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IDAHO PUBLIC
UTILITIES COMMISSION

27 December, 2012

Ms. Jean Jewell
Commission Secretary
Idaho Public Utilities Commission
472 W. Washington
Boise, ID 83702

IPC-E-12-25

RE: IPC-E-12-26 - MOTION TO DISMISS

Dear Ms. Jewell:

Enclosed please find our MOTION TO DISMISS submitted for filing in the above-referenced docket on behalf of Exergy Development Group of Idaho, LLC. Per the Commission's Rules of Procedure, we have enclosed and original and seven (7) copies, as well as an additional copy to be stamped and returned to our office. Thank you.

Sincerely,

Nina Curtis
Richardson & O'Leary, PLLC

Encl.

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IDAHO PUBLIC
UTILITIES COMMISSION

Attorneys for:
New Energy Two, LLC
New Energy Three, LLC

BEFORE THE
IDAHO PUBLIC UTILITIES COMMISSION

IN THE MATTER OF THE COMPLAINT AND)	CASE NO. IPC-E-12-25
PETITION OF IDAHO POWER COMPANY)	
FOR A DECLARATORY ORDER)	CASE NO. IPC-E-12-26
REGARDING THE FIRM ENERGY SALES)	
AGREEMENT AND GENERATOR)	NEW ENERGY TWO, LLC AND
INTERCONNECTION AGREEMENT WITH)	NEW ENERGY THREE, LLC'S
NEW ENERGY TWO, LLC.)	MOTION TO DISMISS FOR LACK
	OF SUBJECT MATTER
IN THE MATTER OF THE COMPLAINT AND)	JURISDICTION
PETITION OF IDAHO POWER COMPANY)	
FOR A DECLARATORY ORDER)	
REGARDING THE FIRM ENERGY SALES)	
AGREEMENT AND GENERATOR)	
INTERCONNECTION AGREEMENT WITH)	
NEW ENERGY THREE, LLC.)	

I. INTRODUCTION

COMES NOW, New Energy Two, LLC and New Energy Three, LLC ("Respondents"),

by and through their undersigned counsel, and file this Motion to Dismiss for Lack of Subject Matter Jurisdiction pursuant to Rule 12(b)(1) of the Idaho Rules of Civil Procedure and Rule 56 of the Idaho Public Utilities Commission's Rules of Procedure ("IPUCRP"). This Motion to Dismiss for Lack of Subject Matter Jurisdiction is addressed to all of Idaho Power Company's ("Idaho Power") claims and prayers for relief.

Therefore, Respondents respectfully request that the Commission dismiss Idaho Power's Claims and Prayer for Relief requesting interpretation and enforcement of the Firm Energy Sales Agreements ("FESAs") because the Commission lacks authority to adjudicate rights and duties under a contract, let alone to declare Idaho Power is entitled to any award of damages.

II. BACKGROUND

On November 9, 2012, Idaho Power filed with this Commission a "Complaint and Petition for Declaratory Order" regarding the FESA between it and New Energy Two, LLC and on November 21, 2012 Idaho Power filed with this Commission a "Complaint and Petition for Declaratory Order" regarding the FESA between it and New Energy Three, LLC ("Complaints").¹ In Order No. 32692 the Commission ruled that the two Complaints be consolidated into a single proceeding and that New Energy and Exergy file a single answer or motion in defense to the consolidated complaints and petitions no later than December 27, 2012.

In its Complaints, Idaho Power makes certain factual allegations and concludes with a Prayer for Relief in which this Commission is asked to adjudicate whether or not an event of force majeure excusing performance under certain contracts has occurred, whether certain contracts have been breached, and to further adjudicate that Idaho Power is entitled to an award

¹ New Energy Two, LLC and New Energy Three, LLC are collectively referred to herein as "New Energy."

of damages as a remedy for said alleged breach of contract. Specifically for New Energy Two, LLC, Idaho Power asked for entry of a declaratory order that:

- 1) the Commission has jurisdiction over the interpretation and enforcement of the FESAs and the GIA;
- 2) that Exergy Development's [New Energy Two] claim of force majeure does not exist so as to excuse New Energy Two's failure to meet the amended Scheduled Operation Date for the Swager Farms project;
- 3) that New Energy Two has failed to place the Swager Farms Project in service by the Scheduled Operation Date of October, 2012, and that Idaho Power may terminate the FESA as of December 30, 2012, if the Swager Farms Project fails to achieve its Operation Date by that date;
- 4) that, pursuant to the FESA, Idaho Power is entitled to an award of liquidated damages.²

