FESA between Idaho Power and New Energy Three. The Commission approved the FESA in Order No. 32027 issued July 1, 2010.

25. On June 21, 2010, Idaho Power inquired from New Energy whether they had identified a specific interconnection point as this information was needed in order to proceed with the Facility Study. New Energy was notified the Facility Study Report would be produced approximately one month after identification of the interconnection point.

26. On August 17, 2010, Idaho Power issued a Draft Facility Study Report for Double B GI #308, which begins a comment period for New Energy extending to September 17, 2010. A true and correct copy of the August 17, 2010, Draft Facility Study Report, with cover letter, is attached hereto as Attachment 13 and incorporated herein by reference.

27. On August 30, 2010, Western States Equipment Company provided a Letter of Guarantee for the payment of Liquidated Damages payable under the FESA for the Double B Project. A true and correct copy of the August 30, 2010, Letter of Guarantee is attached hereto as Attachment 14 and incorporated herein by reference.

28. On September 16, 2010, Idaho Power issued the Final Facility Study Report for Double B GI #308. A true and correct copy of the September 16, 2010, Final

Facility Study Report, with cover letter, is attached hereto as Attachment 15 and incorporated herein by reference.

29. On October 25, 2010, Idaho Power sent a Draft Generator Interconnection Agreement ("GIA") to New Energy. A true and correct copy of the October 25, 2010, Draft GIA, with transmittal letter, is attached hereto as Attachment 16 and incorporated herein by reference. This communication to New Energy indicates Idaho Power drafted the GIA Attachments from the September 16, 2010, Facility Study Report. Idaho Power requests review of the Attachments to make sure they are comprehensive and accurate and advise of any changes. The completed attachments were to be returned to Idaho Power by November 29, 2010, so a GIA could be prepared for execution, and that failure to respond to the letter and requests will be considered as an election not to proceed with the project.

30. On January 3, 2011, New Energy advised Idaho Power they had a new investor on board and would want to proceed with the GIA in the next week, and they were looking at construction this spring/summer and an operation date in September or October.

31. Idaho Power responded the same day to New Energy's January 3, 2011, email. Idaho Power advises New Energy that the Facility Study Report states it would be six months from the time Idaho Power receives construction funding to the time the project would be in service on Idaho Power's end and still in good shape for meeting a late summer or early fall date. However, Idaho Power mentions the sooner the funding is received the sooner the materials can be ordered and the designers can get going on the final design. Idaho Power feels receipt of payment within the next four to six weeks

would be best so construction resources could be scheduled for summer. A true and correct copy of the January 3, 2011, email correspondence between Idaho Power and New Energy is attached hereto as Attachment 17 and incorporated herein by this reference.

32. On January 12, 2011, New Energy Three submitted a new request to expand the capacity of the proposed project by an additional 800 kW bringing the total capacity to 2 MW. Attached hereto as Attachment 18 and incorporated herein by this reference is a true and correct copy of the January 12, 2011, Small Generator Interconnection Request by New Energy Three for the Double B Expansion Project requesting the interconnection of 2 MW. This request was assigned GI #365.

33. On January 20, 2011, Idaho Power acknowledged receipt of New Energy Three's Small Generator Interconnection Request, tendered to New Energy Three a form Small Generator Feasibility Study Agreement for Double B GI #365, and advised New Energy Three of the next steps in the interconnection process. A true and correct copy of the January 20, 2011, letter is attached hereto as Attachment 19 and incorporated herein by reference.

34. The Feasibility Study Agreement for New Energy Three's requested expansion was executed by the parties on February 2, 2011. Attached hereto as Attachment 20 and incorporated herein by this reference is a true and correct copy of the February 2, 2011, Small Generator Feasibility Study Agreement for Double B GI #365.

