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December 19, 2014

Via Hand Delivery

Jean Jewell, Secretary
Idaho Public Utilities Commission
472 W. Washington St.
Boise, Idaho 83720

Re: IPC-E-14-26 Mountain Home Solar, LLC
IPC-E-14-27 Pocatello Solar 1, LLC
IPC-E-14-28 Clark Solar 1, LLC
IPC-E-14-29 Clark Solar 2, LLC
IPC-E-14-30 Clark Solar 3, LLC
IPC-E-14-31 Clark Solar 4, LLC

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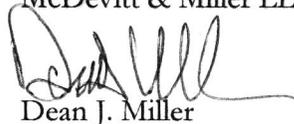
Dear Ms. Jewell:

Enclosed for filing is an original and seven (7) copies of the Reply Comments for each of the cases listed above.

An additional copy of these documents and letter are included for return to me with your file stamp thereon.

Very Truly Yours,

McDevitt & Miller LLP



Dean J. Miller

DJM/hh
Enclosures

ORIGINAL

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Attorney for Mountain Home Solar, LLC, Pocatello Solar 1, LLC, Clark Solar 1, LLC, Clark Solar 2, LLC, Clark Solar 3, LLC, and Clark Solar 4, LLC

BEFORE THE IDAHO PUBLIC UTILITIES COMMISSION

IN THE MATTER OF THE APPLICATION) CASE NO. IPC-E-14-26
OF IDAHO POWER COMPANY FOR)
APPROVAL OR REJECTION OF AN) INITIAL COMMENTS OF
ENERGY SALES AGREEMENT WITH) MOUNTAIN HOME SOLAR, LLC,
MOUNTAIN HOME SOLAR, LLC, FOR) POCATELLO SOLAR 1, LLC, CLARK
THE SALE AND PURCHASE OF) SOLAR 1, LLC, CLARK SOLAR 2,
ELECTRIC ENERGY.) LLC, CLARK SOLAR 3, LLC, and
CLARK SOLAR 4, LLC

IN THE MATTER OF THE APPLICATION) CASE NO. IPC-E-14-27
OF IDAHO POWER COMPANY FOR)
APPROVAL OR REJECTION OF AN)
ENERGY SALES AGREEMENT WITH)
POCATELLO SOLAR 1, LLC, FOR THE)
SALE AND PURCHASE OF ELECTRIC)
ENERGY.)

IN THE MATTER OF THE APPLICATION) CASE NO. IPC-E-14-28
OF IDAHO POWER COMPANY FOR)
APPROVAL OR REJECTION OF AN)
ENERGY SALES AGREEMENT WITH)
CLARK SOLAR 1, LLC, FOR THE SALE)
AND PURCHASE OF ELECTRIC)
ENERGY.)

INITIAL COMMENTS OF MOUNTAIN HOME SOLAR, LLC, POCATELLO SOLAR 1, LLC, CLARK SOLAR 1, LLC, CLARK SOLAR 2, LLC, CLARK SOLAR 3, LLC, AND CLARK SOLAR 4, LLC-1

IN THE MATTER OF THE APPLICATION) CASE NO. IPC-E-14-29
OF IDAHO POWER COMPANY FOR)
APPROVAL OR REJECTION OF AN)
ENERGY SALES AGREEMENT WITH)
CLARK SOLAR 2, LLC, FOR THE SALE)
AND PURCHASE OF ELECTRIC)
ENERGY.)

IN THE MATTER OF THE APPLICATION) CASE NO. IPC-E-14-30
OF IDAHO POWER COMPANY FOR)
APPROVAL OR REJECTION OF AN)
ENERGY SALES AGREEMENT WITH)
CLARK SOLAR 3, LLC, FOR THE SALE)
AND PURCHASE OF ELECTRIC)
ENERGY.)

