Office of the Secretary
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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. 32780**

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. Idaho Power generally alleged the New Energy projects (collectively "New Energy") breached their respective PPAs by failing to supply power to the utility. On December 4, 2012, the Commission consolidated the two cases into a single proceeding and directed New Energy to answer the Complaints and Petitions by December 27, 2012. Order No. 32692. Rather than file an answer, 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 Idaho Power's answer.

On March 5, 2013, the Commission issued Interlocutory Order No. 32755 denying New Energy's "Motion to Dismiss." The Commission found that it did have jurisdiction to resolve the contract dispute because New Energy and Idaho Power had expressly agreed in their PPAs to submit disputes arising under their respective PPAs to the Commission for resolution. Order No. 32755 at 10 *citing Afton Energy v. Idaho Power Co. ("Afton IV")*, 111 Idaho 925, 929, 729 P.2d 400, 404 (1986); PPA § 19.1. The Commission also ordered New Energy to file its answer (if any) to the Complaints and Petitions no later than March 19, 2013. *Id.* at 12.

On March 18, 2013, New Energy filed a Motion generally seeking the Commission's permission for leave to file a permissive appeal pursuant to Idaho Appellate Rule (I.A.R.) 12 challenging the Commission's decision that it did have jurisdiction to resolve the dispute. New Energy did not request a hearing on its Motion and Idaho Power did not file an answer to the Motion. As set out below, the Motion is granted in part and denied in part.

BACKGROUND

A. Interconnection and the PPA Processes

The background for this consolidated case is taken primarily from the two complaints and is set out in greater detail in Order No. 32755. Briefly, New Energy proposed to build two separate anaerobic digester[1] projects at Swager Farms (New Energy Two) and Double B Dairy (New Energy Three) that would generate electricity for sale to Idaho Power pursuant to the Public Utility Regulatory Policies Act (PURPA). PURPA generally requires electric utilities such as Idaho Power to purchase the output from "qualifying facilities (QFs)" at rates set by the state regulatory commissions. PURPA § 210(a), 16 U.S.C. § 824a-3(a). PURPA also requires QFs (such as the anaerobic digesters in this case) to pay the cost of constructing the necessary interconnection facilities (or transmission upgrades) to "connect" the QF project with the purchasing utility's system. Order No. 32755 at 2 citing 18 C.F.R. § 292.308. Thus, the typical PURPA transaction in Idaho contains two separate and independent parts. One part is the parties' obligations to sell and purchase the electrical output from the QF project – in this case embodied in the PPAs. The other part is the interconnection process where the utility and the QF negotiate and contract for the construction of the necessary interconnection facilities. Order No. 32755 at nn.2, 3. The culmination of the interconnection process is the execution of a Generator Interconnection Agreement (GIA) and the construction of the transmission facilities by the utility.[2]

Returning to the facts of this case, New Energy initiated discussions with Idaho Power in October 2009 about the interconnection process for the two digester projects. Order Nos. 32755 at 2; 32692 at 2. Following initial discussions, New Energy submitted a request to

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[1] Anaerobic digesters utilize animal waste to produce methane gas which is then combusted to provide motive force for the production of electricity. Order No. 28945 at 2.

[2] Typically there are three steps to the interconnection process: (1) the QF submits a generator interconnection request and signs a Study Agreement with the utility; (2) the utility prepares and issues a Study Report; and (3) if the study is acceptable, the parties sign the GIA and QF pays the utility to construct the interconnection facilities.

Idaho Power for the utility to prepare an Interconnection Study Report (including proposed routing, estimated cost, and a construction schedule). *Id.* at n.2. Idaho Power submitted separate Study Reports for each project to New Energy. Order No. 32755 at 2.