With respect to New Energy Three (Double B Dairy Project) Idaho Power asked:

- 1) the Commission has jurisdiction over the interpretation and enforcement of the FESAs and the GIA;
- 2) that Exergy Development's [New Energy Two] claim of force majeure does not exist so as to excuse New Energy Three's failure to meet the amended Scheduled Operation Date for the Double B project;
- 3) 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) that, if New Energy Three fails to achieve its Operation Date by March 1, 2013, Idaho Power may terminate the FESA.³

In the body of its Complaints, Idaho Power asserts that this Commission has jurisdiction over its declaratory ruling and breach of contract claims with reference to scant and unsupportive

² *Complaint at p. 37.*

³ *Complaint at pp. 27 - 28.*

legal authority supporting that assertion.⁴ For additional authority, Idaho Power references the FESAs themselves – which, as discussed more fully below, cannot be used to bootstrap this Commission’s limited jurisdiction to expand it into that of a court of general jurisdiction.

III. ARGUMENT

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. This is so despite Idaho Power’s attempts to convince the Commission that a clause in the FESAs somehow represent Respondents’ intent to rewrite Idaho law and confer jurisdiction upon the Commission over FESA contract claims.

A. Idaho Law Deprives the Commission of Jurisdiction Over Any Claims Requesting Interpretation or Enforcement of the FESAs.

Idaho Power filed its Petition and Complaint “pursuant to this Commission’s Rules of Procedure, including but not limited to RP 54 and RP 101.” *Complaints* at p. 1. But both IPUCRP 54 (dealing with Complaints) and IPUCRP 101 (dealing with Declaratory Orders) specifically require that the referenced pleading identify the legal authority upon which it is based. IPUCRP 54.03 requires a complaint to “refer to statutes, rules, orders or other controlling law involved.” Likewise, IPUCRP 101.02(c) requires that a petition for declaratory order “indicate the statute, order, rule or other controlling law” upon which the petitioner relies.

Idaho Power’s failure to cite any statutory provision is telling because multiple Idaho Supreme Court opinions have established that the Commission’s authority is limited to those

⁴ See *Complaints* (-25) at p. 28 and (-26) at p. 19.

powers expressly granted to it by statute. See *Application of Boise Water Corp. to Revise and Increase Rates Charged for Water Service*, 128 Idaho 534, 538, 916 P.2d 1259, 1263 (1996); *Alpert v. Boise Water Corp.*, 118 Idaho 136, 140, 795 P.2d 298, 302 (1990); *Matter of Strand*, 111 Idaho 341, 342, 723 P.2d 885, 886 (1986); *Idaho Power Co. v. Idaho Pub. Util. Comm'n.*, 102 Idaho 744, 750, 639 P.2d 442, 448 (1981); *Wash. Water Power Co. v. Kootenai Environmental Alliance*, 99 Idaho 875, 881-882, 591 P.2d 122, 128-129 (1979); *U.S. v. Utah Power & Light Co.*, 98 Idaho 665, 667-669, 570 P.2d 1353, 1355-1358 (1977); *Lemhi Telephone Co. v. Mountain States Tel. & Tel. Co.*, 98 Idaho 692, 571 P.2d 753 (1977).

The Commission's jurisdiction is statutorily derived and cannot be expanded without legislative action. "The Public Utilities Commission has no inherent power; its powers and jurisdiction derives in its entirety from the enabling statutes, and nothing is presumed in favor of its jurisdiction." *Lemhi*, 98 Idaho at 696, 571 P. 2d at 757 (internal quotation omitted). The general rule is stated in 2 Am. Jur. 2d Administrative Law § 282, as:

Administrative agencies are tribunals of limited jurisdiction, and nothing is presumed in favor of an agency's jurisdiction. As a general rule, agencies have only such adjudicatory jurisdiction as is conferred on them by statute. Their jurisdiction is dependent entirely upon the validity and the terms of the statutes reposing power in them, and they cannot confer jurisdiction on themselves.