IN THE MATTER OF THE APPLICATION) CASE NO. IPC-E-14-31
OF IDAHO POWER COMPANY FOR)
APPROVAL OR REJECTION OF AN)
ENERGY SALES AGREEMENT WITH)
CLARK SOLAR 4, LLC, FOR THE SALE)
AND PURCHASE OF ELECTRIC)
ENERGY.)

Pursuant to Order Numbers 33162, 33163, 33164, 33165, 33166, and 33167 these Initial Comments are filed on behalf of Mountain Home Solar, LLC, Pocatello Solar 1, LLC, Clark Solar 1, LLC, Clark Solar 2, LLC, Clark Solar 3, LLC, and Clark Solar 4, LLC¹.

The Managing member of each of the above referenced special purpose limited liability companies is Intermountain Energy Partners, LLC (IEP), also an Idaho limited liability company. The above referenced projects are therefore collectively referred to herein as “the IEP Contracts or the IEP Projects”. With minor exceptions, relating to project location and the like, all of the IEP Contracts contain identical terms and conditions.

¹ As a counterparty to each of the Energy Sales Agreements, each LLC has a direct interest in the Agreements and a Petition to Intervene is not required as a pre-condition to filing these Comments. See Order No. 32222, Case Nos. IPC-E-10-61, IPC-E-10-62.

INTRODUCTION AND SUMMARY OF ARGUMENT

Each of the IEP Contracts contain alternative Solar Pricing Schedules, labeled as Exhibits

E and F. Each of the IEP Contracts contain the following provision (Paragraph 7.1).

“The Solar Facility Pricing Schedule to be included in this Agreement is disputed by the Parties. Idaho Power believes Appendix E is the appropriate Solar Facility Pricing Schedule as it includes an Idaho Power capacity deficit period beginning in 2021. The Seller believes Appendix F is the appropriate Solar Facility Pricing Schedule and it includes an Idaho Power capacity deficit period beginning in 2016. Both of these pricing schedules were calculated using the Commission approved Incremental Cost IRP Avoided Cost Methodology, with the only difference being the starting date of the Idaho Power capacity deficit period. The Parties have agreed to all other terms and conditions of this Agreement and hereby agree to submit this Solar Facility Pricing Schedule dispute to the Commission for resolution. The Parties may submit to the Commission written argument or Comments in support of their respective positions, in accordance with a procedural schedule mutually agreeable to the Parties and the Commission. The Parties agree to abide and be bound by the Commission’s decision on this issue. The final Order of the Commission resolving this dispute will be included and become an integral part of this Agreement, which the Parties agree to support and uphold”.

As stated in the final sentence of paragraph 7.1, the IEP Projects will accept the Commission’s choice as to whether Appendix E or Appendix F prices should be included in a final approved ESA. These Comments are intended to outline for the Commission considerations it might take into account in making that choice.

There is a complicating factor. In Case No. IPC-E-14-20 (*Boise City Solar*) the Commission Staff proposed adjustments to the IRP calculation methodology that resulted in changes to the prices in Exhibit E, and the parties accepted those adjustments. In response to discovery requests, Idaho Power, in each of IEP Contract cases, has submitted to Commission Staff and to IEP revised Exhibits E and F incorporating the adjustments accepted in *Boise City Solar*.

Following that, Commission Staff submitted another Production Request (Third Production) requesting another re-calculation of rates for each project. (Staff did not ask for a re-calculation price for Clark 3, Case No. IPC-E-14-30). Idaho Power provided to Staff and to IEP those calculations on December 16, 2014 with respect to Exhibit E prices. The Third Production re-calculation resulted in small reductions to the initial Exhibit E prices.

If the Commission chooses to include Exhibit E prices, in the final ESA, IEP agrees those prices may be adjusted to incorporate the Third Production re-calculation. If the Commission chooses to include Exhibit F prices in the final ESA, IEP agrees those prices may be again re-calculated consistent with the Third Production re-calculation.²

For the reasons set forth below, the Commission should approve the prices contained in Exhibit F, as modified by the *Boise City* adjustments, and should direct Idaho Power Company to prepare and file conforming final energy sales agreements for final approval.