35. A Draft Feasibility Study Report was issued on March 16, 2011, attached hereto as Attachment 21 and incorporated herein by this reference, and a Final

Feasibility Study Report was issued on April 26, 2011, attached hereto as Attachment 22 and incorporated herein by this reference for Double B's Expansion Project interconnection. This report was for New Energy Three's requested configuration of GI #365 located in Cassia County, for 2.0 MW at a 34.5 kV connection, with estimated interconnection cost of \$376,000.

36. On April 27, 2011, Idaho Power sent a letter attaching a copy of the Final Feasibility Study Report. The letter advises that the executed Facilities Study Agreement, a completed Attachment A, and payment of the required deposit must be received by June 9, 2011, or the application will be deemed withdrawn. A true and correct copy of the April 27, 2011, letter, with the form Facilities Study Agreement, is attached hereto as Attachment 23 and incorporated herein by reference.

37. On May 24, 2011, Laura Knothe gave permission for Idaho Power to involve Collin Rudeen of Exergy Development in team meetings and discussions and provide information pertaining to the Double B Projects.

38. On June 10, 2011, Idaho Power sent a letter notifying New Energy they were to execute and return the Facilities Study Agreement for interconnection of the proposed Double B GI #365 tendered on April 27, 2011, to Idaho Power with the required deposit by June 9, 2011. Because the time period had expired without authorization to proceed and payment, the application for Generation Interconnection for Double B GI #365 was deemed withdrawn. The letter notifies New Energy that failure to submit the deficient items by June 24, 2011, will cause the Generator Interconnection request to be terminated. A true and correct copy of the June 10, 2011, letter is attached hereto as Attachment 24 and incorporated herein by reference.

39. On September 28, 2011, Idaho Power tendered to New Energy a Draft GIA which was drafted from the September 16, 2010, Facility Study Report and advised New Energy they must provide a Proof of Site Control on or before execution of the GIA. New Energy was also notified that “[f]ailure to respond to this letter by November 28, 2011 will cause your Generator Interconnection request to have been deemed withdrawn and terminated.” A true and correct copy of the September 28, 2011, Draft GIA, with transmittal letter, is attached hereto as Attachment 25 and incorporated herein by reference.

40. On October 18, 2011, Exergy Development provided site control documentation for Double B GI #308.

41. On October 20, 2011, Idaho Power reviewed the site control documentation provided by Exergy for Double B GI #308, and requested additional documents that reflected the right to develop the site.

42. On October 20, 2011, New Energy provided a Certification of Authority for Agents authorizing Laura Knothe and Leslie White to execute instruments, agreements, certificates, and other documents and to take actions on behalf of New Energy. A true and correct copy of the Certification of Authority for Agents is attached hereto as Attachment 26 and incorporated herein by reference.

43. On November 21, 2011, Exergy sent an email to Idaho Power confirming a telephone conversation with an Idaho Power Representative that allowed Exergy to extend the original deadline of November 28, 2011, for submittal of the GIA for the Double B GI #308. Exergy informed Idaho Power it was working on the financial arrangement for credit approval and the line of credit and obtaining the site control

modification requested by Idaho Power on October 21, 2011. Exergy expected documents to be in place within a couple of weeks.

44. On November 28, 2011, Exergy requested insight on the wording in section 5.3.9 of the Draft GIA and detail about the setpoint and other reliability events Exergy can expect in regards to some of the new requirements in the Generator Output Limit Control ("GOLC").

45. On November 29, 2011, Idaho Power responded to Exergy's request for insight on the wording in section 5.3.9 of the Draft GIA and detail about the setpoint and other reliability events Exergy can expect in regards to some of the new requirements in the GOLC. A true and correct copy of the November 28 and 29, 2011, email correspondence between Idaho Power and Exergy is attached hereto as Attachment 27 and incorporated herein by this reference.

46. On February 24, 2012, Idaho Power sent email correspondence to Exergy which requests a status update on Double B GI #308, and verification of milestones and determination of its in service date.

47. On February 28, 2012, Exergy responded to Idaho Power's inquiry stating "[i]s the verification of the milestones and inservice date needed for scheduling of construction within Idaho Power or with IP contractors."

