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IDAHO PUBLIC
UTILITIES COMMISSION

BEFORE THE IDAHO PUBLIC UTILITIES COMMISSION

IN THE MATTER OF THE APPLICATION OF IDAHO POWER COMPANY FOR A DETERMINATION REGARDING THE FIRM ENERGY SALES AGREEMENT FOR THE SALE AND PURCHASE OF ELECTRIC ENERGY BETWEEN IDAHO POWER COMPANY AND GROUSE CREEK WIND PARK, LLC (10-61) AND GROUSE CREEK WIND PARK II, LLC (10-62).	**SUPREME COURT DOCKET NO. 39151-2011** **IPUC CASE NOS. IPC-E-10-61** **IPC-E-10-62**
GROUSE CREEK WIND PARK, LLC AND GROUSE CREEK WIND PARK II, LLC, **Petitioners/Appellants,** **v.** **IDAHO PUBLIC UTILITIES COMMISSION,** **Respondent, Respondent on Appeal,** **and** **IDAHO POWER COMPANY,** **Respondent-Intervenor/Respondent on Appeal.**	**STAFF LEGAL BRIEF**

COMES NOW the Staff of the Idaho Public Utilities Commission, by and through its attorney of record, Kristine A. Sasser, Deputy Attorney General, and in response to the Notice of Scheduling and Notice of Oral Argument issued on January 5, 2012 (Order No. 32430), submits the following legal brief.

BACKGROUND

On December 28, 2010, Idaho Power and Grouse Creek executed two Power Purchase Agreements. Under the terms of the Agreements, each wind project agrees to sell electric energy to Idaho Power for a 20-year term using the non-levelized published avoided cost rates as contained in Order No. 31025. The nameplate rating of each project is 21 MW. Both projects are located near Lynn, Utah. On December 29, 2010, Idaho Power filed two Applications with the Commission requesting acceptance or rejection of the Agreements. The Commission processed the cases through the use of Modified Procedure.

On June 8, 2011, the Commission issued a consolidated final Order disapproving the two Agreements. The Commission found that the Agreements were not fully executed prior to December 14, 2010 – the date that the Commission lowered eligibility for the published avoided cost rates from 10 aMW to 100 kW. Specifically, "on the date the two Agreements became effective, published avoided cost rates were available only to wind and solar projects with a design capacity of 100 kW or less." Order No. 32257 at 9. On June 29, 2011, the projects timely filed a Joint Petition for Reconsideration alleging that the Commission's final Order was arbitrary and capricious, not in conformity with controlling federal or Idaho state case law, and a violation of the rulemaking requirements of the Idaho Administrative Procedures Act.

On July 27, 2011, the Commission issued a Final Order on Reconsideration affirming its prior decision to not approve the two Agreements entered into between the Grouse Creek projects and Idaho Power pursuant to the federal Public Utility Regulatory Policies Act of 1978 (PURPA). Order No. 32299. Based upon the express terms of the Agreements, the Commission found that the PPAs were not effective prior to December 14, 2010. Because each of the PPAs requested published avoided cost rates but the projects were in excess of 100 kW, the Commission found that the published rates were no longer available to the projects.

On September 7, 2011, the Grouse Creek projects appealed the Commission's Order to the Idaho Supreme Court. On October 4, 2011, the Federal Energy Regulatory Commission

(FERC) issued an Order in a similar case that the IPUC's decision to not approve the PPAs was inconsistent with PURPA and FERC's regulations implementing PURPA. *Notice of Intent Not to Act and Declaratory Order (Cedar Creek)*, 137 FERC ¶ 61,006 (Oct. 4, 2011). On November 3, 2011, the Grouse Creek projects, the Idaho Public Utilities Commission and Idaho Power Company (collectively "the Parties") filed a Stipulated Motion to Suspend Appeal and Remand to the Administrative Agency with the Idaho Supreme Court. *Idaho Code* § 61-624 provides that the Commission "may at any time, upon notice to the public utility affected, and after opportunity to be heard . . ., rescind, alter or amend any order or decision made by it." The Parties maintained that there "is good cause for the Court to grant this Motion in order for the Parties to consider a recent decision issued by the Federal Energy Regulatory Commission ("FERC") regarding the subject matter of the appeal." Motion at 2. The Court granted the Parties' Motion on November 22, 2011.