FACTS

Each of the IEP Contracts were finally executed by the parties on October 13, 2014. Pursuant to paragraph 1.11, the IEP Contracts became binding contractual obligations, as between the parties, on that date.

As of October 13, 2014, the date the IEP contracts became binding between the parties, the Commission approved IRP methodology contemplated a first deficit year of 2021, as reflected by the prices contained in Exhibit E.

²IEP has reservations about the process (changing IRP methodology in a bi-lateral contract approval case) and the methodology (which is basically incomprehensible to a person of ordinary intelligence) that produced the Third Production re-calculations. The small price reductions resulting from the Third Production re-calculations are certainly within a margin of error inherent in avoided cost estimations and it would not be unreasonable to ignore them. However, from IEP's business perspective, it is not worth the effort required to contest them. IEP, therefore, accepts the reductions if the Commission chooses to order them, for the purpose of these cases, only.

On October 29, 2014, in Case No. IPC-E-14-22, *Application Confirming Capacity Deficit Period for IRP Methodology*, the Commission issued Order No. 33159. That Order concluded that a first deficit year of 2021 was appropriate for use in the IRP methodology. Order No. 33159 is silent as to whether it applies to energy sales agreements already executed and binding between the parties.

General Framework

A fundamental principle of public utility regulation is that the Commission orders operate prospectively and the Commission may not engage in retroactive ratemaking. *Utah Power v. IPUC*, 107 Idaho 47, 685 P.2d 276 (1984). When acting in its legislative capacity, as opposed to quasi-judicial, Commission orders are only effective prospectively. Order No. 32974, *Grandview Solar v. Idaho Power*, Case No. IPC-E-11-5.

Thus, in the absence of other considerations, discussed below, Order No. 33159, issued on October 29, 2014, could only be effective as to contracts executed after that date. Order No. 33159, by its terms, does not purport to effect a change in prices for executed contracts, such as the IEP Contracts, which were in existence on October 29, 2014.

Section 1.11, Effective Date

As noted above, each of the ESA's, contain paragraph 1.11, which states:

“1.11 “Effective Date”-The date stated in the opening paragraph of this Energy Sales Agreement representing the date upon which this Energy Sales Agreement was fully executed by both Parties.”

The date stated in the opening paragraph representing the date each of the ESAs were fully executed is October 13, 2014.

The Commission has consistently held that the effective date stated in an energy sales agreement is the date upon which the rights of the parties become fixed and legally binding. *See*, Order No. 27271, *A.W. Brown v. Idaho Power*, Case No. IPC-E-88-9; Order Nos. 32256, 32300, Case Nos. IPC-E-10-59, IPC-10-60, *In Re: Rainbow Ranch*, (holding that contracts with effective dates one day after a Commission deadline should be rejected). *See also*, Order No. 32299, Case Nos. IPC-E-10-61, IPC-E-62, *In Re: Grouse Creek*.

Role of Contracts

The Idaho Supreme Court has recognized that contracts between utility companies and other parties are protected from government interference by Idaho Constitution Art. I Sec. 16, which provides that “no law impairing the obligation of contracts shall ever be passed”. *Bunker Hill v. Washington Water Power* 98 Idaho 249, 561 P.2d 391 (1977); *Agricultural Products v. Utah Power* 557 P.2d 617 (1976).

A limited exception to the constitutional protection of contracts arises from the state’s police powers. However, the Supreme Court has recognized that the police power is not unlimited and the “state may not interfere with a utility contract unless it finds that the rate is so low as to adversely affect the public interest—as where it might impair the financial ability of the public utility to continue its service, cast upon other consumers an excessive burden or be unduly discriminatory”. *CDA Dairy Queen v. State Insurance Fund*, 154 Idaho 379, 299 P.2d 186, 192 (2013).

