Office of the Secretary
Service Date
March 5, 2013

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**
	)	**ORDER NO. 32755**

On November 9 and 21, 2012, Idaho Power Company filed two separate "Complaints and Petitions for Declaratory Order" regarding two Power Purchase Agreements (PPAs) between itself and New Energy Two and New Energy Three, respectively. In the 12-25 case, Idaho Power alleged that New Energy Two's proposed anaerobic digester at Swager Farms failed to meet its scheduled commercial operation date of October 1, 2012. In the 12-26 case, Idaho Power alleged that New Energy Three's proposed anaerobic digester at the Double B Dairy did not meet its scheduled operation date of December 1, 2012. Idaho Power asserted in both complaints that the qualifying facilities (QFs) have "failed to take the necessary steps required to bring the facilit[ies] online and operational by the dates required in [their power purchase agreements (PPAs)] including, . . . failing to take steps required to secure the interconnection of [their] proposed facilit[ies] to Idaho Power's system." Complaints at 3.

On December 4, 2012, the Commission issued a Notice of the Complaints and Petitions and ordered that the two cases be consolidated into a single proceeding. Order No. 32692. The Commission directed the Commission Secretary to serve copies of the complaints on the respondents. On December 27, 2012, New Energy Two and New Energy Three (collectively "New Energy") filed a "Motion to Dismiss for Lack of Subject Matter Jurisdiction." Idaho Power filed an answer to the Motion, and New Energy filed a reply to the answer. Rules 56-57. As outlined below, the Commission denies the Motion to Dismiss.

BACKGROUND

A. Interconnection and the PPAs

The background for these cases is taken primarily from the two complaints and is summarized below. In October 2009, New Energy initiated discussions with Idaho Power to begin the interconnection process for two anaerobic digester projects to be located at Swager Farms and Double B Dairy.[1] Under the federal Public Utility Regulatory Policies Act (PURPA), QFs are obligated to pay the costs of constructing the necessary interconnection facilities (or transmission upgrades) between the QF project and the purchasing utility's system. 18 C.F.R. § 292.308.[2]

Following initial discussions, New Energy submitted a small generator interconnection request to Idaho Power for each project. Both QF projects executed interconnection Facility Study Agreements with Idaho Power in late October 2009. Order No. 32692 at 2. Idaho Power subsequently prepared and submitted separate Study Reports for each project to New Energy.

In May 2010, Idaho Power and New Energy entered into two separate PPAs for each of the biogas projects.[3] Initially each biogas project was projected to sell 1.2 MW of power to the utility. The PPAs contained avoided cost rates which were in effect prior to the issuance of Order No. 31025 (March 16, 2010), and contained 15-year operating terms. The scheduled commercial operation date (COD) for Swager Farms was October 1, 2012, and the COD for Double B was December 1, 2012. On July 1, 2010, the Commission approved the Swager Farms and the Double B Dairy PPAs in Order Nos. 32026 and 32027, respectively.

About the time Idaho Power submitted the PPAs for approval, Idaho Power and New Energy continued their discussions regarding interconnection. In January 2011, New Energy requested that the interconnection capacity for each of its projects be increased from 1.2 MW to

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[1] Double B subsequently authorized New Energy Three to act on its behalf in negotiating with Idaho Power.

[2] Typically the interconnection process has three primary steps. First, a QF submits a small generator interconnection (GI) request to the utility and the parties execute an Interconnection Facilities Study Agreement. Second, once the Study Agreement is executed, the utility prepares a GI "Study Report" outlining the necessary construction for interconnection. Finally, if the interconnection Study Report (including proposed routing, estimated costs, and a construction schedule) is acceptable to the QF, then the parties execute a "Generator Interconnection Agreement" (GIA) and the QF pays the utility so the utility can begin construction of the interconnection facilities.

[3] The interconnection process and the GIA are separate and distinct from the PPA obligations to sell and purchase QF power. In other words, the QF transaction requires the construction of both the interconnection facilities and the QF's generating plant.

