

DECISION MEMORANDUM

**TO: COMMISSIONER KJELLANDER
 COMMISSIONER REDFORD
 COMMISSIONER SMITH
 COMMISSION SECRETARY
 COMMISSION STAFF**

**FROM: DON HOWELL
 DEPUTY ATTORNEY GENERAL**

DATE: MARCH 29, 2013

**SUBJECT: NEW ENERGY TWO AND NEW ENERGY THREE'S MOTION FOR
 PERMISSION TO FILE A PERMISSIVE APPEAL, CASE NOS. IPC-E-12-
 25 AND IPC-E-12-26**

On March 18, 2013, New Energy Two and New Energy Three (collectively "New Energy") filed a Motion generally seeking the Commission's permission for leave to file a permissive appeal pursuant Idaho Appellate Rule (I.A.R.) 12. In Interlocutory Order No. 32755 issued March 5, 2013, the Commission denied New Energy's "Motion to Dismiss" for lack of subject matter jurisdiction. In that Order, the Commission found that it did have jurisdiction to resolve the complaints filed by Idaho Power against New Energy for the alleged breach of two separate Power Purchase Agreements (PPAs). The Commission found that it had 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 PPA § 19.1.

Appellate Rule 12(c) requires that the Commission rule upon a motion for permission to appeal within 21 days from the date that the motion is filed. New Energy did not request a hearing on its Motion. Pursuant to Rule 12(c)(1), the Commission must issue its Order approving or disapproving the Motion no later than April 8, 2013.

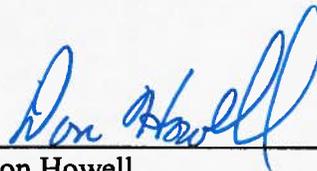
NEW ENERGY'S MOTION FOR PERMISSIVE APPEAL

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],¹ 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 Commission Rule "324 until the appeal to the Supreme Court is resolved." *Id.* Finally, and in alternative, New Energy seeks reconsideration of Order Nos. 32692 and 32755 pursuant to Commission Rule 331, IDAPA 31.01.01.331. New Energy's Motion is attached for your review and consideration.

COMMISSION DECISION

1. Does the Commission wish to designate its two interlocutory Order Nos. 32692 (Notice of Complaint) and 32755 (denying Motion to Dismiss) as final Orders pursuant to Rule 323.03?
2. Does the Commission wish to approve or disapprove New Energy's request for permission to appeal from the two interlocutory Orders pursuant to Appellate Rule 12?
3. Does the Commission wish to grant reconsideration of Order Nos. 32692 and 32755?
4. Does the Commission wish to grant a stay of the current proceeding "until the appeal to the Supreme Court is resolved"?



Don Howell
Deputy Attorney General

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¹ New Energy actually cites to Rule 323.04 but quotes Rule 323.03. Motion at 2-3.

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IDAHO PUBLIC
UTILITIES COMMISSION

Angelo L. Rosa (ISB No. 7546)
1168 E. 1700 S.
Salt Lake City, Utah 84105
Telephone: (801) 440-4400
Fax: (801) 415-1773
E-mail: arosa@exergydevelopment.com

PETER J. RICAHRDSON (ISB No. 3195)
GREGORY M. ADAMS (ISB No. 7454)
Richardson & O'Leary, PLLC
515 North 27th Street
P.O. Box 7218
Boise, Idaho 83707
Telephone (208) 938-7900
Fax (208) 938-7903
peter@richardsonandoleary.com
greg@richardsonandoleary.com

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

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

CASE NO. IPC-E-12-26

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.)

**MOTION FOR CERTIFICATION
OF ORDERS AS FINAL/FOR
PERMISSIVE APPEAL/FOR STAY
OF PROCEEDINGS OR, IN THE
ALTERNATIVE, MOTION FOR
RECONSIDERATION**

IPC-E-12-25/26

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I.

INTRODUCTION

COMES NOW New Energy Two, LLC and New Energy Three, LLC, by and through their counsel of record, Peter Richardson and Angelo L. Rosa, and hereby petitions the Commission for the following relief:

1. For an order (a) designating the Commission's Orders 32692 and 32755 as final orders pursuant to IPUC Rule of Procedure 323(04); (b) granting permission to appeal the Commission's Orders 32692 and 32755 to the Idaho Supreme Court pursuant to Idaho Appellate Rule 12(a); and (c) staying the above-captioned proceedings pursuant to IPUC Rule of Procedure 324 until the appeal to the Supreme Court is resolved; and
2. In the alternative, for reconsideration of Orders 32692 and 32755 pursuant to IPUC Rule of Procedure 331, *et al.*

Good cause exists to grant Exergy the relief requested on the followings grounds:

1. Exergy intends to appeal the Orders in question and designation of those Orders as final is appropriate. The Commission's Orders may be certified as final for the purposes of seeking appellate review of those orders. The Orders in question concern the Commission's subject-matter jurisdiction over the issues presented by Idaho Power Company in its Petition and Complaints in these matters. As such, they embrace a controlling issue of law and are appealable pursuant to the applicable provisions of the IPUC Rules of Procedure and the Idaho Code.
2. Permissive appeal to the Idaho Supreme Court is appropriate under the circumstances given that the issues on appeal are threshold matters that will

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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.