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

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

I.C. § 61-501 (emphasis supplied). As early as 1921, the Idaho Supreme Court made clear that the Commission only has jurisdiction over public utilities:

[Y]et in every case before the Public Utilities Commission, it must in the first

instance determine from the evidence before it whether the utility with which it is seeking to deal is a public utility, for unless it be a public utility, the commission is without any jurisdiction over it whatsoever

Natatorium Co. v. Erb, 34 Idaho 209, 215, 200 P. 348, 350 (1921).

There is no provision in the Public Utilities Law that requires or permits the Commission to interpret or enforce civil contracts, nor is such authority “necessary” to carry out the “spirit and intent” of the Commission’s regulatory and supervisory authority over public utilities.

The Idaho Supreme Court has ruled on the question of the Commission’s jurisdiction to interpret and/or enforce private contracts on several occasions throughout the past three decades.

As was the case in *Lemhi*, the issue presented here by Idaho Power’s Complaint is “in all manners one calling for the interpretation and enforcement of the parties’ contractual rights.” 98

Idaho at 696, 571 P.2d at 757. The Supreme Court held in that case:

Generally, construction and enforcement of contract rights is a matter which lies in the jurisdiction of the courts and not the Public Utilities Commission. This is true notwithstanding that the parties are public utilities or that the subject matter of the contract coincides generally with the expertise of the commission. If the matter is a contractual dispute, it should be heard by the courts.

Id. at 696-697, 571 P.2d at 757-758 (collecting cases in support of this proposition).

Similarly, in *Bunker Hill Co. v. Wash. Water Power Co.*, the Idaho Supreme Court held that:

Here, as in *Lemhi*, the parties' dispute arises from differing constructions and interpretations of the contract rights of the parties. While one of the parties is a public utility, and while the general area of power supply may be one in which the Commission is presumed to have expertise, nevertheless, the matter remains a contractual dispute involving the legal interpretation of a contract which historically lies within the jurisdiction of the courts. Hence, no jurisdiction is vested in the Public Utilities Commission and the refusal of the Commission to grant Bunker Hill's motion to dismiss was error.

101 Idaho 493, 494; 616 P.2d 272, 273 (1980).

Notwithstanding this precedent, Idaho Power makes the assertion that, “The Commission

has jurisdiction over the interpretation of contracts where the parties have agreed to submit a dispute involving contract interpretation to the Commission.”⁵ With no analysis or explanation as to how the two cases cited support the extraordinary proposition that parties to a contract may confer jurisdiction on the Commission when it has no such jurisdiction in the first place, Idaho Power cites to *Afton Energy, Inc. v. Idaho Power Co.* (hereinafter *Afton IV*), 111 Idaho 925, 929, 729 P.2d 400, 404 (1986) (citing *Bunker Hill Co. v. Wash. Water Power Co.*, 98 Idaho 249, 252, 561 P.2d 391, 394 (1977)).

It is true that the majority opinion in the *Afton* line of cases did not rely upon any particular Idaho statute as the basis for the Commission’s authority to order Idaho Power to *enter into* a long-term, fixed-rate PURPA contract. *Afton Energy, Inc. v. Idaho Power Co.* (hereinafter *Afton I/III*) 107 Idaho 781, 784-786, 693 P.2d 427, 430-432 (1984). Rather, the Court held “the federal government is permitting the Commission to further certain federal policies through the performance of those functions the Commission is authorized to perform under Idaho statutes.” *Id.* at 784, 693 P.2d at 430. The Court further held that “PURPA was intended to confer upon state regulatory commissions responsibilities not conferred under state law.” *Id.* at 785, 693 P.2d at 431. Thus, the Commission acts pursuant to federal authority when it implements PURPA’s mandatory purchase provisions and the Federal Energy Regulatory Commission’s implementing regulations that require utilities to interconnect to and purchase power from QFs. *See* 18 C.F.R. §§ 292.101 *et seq.* But unlike the authority to order utilities to enter into contracts containing the avoided cost rates and the authority to require utilities to interconnect to QFs in a non-discriminatory fashion, the avoided cost provisions of PURPA provide no independent basis of

⁵ *Complaint (-25) at p. 29 and (-26) at p. 19.*

authority to interpret executed QF contracts. See *American Ref-Fuel Co. of Niagara, L.P. v. Niagara Mohawk Power Corp.*, 97 FERC ¶ 61,158, ¶¶ 61,701-61,702 (2001). Instead, interpretation of an executed QF contract is a matter governed by state contract law, *id.*, and each particular state's laws govern the proper forum for such contract disputes. In Idaho, the Commission simply does not have ongoing jurisdiction over any contract disputes.