2.0 MW. The parties subsequently executed new Facility Study Agreements and Idaho Power then prepared a new Facility Study Report for each project. Drafts of the two Study Reports were provided to New Energy. In late April 2011, Idaho Power issued its final Facility Study Reports estimating that constructing the transmission interconnection for Swager Farms' 2 MW interconnection would cost approximately $1.71 million.[4] Idaho Power's final Facility Study Report for Double B's 2.0 MW capacity estimated that interconnection would cost approximately $376,000. In May 2011, New Energy advised Idaho Power that Exergy Development would be assisting New Energy with its two QF projects. Order No. 32692 at 3. The parties then had protracted discussions and communications leading up to Idaho Power preparing the draft "Generation Interconnection Agreements" (GIAs) for each QF.

On May 9, 2012, Idaho Power sent a draft GIA to New Energy/Exergy for the Double B project and advised it that failure to submit all of the requested items and the executed GIA "will cause the Generator Interconnection request to have been deemed withdrawn." Double B Complaint at ¶ 49. On June 19, 2012, Idaho Power sent Double B a final GIA to be executed and returned to Idaho Power no later than July 20, or "your Generation Interconnection Application will be deemed withdrawn." *Id.* at ¶ 53. Idaho Power insisted that the GIA was not returned and that Idaho Power subsequently issued a deficiency notice that the GIA has been deemed withdrawn and that the project has been removed from Idaho Power's interconnection queue. On August 28, 2012, Idaho Power refunded Exergy's interconnection deposit for the Double B project. *Id.* at ¶ 54-55.

On March 22, 2012, Idaho Power sent the draft GIA to Swager Farms. Swager Farms at ¶ 58. In April 2012, Exergy asked that Idaho Power "revisit" the interconnection at a lower capacity of 0.8 MW. *Id.* at ¶ 59. The parties executed a "Re-Study" Feasibility Study Agreement which estimated an interconnection cost for the reduced capacity of $225,000. *Id.* at ¶ 61. On September 14, 2012, Idaho Power sent the final GIA to Swager Farms at the lower 0.8 MW interconnection. *Id.* at ¶ 66. The cover letter for the Swager Farms GIA stated that Idaho Power "must have the executed GIA and funding no later than October 1, 2012, in order to complete construction by this date." *Id.* (emphasis original). In an e-mail dated September 20, 2012, Idaho Power warned Exergy that if the GIA and the required funding is not received by

[4] The final Study Report also noted that interconnection costs for the smaller 1.2 MW interconnection would cost approximately $575,000.

October 1, 2012, "it will not be possible to complete the required interconnection work before the end of the year 2012." *Id.* at ¶ 68. Idaho Power alleged that Swager Farms did not execute the GIA and did not pay for the interconnection.

B. Force Majeure

On September 28, 2012, Swager Farms and Double B provided a joint "Notice of Force Majeure" to Idaho Power. In accordance with Section 14 of their respective PPAs, the QF projects notified the utility that they could not perform under their respective Agreements because of "the occurrence of a Force Majeure event." Swager Complaint at Tab 56; Double B Complaint at Tab 36. More specifically, the QFs alleged that the Commission's generic PURPA investigation (GNR-E-11-03) and other "pending proceedings" caused the force majeure event. They insisted that the Commission's investigation regarding the ownership of renewable energy credits (RECs) and the issue of "curtailment" caused lenders to be "unwilling to lend in Idaho pending the outcome of these proceedings." *Id.* Thus, with "no financing available, . . . it [is] impossible for [the QFs] to perform [their] obligation" under the PPAs. *Id.* at ¶ 4.