3. Until the issue of subject-matter jurisdiction is resolved, it would be premature and inappropriate for Exergy to answer the Petition and Complaint in the above-captioned matters as directed by Orders 32692 and 32755. No prejudice or hardship will inure to Idaho Power by a stay of these proceedings, whereas substantial prejudice and irreparable harm (in the form of deprivation of the opportunity to be heard in what the New Energy entities allege to be the correct forum for this dispute) will result if these proceedings are not stayed pending the resolution of an appeal.

In the alternative, Exergy respectfully petitions the Commission pursuant to IPUC Rule of Procedure 331 for reconsideration of Orders 32692 and 32755 on the grounds that the Commission has not applied the statutory and appellate guidance on this issue correctly, as set forth herein.

II.

STATEMENT OF APPLICABLE LAW

A. Legal Standard for Designation of Orders as Final

IPUC Rule of Procedure 323 empowers the Commission to designate orders as final.

That Rule states, in pertinent part:

“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. If an order is designated as final after

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its release, its effective date for purposes of reconsideration or appeal is the date of the order of designation.”

IPUC Rule of Procedure 323(04), at IDAPA 31.01.01.

B. Legal Standard for Permissive Appeal

Idaho Appellate Rule 12(a) authorizes appeals by permission from the administrative level to the Supreme Court for review. That Rule states, in pertinent part:

“Criteria for permission to appeal. Permission may be granted by the Supreme Court to appeal from an interlocutory order or judgment of a district court in a civil or criminal action, or from an interlocutory order of an administrative agency, 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 in which an immediate appeal from the order or decree may materially advance the orderly resolution of the litigation.”

I.A.R. 12(a).

C. Legal Standard for Stay of Commission Proceedings

IPUC Rule of Procedure 324 empowers the Commission to stay proceedings before it during the pendency of an appeal. That Rule states, in pertinent part:

“Any person may petition the Commission to stay any order, whether interlocutory or final. Orders may be stayed by the judiciary according to statute. The Commission may stay any order on its own motion.”

IUC Rule of Procedure 324, at IDAPA 31.01.01.

D. Legal Standard for Reconsideration

IPUC Rule of Procedure 331 and Idaho Code Section 61-626 set forth the standard, and

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procedure, by which reconsideration is sought. Rule of Procedure 331 states, in pertinent part:

“Within twenty-one (21) days after the service date of issuance of any final order, any person interested in a final order or any issue decided in a final order of the Commission may petition for reconsideration. Petitions 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.”

IUC Rule of Procedure 324, at IDAPA 31.01.01. Further, Idaho Code Section 61-626 states, in pertinent part:

“After an order has been made by the commission, any corporation, public utility or person interested therein shall have the right, within twenty-one (21) days after the date of said order, to petition for reconsideration in respect to any matter determined therein.”

I.C. § 61-626(1).

III.

ARGUMENT

A. An Order on Jurisdiction is Sufficiently Final to be Certified by the Commission as Such.

The Orders of the Commission ruling on subject-matter jurisdiction are fundamental orders that affect the rights of the parties. Accordingly, they are final orders for the purposes of the issue adjudicated. “As a general rule, a final judgment is an order or judgment that ends the lawsuit, adjudicates the subject matter of the controversy, and represents a final determination of

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the rights of the parties.” *Camp v. East Fork Ditch Co., Ltd.*, 137 Idaho 850, 867, 55 P.3d 304, 321 (2002). As such, the Orders are final orders for the purposes of appeal, notwithstanding any lack of verbiage denoting their finality. Further, it is well established that “[t]he real character of a written instrument is to be judged by its contents and substance, not by its title.” *Swinehart v. Turner*, 36 Idaho 450, 452, 211 P. 558, 559 (1922). The Commission is empowered by the IPUC Rules of Procedure to define an Order as final for the purposes of an appeal, notwithstanding the pendency of other issues before it. Such a characterization is appropriate here given the nature of the Orders and the effect they have on the rights of the parties.

B. Appeal by Permission is Overwhelmingly Warranted Given the Issue of Jurisdiction is a Controlling Issue of Law and a Resolution Thereof Will Materially Affect the Pending Proceedings.