In May 2010, Idaho Power and New Energy entered into a separate PPA for each digester project. Each project was contracted to supply 1.2 MW of power to Idaho Power over a 15-year term. The scheduled commercial operation date (COD) for Swager Farms was October 1, 2012, and the COD for Double B was December 1, 2012. *Id.* On July 1, 2010, the Commission approved the PPAs for Swager Farms and the Double B Dairy in Order Nos. 32026 and 32027, respectively. *Id.*

In January 2011, New Energy requested that the interconnection capacity for each project be increased from 1.2 MW to 2.0 MW. *Id.* at 2-3. New Energy and Idaho Power subsequently executed new Study Agreements and Idaho Power prepared a new Facility (Interconnection) Study Report for each project. In late April 2011, Idaho Power issued its final Facility Study Reports estimating that the cost for the Swager Farms' 2.0 MW interconnection would cost approximately $1.71 million, and Double B's 2.0 MW interconnection capacity would cost approximately $376,000. *Id.* at 3. The parties then engaged in protracted discussions and communications leading up to Idaho Power's preparation of draft "Generation Interconnection Agreements" (GIAs) for each QF.

On March 22, 2012, Idaho Power sent New Energy the draft GIA for Swager Farms. In April 2012, New Energy asked Idaho Power to revise the interconnection facilities to the original 0.8 MW capacity. Swager Farms Complaint at ¶ 59.[3] The parties executed a "Re-Study" Agreement and Idaho Power subsequently estimated that the interconnection cost for the reduced Swager Farms capacity would be approximately $225,000. *Id.* at ¶¶ 60-61.

On September 14, 2012, Idaho Power sent the final GIA to Swager Farms at the lower 0.8 MW capacity. Idaho Power's cover letter to the GIA advised Swager Farms that it "must have the executed GIA and funding no later than October 1, 2012, in order to complete construction by this date." *Id.* at ¶ 66 (emphasis original). In a follow-up e-mail, Idaho Power warned New Energy that if the executed GIA and the required funding are not received by

[3] In May 2011, New Energy advised Idaho Power that Exergy Development would assist New Energy with its two QF projects. Order No. 32755 at 3.

October 1, 2012, "it will not be possible to complete the required interconnection work before the end of the year 2012." *Id.* at ¶ 68.[4]

On May 9, 2012, Idaho Power sent a draft GIA to New Energy for the Double B project and advised it that failure to submit all of the required 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 [GIA] will be deemed withdrawn."[5] *Id.* at ¶ 53. Idaho Power insisted in its Complaint that New Energy did not execute the GIA and return it to the utility. Idaho Power subsequently issued a deficiency notice to New Energy that the GIA had been deemed withdrawn and removed the project from Idaho Power's interconnection queue. On August 28, 2012, Idaho Power asserted it refunded New Energy's interconnection deposit for the Double B project. *Id.* at ¶ 54-55.

B. Notice of Force Majeure

On September 28, 2012, the two New Energy projects sent a joint "Notice of Force Majeure" to Idaho Power in accordance with Section 14 of their respective PPAs. The projects explained they could not perform under the respective PPAs because of "the occurrence of a force majeure event." Swager at Tab 56; Double B at Tab 36. The projects alleged in their notice that the Commission's generic PURPA investigation (GNR-E-11-03) and other "pending proceedings" 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 QF] projects to perform [their] obligation" under the PPAs. *Id.* ¶ 4; Order No. 32755 at 4.

C. New Energy's Motion to Dismiss

In its Motion to Dismiss, New Energy maintained that the Commission does not possess the necessary jurisdiction to interpret and/or enforce contracts. In particular, New Energy asserted the Supreme Court has stated that the "general rule" is:

> Generally, 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

[4] The Swager Farms PPA provided that the project's commercial operation date for supplying power to the utility is October 1, 2012.

[5] Under the terms of its PPA, Double B was to be in commercial operation supplying power to the utility no later than December 1, 2012.

> commission. If the matter is a contractual dispute, it should be heard by the courts.

Motion at 6 *quoting Lemhi Telephone Co. v. Mountain States Tel. & Tel. Co.*, 98 Idaho 692, 696, 571 P.2d 753, 757 (1977). New Energy did concede that the Court has recognized exceptions to the general rule set out above. *Id.* at 9-10. More specifically, the Court in *Afton Energy v. Idaho Power Co. ("Afton IV")*, reiterated the exception to the general rule is that the Commission may resolve a contract dispute 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 925, 729 P.2d 400 (1986), *citing Bunker Hill v. Washington Water Power Co.*, 98 Idaho 249, 259, 561 P.2d 391, 394 (1977). New Energy also observed the *Afton IV* Court found that the PURPA 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." Motion at 10 *quoting Afton IV*, 111 Idaho at 929, 729 P.2d at 404. Idaho Power filed an answer opposing the Motion. See Order No. 32755 at 7-8.