Indeed, if this Commission upholds Idaho Power's claim that the Commission has jurisdiction over a complaint for damages for violation of a PURPA contract or to resolve disputes between a utility and a QF over the terms of such a contract, then this Commission would have jurisdiction over the QF itself. This result has been thoroughly repudiated by the Idaho Supreme Court in the very *Afton* decision and its progeny relied on by Idaho Power. In *Afton I/III*, Idaho Power sought to amend a PURPA contract by adding the following language:

The rates, terms and conditions set forth in this agreement are subject to the *continuing jurisdiction* of the Idaho Public Utilities Commission. The rates, terms and conditions under this agreement are subject to change and revision by order of the Commission upon a finding, supported by substantial competent evidence, that such rates, terms or conditions, change or revision is just, fair, reasonable, sufficient, non-preferential and non-discriminatory.

107 Idaho at 786, 693 P.2d at 432 (emphasis in original).

The Court's resounding rebuke to Idaho Power's proposal may be instructive to Idaho Power in assisting it to understand that it *still* cannot confer jurisdiction over PURPA contracts on the IPUC:

[W]e reject Idaho Power's argument that the Commission does not have any authority to establish an avoided cost rate which is fixed for the duration of the contract and which is *not subject to the Commission's continuing jurisdiction*. It is clear that both Congress and FERC, through its implementing regulations, intended that CSPPs [QFs] should not be subjected to the pervasive utility-type regulation which would result if the contract language proposed by Idaho Power were approved by the Commission. In fact, one of Congress' main objectives in enacting PURPA was to encourage cogeneration and small power production by exempting CSPPs from pervasive state regulation. Congress was aware that such

regulation presented a strong disincentive for CSPPs to engage in power production where the financial risks were great and the returns were not guaranteed to be recoverable. The Commission, in refusing to adopt Idaho Power's proffered language was merely carrying out the directives imposed by PURPA and the implementing FERC regulations.

Id. at 788, 693 P.2d at 434 (emphasis added).

Jurisdiction to interpret the terms of a PURPA contract and to award or declare entitlement to damages is exactly the type of regulation the Idaho Supreme Court rejected in *Afton*.

In *Afton IV*, Idaho Power again sought PUC interpretation of a PURPA contract – which the Court again rejected. The Court in *Afton IV* identified the issue thusly:

The present proceeding was initiated by Idaho Power when it moved the Commission to modify Orders Nos. 17478, 17495 and 17609 to conform to the *Afton I/III* and declare the second payment option of the contract in effect... The Commission, reading the motion as a contract interpretation request, dismissed it, holding that the district court is the proper forum to interpret contracts.

111 Idaho at 928, 729 P.2d at 403.

The Court unambiguously affirmed the Commission's finding that PURPA contract disputes belong in district court:

It [Idaho Power] has simply asked the Commission, through a motion to modify a previous order, to declare that one of two freely negotiated payment options is in effect as selected by a legal determination of this Court. In other words, **Idaho Power has asked for an interpretation of its contract. The district court is the proper forum for this action.** We hold the Commission acted properly when it dismissed Idaho Power's motion to modify previous orders.

Id. at 930, 729 P.2d at 405 (emphasis added).

The Court in *Afton IV* explained in some detail the exceptions to its general rule that contract disputes do not belong at the IPUC:

The Court has recognized exceptions to this rule. In *Bunker Hill Co. v. Washington Water Power, supra*, we allowed the Commission to interpret an unprecise contract because "the parties agreed to let the PUC settle this dispute and since there is substantial evidence in the record to support the Commission's decision . . . Additionally, the Commission can use its expertise and supply a

reasonable contract rate where the parties have an existing contract but are unable to agree to the specific rate ...Here however, the contract between Afton and Idaho Power does not fall within any of these exceptions. Idaho Power and Afton have not agreed to allow the Commission to interpret the contract. *The contract, while being complex, does not require any particular expertise in the ratemaking area to interpret the disputed provision.*

Id. at 929, 729 P.2d at 404 (emphasis added).

