Office of the Secretary
Service Date
July 27, 2011

BEFORE THE IDAHO PUBLIC UTILITIES COMMISSION

IN THE MATTER OF THE APPLICATION OF PACIFICORP DBA ROCKY MOUNTAIN POWER FOR A DETERMINATION REGARDING A FIRM ENERGY SALES AGREEMENT BETWEEN ROCKY MOUNTAIN POWER AND CEDAR CREEK WIND, LLC (RATTLESNAKE CANYON PROJECT)	CASE NO. PAC-E-11-01
IN THE MATTER OF THE APPLICATION OF PACIFICORP DBA ROCKY MOUNTAIN POWER FOR A DETERMINATION REGARDING A FIRM ENERGY SALES AGREEMENT BETWEEN ROCKY MOUNTAIN POWER AND CEDAR CREEK WIND, LLC (COYOTE HILL PROJECT)	CASE NO. PAC-E-11-02
IN THE MATTER OF THE APPLICATION OF PACIFICORP DBA ROCKY MOUNTAIN POWER FOR A DETERMINATION REGARDING A FIRM ENERGY SALES AGREEMENT BETWEEN ROCKY MOUNTAIN POWER AND CEDAR CREEK WIND, LLC (NORTH POINT PROJECT)	CASE NO. PAC-E-11-03
IN THE MATTER OF THE APPLICATION OF PACIFICORP DBA ROCKY MOUNTAIN POWER FOR A DETERMINATION REGARDING A FIRM ENERGY SALES AGREEMENT BETWEEN ROCKY MOUNTAIN POWER AND CEDAR CREEK WIND, LLC (STEEP RIDGE PROJECT)	CASE NO. PAC-E-11-04
IN THE MATTER OF THE APPLICATION OF PACIFICORP DBA ROCKY MOUNTAIN POWER FOR A DETERMINATION REGARDING A FIRM ENERGY SALES AGREEMENT BETWEEN ROCKY MOUNTAIN POWER AND CEDAR CREEK WIND, LLC (FIVE PINE PROJECT)	CASE NO. PAC-E-11-05 ORDER NO. 32302

On January 10, 2011, PacifiCorp dba Rocky Mountain Power filed five Applications each requesting acceptance or rejection of a 20-year Firm Energy Sales Agreement

("Agreements") between Rocky Mountain Power and Cedar Creek Wind, LLC, for its Rattlesnake Canyon, Coyote Hill, North Point, Steep Ridge and Five Pine wind projects (collectively "the Projects"). On February 24, 2011, the Commission issued a consolidated Notice of Application and Notice of Modified Procedure for the five Applications. Timely comments in response to the Notice of Modified Procedure were filed by the Commission Staff and the Projects. On March 31, 2011, Rocky Mountain Power filed reply comments. On June 8, 2011, the Commission issued a consolidated final Order disapproving each of the five Agreements. The Commission found that the Agreements "were not fully executed (signed by both parties) prior to December 14, 2010" – the date that the Commission lowered the eligibility cap for the published avoided cost rate from 10 aMW to 100 kW. Order No. 32260 at 10. Thus, the Agreements contained an essential term that was no longer available to the Projects. *Id.*

On June 29, 2011, the Projects timely filed a Joint Petition for Reconsideration of the Commission's final Order. The Projects allege that the Commission's final Order is erroneous and is not in conformity with the law because a legally enforceable obligation existed between Rocky Mountain Power and the Cedar Creek projects prior to December 14, 2010. As a result, Cedar Creek maintains that they are entitled to published avoided cost rates under the previous 10 aMW eligibility cap. The Projects further argue that not considering grandfathering criteria is a departure from the Commission's past precedent and the Commission did not give proper notice to the parties regarding its intent to depart from precedent.

On July 6, 2011, Rocky Mountain Power filed an answer to the Projects' Petition. Rocky Mountain Power maintains that the Commission's final Order is consistent with federal and state law. Rocky Mountain Power contends that the Commission had good cause to act as it did. Further, the Commission was acting within its discretion and, therefore, reconsideration should be denied.

This matter was fully submitted for the Commission's consideration on the July 11, 2011, decision meeting agenda. On July 12, 2011, the Projects filed a reply to Rocky Mountain Power's answer. On July 21, 2011, Rocky Mountain Power filed a sur-reply to the Projects' reply. The Commission finds that the record in this case closed on July 11, 2011, when the matter became fully submitted. Furthermore, Commission Rule 331 does not provide parties the opportunity for a reply and sur-reply to the initial petition for reconsideration and answer.