48. On February 29, 2012, Idaho Power informs Exergy that the GI Process requires Idaho Power to finalize the GIA and in order to do that, Idaho Power needs the in service date. Idaho Power provides clarification and states "I am asking when you want to begin to put test energy on our system, and the milestones are based on the date you provide. I'm sure the Project Leader is waiting for this information to schedule

[Idaho Power] resources, consider outages in the area, etc.” Attached hereto as Attachment 28 is a true and correct copy of the email correspondence between Idaho Power and Exergy dated February 24, February 28, and February 29, 2012, and incorporated herein by reference.

49. On May 9, 2012, Idaho Power sent a Draft GIA to Exergy. A true and correct copy of the May 9, 2012, Draft GIA, with transmittal letter, is attached hereto as Attachment 29 and incorporated herein by reference. This communication to Exergy indicates that failure to submit all of the requested items by June 11, 2012, will cause the Generator Interconnection request to have been deemed withdrawn.

50. On June 11, 2012, Exergy sent an email informing Idaho Power that the dairy owner is having difficulty with the Double B Dairy and/or might be selling it. Therefore, Exergy is not ready to execute the GIA.

51. Idaho Power responded the same day to Exergy's June 11, 2012, email. Idaho Power requests clarification from Exergy as to whether they are choosing to not proceed with the Double B Project. If Exergy is choosing not to proceed, Idaho Power will send out an official withdrawal letter.

52. On June 11, 2012, Exergy requests a period of time to solidify with the dairyman that this is, in fact, the case with his dairy. Idaho Power indicates they will follow up with Exergy on this matter the following day. Attached hereto as Attachment 30 is a true and correct copy of the email correspondence between Idaho Power and Exergy dated June 11, 2012, and incorporated herein by reference.

53. On June 19, 2012, Idaho Power sent a Final GIA to Double B for GI #308. A true and correct copy of the June 19, 2012, Final GIA, with cover letter, is attached

hereto as Attachment 31 and incorporated herein by this reference. The June 19, 2012, letter notifies Exergy:

Please complete the NOTICES information, and sign and return both sets as soon as possible. We will return a fully executed copy of the signature pages for your files. These need to be returned to me by July 20, 2012, otherwise your Generator Interconnection Application will be deemed withdrawn.

54. On July 27, 2012, Idaho Power sent a Final/Deficiency Notice to Exergy. A true and correct copy of the July 27, 2012, Deficiency Notice is attached hereto as Attachment 32 and incorporated herein by this reference. The July 27, 2012, notice states Exergy Development:

..was to execute and return to [Josh Harris] the Agreement with the required deposit by July 20, 2012. That time period has now expired. Your application for Generation Interconnection has now been deemed withdrawn and this project has been removed from Idaho Power's Generator Interconnection Queue. If you wish to proceed with this project, you must submit a new application for Generator Interconnection.

55. On August 28, 2012, Idaho Power sent correspondence to Exergy. This communication notified Exergy that Double B GI #308 had been withdrawn. Therefore, Idaho Power refunded Exergy's deposit. A true and correct copy of the August 28, 2012, correspondence is attached hereto as Attachment 33 and incorporated herein by this reference.

56. On and around September 18, 2012, Exergy Development indicated to Idaho Power that it had an understanding that Idaho Power had somehow agreed to extend the Operation Date for Double B and Swager Farms in discussions related to a different wind QF project.

57. On September 20, 2012, Idaho Power responded to Exergy Development regarding the Operation Date. The September 20, 2012, email stated that there had been no discussion, and absolutely no agreement from Idaho Power to extend the Scheduled Operation Date from the PPA.

