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IDAHO PUBLIC
UTILITIES COMMISSION

Attorneys for Respondents New Energy Two, LLC and New Energy Three, LLC

**BEFORE THE
IDAHO PUBLIC UTILITIES COMMISSION**

IN THE MATTER OF THE COMPLAINT AND)
PETITION FOR 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

CASE NO. IPC-E-12-26

NEW ENERGY TWO, LLC AND NEW
ENERGY THREE, LLC's REPLY TO
IDAHO POWER COMPANY'S
RESPONSE TO MOTION TO
DISMISS

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

1

2 **COMES NOW**, New Energy Two, LLC and New Energy Three, LLC (“Respondents”),
3 by and through undersigned counsel, and files this Reply to Idaho Power’s Response to
4 Respondents Motion to Dismiss (“Response”).

5 Idaho Power asserts that Respondents “misrepresent the law” by asserting that “Idaho law
6 deprives the Commission of jurisdiction to adjudicate a contract dispute.” Response at 2. Then

1 Idaho Power asserts that, “The Idaho Supreme Court has specifically found that despite language
2 that contract interpretation is for the courts, the Commission does have jurisdiction, and the right,
3 to interpret contracts.” Response at 3. Despite Idaho Power’s pugnacious assertion that your
4 Respondents have “misrepresented” the law, the fact remains that in the context of PURPA
5 contracts, Idaho law does, in fact, deprive the Commission of jurisdiction to adjudicate a contract
6 dispute.

7 Idaho Power asserts that:

8 The Idaho Supreme Court has specifically found that despite language that contract
9 interpretation is for the courts, the Commission does have jurisdiction, and the right to
10 interpret contracts.

11 Response at p. 2. The sole authority Idaho Power relies on in support of that sweeping assertion
12 is the Idaho Supreme Court case of *McNeil v. IPUC* 142 Idaho 685, 132 P. 3rd 442 (2006). Idaho
13 Power wildly overstates the Supreme Court’s findings in *McNeil*. *McNeil* actually supports
14 Respondents’ position that this Commission has no jurisdiction over interpretation of PURPA
15 contracts. In *McNeil* the Commission was asked to interpret an interconnection agreement
16 between two telecommunication carriers. Interconnection agreements between
17 telecommunication carriers are, indeed, interpreted and administered by state commissions by
18 operation of federal law. The *McNeil* Court relies on *Southwestern Bell Telephone Co. v. Public*
19 *Utility Commission of Texas* 208 F.3rd 475 (5th Cir. 2000) for the proposition that:

20 [T]he Act’s grant to the state commissions of plenary authority to approve or disapprove
21 these interconnection agreements necessarily carries with it the authority to interpret and
22 enforce the provisions of agreements that state commissions have approved.

23 *Id.* at 479.

1 The Court in *Southwestern Bell* expanded on its findings in some detail explaining why it is not
2 just the fact that the PUC approves the contract that confers ongoing jurisdiction:

3 We believe that the FCC plainly expects state commissions to decide intermediation and
4 enforcement disputes that arise after the approval procedures are complete. See, e.g.,
5 Reciprocal Compensation Ruling P 22 (noting that parties are bound by their
6 interconnection agreements “as interpreted and enforced by the state commissions”)
7 (emphasis ours); id. P 21 (referring to state commission “findings” as to whether
8 reciprocal compensation provisions of interconnection agreements apply to ISP-bound
9 traffic); id P 24.

10 *Id.* at 480.

11 Idaho Power does not cite this Commission to any similar Federal Energy Regulatory
12 Commission (“FERC”) expectations that state commissions decide intermediation and
13 enforcement disputes under PURPA – because there are none. If there were, then one would
14 expect to find case law similar to the wealth of case law on telecommunication interconnection
15 agreements. Another important distinction is that in the telecommunications arena, both parties
16 to the contract are providing utility-type service which makes the ongoing jurisdiction of the
17 Commission reasonable.

18 “It has been firmly established that the PUC has no authority not given it by statute.”
19 *Utah Power & Light Co. v. Idaho Public Utilities Comm’n* 107 Idaho 47, 52 685 P.2d 276, 281
20 (1984). As noted in *McNeil*, “The Commission is not a “court”: “[T]he commission is an arm of
21 the legislative authority and not a court of justice”. *McNeil*, supra at 448, 132 P.2d at 691.
22 Idaho Power is asking this Commission to engage as a court of justice by adjudicating such
23 things as when and whether an event of force majeure has occurred and making findings of

1 entitlement to liquidated damages and even whether Idaho Power has the right to terminate a
2 contract with a party not subject to this Commissions jurisdiction.