THE COMPLAINTS AND PETITIONS

In its Complaints and Petitions, Idaho Power alleged that Swager Farms and Double B failed to meet their obligations under their PPAs of providing power to Idaho Power by October 1, 2012, and December 1, 2012, respectively. Swager Complaint at ¶ 2, Double B Complaint at ¶ 2. Idaho Power maintained that the Commission has the authority to issue declaratory orders pursuant to the Uniform Declaratory Judgments Act, citing *Idaho Code* § 10-1203. Swager at ¶ 76, Double B at ¶ 63 c*iting Utah Power & Light Co. v. Idaho PUC*, 112 Idaho 10, 12, 730 P.2d 930, 932 (1987).

Idaho Power maintained that the Commission has jurisdiction over this matter because: (1) the parties have agreed to submit disputes under the PPA to the Commission; (2) the dispute requires an interpretation of the PPAs approved by the Commission; (3) the Idaho Supreme Court allows the Commission to interpret contracts where parties agree to allow the PUC to settle a dispute; (4) the Commission has authority over the generator interconnection process; and (5) the allegations of force majeure pertain to Commission proceedings. Swager at ¶¶ 76, 89, Double B at ¶¶ 63, 75. Idaho Power asserted that it and New Energy "agreed to the Commission's jurisdiction regarding any and all disputes under the [PPA]." Swager at ¶ 79,

Double B at ¶ 65. Idaho Power relies on Section 19.1 of the PPAs executed by both Idaho Power and the QFs which provides:

> Disputes – All disputes relating 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. (Swager & Double B Tab 1 at p. 24) (emphasis added). Idaho Power asserted that the parties' agreement in Section 19.1 above – to submit all disputes involving contract interpretation to the Commission – falls within an exception to the "general rule" that generally the interpretation of contracts is a matter for the courts. Swager at ¶ 77, Double B at ¶ 63, *citing Afton Energy v. Idaho Power Co. ("Afton IV")*, 111 Idaho 925, 929, 729 P.2d 400, 404 (1986); *Bunker Hill Co. v. Washington Water Power Co. ("Bunker Hill I")*, 98 Idaho 249, 252, 561 P.2d 391, 394 (1977).[5]

Given that the QF projects have failed to meet their scheduled operation dates, Idaho Power claimed that they are in material breach of their respective PPAs. Idaho Power also points to Section 5.4 of the respective PPAs that upon a material breach by New Energy, Idaho Power may terminate the PPAs at any time. Swager at ¶ 86, Double B at ¶ 72. Consequently, Idaho Power requested that the Commission issue an Order declaring that Idaho Power may terminate the PPAs due to the breach and recover delay damages. *Id.*

In summary, the utility requested that the Commission find and declare:

1. That the Commission has jurisdiction "over the interpretation and enforcement of the [PPAs] and the GIA[s]";

2. That New Energy/Exergy's "claim of force majeure does not . . . excuse [the QFs] failure to meet the amended Scheduled Operation Date for the [PPAs]";

3. That New Energy/Exergy have failed to place Swager Farms and Double B in service by their respective scheduled commercial operation dates of October 1, 2012, and December 1, 2012;

4. That Idaho Power may terminate the PPAs if Swager Farms and Double B failed to cure their defaults under their respective PPAs by December 30, 2012, and March 1, 2013;

5. That under the terms of the PPAs Idaho Power is entitled to an award of liquidated damages; and

[5] Idaho Power also noted that New Energy's force majeure notice specifically refers to Section 19.1 of the PPAs.

6. Award any further relief to which Idaho Power is entitled.

Swager Farms Complaint at 37; Double B Complaint at 27-28.

NEW ENERGY'S MOTION TO DISMISS

On December 27, 2012, New Energy filed a timely "Motion to Dismiss for Lack of Subject Matter Jurisdiction." New Energy advanced two primary arguments. First, New Energy maintained that the Commission does not possess the necessary jurisdiction to interpret and/or enforce contracts. In particular, New Energy noted the Idaho Supreme Court has stated the "general rule" is that the

> construction and enforcement of contract rights is a matter that 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.

Lemhi Telephone Co. v. Mountain States Tel. & Tel. Co., 98 Idaho 692, 696, 571 P.2d 753, 757 (1977); *Bunker Hill Co. v. Washington Water Power Co. ("Bunker Hill II")*, 101 Idaho 493, 494, 616 P.2d 272, 273 (1980).