THE COMMISSION'S INTERLOCUTORY ORDER NO. 32755

In Order No. 32755, the Commission recognized that the general rule is "[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." Order No. 32755 at 9 *quoting Afton IV*, 111 Idaho at 928, 729 P.2d at 403 (emphasis added). However, the Commission found that this case is controlled by one of the exceptions to the general rule where "the parties agreed to let the PUC settle th[e] dispute. . . ." *Id.* at 9-10; *Afton IV*, 111 Idaho at 929, 729 P.2d at 404 *quoting Bunker Hill*, 98 Idaho at 242, 561 P.2d at 394.[6] In particular, the Commission found

> **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:

[6] In *McNeal v. Idaho PUC*, 142 Idaho 685, 689, 132 P.3d 442, 446 (2006), the Court recognized another exception to the general rule regarding the Commission's ability to interpret and enforce interconnection agreements between telecommunication carriers. In explaining this exception, the Court stated it has been "careful to use words such as 'generally' and 'normally' [when stating the applicability of the general rule] and also, to provide for exceptions to the norm." (Emphasis added.) The Commission resolving disputes about interconnection agreements is an exception to the general rule (i.e., norm).

> 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**.[7] 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 law; 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.[8] 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)

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[7] *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. . . ."

[8] 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).

(emphasis added); *Afton I/III*, 107 Idaho at 789, 693 P.2d at 435 (emphasis original).

Order No. 32755 at 10-11 (bolding added, underline original, footnote original). Having found that it has jurisdiction to resolve the contract dispute, the Commission ordered New Energy to file its answer by March 19, 2013.

NEW ENERGY'S MOTION FOR PERMISSIVE APPEAL

New Energy's Motion for leave to file a permissive appeal has four parts. First, it requests that the Commission designate its two Interlocutory Orders (Nos. 32692 and 32755) as final Orders pursuant to Commission Rule 323.[03],[9] IDAPA 31.01.01.323.03. Motion at 2. Second, New Energy seeks a Commission Order approving New Energy's Motion for a Permissive Appeal under I.A.R. 12. *Id.* Third, New Energy seeks a stay of the current proceeding pursuant to Rule "324 until the appeal to the Supreme Court is resolved." *Id.* Finally, and in the alternative, New Energy seeks reconsideration of Order Nos. 32692 and 32755 pursuant to Commission Rule 331, IDAPA 31.01.01.331. Each component of New Energy's Motion is set out and reviewed in greater detail below.

A. Designating the Commission's Interlocutory Orders as Final Orders

New Energy first requests that the Commission designate its two interlocutory Orders (Nos. 32692 and 32755) as final Orders pursuant to Commission Rule 323.[03].[10] Rule 323.03 provides in pertinent part that: "Whenever a party believes that an order not designated as a final order according to the terms of these rules should be a final order, the party may petition the Commission to designate the order as final." IDAPA 31.01.01.323.03. In its Motion, New Energy states that it "intends to appeal the [two] Orders in question and designation of those Orders as final is appropriate." Motion at 2. New Energy insists that these two Orders "embrace a controlling issue of law and are appealable pursuant to the appellate provisions of the IPUC Rules of Procedure and the Idaho Code." *Id.*

Commission Findings: *Idaho Code* § 61-601 provides that all proceedings before the Commission shall be governed by the Public Utilities Law and by the rules of practice and procedure adopted by the Commission. Commission Rule 321 defines and designates certain

[9] New Energy actually cites to Rule 323.04 but quotes Rule 323.03. Motion at 2-3.

[10] *Supra*, n.9.

Commission Orders as interlocutory orders. Rule 321.01 defines interlocutory orders as those orders "that do not finally decide all previously undecided issues presented in a proceeding, except the Commission may by order decide some of the issues presented in a proceeding and provide in that order that its decision on those issues is final and subject to review by reconsideration and appeal. . . ." IDAPA 31.01.01.321.01. Rule 321.02 specifically designates certain orders as "always interlocutory [including]: . . . orders initiating complaints or investigations; orders joining, consolidating or separating issues, proceedings or parties. . . ." IDAPA 31.01.01.321.02 (emphasis added).