Permissive appeal is very necessary under the present circumstances. The standard set forth in Idaho Appellate Rule 12(a) (*see supra*) is met given that (a) the issue in dispute involves a controlling question of law as to which there is substantial grounds for difference of opinion and (b) an immediate appeal from the Orders in question will materially advance the orderly resolution of this litigation. The issue of subject-matter jurisdiction is a controlling question of law in that the appropriate forum for this matter as a whole is in dispute and there must be clarification of that issue given the disagreement between the parties and the Commission as to which adjudicatory body has jurisdiction to hear that dispute. Issues of subject matter jurisdiction present questions of law over which appellate courts exercise free review. *State v. Barros*, 131 Idaho 379, 380, 957 P.2d 1095, 1096 (1998); *State v. Doyle*, 121 Idaho 911, 913, 828 P.2d 1316, 1318 (1992). Furthermore, it would be duplicitous and wasteful for the parties and the Commission to continue forward with these proceedings until the

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aforementioned question of jurisdiction is resolved. Therefore, permissive appeal is necessary to materially advance the orderly resolution of this dispute. The New Energy parties therefore respectfully submit that the Commission grant permission to appeal this issue to the Idaho Supreme Court.

C. A Stay of Commission Proceedings is Essential Given the Need for Appellate Review on a Threshold Issue of Whether the Commission Indeed Has Subject-Matter Jurisdiction Under the Present Facts.

The relevant IPUC Rules of Procedure authorize the issuance of a stay while a matter is pending reconsideration and/or appeal. As alluded to in Section III(B), *supra*, if this matter was heard at the Commission level before the threshold issue of jurisdiction is resolved, there will be prejudice to the New Energy parties' rights given their objection to the Commission's jurisdiction on this issue. It is established at the appellate level that issues of jurisdiction must be resolved prior to the determination of matters on their merits: "A question of subject matter jurisdiction is fundamental and a matter of law; it cannot be ignored when brought to our attention and should be addressed prior to considering the merits of an appeal." *See State v. Kavajecz*, 139 Idaho 482, 483, 80 P.3d 1083, 1084 (2003); *State v. Savage*, 145 Idaho 756, 758, 185 P.3d 268, 270 (Ct. App. 2008). Additionally, not staying these proceedings would also result in a significant waste of time, money and resources committed to what would be a premature adjudication before New Energy's rights vis-à-vis subject-matter jurisdiction are resolved. A stay is therefore appropriate and warranted, both to preserve the rights of the parties as well as to conserve resources.

D. In the Alternative, Reconsideration of the Court's Order Denying New Energy's Motions to Dismiss is Appropriate to Conform the Court's Rulings

to the Prevailing Law.

In the event that the Commission is not inclined to grant the aforementioned three components of relief, it is appropriate for the Commission to reconsider its ruling on the Orders in question.

The Commission lacks subject-matter jurisdiction for the reasons set forth in the New Energy parties' motion to dismiss and reply brief. The appellate guidance on point (notably *Afton* and its progeny) are clear in that contract interpretation issues are reserved for the District Court system in the State of Idaho. *See Motions to Dismiss and Reply to Opposition to Motions to Dismiss*, on file herewith. Furthermore, the fact that the New Energy parties agreed to boilerplate language proffered by Idaho Power as to forum for dispute resolution is not outcome determinative because, as set forth in detail in the New Energy parties' Motions to Dismiss. The New Energy parties respectfully submit that the Commission should revisit the analysis laid out in detail in the Motions to Dismiss for the purposes of reassessing whether it truly has subject-matter jurisdiction in light of the appellate guidance on the issue.

VI.

CONCLUSION

For the foregoing reasons, New Energy Two and New Energy Three respectfully submit that the Commission is legally empowered to grant the relief requested herein, that the applicable law supports a grant of the relief requested, and the Commission will be making a sound ruling in its discretion if it grants said relief.

DATED THIS 18th day of March, 2013.

RICHARDSON & O'LEARY, PLLC



Peter J. Richardson (ISB No: 3195)

Gregory M. Adams (ISB No. 7454)

Attorneys for Respondents

ANGELO L. ROSA



Angelo L. Rosa (ISB No. 7546)

Attorney for New Energy Two, LLC and
New Energy Three, LLC

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 18th day of March, 2013, I caused a true and correct copy of the MOTION FOR CERTIFICATION OF ORDERS AS FINAL/FOR PERMISSIVE APPEAL/FOR STAY OF PROCEEDINGS OR, IN THE ALTERNATIVE, MOTION FOR RECONSIDERATION to be served by the method indicated below, and addressed to the following:

Jean Jewell
Secretary
Idaho Public Utilities Commission
472 W Washington Street
Boise, Idaho 83702

() U.S. Mail, Postage Prepaid
() Hand Delivered
() Overnight Mail
(X) Facsimile
(X) Electronic Mail

Peter Richardson
Richardson & O'Leary, PLLC
515 N. 27th Street
Boise, Idaho 83702

() U.S. Mail, Postage Prepaid
() Hand Delivered
() Overnight Mail
() Facsimile
(X) Electronic Mail

Donovan Walker
Jason Williams
Idaho Power Company
1221 West Idaho Street
Boise, Idaho 83702

() U.S. Mail, Postage Prepaid
() Hand Delivered
() Overnight Mail
(X) Facsimile
(X) Electronic Mail

ALR

Signed _____
Angelo L. Rosa