Therefore, the Commission will not consider the arguments addressed in the Projects' July 12 reply or Rocky Mountain Power's July 21 sur-reply.

BACKGROUND

A. The Agreements

On December 22, 2010, Rocky Mountain Power and the five wind projects entered into their respective Agreements. Under the terms of the Agreements, each wind project agrees to sell electric energy to Rocky Mountain Power for a 20-year term using the 10 aMW non-levelized published avoided cost rates. Applications at 8-9. The Applications recite that Rattlesnake Canyon, Coyote Hill and North Point will each have a maximum capacity of 27.6 MW, and Steep Ridge and Five Pine will each have a maximum capacity of 25.2 MW. Under normal and/or average conditions, each QF will not generate more than 10 aMW on a monthly basis. Rocky Mountain Power warrants that the Agreements comport with the terms and conditions of the various Commission Orders applicable to PURPA agreements for a wind resource. *Id.* at ¶ 6 *citing* Order Nos. 30415, 30488, 30738 and 31025.

The projects all selected October 1, 2012, as the Scheduled Commercial Operation Date. Applications at 9. Rocky Mountain Power asserts that various requirements have been placed upon the projects in order for Rocky Mountain Power to accept the project's energy deliveries. Rocky Mountain Power states that it will monitor each project's compliance with initial and ongoing requirements through the term of the Agreement. The parties have each agreed to liquidated damage and security provisions. Agreements ¶¶ 2.5.1, 11.1.2.

Rocky Mountain Power asserts that it advised each project of the project's responsibility to work with Rocky Mountain Power's delivery transmission unit to ensure that sufficient time and resources will be available for the delivery unit to construct the interconnection facilities, and transmission upgrades if required, in time to allow the projects to achieve their October 1, 2012, Scheduled Commercial Operation Date. The Applications state that the projects have been advised that delays in the interconnection or transmission process do not constitute excusable delays and if a project fails to achieve its Scheduled Commercial Operation Date, delay damages will be assessed. Applications at 11. The Applications further maintain that each project has acknowledged and accepted the risk inherent in proceeding with its Agreement without knowledge of the requirements of interconnection and possible transmission upgrades. *Id.*

Rocky Mountain Power states that each project has also been made aware of and accepted the provisions in each Agreement regarding curtailment or disconnection of its facility should certain operating conditions develop on Rocky Mountain Power's system. Agreements ¶ 6.3.

By their own terms, the "effective date" of each agreement is "after execution by both parties and after approval by the Commission." Agreement ¶ 2.1; 1.13. The Agreements are dated December 22, 2010. *Id.* at p. 1. The Agreements further provide that the Agreements will not become effective until the Commission has approved all of the terms and conditions and declares that all payments made by Rocky Mountain Power to each project for purchases of energy "are just and reasonable, in the public interest, and that the costs incurred by [Rocky Mountain Power] for purchases of capacity and energy from [Cedar Creek] are legitimate expenses, all of which the Commission will allow [Rocky Mountain Power] to recover in rates in Idaho in the event other jurisdictions deny recovery of their proportionate share of said expenses." Agreements ¶ 2.1.

B. The Utilities' Joint Petition

On November 5, 2010, prior to the date that Rocky Mountain Power and the Projects entered into their Agreements, Idaho Power, Avista Corporation, and PacifiCorp dba Rocky Mountain Power filed a Joint Petition requesting that the Commission initiate an investigation to address various avoided cost issues related to the Commission's implementation of PURPA. Case No. GNR-E-10-04. On December 3, 2010, the Commission issued Order No. 32131 declining a motion made by the utilities to immediately reduce the published avoided cost rate eligibility cap from 10 aMW to 100 kW. Order No. 32131 at 5. However, the Order did notify parties that the Commission's decision regarding whether to reduce the published avoided cost eligibility cap would become effective on December 14, 2010. *Id.* at 5-6, 9.

Section 210 of PURPA generally requires electric utilities to purchase power produced by QFs at "avoided cost" rates set by the Commission. "Avoided costs" are those costs which a public utility would otherwise incur for electric power, whether that power was purchased from another source or generated by the utility itself." 18 C.F.R. § 292.101(b)(6). Order No. 32176 at 1. Under PURPA regulations issued by the Federal Energy Regulatory Commission (FERC), the Commission must "publish" avoided cost rates for small QFs with a design capacity of 100 kW or less. Order No. 32176 at 1. However, the Commission has the

discretion to set eligibility for the published avoided cost rate at a higher capacity amount – commonly referred to as the "eligibility cap." 18 C.F.R. § 292.304(c)(1-2). When a QF project is larger than the Commission-established eligibility cap the avoided cost rate for the project must be individually negotiated by the QF and the utility using the Integrated Resource Plan (IRP) Methodology. Order No. 32176.