Grouse Creek and A.W. Brown

The most recent Idaho Supreme Court decision relating to contract formation and Commission approval of contracts is *Grouse Creek Wind Park LLC v. Idaho Power Company*, 155 Idaho 780, 316 P.3d 1278 (2103). There, the Commission established a bright-line date of

December 14, 2010 as a deadline for submitted fully executed energy sales agreements. The energy sales agreements for the Grouse Creek projects were fully executed on December 28, 2010. (316 P.3d 1283). The Grouse Creek projects argued a legally enforceable obligation was created prior to December 14, 2010. The Supreme Court held that where a party executes a sales agreement with a stated effective date, the party may not claim the existence of a prior legally enforceable obligation: “Because the parties voluntarily negotiated their power purchase agreement, which provided that the effective dates were December 28, whether there could have a legally enforceable obligation prior to entering into those agreements is irrelevant...” (316 P.3d 1286). *See also*, Jones, J, concurring: “By ceding to Idaho Power the ability to established the effective date of contracts...Grouse Creek was clearly taking a gamble—one which it lost.” (316 P.3d 1291).

Significantly, the Court in *Grouse Creek*, affirmed its prior holding in *A.W. Brown Co., v. Idaho Power Company*, 121 Idaho 812, 828 P.2d 841 (1992), *affirmed in Rosebud Enterprises, Inc. v. Idaho Public Utilities Comm’n* (131 Idaho 1, 952 P.2d 521 (1977)). In *A.W. Brown* the Court upheld the Commission’s position that a legally enforceable obligation comes into being on the date a written agreement becomes effective by its terms.

Section 21.1

Each of the Agreements contains a section 21.1 which provides in part:

“This Agreement shall only become finally effective upon the Commission’s approval of all terms and provisions hereof without change or condition and declaration that all payments to be made to Seller hereunder shall be allowed as prudently incurred expenses for ratemaking purposes.”

In previous cases the Commission has relied on similar contract clauses to, in effect, over-ride the signature date of agreements and to approve “grandfathering” entitlement to rates existing before the signature date. See, Order No. 32024, Case No. IPC-E-10-15, *In re: Cargill*; Order No. 29951, Case No. IPC-E-05-33, *In Re: Salmon Falls*; Order No. 32104, Case No. IPC-E-10-22, *In Re: Yellowstone Power*.

In all of those cases, however, the triggering event—the date of change in rates—occurred before the contract signature date. Here, the triggering event—the issuance of Order No. 33159 on October 29, 2014—occurred after the signature effective date.

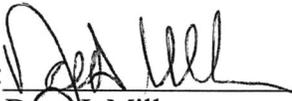
The issue presented here, then, is how to harmonize and give effect to both ESA paragraph 1.11, Effective Date and ESA paragraph 21.1, Commission Approval. IEP recognizes that in *Grouse Creek*, the Supreme Court said that because of paragraph 21.1 the Commission is not obligated to accept the prices contained in an ESA.

Grouse Creek is distinguishable, however, because it did not involve, as here, an Order issued after the effective signature date. *Grouse Creek* does not answer the question presented here. And, it goes without saying, *Grouse Creek* certainly did not say the Commission must reject prices in place on the signature effective date.

In light of the foregoing, IEP recommends, therefore, the Commission adhere to well-established principle that Commission orders operate in a prospective way only; they do not look back and re-adjust rights that came into existence before the Order was issued.

For the foregoing reasons, IEP respectfully recommends that the Commission approve the ESA’s prices contained in Schedule F.

Dated this 15 day of December, 2014.

By:  _____
Dean J. Miller

*Attorney for Mountain Home Solar, LLC, Pocatello
Solar 1, LLC, Clark Solar 1, LLC, Clark Solar 2,
LLC, Clark Solar 3, LLC, and Clark Solar 4, LLC*

CERTIFICATE OF SERVICE

I hereby certify that on the 19th day of December, 2014, I caused to be served, via the method(s) indicated below, true and correct copies of the foregoing document, upon:

Jean Jewell, Secretary
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BY: Heather Houk, legal asst.
MCDEVITT & MILLER LLP