58. On September 27, 2012, Exergy Development responded with a request for, "a digester meeting ... to sort this out." Idaho Power agreed to meet and reiterated its position that it would not agree to change the dates in the PPA. Exergy Development responded, again, with a claim that Idaho Power had somehow agreed to change the dates in connection with discussions related to separate matters involving Exergy Development's proposed wind QF projects. Idaho Power responded emphatically that issues related to Exergy Development's biodigester QF projects were specifically and expressly not discussed, nor agreed to in conjunction with the discussions between Idaho Power and Exergy Development concerning Exergy's wind projects. The parties agreed to meet the following day. Attached hereto as Attachment 34 and incorporated herein by reference is a true and correct copy of an e-mail string of communications between Idaho Power and Exergy on September 27, 2012.

59. Subsequent to the parties' meeting on September 28, 2012, Exergy informed Idaho Power, "As to the PPAs, I think it best that we file our force majeure positions on those based on the generic PURPA docket going on." See September 28, 2012, email correspondence attached hereto as Attachment 35 and incorporated herein by this reference.

60. On September 28, 2012, Exergy Development delivered to Idaho Power a Notice of Force Majeure for the Double B Dairy Project. A true and correct copy of the

September 28, 2012, Notice of Force Majeure from Exergy is attached hereto as Attachment 36 and incorporated herein by reference. Exergy Development bases its claim of force majeure on its contentions that, "There are currently ongoing proceedings upon the IPUC docket, the issues in which include pricing, size, duration and curtailment." Exergy Development claims that because of the pending proceedings regarding PURPA related issues before the Commission that they are unable to obtain financing in order to meet its obligations under the FESA.

61. On November 21, 2012, Idaho Power responded with the filing and service of this Complaint and Petition.

### **JURISDICTION**

**A. The Commission Has Jurisdiction Over Interpretation and Enforcement of the FESA and the GIA.**

62. The Commission has authority to issue declaratory orders pursuant to the Idaho Uniform Declaratory Judgments Act. *Utah Power & Light Co. v. Idaho Pub. Utils. Comm'n*, 112 Idaho 10, 12, 730 P.2d 930, 932 (1987). The Idaho Uniform Declaratory Judgments Act provides for the issuance of a declaratory judgment in a contract dispute "before or after there has been a breach." *Harris v. Cassia County*, 106 Idaho 513, 516–517, 681 P.2d 988, 991 (1984).

63. The Commission has 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)).

1. **The Commission Has Jurisdiction Over Interpretation and Enforcement of the FESA.**

64. Paragraph 7.7 of the FESA between Idaho Power and New Energy Three provides for the continuing jurisdiction of the Commission over the Agreement:

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.

(Attachment 1 at p. 17.)

65. Idaho Power and New Energy Three have also agreed to the Commission's jurisdiction regarding any and all disputes under the FESA. Paragraph 19.1 of the FESA further provides 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.

(Attachment 1 at p. 24.)

66. New Energy Three has reaffirmed its position that the Commission has jurisdiction with regard to disputes under the FESA. Paragraph 3 of the Notice of Force Majeure dated September 28, 2012, states as follows:

Further, pursuant to Section 19.1 (Disputes) of Article XIX of the FESA, if Idaho Power disputes [the claim of Force Majeure], Seller reserves the right to submit the same to the Idaho Public Utilities Commission ...

(Attachment 36 at p. 2.) Idaho Power agrees that the Commission has jurisdiction to interpret and enforce the FESA pursuant to both the FESA itself and the Idaho Uniform Declaratory Judgments Act.

2. **The Commission Has Jurisdiction Over Interpretation and Enforcement of the GIA.**

67. FERC has stated that the relevant state authority exercises exclusive jurisdiction over interconnections in which the electric utility must purchase the entire output of the qualifying facility:

When an electric utility is obligated to interconnect under Section 292.303 of the Commission's Regulations, that is, when it must purchase the QF's total output, the relevant state authority exercises authority over the interconnection and the allocation of interconnection costs.