The purpose of utilizing the IRP Methodology for large QF projects is to more precisely value the energy being delivered. *Id.* at 10. The IRP Methodology recognizes the individual generation characteristics of each project by assessing when the QF is capable of delivering its resources against when the utility is most in need of such resources. The resultant pricing is reflective of the value of QF energy to the utility. Utilization of the IRP Methodology does not negate the requirement under PURPA that the utility purchase the QF energy.

Based upon the record in the GNR-E-10-04 case, the Commission subsequently found that a "convincing case has been made to temporarily reduce the eligibility cap for published avoided cost rates from 10 aMW to 100 kW for wind and solar only while the Commission further investigates" other avoided cost issues. Order No. 32176 at 9 (emphasis original). On reconsideration, the Commission affirmed its decision to temporarily reduce the eligibility cap for published avoided cost rates from 10 aMW to 100 kW. Order No. 32212. Thus, the eligibility cap for the published avoided cost rate for wind and solar QF projects was set at 100 kW effective December 14, 2010. No party appealed from the Orders in Case No. GNR-E-10-04.

C. The Prior Final Order in this Case

On June 8, 2011, the Commission issued Order No. 32260 disapproving the Agreements between Rocky Mountain Power and each of the five wind projects – Rattlesnake Canyon, Coyote Hill, North Point, Steep Ridge and Five Pine.[1] The Commission determined that the Agreements were not fully executed (signed by both parties) prior to December 14, 2010, the date upon which the eligibility for published avoided cost rates changed from 10 aMW to 100 kW for wind and solar projects. Consequently, the Commission found that the rates contained in the Agreements did not comply with Order No. 32176 because each of the projects

[1] The five projects had previously filed consolidated comments because the relevant facts for each of these five projects are substantially similar. Consequently, the Commission found it reasonable and appropriate to consolidate the cases and issue a consolidated final Order. Order No. 32260 n.1.

requesting published avoided cost rates is in excess of 100 kW. Order No. 32260 at 10. The "old" 10 aMW published rate is available only to non-wind and non-solar QFs.

The Projects signed the Agreements on December 13, 2010, and Rocky Mountain Power signed on December 22, 2010. The Commission noted that the Agreements contain language regarding the effective date. The terms of the Agreements unequivocally state that the "Effective Date" of the Agreements is "after execution by both Parties and after approval by the Commission." Agreements ¶¶ 1.13, 2.1 (emphasis added). The Agreement is dated "this 22nd day of December, 2010" and Rocky Mountain Power stated that it executed the Agreements on December 22, 2010. Applications at ¶ 9; Reply Comments at 4. We stated that "[t]he Commission does not consider a utility and its ratepayers obligated until both parties have completed their final reviews and signed the agreement." Order No. 32260 at 9. We found that "a thorough review is appropriate and necessary prior to signing Agreements that obligate ratepayers to payments in excess of $685 million" over the 20-year term of the Agreements. *Id.* at 8. The Commission established a bright line rule that for a wind or solar QF larger than 100 kW to be eligible for published avoided cost rates, a Firm Energy Sales Agreement/Power Purchase Agreement must have been executed, i.e., signed by both parties, prior to the December 14, 2010, effective date of the change in eligibility criteria. *Id.* at 10. The Commission additionally found that it was "not in the public interest to allow parties with contracts executed on or after December 14, 2010, to avail themselves of an eligibility cap that is no longer applicable." *Id.* at 9.

PETITION FOR RECONSIDERATION

On June 29, 2011, the Projects filed a timely Joint Petition for Reconsideration. *Idaho Code* § 61-626. The Projects allege that the Commission's Order is erroneous and violates federal and state law. Specifically, the Projects argue that (1) the Commission's bright line rule requiring an executed contract in order for a wind facility to qualify for a 10 aMW eligibility cap violates federal law; (2) the Commission arbitrarily departed from past precedent by not utilizing grandfathering criteria to allow projects an opportunity to qualify under the 10 aMW eligibility cap; and (3) the Commission did not give proper notice prior to deviating from past precedent with regard to grandfathering. Ultimately, the Projects contend that their Agreements should be approved because a legally enforceable obligation existed prior to December 14, 2010. The Projects request that the Commission "expeditiously grant this petition for reconsideration and,

by August 5, 2011, approve the Agreements without further briefing, hearing, or other proceedings." Reconsideration at 18.