Based on the foregoing, there can be no dispute that Idaho law deprives the Commission of jurisdiction over the subject matter of Idaho Power's request that the Commission interpret the FESAs and declare Idaho Power entitled to damages.

B. Respondents Have Not Consented to the Commission's Jurisdiction to Interpret and Enforce the FESAs.

Apparently recognizing that the Commission is the wrong forum to try a contract dispute, Idaho Power has attempted to establish that the parties have somehow consented to confer jurisdiction on the Commission. Idaho Power cites to the FESA's paragraph 19.1, which Idaho Power requires each QF to include in any FESA Idaho Power will sign. While Idaho Power did insert language into the instant parties' FESAs to the effect that disputes would be *submitted* to the Commission if a dispute arose, the Commission has consistently disavowed the ability of the parties to unilaterally confer jurisdiction on it:

The Commission reminds the parties that jurisdiction may not be conferred on the Commission by contractual stipulation. The authority and jurisdiction of the Commission is restricted to that expressly and by necessary implication conferred upon it by enabling statutes.

In Re Application of Idaho Power for Approval of FESA with Interwest Hydro, Inc., IPUC Case No. U-1006-295, Order No. 21359, p. 1 (1987).

In another case, the Commission directly addressed the same FESA language at issue here:

Agreement ¶ 21.1 reads as follows: "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.”

The Commission reminds the parties that jurisdiction may not be conferred on the Commission by contractual stipulation. The authority and jurisdiction of the Commission is restricted to that expressly and by necessary implication conferred upon it by enabling statutes. The nature and extent of the Commission jurisdiction to resolve actual disputes will be determined by the Commission on an individual case-by-case basis notwithstanding paragraph 21.1 of the Agreement.

In Re Application of Idaho Power for Approval of FESA with Glenns Ferry Cogeneration, IPUC Case No. IPC-E-92-32, Order No. 24674 (1993).⁶

The Commission warned Idaho Power that contract disputes are the sole province of the judiciary when it issued one of its first orders creating security and liquidated damages provisions for QF contracts. In determining the appropriate calculation of liquidated damages to include in QF FESAs, the Commission was clear that “Contract disputes and interpretation in the event of alleged default or breach are normally appropriate for judicial determination, not Commission determination.” *In Re Investigation on the Commission’s Own Motion of Reasonable Terms for Security in Agreements Between Idaho Power Company and Cogenerators and Small Power Producers*, IPUC Case No. U-1006-292, Order No. 21800 at p. 4 (1988).

Even if Respondents were to consent to Commission jurisdiction (which they do not), none of the other criteria used by the *Afton IV* Court are applicable. As that Court noted, these contracts while complex, do not require any particular ratemaking expertise to interpret, particularly the delay, default and Force Majeure provisions upon which Idaho Power relies as the entire basis for its FESA claims. Just as the Commission has stated in the past, a court is the appropriate forum to determine if Idaho Power is entitled to collect liquidated damages.

⁶ Ultimately, in 2008, Idaho Power attempted to bring a complaint for breach of contract against the Glenns Ferry QF at the Commission in Case No. IPC-E-08-20. As can be seen from a review of the pleadings in that docket, Idaho Power ultimately withdrew its Complaint when the QF filed a motion to dismiss and it became obvious that the Commission had no jurisdiction over a breach of contract claim.

V. CONCLUSION

WHEREFORE, Respondents respectfully prays that the Commission dismiss Idaho Power's claims for interpretation and enforcement of the FESAs for lack of subject matter jurisdiction. Respondents stands ready for oral argument on its Motion if the Commission so desires.

Respectfully submitted this 27th day of December, 2012.

RICHARDSON & O'LEARY, PLLC

A handwritten signature in black ink, appearing to read "Peter J. Richardson", written over a horizontal line.

Peter J. Richardson (ISB No: 3195)
Gregory M. Adams (ISB No. 7454)

Attorneys for Respondents

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 27th day of December, 2012, a true and correct copy, of the within and foregoing EXERGY DEVELOPMENT GROUP OF IDAHO'S MOTION TO DISMISS CASE NO. IPC-E-12-26 was served in the manner shown to the following parties:

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Nina Curtis