Returning to the first Order (32692), we find that it is clearly an interlocutory order as defined by our Rule 321. Order No. 32692 initiated the complaint and consolidated the two complaints into a single proceeding. In addition, the Idaho Supreme Court has held that "[a]s a general rule, final judgment is an order or judgment that ends the lawsuit, adjudicates the subject matter of the controversy, and represents a final determination of the rights of the parties." *In re Johnson*, 153 Idaho 246, 251 n.5, 280 P.3d 749, 754 n.5 (Ct.App. 2012) *quoting Camp v. East Fork Ditch Co.*, 137 Idaho 850, 867, 55 P.3d 304, 321 (2002). Our first Order neither ended the case nor represented a final determination. It does not meet the definition of a final order under our Procedural Rules or the guidelines issued by our appellate courts.

The Commission's second Order No. 32755 denying New Energy's Motion to Dismiss also was not designated as a final Order pursuant to Rule 323, IDAPA 31.01.01.323.01. However, it is not the "title" or description of an order that is controlling but whether the order represents a final decision of the whole controversy. *Williams v. State Bd. of Real Estate Appraisers*, 149 Idaho 675, 677-78, 239 P.3d 780, 782-83 (2010). An order "which is intermediate or incomplete and, while it settles some of the rights of the parties, leaves something to be done in the adjudication of their substantive rights in the case . . . is interlocutory." *Id. quoting Evans State Bank v. Skeen*, 30 Idaho 703, 705, 167 P. 1165, 166 (1917). The Commission expressly noted that Order No. 32755 did not address or resolve the substantive issues in dispute. Order No. 32755 at 12. Although this second Order decided that the Commission had jurisdiction to resolve this contract dispute, it did not end the lawsuit, did not fully adjudicate the subject matter of the controversy, and did not represent a final determination of the rights of the parties. Rule 321.01.

Our Supreme Court held in *Williams* that an "order simply denying a motion to dismiss is not a final order." 149 Idaho at 678, 239 P.3d at 783. The Court went on to say that an order denying a motion to dismiss "would only be reviewable in connection with the petition for judicial review of the final order ultimately entered." *Id.* Consequently, we conclude that the Commission's Order Nos. 32692 and 32755 are not "final Orders" and we decline to designate them as final Orders (thereby becoming subject to reconsideration). *Idaho Code* §§ 61-626(1), 61-627; *Key Transp. v. Trans Magic Airlines*, 96 Idaho 110, 524 P.2d 1338 (1974).

B. Motion for Approval of Permissive Appeal

New Energy next requests that the Commission approve the digesters' Motion for permission to appeal from an interlocutory order pursuant to Appellate Rule 12. New Energy asserts that a permissive appeal from the Commission's interlocutory Orders is appropriate in this circumstance "because the issues on appeal are threshold matters that will determine whether these proceedings may be adjudicated before the Commission or in another forum. As such, these are controlling issues of law reviewable by an appellate court preparatory to an adjudication of the merits." Motion at 2-3.

Appellate Rule 12(a) provides that the Supreme Court may grant permission to appeal from an interlocutory order issued by the Commission "which is not otherwise appealable under these rules, but which involves a controlling question of law as to which there is substantial grounds for difference of opinion and which an immediate appeal from the order or decree may materially advance the orderly resolution of the litigation." New Energy asserts that a permissive appeal is warranted at this juncture in the case "given the disagreement between the parties and the Commission as to which adjudicatory body has jurisdiction to hear [this] dispute." Motion at 6. It further maintains that it would be "duplicitous and wasteful" for the proceeding to continue until the question of jurisdiction has been resolved. *Id.* Consequently, New Energy respectfully requests that the Commission grant permission for an interlocutory appeal "to materially advance the orderly resolution of this dispute." *Id.* at 7.