Although New Energy acknowledged that the Idaho Supreme Court has held "PURPA was intended to confer upon state regulatory commissions responsibilities not conferred under state law," it argued that "PURPA provides no independent basis of authority to interpret executed QF contracts." Motion at 7-8 *quoting Afton Energy v. Idaho Power Co. ("Afton I/III")*, 107 Idaho 781, 785, 693 P.2d 427, 431 (1984). Consequently, New Energy asserted that the interpretation of the PPAs is a matter governed by state contract law "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." *Id.* at 8.

New Energy also conceded that the Supreme Court recognizes exceptions to its general rule that the Commission does not have jurisdiction over contract disputes. Motion at 9-10. In *Afton IV*, the Court reiterated the exception to the general rule is that the Commission may "interpret an imprecise contract because 'the parties agreed to let the PUC settle this dispute and . . . there is substantial evidence in the record to support the Commission's decision.'" 111 Idaho at 929, 729 P.2d at 404, *citing Bunker Hill I*, 98 Idaho at 249, 561 P.2d at 391.[6] However, New

[6] The lineage of the Afton cases is sometimes confusing. *Afton I* was issued in January 1984. Idaho Power subsequently petitioned for rehearing and the case was re-argued. In July 1984, the Court issued a subsequent

Energy noted the *Afton IV* Court found that the QF contract "between Afton and Idaho Power does not fall within any of the exceptions [to the general rule]. Idaho Power and Afton have not agreed to allow the Commission to interpret the contract." *Id.*

Second, New Energy asserted it has not consented to the Commission's jurisdiction to interpret and enforce the two PPAs. In particular, New Energy insisted the dispute resolution provision in each PPA does not confer jurisdiction upon the Commission. Although Section 19.1[7] of each PPA requires that all disputes be submitted to the Commission, New Energy argued that the Commission "has consistently disavowed the ability of the parties to unilaterally confer jurisdiction" on the Commission. Motion at 10. More specifically, New Energy relies on two prior Commission Orders cautioning PURPA parties "that jurisdiction may not be conferred upon the Commission by contractual stipulation." Motion at 10-11, *citing* Order Nos. 21359 at 1; 24674 at 4. Consequently, New Energy urged the Commission to decline jurisdiction and grant its Motion to Dismiss Idaho Power's Complaints and Petitions for Declaratory Order. Motion at 12.

IDAHO POWER RESPONSE

On January 10, 2013, Idaho Power filed a response to the Motion to Dismiss. Although Idaho Power conceded that the "general rule" normally requires that the interpretation and enforcement of a contract is a matter for the courts, it asserted that the Court has recognized exceptions to the general rule. More specifically, Idaho Power maintained that the Supreme Court in *Afton IV* allowed the Commission to interpret a contract because "the parties have agreed to submit a dispute involving contract interpretation to the Commission." Response at 5 *citing* 111 Idaho at 929, 729 P.2d at 404; *Bunker Hill I*, 98 Idaho at 252, 561 P.2d at 394.

Idaho Power also pointed out that the Court created another exception to the general rule in *McNeal v. Idaho PUC*, 142 Idaho 685, 132 P.3d 442 (2006). In *McNeal*, the Idaho Supreme Court found that the Commission had authority to interpret an interconnection agreement between two telecommunications carriers. After citing the general rule that contract interpretation and enforcement are normally matters for the courts, the Idaho Supreme Court held that the Commission does have authority to interpret and enforce interconnection agreements

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opinion (*Afton II*) at which time Afton petitioned for rehearing. Finally, in December 1984, the Court withdrew *Afton II* and issued a third opinion (*Afton III*) that modified the Court's *Afton I* opinion. Consequently, the opinion is often cited as "*Afton I/III.*" *See Afton IV*, 111 Idaho 927 n.1, 729 P.2d 402 n.1.