Standardization of Generator Interconnection Agreements and Procedures, Order No. 2003, FERC Stats. & Regs. ¶ 31,146 at P 813 (2003), order on reh'g, Order No. 2003-A, FERC Stats. & Regs. ¶ 31,160, order on reh'g, Order No. 2003-B, FERC Stats. & Regs. ¶ 31,171 (2004), order on reh'g, Order No. 2003-C, FERC Stats. & Regs. K 31,190 (2005), aff'd sub nom. Nat'l Ass'n of Regulatory Util. Comm'rs v. FERC, 475 F.3d 1277 (D.C. Cir. 2007)). Recently, FERC has reaffirmed the finding that it will have jurisdiction over an interconnection with a qualifying facility only if the host utility is given notice that third-party sales of the facility's output are occurring or are planned:

Therefore, consistent with our conclusions in *Niagara Mohawk*, where a host utility is not given notice that third-party sales of output are occurring or are planned (e.g., through a QF's request for wheeling service or a contract providing the QF an express right to sell output to third parties), we will assume that all sales of a QF's output are being made to the host utility and therefore that Commission jurisdiction will not attach.

Florida Power & Light Co., 133 FERC ¶ 61,121 at P 22 (2010) (citing Niagara Mohawk Power Corp., 121 FERC ¶ 61,183 (2007), order denying reh'g, 123 FERC ¶ 61,061 (2008)). Here, the FESA would obligate Idaho Power to purchase the entire output of the project. Therefore, this Commission—and not FERC—has jurisdiction over the GIA.

**B. The Dispute Is a Justiciable Controversy.**

68. This is an action for declaratory order brought for the purpose of determining a question of actual controversy between the parties. The dispute is as follows: Idaho Power claims that New Energy Three will not achieve the Scheduled Operation Date of December 1, 2012, and will likely not achieve the Operation Date by March 1, 2013. Idaho Power further claims that if New Energy Three does not achieve its Operation Date by March 1, 2013, then it will be in material breach of its FESA. New Energy Three disputes Idaho Power's claim that the failure of the Double B Project to achieve the Operation Date will result in material breach of its respective FESA. Specifically, New Energy Three claims force majeure events have occurred that excuse its respective failure to meet the Scheduled Operation Date. (See Attachment 36.) Article XIV of the FESA excuses both parties from whatever performance is affected by "any cause beyond the control of the Seller or of Idaho Power which, despite the exercise of due diligence, such Party is unable to prevent or overcome." Idaho Power disagrees with New Energy Three that any force majeure event has occurred.

69. As a general rule, a declaratory judgment can only be rendered in a case where an actual or justiciable controversy exists. *Harris*, at 516, citing (internal cites omitted). A "justiciable controversy" ripe for a declaratory judgment must be one that is appropriate for judicial determination, must be definite and concrete, touching the legal

relations of parties having adverse legal interests, and must be real and substantial admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts. *Harris*, at 516, citing I.C. § 10–1201; Rules Civ.Proc., Rule 57.

70. Idaho Power and New Energy Three agree that the Commission has jurisdiction over the dispute at hand. The dispute is appropriate for the Commission's determination because it requires interpretation of several provisions of the FESA, as well as Schedule 72 and the generator interconnection process for QF generators. The dispute is definite and concrete because Idaho Power claims current or impending violations of specific provisions of the FESA by New Energy Three and because Idaho Power disagrees with any application of the Force Majeure provision of the FESA. The parties to the FESA have adverse legal interests. The dispute is real and substantial, as distinguished from a request for an advisory opinion, because it (1) calls for interpretation and enforcement of a valid and enforceable agreement and (2) the Commission's resolution of the dispute would likely involve specific relief expressly provided for in the FESA.

#### **DECLARATORY ORDER TO TERMINATE CONTRACT**

71. Idaho Power realleges and hereby incorporates by reference all of the foregoing allegations as if fully stated herein.