Commission Findings: Our Supreme Court has held that permission to appeal from an interlocutory order should only be granted "in the most exceptional cases." *Verska v. St. Alphonsus Reg. Med. Center*, 151 Idaho 889, 892, 256 P.3d 502, 505 (2011); *Montalbano v. St. Alphonsus Reg. Med. Center*, 151 Idaho 837 n.1, 264 P.3d 994 n.1 (2011); *see also Aardema v.*

U.S. Dairy Systems, 147 Idaho 785, 215 P.2d 505 (2009). In *Verska*, the Court laid out six factors to be considered when evaluating a request for permissive appeal.

> It was the intent of I.A.R. 12 to provide an immediate appeal from an interlocutory order if [there are: (1)] substantial legal issues of great public interest[; (2)] legal questions of first impression[; (3)] the impact of an immediate appeal upon the parties[; (4)] the effect of the delay on the proceedings in the [agency] pending the appeal[; (5)] the likelihood or possibility of a second appeal after judgment is finally entered by the [agency; and (6)] the case workload of the appellate courts. No single factor is controlling in the Court's decision of acceptance or rejection of an appeal by certification, but the Court intends by Rule 12 to create an appeal in the exceptional case and does not intend by the rule to broaden the appeals which may be taken as a matter right under I.A.R. 11.

151 Idaho at 892, 265 P.3d at 505 *quoting Budell v. Todd*, 105 Idaho 2, 4, 665 P.2d 701, 703 (1983) (emphasis added).

Turning to the first two *Verska* factors set out above, we find that the question of jurisdiction in this case is neither a legal question of first impression nor an issue of great public interest. As the Commission noted in its Order, this Court has recognized an exception to the general rule that allows the Commission to resolve contract disputes when both parties consent to the Commission's jurisdiction. Order No. 32755 at 9-11; *Afton IV*, 111 Idaho at 929, 729 P.2d at 404. Relying on § 19.1 of the Agreements, the Commission found that New Energy and Idaho Power expressly agreed that "[a]ll disputes related to or arising under this Agreement . . . will be submitted to the Commission for resolution." Order No. 32755 at 10. The Commission also noted that New Energy's Notice of Force Majeure specifically references § 14 of the PPA and that § 20.1 of the PPA provides that the Agreement "is subject to the jurisdiction of those governmental agencies having control over either party of this Agreement." *Id.* Section 19 also states that the interpretation of terms contained in the Agreement – including what constitutes *force majeure* under § 14.1 – will be submitted to the Commission for resolution. *Id.*; PPA §§ 14.1 and 19.1. As far as this issue being "of great public interest," it involves two QF entities, a utility, and the Commission. While this issue may be of great interest to the parties, it does not rise to the level of "great public interest."

Turning to the remaining factors, we find that granting a permissive appeal from the interlocutory Order will certainly delay this proceeding and cause the parties to commit additional time and resources. While a decision on the issue of the Commission's jurisdiction

will be definitive, a ruling in favor of the Commission may not eliminate the possibility of a second appeal on the merits. Motion at 2. Although there is a difference of opinion whether the Commission has jurisdiction to resolve this dispute, New Energy has not demonstrated the "substantial grounds" regarding the dispute over jurisdiction or why the Commission's decision is in error. I.A.R. 12(a). There is substantial and competent evidence to support the Commission's findings as well as a statutory basis to hear the utility's complaint. *Industrial Customers of Idaho Power v. Idaho PUC*, 134 Idaho 285, 288, 1 P.3d 786, 789 (2000); Order No. 32755 at 9-11; *Idaho Code* § 61-621. In summary, after weighing the factors set out above, we find that these factors tip the scales in favor of disapproving New Energy's request for granting a permissive appeal.

C. Reconsideration of Order No. 32755

If the Commission is not inclined to either designate its Orders as final or approve a request for a permissive appeal, then New Energy moves in the alternative for the Commission to reconsider its Order denying the Motion to Dismiss. Relying on our Procedural Rule 331, New Energy requests that the Commission "reconsider" its ruling on jurisdiction for the reasons set forth in New Energy's Motion and its reply to Idaho Power's answer. Motion at 8. The Motion further states that "the fact that the New Energy parties agreed to boilerplate language offered by Idaho Power as to [the] forum for dispute resolution is not outcome determinative because [sic], as set forth in detail in the New Energy parties' Motion to Dismiss." *Id.*