[7] *Supra*, p. 5.

between telecommunications carriers. Response at 4 *citing McNeal*, 142 Idaho at 689, 132 P.3d at 446. Like the Commission's authority under the federal Telecommunications Act to interpret interconnection agreements, Idaho Power insisted that PURPA grants the Commission "the jurisdiction and authority to interpret the force majeure clause in the [PPAs]." Response at 5.

Idaho Power also asserted New Energy had agreed in the PPAs to submit all contract disputes to the Commission. In particular, the utility reiterated that Section 19.1 of the PPAs provides that "all disputes relating 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.* Idaho Power also insisted that Section 7.7 of each PPA provides that the Commission will have continuing jurisdiction over the Agreement. *Id.*

Idaho Power next argued that there is a statutory basis for the Commission's jurisdiction over this dispute. In particular, Idaho Power insisted that *Idaho Code* § 61-501 provides the Commission with the authority to supervise utilities and to do "all things necessary to carry out the spirit and intent" of the Public Utilities Law. In addition, *Idaho Code* §§ 61-502 and 61-503 provides the Commission with jurisdiction over contracts affecting rates and the power to investigate a single contract, respectively. "The [PPAs] 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." Response at 6-7.

Finally, Idaho Power asserted "PURPA itself grants the Commission jurisdiction. . . ." *Id.* at 7. Idaho Power declared that our Supreme Court has stated that "it is clear that PURPA was intended to confer upon state regulatory commissions responsibilities not conferred under state law." *Id. quoting Afton I/III*, 107 Idaho at 784-85, 693 P.2d at 430-31. Consequently, Idaho Power insisted that "the present dispute between a utility and [New Energy] over a PURPA matter is seemingly precisely what FERC envisioned when it promulgated 18 C.F.R. § 292.401(a)." *Id.* Combining the federal authority with the specific state statutory authority "creates an explicit grant of authority to the Commission to interpret a PURPA contract." *Id.* at 8.

NEW ENERGY REPLY

On January 16, 2013, New Energy filed a reply to Idaho Power's response. New Energy takes issue with Idaho Power's reliance on the exceptions to the general rule set out in the *McNeal* case. More specifically, New Energy distinguishes the *McNeal* case which is

premised upon the federal Telecommunications Act. In *McNeal*, the Supreme Court cited *Southwestern Bell Telephone Co. v. PUC of Texas*, 208 F.3d 475 (5th Cir. 2000), for the proposition that the Telecommunications Act grants state commissions the authority to interpret and enforce the provisions of interconnection agreements that state commissions have approved. New Energy Reply at 2. However, New Energy asserts that Idaho Power does not cite to any FERC or PURPA case law allowing state commissions to decide and enforce disputes under PURPA. New Energy argues that Idaho Power has not cited to any PURPA case "because there are none." Reply at 3.

While it recognizes that the PPAs contain language "to the effect that disputes would be submitted to the Commission for resolution," New Energy reiterates that the Commission's prior Orders have declined to exert jurisdiction. *Id.* at 6. Consequently, New Energy urges the Commission to grant its Motion to Dismiss and "defer the common breach of contract claims to the proper forum for resolution." *Id.* at 7.

COMMISSION FINDINGS AND DISCUSSION

In its Motion, New Energy asked us to dismiss Idaho Power's Complaints and Petitions for Declaratory Order arguing that the Commission does not have the jurisdiction to resolve disputes regarding PPAs. It is well settled that the Commission exercises limited jurisdiction and nothing is presumed in favor of its jurisdiction. *Utah Power & Light Co. v. Idaho PUC*, 107 Idaho 47, 52, 685 P.2d 276, 281 (1984). The Commission may determine whether it possesses jurisdiction over a particular matter. *Id.* However, once jurisdiction is clear, the Commission is allowed all powers necessary to enable it to carry out its responsibilities. *Washington Water Power Co. v Kootenai Environmental Alliance*, 99 Idaho 875, 879, 591 P.2d 122, 126 (1979).