Rocky Mountain Power filed an answer to the Projects' Petition for Reconsideration. Rocky Mountain Power states that the Commission properly applied the controlling legal standard for determining when a legally enforceable obligation arises under Idaho and federal law. Rocky Mountain Power asserts that "there is no contract until Rocky Mountain Power has completed its internal review, and signified its acceptance by executing the Agreement." Answer at 16. The Company maintains that it executed the Agreement after the eligibility cap was reduced to 100 kW – i.e., on December 22, 2010. *Id.* at 15. The Company further argues that the Commission may, in its discretion, determine whether to utilize grandfathering criteria. Finally, Rocky Mountain Power maintains that the Projects have failed to demonstrate that the Commission's Order is legally flawed.

ISSUES ON RECONSIDERATION

A. Legal Standards

Reconsideration provides an opportunity for a party to bring to the Commission's attention any question previously determined and thereby affords the Commission an opportunity to rectify any mistake or omission. *Washington Water Power Co. v. Kootenai Environmental Alliance*, 99 Idaho 875, 879, 591 P.2d 122, 126 (1979). The Commission may grant reconsideration by reviewing the existing record, by written briefs, or by evidentiary hearing. IDAPA 31.01.01.311.03. If reconsideration is granted, the Commission must complete its reconsideration within 13 weeks after the deadline for filing petitions for reconsideration. *Idaho Code* § 61-626(2).

Consistent with the purpose of reconsideration, the Commission's Rules of Procedure require that petitions for reconsideration "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." Rule 331.01, IDAPA 31.01.01.331.01. Rule 331 further requires that the petitioner provide a "statement of the nature and quantity of evidence or argument the petitioner will offer if reconsideration is granted." *Id.*

B. Legally Enforceable Obligation

The Projects argue that, pursuant to 18 C.F.R. § 292.304(d)(2), a QF is entitled to the rates that are in effect on the date the QF incurred a legally enforceable obligation to provide

energy. The Projects maintain that the key consideration is "whether, as was true here for Cedar Creek, the QF has committed through a legally enforceable obligation to sell power to the utility or, as also was the case here for Rocky Mountain Power, the utility is committed to entering into a legally enforceable obligation to buy that power." Reconsideration Petition at 5. The Projects argue that the Commission committed reversible error by requiring a fully executed contract to establish a legally enforceable obligation.

Commission Findings: The Idaho Supreme Court has held that "[t]he implementation of PURPA as it relates to cogeneration and small power producers, and the regulations promulgated by FERC, have been largely left to the regulatory authorities of the individual states." *A.W. Brown Company, Inc. v. Idaho Power Company*, 121 Idaho 812, 816, 828 P.2d 841, 845 (1992). "FERC regulations grant the states latitude in implementing the regulation of sales and purchases between QFs and electric utilities." Order No. 32262 *citing Federal Energy Regulatory Commission v. Mississippi*, 456 U.S. 742, 102 S.Ct. 2126, 72 L.Ed.2d 532 (1982). As we stated in our final Order, "[a]ccording to the FERC, 'it is up to the States, not [FERC] to determine the specific parameters of individual QF power purchase agreements, including the date at which a legally enforceable obligation is incurred under State law." Order No. 32260 at 9 *citing Rosebud Enterprises v. Idaho PUC*, 128 Idaho 609, 623-624, 917 P.2d 766, 780-781 (1996) *citing West Penn Power Co.*, 71 FERC ¶ 61,153 (1995).

The premise of the Projects' argument is correct: QFs have the right to choose to have rates calculated at the time that a legally enforceable obligation is incurred. Reconsideration at 5. However, this Commission determined that the parties entered into a legally enforceable obligation at the time that both parties executed the power purchase agreement. We find that, for each of these five projects, a legally enforceable obligation was incurred on December 22, 2010 – the date that Rocky Mountain Power executed the Agreements. By their very terms the Agreements were not effective until December 22, 2010, and after approval by this Commission. Agreements ¶¶ 1.13, 2.1. On December 14, 2010, wind projects larger than 100 kW were no longer entitled to the 10 MW published avoided cost rate. In determining when the parties incurred a legally enforceable obligation, we properly exercised the authority granted us by FERC. "For purposes of [FERC] regulations, the critical date is the date on which a legally enforceable obligation is incurred, and choosing that date for a specific QF is

the responsibility of the States, not of [FERC]." *West Penn Power Co.*, 71 FERC ¶ 61153, 61495 (1995).