Commission Findings: For the reasons set out below, we decline to "reconsider" Order No. 32755. Our Rule 331 provides that within 21 days of the "issuance of any final order, any person interested in a final order . . . may petition for reconsideration." IDAPA 31.01.01.331.01 (emphasis added). First, under the Commission's Rules of Procedure, reconsideration under Rule 331 is only applicable to final Orders of the Commission. As the Commission found above, Order No. 32755 is neither a "final" Order nor does it result in a final determination of the rights of the parties. As our appellate courts have held, a final order is one that resolves all issues, or the last unresolved issue. *Johnson*, 153 Idaho at 251, 280 P.3d at 754; *Williams*, 149 Idaho at 677-78, 239 P. 3d at 782-83; *Camp v. East Fork Ditch Co.*, 137 Idaho at 867, 55 P.3d at 321.

Second, Rule 331.01 also requires that requests "for reconsideration must set forth specifically the ground or grounds why the petitioner contends that the order or any issue

decided in the order is unreasonable, unlawful, erroneous, or not in conformity with the law, and a statement of the nature and quantity of evidence or argument the petitioner will offer if reconsideration is granted." IDAPA 31.01.01.331.01. New Energy does not specifically point to any particular finding or analysis contained in the Commission's Order that is in error. Order No. 32755 set forth several reasons supporting the Commission's jurisdiction but New Energy does not indicate which specific finding is in error. The Motion merely asks the Commission to reconsider its Order based upon "the reasons set forth in the New Energy parties' motion to dismiss and reply" to Idaho Power. Motion at 8. Despite New Energy's concession that the dispute resolution language contained in Section 19.1 allows the Commission to resolve contract disputes, New Energy does not elaborate why this "is not outcome determinative."

Third, and more importantly, New Energy's request is more properly viewed as a motion to "review" interlocutory Order No. 32755 pursuant to Rule 322. The distinction here is important because "reconsideration" is only available from final orders and is a statutory prerequisite for parties seeking to appeal. *Idaho Code* § 61-626; *compare* Rule 322 *with* Rule 331, IDAPA 31.01.01.322 and .331. As the Supreme Court observed in *Washington Water Power Co. v. Kootenai Environmental Alliance*, the purpose of "reconsideration" under *Idaho Code* § 61-626 is "to afford an opportunity for the parties to bring to the Commission's attention in an orderly manner any question [previously] determined in the [proceeding] and thereby afford the Commission an opportunity to rectify any mistake made by it before" an appeal. 99 Idaho 875, 879, 591 P.2d 122, 126 (1979).

In essence, reconsideration is an administrative remedy that must be exhausted before seeking judicial review. Rule 331.01, IDAPA 31.01.01.331.01; *Idaho Code* §§ 61-626, 61-627; *Eagle Water Co. v. Idaho PUC*, 130 Idaho 314, 316, 940 P.2d 1133, 1135 (1997). "Final orders of the Commission should ordinarily be challenged either by petition to the Commission for [reconsideration] or by appeal to this Court as provided by I.C. §§ 61-626 and -627; Idaho Const. Art. V, § 9. A different rule would lead to endless consideration of matters previously presented to the Commission and confusion about the effectiveness of Commission orders." *Utah-Idaho Sugar Co. v. Intermountain Gas Co.*, 100 Idaho 368, 373-74, 597 P.2d 1058, 1063-64 (1979) (emphasis added). Simply put, reconsideration is not available with the issuance of every Commission Order.

Finally, we find that New Energy's reliance on the *Afton* cases is misplaced because the Agreement and facts in the *Afton* cases are distinguishable from the Agreements and facts in this case. In *Afton I/III*, Afton filed a complaint with the Commission requesting that the Commission order Idaho Power to enter into a PURPA contract with Afton. Idaho Power objected to the Commission's jurisdiction (authority) to compel the utility to enter into a PURPA contract with Afton. *Afton Energy v. Idaho Power Co.*, 107 Idaho 781, 782, 693 P.2d 427, 428 (1984) (*Afton I/III*).[11] In *Afton IV*, Idaho Power petitioned the Commission to interpret the underlying contract but the Commission declined finding that the proper forum was district court. 111 Idaho at 928, 729 P.2d at 403. The Court stated in *Afton IV* that "Idaho Power and Afton have not agreed to allow the Commission to interpret the contract." *Id.* at 929, 729 P.2d at 404.