**A. Idaho Power May Terminate the FESA Upon Failure of the Project to Achieve Its Operation Date.**

72. New Energy Three will not achieve the Scheduled Operation Date of December 1, 2012, as provided in Section B-3 in Appendix B of the FESA. As provided in Section 5.4 of the FESA, the entity will be in material breach of their respective FESA

if they fail to achieve the Operation Date by March 1, 2013. The Idaho Uniform Declaratory Judgments Act provides for the issuance of a declaratory judgment in a contract dispute “before or after there has been a breach.” *Harris* at 516–517, 991 (1984). Section 5.4 of the FESA provides that upon material breach by New Energy Three, Idaho Power may terminate the FESA at any time. Section 5.3 provides for delay damages as result of a material breach; therefore, in the event of a breach, Idaho Power is entitled to delay damages in the amount provided in Section 5.3 of the FESA. Accordingly, Idaho Power requests an Order from the Commission declaring that Idaho Power may terminate the FESA and recover delay damages upon the anticipated failure of New Energy Three to not achieve the Operation Date by March 1, 2013.

**B. No Force Majeure Event Has Occurred**

73. New Energy Three claims that events have occurred that constitute Force Majeure pursuant to Section 14 of the FESA. Paragraph 14.1 states, in relevant part:

As used in this Agreement, “Force Majeure” or “an event of Force Majeure” means any cause beyond the control of the Seller or of Idaho Power which, despite the exercise of due diligence, such Party is unable to prevent or overcome. Force Majeure includes, but is not limited to, acts of God, fire, flood, storms, wars, hostilities, civil strife, strikes and other labor disturbances, earthquakes, fires, lightning, epidemics, sabotage, or changes in law or regulation occurring after the Operation Date, which, by the existence of reasonable foresight such party could not reasonably have been expected to avoid and by the exercise of due diligence, it shall be unable to overcome.

(Attachment 1 at p. 22.)

74. In its Notice of Force Majeure, Exergy Development contends, among other things, that other pending proceedings at the Commission excuse its performance under the FESA. Exergy Development, on behalf of New Energy Three, asserts that

because of pending PURPA proceedings at the Commission renewable energy project lenders are unwilling to lend in Idaho pending the outcome of those proceedings. Exergy Development claims that its lack of ability to finance its project is an event of force majeure excusing its performance under the FESA. Exergy Development has not identified a valid event of force majeure. The claimed events do not excuse New Energy Three from meeting the operational requirements pursuant to the Commission approved FESA.

75. New Energy Three's attempt to excuse its non-performance fails because it does not meet the FESA's definition of a Force Majeure event, and the project's own actions and/or inactions, many of which predate the existence of the referred to Idaho PUC pending actions, caused considerable delay that it now claims constitutes Force Majeure. New Energy Three has not, to this day, paid the required construction deposit, nor authorized Idaho Power to move forward with the required work necessary for the interconnection and transmission upgrades required to connect the project to Idaho Power's system has resulted in the termination of its generation interconnection application and removal from Idaho Power's interconnection queue. The project's failure to pay and authorize its interconnection to proceed, New Energy Three now claims a force majeure when it is out of time to become operational pursuant to the terms of its Commission approved FESA. Its claim is without merit, and should be rejected.

76. New Energy Three was offered a Final GIA that would have their required interconnection facilities completed before the end of 2012 and before the expiration of its 90 day cure period under the terms of the FESA. Exergy Development and New

Energy Three claims now that its inability to obtain financing and construct its project on time and pursuant to the commitments it made in the FESA is excused by an event of force majeure. New Energy Three's FESA was executed with an effective date of May 24, 2010. That FESA was approved by the Idaho PUC on July 1, 2010. The project initiated its interconnection process more than a year before that in October of 2009. It committed itself in the FESA to a Scheduled Operation Date of December 1, 2012, with more than two years of lead time from the time the FESA was effective to become operational. Its own inability to finance and construct in that time frame does not qualify as an event of force majeure under the terms of the FESA such that its performance would be excused.