In their Petition for Reconsideration, the Projects reference FERC regulations and *JD Wind 1, LLC*, 130 FERC ¶ 61,127 (2010), in support of their proposition that an executed contract is not necessarily required in order for a legally enforceable obligation to exist. In *JD Wind*, six separate QFs developed by John Deere Renewables petitioned FERC to overturn a Texas PUC decision denying the projects long-term contracts at avoided cost rates calculated at the beginning of the contract. The Texas PUC found that wind QFs were not entitled to long-term legally enforceable obligations because of the intermittent, or non-firm, nature of the resource. FERC concluded that the Texas PUC's Order, limiting the award of a legally enforceable obligation to only those QFs that provide firm power, was inconsistent with FERC regulations implementing PURPA. *JD Wind* does not consider or analyze when a legally enforceable obligation is incurred under PURPA. The Projects' use of this FERC case as instructive on the issues of contract formation and timing of a legally enforceable obligation is misleading and without merit. *JD Wind* contemplates whether a legally enforceable obligation must be entered into by a utility for intermittent/non-firm resources – nothing more.

Nothing cited by the Projects demonstrates that the Commission's Order is erroneous or inconsistent with federal law. On the contrary, the Projects admit, "[n]o doubt, FERC leaves it to the discretion of state commissions to establish *the date* on which a legally enforceable PURPA obligation is created." Reconsideration at 6 (emphasis in original). We find that, in this case, a legally enforceable obligation was incurred when the contracts were fully executed – upon obtaining the signature of both parties – December 22, 2010. Rocky Mountain Power executed the Agreements on December 22, 2010. Applications at ¶ 9; Reply Comments at 4; Answer at 16. This finding is based on substantial and competent evidence and supported by the record. The Commission's finding is also in the public interest and strikes a balance between "the local public interest of a utility's electric consumers and the national public interest in development of alternative energy sources." *Rosebud Enterprises*, 128 Idaho at 613, 917 P.2d at 770. Allowing a project to avail itself of an eligibility cap (and therefore published rates) that is no longer applicable could cause ratepayers to pay more than the utility's avoided cost which "would be in direct violation of PURPA policies." *A.W. Brown Company v. Idaho Power*

Company, 121 Idaho 812, 818, 828 P.2d 841, 847 (1992). Based on the foregoing, the Projects' request for reconsideration on this issue is denied.

Prior to signing, Rocky Mountain Power performs a thorough review of the terms of the contract. As we stated in our final Order, a comprehensive review of a power purchase agreement is consistent with this Commission's directive to utilities that they assist the Commission in its gatekeeper role when reviewing QF contracts. Order No. 32260 at 8. We find that it is reasonable and consistent with the authority granted us under PURPA, and that the public interest requires that each party have a full and final review of the contract before signing and obligating the utility and its ratepayers to hundreds of millions of dollars in energy payments over the 20-year life of the Agreements. The Projects were given unrestricted time to adequately review the contracts before signing. Rocky Mountain Power is obligated to be as diligent in its review prior to asking the Commission to commit ratepayer dollars.

We further note that, unlike standard offer and acceptance contracts, PURPA agreements are subject to review and approval by this Commission pursuant to Idaho statutes. *Idaho Code* §§ 61-502 and 61-503. "The Commission, as part of its statutory duties, determines reasonable rates and investigates and reviews contracts." *A.W. Brown Company v. Idaho Power Company*, 121 Idaho 812, 816, 828 P.2d 841, 845 (1992). The Agreements acknowledge this statutory duty of the Commission by providing that each Agreement will not become effective *until the Commission has approved* all of the terms and conditions and declares that all payments made by Rocky Mountain Power to the Projects for purchases of energy are just and reasonable and in the public interest. Agreements ¶ 2.1. An effective date based on Commission approval of the Agreement has been supported on Idaho Supreme Court review.[2] Here, no one has argued that the legally enforceable obligation arises only after the Commission has approved the Agreements. Therefore, based upon this record and pursuant to the discretion granted us by PURPA and FERC regulations, we find that a legally enforceable obligation was incurred between Rocky Mountain Power and the Projects on the date that the parties executed the Agreements and agreed to be bound by the terms contained therein. Our Order presented

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[2] "Rosebud is not entitled to a lock-in of an avoided cost rate until it has entered into a legally enforceable *and IPUC approved* obligation for the delivery of energy and capacity." *Rosebud Enterprises*, 128 Idaho at 620, 917 P.2d at 777 (emphasis added).

sufficient facts to show that we did not act arbitrarily. Furthermore, the Projects have failed to demonstrate that we were not regularly pursuing our authority.