Both parties recognize and we agree that the general rule is that "[g]enerally, the construction and enforcement of contract rights is a matter which lies in the jurisdiction of the courts and not in the public utilities commission. . . . If the matter is a contractual dispute, it should be heard by the courts." *Afton IV*, 111 Idaho at 928, 729 P.2d at 403 (emphasis added); *Lemhi Telephone*, 98 Idaho 692, 696, 571 P.2d 753, 757 (1977); *McNeal*, 142 Idaho 685, 132 P.3d 442 (2006). However, the Supreme "Court has recognized exceptions to this [general] rule." *Afton IV*, 111 Idaho at 924, 729 P.2d at 404. In *McNeal*, the Court explained that it has "been careful to use words such as 'generally' and 'normally' [when stating the general rule] and

also, to provide for exceptions to the norm." 142 Idaho at 689, 132 P.3d at 446 (emphasis added). More specifically, the Court held that one exception to the general rule is where "the parties agreed to let the PUC settle th[e] dispute. . . ." *Afton IV*, 111 Idaho at 929, 729 P.2d at 404 *quoting Bunker Hill I*, 98 Idaho at 242, 561 P.2d at 394. New Energy declared that it has not consented to allowing the Commission to resolve this contract dispute, while Idaho Power believes that the exception to the general rule is applicable in this instance.

Based upon our review of the pleadings, the underlying record, and the case law, we find that the "consent" exception (where parties agree to let the Commission settle a contractual dispute) is controlling in this instance. More specifically, we find that the QFs and Idaho Power have expressly agreed in their PPAs to submit disputes arising under their respective PPAs to the Commission for resolution. As pointed out by Idaho Power, each PPA contains a provision granting the Commission jurisdiction over this matter. Section 19.1 of each PPA provides:

> 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.

Swager at Tab 1, Double B at Tab 1 (emphasis added). Unlike the parties in *Afton IV*, we find that New Energy and Idaho Power have expressly agreed that "[a]ll disputes related to or arising under this Agreement . . . will be submitted to the Commission for resolution." PPA at § 19.1. New Energy Two and New Energy Three signed their respective PPAs containing Section 19.1 on May 21, 2010. We further find this provision of the PPA to be clear and unambiguous. "An unambiguous contract will be given its plain meaning." *Shawver v. Huckleberry Estates*, 140 Idaho 345, 361, 93 P.3d 685, 692 (2004). In this case, the dispute between the parties is "related to or arising under this Agreement." In addition, New Energy's force majeure notice specifically refers to Section 14 of the PPAs – clearly relating to the PPAs. Swager at Tab 56, Double B at Tab 36. Moreover, each PPA provides in Section 20.1 that "This Agreement is subject to the jurisdiction of those governmental agencies having control over either party of this Agreement." Swager at Tab 1, Double B at Tab 1.

We further find that there is a statutory basis for our jurisdiction in this matter. Just as in the case where QFs may bring complaints against utilities under PURPA (*Afton I/III*, 107 Idaho at 781, 693 P.2d at 427), the Commission is authorized under *Idaho Code* § 61-621 to hear

complaints made by public utilities.[8] As the Idaho Supreme Court noted in *Afton I/III*, Section 61-612 "gives the Commission jurisdiction to hear complaints against public utilities alleging violations of rules, regulations or any provision of laws; I.C. § 61-502 gives the Commission jurisdiction to determine reasonable rates, including rates collected under contracts; and I.C. § 61-503 gives the Commission power to investigate a single contract. . . ." 107 Idaho at 784, 693 P.2d at 430. The PPAs at issue in this case directly affect Idaho Power's rates through the annual Power Cost Adjustment (PCA). *Idaho Code* § 61-502, *Kootenai*, 99 Idaho at 880, 591 P.2d at 127.[9] The United States Supreme Court also noted in *FERC v. Mississippi*, PURPA "and the [FERC] implementing regulations simply require the [state regulatory] authorities to adjudicate disputes arising under [PURPA]. Dispute resolution of this kind is the *very type of activity* customarily engaged in by the Mississippi [Public Utilities] Commission. . . ." 456 U.S. 742, 760, 102 S.Ct. 2126, 2138 (1982) (emphasis added); *Afton I/III*, 107 Idaho at 789, 693 P.2d at 435 (emphasis original).