77. New Energy Three is not expected to bring the project online by the Scheduled Operation Date of December 1, 2012. For these reasons, Idaho Power requests an Order from the Commission declaring that no Force Majeure event has occurred to excuse default.

**C. Termination of the FESA is in the Public Interest.**

78. Idaho Power's ability to terminate the FESA upon default and breach of New Energy Three's failure to meet the Operations Date pursuant to Section 5 of the FESA is in the public interest. The FESA currently provides for rates that have subsequently been found to not be in the public interest. In The Matter of the Commission's Review of PURPA QF Contract Provisions, Case No. GNR-E-11-03, Order No. 32498 at 2 (March 22, 2012), this Commission stated:

We also find, however, as stated on the record at the conclusion of the March 21, 2012, hearing, that the methodologies previously approved by this Commission, as utilized and applied by Idaho Power, do not currently

produce rates that reflect Idaho Power's avoided costs and are not just and reasonable, nor in the public interest. Effective March 21, 2012, and continuing until altered or amended by Order of the Commission at the conclusion of this case, contracts for all projects over 100 kW entered into by Idaho Power and presented to this Commission for approval will be individually evaluated with regard to all terms contained therein.

(Emphasis added.) The rates at issue in this Complaint Petition are provided in Article VII of the FESA. The FESA's rates have subsequently been determined, as described above, to not be in the public interest. If the Commission issues an order declaring that Idaho Power is authorized to terminate the FESA upon the failure of New Energy Three to meet its Operation Date of March 1, 2013, rates that have been deemed not to be in the public interest will likewise be terminated. If Idaho Power and New Energy Three were to execute a new FESA, the parties must obviously comply with Order 32498, thereby establishing rates that are in the public interest pursuant to the methodology approved in Order 32498.

#### **REQUESTED RELIEF – CONCLUSION**

79. Idaho Power respectfully requests that the Commission grant the following relief:

- 1) Entry of a declaratory order that the Commission has jurisdiction over the interpretation and enforcement of the FESA and the GIA;
- 2) Entry of a declaratory order that Exergy Development's claim of force majeure does not exist so as to excuse New Energy Three's failure to meet the Scheduled Operation Date for the Double B project;

- 3) Entry of a declaratory order that if New Energy Three has failed to place the Double B Project in service by the Scheduled Operation Date of December 1, 2012, Idaho Power may collect Delay Damages;
- 4) Entry of a declaratory order that if New Energy Three fails to achieve its Operation Date by March 1, 2013, Idaho Power may terminate the FESA; and
- 5) Any further relief to which Idaho Power is entitled.

Respectfully submitted at Boise, Idaho, this 21<sup>st</sup> day of November 2012.



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DONOVAN E. WALKER  
Attorney for Idaho Power Company

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that, on this 21<sup>st</sup> day of November 2012 I served a true and correct copy of IDAHO POWER COMPANY'S COMPLAINT AND PETITION FOR DECLARATORY ORDER upon the following named parties by the method indicated below, and addressed to the following:

**New Energy Three, LLC**

c/o Exergy Development Group of  
Idaho, LLC  
Leslie White  
802 West Bannock, Suite 1200  
Boise, Idaho 83702

Hand Delivered  
 U.S. Mail  
 Overnight Mail  
 FAX  
 Email

Leslie White

\*Pleading emailed without  
attachments due to file size. For a  
copy of the attachments, please see  
the Idaho Public Utilities Commission  
website or contact Idaho Power.

Hand Delivered  
 U.S. Mail  
 Overnight Mail  
 FAX  
 Email [lwhite@exergydevelopment.com](mailto:lwhite@exergydevelopment.com)

Laura Knothe

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attachments due to file size. For a  
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 Email [lknothe@exergydevelopment.com](mailto:lknothe@exergydevelopment.com)

James Carkulis

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 U.S. Mail  
 Overnight Mail  
 FAX  
 Email [jcarkulis@exergydevelopment.com](mailto:jcarkulis@exergydevelopment.com)



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Danielle Clark, Paralegal