C. Application of Grandfathering Criteria

The Projects also argue that the Commission's decision to not consider the application of grandfathering criteria is erroneous and contrary to Commission precedent. Specifically, the Projects argue that, "when previously considering whether QFs were eligible to receive published avoided cost rates, the Commission identified indicative criteria to determine *whether* such a legally enforceable obligation existed prior to the effective date of its decision on the eligibility cap." Reconsideration at 7 (emphasis in original). In cases where the criteria were met, projects were grandfathered and permitted to use rates previously in effect. The Projects contend that they satisfied the requirements of the Commission's grandfathering precedent before the effective date of the eligibility cap reduction.

Commission Findings: The Projects' reliance on previously utilized grandfathering criteria is misplaced. First, this Commission has explicitly stated that "we look at the totality of the facts" in assessing entitlement to grandfathering status. Order No. 29954 at 2. In these Agreements, the "effective date" of each Agreement – the date when both parties executed the Agreement and agreed to be bound by its terms – is well after the Commission lowered the eligibility cap for the published avoided cost rate to 100 kW. Thus, the Projects' Agreements do not support that use of grandfathering. Second, the Idaho Supreme Court has stated that "[c]onferment of grandfathered status on [a] qualifying facility is essentially an IPUC finding that a legally enforceable obligation to sell power existed by a given date. *Such a finding is within the discretion of the state regulatory agency.*" *Rosebud Enterprises*, 128 Idaho 624, 917 P.2d at 781 (emphasis added). In this consolidated case, we found that each of the five projects incurred a legally enforceable obligation on December 22, 2010. Thus, there is no occasion to resort to the use of grandfathering criteria. We further find that the time Rocky Mountain Power took to complete its final review of the Agreements was reasonable. This finding is consistent with our authority under federal and state law.

Third, our Supreme Court has noted, "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." *Rosebud Enterprises v. Idaho PUC*, 128 Idaho 609, 618, 917

P.2d 766, 775 (1996) *citing Intermountain Gas Co. v. Idaho PUC*, 97 Idaho 113, 119, 540 P.2d 775, 781 (1975). "So long as the Commission enters sufficient findings to show that its action is not arbitrary and capricious, the Commission can alter its decisions." *Washington Water Power v. Idaho PUC*, 101 Idaho 567, 579, 617 P.2d 1242, 1254 (1980). Therefore, simply because grandfathering criteria have been used in consideration of QF eligibility to published rates in the past does not mean that this Commission must decide all future QF eligibility cases in the same manner.

Regardless of whether it is a change in the eligibility cap for access to published rates or a change in the rates themselves, the Commission is not bound by prior grandfathering treatment decisions so long as our decision is based on substantial and competent evidence in the record and we enter sufficient findings to demonstrate that is the case. The decision of whether to use grandfathering criteria is within the Commission's discretion. In contrast to the change in eligibility for published rates in 2005,[3] no criteria were enunciated or established by this Commission to determine project eligibility through the use of grandfathering for QF agreements executed on or after December 14, 2010. As stated in our final Order, it is adverse to the public interest to allow parties who have not executed contracts to avail themselves of an eligibility cap that is no longer in place. Order No. 32260 at 9. Grandfathering contracts that were executed on or after December 14, 2010, and allowing them to utilize an eligibility cap that is no longer applicable would be contrary to our determination regarding what the public interest requires. This finding is supported by substantial and competent evidence in the record and is explained in our Orders. Because the Commission's decision to not utilize grandfathering criteria was not arbitrary and/or capricious, we deny reconsideration on this issue.

D. December 14, 2010, Effective Date

The Projects next argue that the Commission did not give proper notice of its intention to require that QFs have fully executed contracts by December 14, 2010, in order for 10 aMW projects to be eligible for published avoided cost rates. Reconsideration at 10. Specifically, the Projects maintain that the Commission did not "state, imply, or otherwise lead one reasonably to conclude that the Commission would or even might reject its own precedent,

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[3] The Commission outlined criteria that it would consider in determining whether a project was eligible for the previous, no longer applicable, eligibility cap for published avoided cost rates, i.e., whether a project would be "grandfathered" and permitted to utilize the old eligibility cap. Order No. 29839.

much less violate PURPA, by requiring that a QF have a fully-executed contract in order to receive published rates." *Id.* at 11. The Projects insist that by failing to provide proper notice, the Commission has acted in an unreasonable and unlawful manner.