New Energy also relies on two prior Orders of this Commission to support its argument that the Commission does not have jurisdiction in this matter. In its reply, New Energy concedes that "While the instant parties do have language in their Agreements to the effect that disputes would be submitted to the Commission for resolution, the Commission has already disavowed the ability of the parties to unilaterally confer jurisdiction on [the Commission]." Reply at 6. In particular, New Energy refers to a 1993 Order where the Commission cautioned contracting parties regarding the Commission's jurisdiction. Order No. 24674 in Case No. IPC-E-92-32. In that case, the parties (Idaho Power and Glenns Ferry Cogeneration) had executed a PPA that contained identical language to the dispute resolution provision at issue in this case. In reviewing the language in the Glenns Ferry PPA, 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

[8] *Idaho Code* § 61-621 states: "Any public utility shall have a right to complain on any grounds upon which complaints are allowed to be filed by other parties. . . ."

[9] The Idaho Supreme Court in *Afton I/III* observed: "Contracts entered into by public utilities with [QFs] or decisions by utilities not to contract with [QFs] have a very real effect on the rates paid by consumers both at present and in the future." 107 Idaho at 789, 693 P.2d at 435 (emphasis added).

> individual case-by-case basis notwithstanding [the dispute resolution provision] of the Agreement.

Order No. 24674 at 4 (emphasis added). Despite expressing concern about the language, the Commission approved the Glenns Ferry contract including the dispute resolution provision. *Id.*

We find New Energy's reliance on this prior case is misplaced. As noted above, the Commission stated that the nature and extent of our jurisdiction "will be determined . . . on an individual case-by-case basis." In the Glenns Ferry case, the Commission did not foreclose exercising jurisdiction; it stated that the scope of its jurisdiction "to resolve actual disputes will be determined . . . on an individual case-by-case basis." For the reasons outlined above, the Commission finds in this particular case that it has jurisdiction to resolve this contract dispute pursuant to the consent exception to the "general rule."

In addition and without addressing the merits of the case, the Commission also notes that New Energy alleges that the occurrence of the force majeure event concerned this Commission's generic PURPA investigation and possibly other PURPA proceedings. Because New Energy's force majeure allegation arises from Commission proceedings, we find that the Commission is well-suited to review these allegations. Finally, we note that because "regulatory bodies perform legislative as well as judicial functions in their proceedings, they are not so rigorously bound by the doctrine of *stare decisis* that they must decide all future cases in the same way as they have decided similar cases in the past." *McNeal v. Idaho PUC*, 142 Idaho at 690, 132 P.3d at 447; *Washington Water Power Co. v. Idaho PUC*, 101 Idaho 567, 579, 617 P.2d 1242, 1254 (1980).

In summary, the Commission finds in this particular case that it has jurisdiction to resolve the contract dispute under the consent exception to the general rule. Having found jurisdiction in this matter, New Energy Two and New Energy Three should file their consolidated answer (if any) to the Complaints and Petitions within 14 days of the service date of this Order.

ORDER

IT IS HEREBY ORDERED that New Energy Two and New Energy Three's Motion to Dismiss for Lack of Subject Matter Jurisdiction is denied.

IT IS FURTHER ORDERED that New Energy Two and New Energy Three file their answer (if any) to the Complaints and Petitions within 14 days of the service date of this Order.

DONE by Order of the Idaho Public Utilities Commission at Boise, Idaho this 5th day of March 2013.

PAUL KJELLANDER, PRESIDENT

MACK A. REDFORD, COMMISSIONER

MARSHA H. SMITH, COMMISSIONER

ATTEST:

Jean D. Jewell
Commission Secretary

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