3 In fact, if Idaho Power's claim that this Commission has jurisdiction over a complaint for
4 damages for violation of a PURPA contract is upheld, then this Commission would have
5 jurisdiction over the QF itself – a result that has been thoroughly repudiated by the Idaho
6 Supreme Court in the *Afton* decisions. In *Afton Energy v. Idaho Power Company* 107 Idaho
7 781, 693 P.2d 427 (1982), Idaho Power sought to amend a PURPA contract by adding the
8 following language:

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

15 *Id.* at 786.

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

19 We reject Idaho Power's argument that the Commission does not have any authority to
20 establish an avoided cost rate which is fixed for the duration of the contract and which is
21 not subject to the Commission's continuing jurisdiction. It is clear that both Congress
22 and FERC, through its implementing regulations, intended that CSPPs [QFs] should not
23 be subjected to the pervasive utility-type regulation which would result if the contract

1 language proposed by Idaho Power were approved by the Commission. In fact, one of
2 Congress' main objectives in enacting PURPA was to encourage cogeneration and small
3 power production by exempting CSPPs from pervasive state regulation. Congress was
4 aware that such regulation presented a strong disincentive for CSPPs to engage in power
5 production where the financial risks were great and the returns were not guaranteed to be
6 recoverable. The Commission, in refusing to adopt Idaho Power's proffered language
7 was merely carrying out the directives imposed by PURPA and the implementing FERC
8 regulations.

9 *Id.* at 788.

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

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

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

19 *Afton Energy v. Idaho Power* 111 Idaho 925, 928, 729 P.2d 400 (1986).

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

22 It [Idaho Power] has simply asked the Commission, through a motion to modify a
23 previous order, to declare that one of two freely negotiated payment options is in effect as

1 selected by a legal determination of this Court. In other words, Idaho Power has asked
2 for an interpretation of its contract. The district court is the proper forum for this action.
3 We hold the Commission acted properly when it dismissed Idaho Power's motion to
4 modify previous orders.

5 *Id.* at 930

6 The Court in *Afton II* explained in some detail the exceptions to its general rule that
7 contract disputes do not belong at the PUC:

8 The Court has recognized exceptions to this rule. In *Bunker Hill Co. v. Washington*
9 *Water Power*, supra, we allowed the Commission to interpret an un-precise contract
10 because "the parties agreed to let the PUC settle this dispute and since there is substantial
11 evidence in the record to support the Commission's decision . . . Additionally, the
12 Commission can use its expertise and supply a reasonable contract rate where the parties
13 have an existing contract but are unable to agree to the specific rate . . . Here however, the
14 contract between Afton and Idaho Power does not fall within any of these exceptions.
15 Idaho Power and Afton have not agreed to allow the Commission to interpret the
16 contract. The contract, while being complex, does not require any particular expertise in
17 the ratemaking area to interpret the disputed provision.

18 *Id.* at 929. (Emphasis provided.)

19 While the instant parties do have language in their agreements to the effect that disputes would
20 be submitted to the Commission for resolution, the Commission has already disavowed the
21 ability of the parties to unilaterally confer jurisdiction on it. None of the other criteria used by
22 the Court in *Afton II* are applicable. And, as that Court noted, these contracts, while complex, do

1 not require any particular ratemaking expertise to interpret. Indeed, no ratemaking expertise
2 whatsoever is required to interpret these contracts.

3 In consideration of the foregoing, the Commission is urged to defer common breach of
4 contract claims to the proper forum for resolution.

Respectfully submitted this 16th day of January 2013,

RICHARDSON AND O'LEARY, PLLC



Peter J. Richardson (ISB No: 3195)
Attorney for New Energy Two, LLC and
New Energy Three, LLC

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 16th day of January, 2013, a true and correct copy, of the within and foregoing EXERGY DEVELOPMENT GROUP OF IDAHO'S REPLY TO IDAHO POWER'S RESPONSE TO MOTION TO DISMISS IN CASE NO. IPC-E-12-25 and IPC-e-12-26 was served in the manner shown to the following parties:

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