Commission Findings: Contrary to the assertion of the Projects, the Commission provided actual notice to the Projects on December 3, 2010, that its decision regarding the published avoided cost rate eligibility cap would become effective December 14, 2010. Order No. 32131 at 5-6, 9, granting Cedar Creek's Petition to Intervene. The Commission's Order No. 32131 states that "it is our intent that our decision regarding the 'Joint Motion' to reduce the published avoided cost eligibility cap shall become effective on December 14, 2010." *Id.* at 5-6 (emphasis added). Moreover, the ordering section of the Order states: "IT IS FURTHER ORDERED that the Commission's decision regarding whether to reduce the published avoided cost eligibility cap become effective on December 14, 2010." *Id.* at 9 (capitals in original). Because this is the very same Order that granted intervention to Cedar Creek, the Projects (i.e., Cedar Creek) were provided actual notice. Consequently, we find that the Commission provided adequate notice to all parties that the eligibility cap was subject to change and that any change would become effective on December 14, 2010.

In the Commission's final Order in the case establishing the December 14, 2010, effective date for the 100 kW eligibility cap for wind and solar's access to published rates (GNR-E-10-04), we unequivocally stated that "[a]rguments that the Commission is without authority to implement its eligibility cap reduction on December 14 are unpersuasive. . . ." Order No. 32176 at 10. We noted FERC's determination that the filed rate doctrine and rule against retroactive ratemaking do not extend "to cases in which [parties] are on adequate notice that resolution of some specific issue may cause a later adjustment to the rate being collected at the time of service." *Natural Gas Clearinghouse v. FERC*, 965 F.2d 1066, 1075 (D.C. Cir. 1992) (emphasis added). We further confirmed that "[t]he goals of equity and predictability are not undermined when the Commission warns all parties involved that a change in rates is only tentative and might be disallowed." *OXY USA, Inc., v. FERC*, 64 F.3d 679, 699 (D.C. Cir. 1995).

The Projects insist that by failing to provide proper notice, "regardless of whether the appropriate notice period was simply the 30-day notice required when the Commission is performing its legislative function of setting rates, or the more extensive notice required under Idaho's Administrative Procedure Act, the Commission has acted in an unreasonable and

unlawful manner. . . ." *Id.* at 12. The Projects' argument regarding notice is without merit for several reasons. First, as mentioned above, the Projects had actual notice that the Commission intended the effective date for the lowered eligibility cap to be December 14, 2010. The Projects (i.e., Cedar Creek) petitioned to intervene in the GNR-E-10-04 case on November 10, 2010 – five days after the three utilities petitioned the Commission to immediately reduce the eligibility cap from 10 MW to 100 kW and more than a month before the Commission's stated effective date. Cedar Creek Wind Petition at 1 (Case No.GNR-E-10-04). Second, "[t]he Commission, as part of its statutory duties, determines reasonable rates and investigates *and reviews contracts*." *A.W. Brown Company v. Idaho Power Company*, 121 Idaho 812, 816, 828 P.2d 841, 845 (1992) (emphasis added). These duties are legislative, not adjudicative, in nature. The Commission, as an agency of the legislative branch of government, exercises delegated legislative powers to make rates. *Id. Idaho Code* § 61-502 defines "Determination of rates" as

> Whenever the commission, after a hearing had upon its own motion or upon complaint, shall find that . . . the rules, regulations, practices, or contracts [by any public utility] affecting such rates . . . are unjust, unreasonable, discriminatory or preferential, or in any wise in violation of any provision of law . . . the commission shall determine the just, reasonable or sufficient rates, fares, tolls, rentals, charges, classifications, rules, regulations, practices or contracts to be thereafter observed and in force . . . .

Review of contracts or agreements that contain PURPA rates falls clearly within the Commission's ratesetting, i.e., legislative, function. Moreover, the APA does not apply to contested cases before the Commission. *Idaho Code* § 67-5240. There is no question that the Projects and others were contesting the proposed reduction in the eligibility cap. "The APA specifically does not apply to 'those in the legislative or judicial branch.' I.C. § 67-5201." *A.W. Brown Company v. Idaho Power Company*, 121 Idaho 812, 819, 828 P.2d 841, 848 (1992).

Finally, *Idaho Code* § 61-625 prohibits collateral attacks of Commission Orders that are final and conclusive. "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, 597 P.2d 1028, 1063 (1979). The Projects argue that the Commission's final Order disapproving the Agreements retroactively applies the reduced 100 kW eligibility cap without notice or due process. Reconsideration at 12. This argument amounts to a collateral attack of the Commission's prior Order reducing the eligibility cap. No party to the GNR-E-10-04 case that

lowered the eligibility cap – including the Projects – timely appealed the Commission's decision to lower the eligibility cap effective December 14, 2010. Case No. GNR-E-10-04; Order Nos. 32176 and 32212. Therefore, the Commission's decision to lower the eligibility cap from 10 aMW to 100 kW for wind and solar projects effective December 14, 2010, is a final and conclusive Order of the Commission that is not subject to collateral attack. The Projects' failure to appeal the Commission's decision to temporarily reduce the cap effective on December 14, 2010, cannot be revived by seeking reconsideration of the Commission's final Order in this case. Therefore, reconsideration of these issues is denied.