The PURPA Agreement in *Afton I/III* is markedly different than the Agreements in this proceeding. The *Afton* Agreement Article XIII (Legal Dispute) states that there is "a bona fide legal dispute . . . between [Afton] and Idaho [Power] as to the authority of the Idaho Public Utilities Commission to order Idaho [Power] to enter into contracts containing rates, terms and conditions with which Idaho [Power] does not concur." *Afton* PPA, Art. XIII dated Aug. 11, 1982. That language stands in stark contrast to the dispute resolution language in the current PPAs which provides that "all disputes related to or arising under this Agreement, including, but not limited to, interpretation of the terms and conditions of this Agreement will be submitted to the Commission for resolution." Order No. 32755 at 10 *citing* PPA § 19.1. Thus, the parties in the present Agreements have expressly agreed to the Commission's jurisdiction, while each party in the *Afton* cases and Agreement did not consent to submitting the dispute to the Commission's jurisdiction.

Having reviewed our interlocutory Order No. 32755, we deny New Energy's alternative request for reconsideration for the reasons set out above.

[11] The lineage of the Afton cases is sometimes confusing. *Afton I* was issued in January 1984. Idaho Power subsequently petitioned the Court for rehearing and the case was re-argued. In July 1984, the Court issued a subsequent opinion (*Afton II*) at which time Afton petitioned for rehearing. Finally, in December 1984, the Court withdrew its *Afton II* opinion and issued a third opinion (*Afton III*) that modified the Court's *Afton I* opinion. Consequently, the first opinion is often cited as "*Afton I/III*." Order No. 32755 at n.6 *citing Afton IV*, 111 Idaho 927 n.1, 729 P.2d 402 n.1.

D. Request for Stay

As part of its Motion, New Energy requests that the Commission stay the proceedings while the digesters pursue an interlocutory appeal under I.A.R. 12. Motion at 3, 7. New Energy maintains that a stay is appropriate so that "the threshold issue of jurisdiction is resolved" and a stay will preserve resources. *Id.* at 7. Rule 324 provides that the Commission may "stay any order, whether interlocutory or final." IDAPA 31.01.01.324.

Commission Findings: While the Commission does not approve New Energy's request to seek a permissive appeal, we find there is merit in granting a stay. Appellate Rule 12(c)(1) provides that any party may appeal an agency's "order approving or disapproving a motion for permission to appeal" within 14 days of the agency's order. The Commission finds that it is reasonable to stay our proceeding for 15 days to see whether New Energy files a motion for a permissive appeal with the Court. If New Energy files a Rule 12 motion with the Court requesting acceptance of an appeal by permission, then the Commission will continue its stay of this proceeding until such time as the Court has ruled on the Rule 12 motion.

ORDER

IT IS HEREBY ORDERED that New Energy's Motion for Permissive Appeal is granted in part and denied in part. More specifically, New Energy's request that the Commission designate its two interlocutory Order Nos. 32692 and 32755 as final Orders is denied.

IT IS FURTHER ORDERED that New Energy's motion that the Commission approve a permissive appeal from the two interlocutory Orders is denied.

IT IS FURTHER ORDERED that New Energy's request that the Commission reconsider its Order No. 32755 regarding the Commission's finding that it has jurisdiction to resolve the contract dispute is denied.

IT IS FURTHER ORDERED that New Energy's request for a stay of this proceeding is initially granted for 15 days from the date of this Order. If New Energy does not file an Appellate Rule 12 motion with the Supreme Court within 14 days from the service date of this Order, the stay will be lifted and New Energy is directed to file an answer to Idaho Power's complaints within 28 days from the service date of this Order. If New Energy does file a timely Rule 12 motion with the Supreme Court seeking a permissive appeal from interlocutory Order No. 32755, the stay shall be continued until such time as the Court rules on New Energy's motion.

DONE by Order of the Idaho Public Utilities Commission at Boise, Idaho this 4th day of April 2013.

PAUL KJELLANDER, PRESIDENT

MACK A. REDFORD, COMMISSIONER

MARSHA H. SMITH, COMMISSIONER

ATTEST:

Jean D. Jewell
Commission Secretary

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