Although in this particular case we have established that Cedar Creek had actual notice, in the alternative, the Commission, "for good cause shown, may allow changes without requiring the thirty (30) days' notice herein provided for, by an order specifying the changes so to be made and the time when they shall take effect. . . ." *Idaho Code* § 61-307. The utilities had requested an immediate reduction for access to published rates from 10 aMW to 100 kW claiming that the combined megawatts, the dollar impacts, and the potential adverse consequences to the system and to customers was enormous. Order No. 32131 at 2. On December 3, 2010, the Commission declared that any changes to the published avoided cost rate eligibility cap would be effective December 14, 2010. *Id.* Although the Commission declined to immediately reduce QF projects' access to published rates, we declared that any change would become effective December 14, 2010, based on the assertions in the Utilities' Joint Petition. Absent actual notice, the notice provided would have otherwise met the "good cause" exception to the 30 days' notice requirement of *Idaho Code* § 61-307.

CONCLUSION

The Commission has jurisdiction over PacifiCorp dba Rocky Mountain Power, an electric utility, and the issues raised in this matter pursuant to the authority and power granted it under Title 61 of the Idaho Code and the Public Utility Regulatory Policies Act of 1978 (PURPA). The Commission has authority under PURPA and the implementing regulations of the Federal Energy Regulatory Commission (FERC) to set avoided cost rates, to order electric utilities to enter into fixed-term obligations for the purchase of energy from qualified facilities (QFs) and to implement FERC rules. *Rosebud Enterprises, Inc. v. Idaho Public Utilities Commission*, 128 Idaho 609, 612, 917 P.2d 766, 769 (1996).

Although FERC promulgated the general scheme and rules, it left the actual implementation of PURPA to the state regulatory authorities. *Id.*, 128 Idaho at 614, 917 P.2d 771. FERC rules insist that rates for purchases from QFs be just and reasonable to ratepayers, in the public interest, and not discriminatory against QFs. 18 C.F.R. § 292.304(a)(1). Notably, PURPA and the implementing regulations require only that published/standard avoided cost rates be established and made available to QFs with a design capacity of 100 kW or less. 18 C.F.R. § 292.304(c). When this Commission reduced wind and solar projects' eligibility to published avoided cost rates we unequivocally stated that continuing to allow large wind and solar projects access to published avoided cost rates for projects greater than 100 kW was "clearly not in the public interest." Order No. 32262. We reaffirmed that determination in the present case by finding that "it is not in the public interest to allow parties with contracts executed on or after December 14, 2010, to avail themselves of an eligibility cap that is no longer applicable." Order No. 32260 at 9. The Projects have failed to demonstrate that the Commission's findings are unreasonable, unlawful, erroneous, or not in conformity with the law. Rule of Procedure 331, IDAPA 31.01.01.331.01.

The Firm Energy Sales Agreements between Rocky Mountain Power and the five projects were executed on December 22, 2010. The Agreements recite that Rattlesnake Canyon, Coyote Hill and North Point will each have a maximum capacity of 27.6 MW. Steep Ridge and Rive Pine will each have a maximum capacity amount of 25.2 MW. Under normal and/or average conditions, each project will not exceed 10 aMW on a monthly basis. Because the size of each of these wind projects exceeds 100 kW, they are not eligible to receive the published avoided cost rate. Nevertheless, the Projects are entitled to PURPA contracts with avoided cost rates calculated using the IRP Methodology.

ORDER

IT IS HEREBY ORDERED that the Joint Petition for Reconsideration filed by Rattlesnake Canyon, Coyote Hill, North Point, Steep Ridge and Five Pine wind projects is denied.

THIS IS A FINAL ORDER ON RECONSIDERATION. Any party aggrieved by this Order or other final or interlocutory Orders previously issued in this Case Nos. PAC-E-11-01, PAC-E-11-02, PAC-E-11-03, PAC-E-11-04, and PAC-E-11-05 may appeal to the Supreme

Court of Idaho pursuant to the Public Utilities Law and the Idaho Appellate Rules. See *Idaho Code* § 61-627.

DONE by Order of the Idaho Public Utilities Commission at Boise, Idaho this 27th day of July 2011.

PAUL KJELLANDER, PRESIDENT

MACK A. REDFORD, COMMISSIONER

MARSHA H. SMITH, COMMISSIONER

ATTEST:

Jean D. Jewell
Commission Secretary

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