The Parties engaged in settlement discussions on December 9, 2011, and December 22, 2011. During the second settlement conference, the Parties concluded that a briefing schedule would be the most productive means to move the case forward. The Parties proposed, and the Commission adopted, a briefing schedule and set a date for oral argument. Order No. 32430.

ARGUMENT

The Agreements entered into between Idaho Power and the Grouse Creek projects contained express terms regarding the effective date. Each Agreement states that the "Effective Date" is the "date stated in the opening paragraph of this . . . Agreement representing the date upon which this [Agreement] was fully executed by both Parties." Agreements ¶ 1.11. The opening paragraph is dated "this 28 day of December, 2010." Agreements at 1. In reading the express terms of the Agreements, the Commission determined that the projects were not entitled to published avoided cost rates because, at the time the Agreements became effective, published rates were available only to wind and solar projects with a design capacity of 100 kW or less. Order No. 32257 at 9.

PURPA § 292.304(d)(2) "permits a qualifying facility to enter into a contract or other legally enforceable obligation to provide energy or capacity over a specified term." In the *Cedar Creek* case, FERC states that:

> [w]hile this may be done through a contract, if the electric utility refuses to sign a contract, the QF may seek state regulatory authority assistance to enforce the PURPA-imposed obligation on the electric utility to purchase from the QF, and a non-contractual, but still legally enforceable, obligation will be created pursuant to the state's implementation of PURPA. Accordingly, a QF, by committing itself to sell to an electric utility, also commits the electric utility to buy from the QF; these commitments result either in contracts or in non-contractual, but binding, legally enforceable obligations.

137 FERC ¶ 61,006 at p. 13. FERC concluded that this Commission's prior Order "makes a fully-executed contract a condition precedent to the creation of a legally enforceable obligation." *Id.* Despite FERC's conclusions to the contrary, this Commission did not determine whether or when a legally enforceable obligation may have arisen. In its previous Orders, the Commission relied only on the express terms in each Agreement – terms each party agreed to. However, the Commission asked that the Idaho Supreme Court remand the case back to the Commission so that a determination of whether and when a legally enforceable obligation arose could be examined. That is the issue currently before the Commission.

Grouse Creek asserts that it has been engaged in negotiations with Idaho Power for purchase of its output since early 2010. Grouse Creek Comments at 3. In April 2010, the projects requested that Idaho Power provide them with a PURPA contract for a single, 65 MW project. *Id.* at 11. In a June 25, 2010, letter to Idaho Power, the projects indicated that, due to federal permitting issues, the projects intended to reduce the overall footprint and "wished to discuss power sales contracts for two single 10 aMW projects, instead of the large 65 MW project." *Id.* at 13. On July 14, 2010, the projects submitted a formal request for two 10 aMW PURPA contracts to Idaho Power. *Id.* The projects sent an e-mail on August 17, 2010, clarifying that they were formally requesting two PURPA contracts. *Id.* at 14. On October 1, 2010, the projects sent a letter to Idaho Power expressing their intent to obligate themselves to two power purchase agreements. *Id.* The October 1 letter also questioned the legality of what the projects considered an excessive delay liquidated damages security provision. *Id.* at 15.

On November 1, 2010, Idaho Power provided draft standard power purchase agreements to the projects and clarified Idaho Power's position regarding the delay liquidated damages. *Id.* at 16. On December 2, 2010, the projects sent a letter and versions of PURPA contracts to Idaho Power containing project specifics – including acceptance of Idaho Power's

terms regarding delay liquidated damages. *Id.* at 17. "Idaho Power confirmed receipt on December 7, 2010." *Id.* at 18. On December 9, 2010, the projects requested by e-mail that the "First Energy Date" and "Commercial Operation Date" in the Agreements be modified. *Id.* at 18. On December 15, 2010, Idaho Power confirmed the updated on-line dates, and on December 16 Idaho Power provided the projects with executable power purchase agreements. *Id.* at 19.

In *Cedar Creek*, FERC states that "a legally enforceable obligation may be incurred before the formal memorialization of a contract to writing." 137 FERC ¶ 61,006 at 15. However, the simple act of a QF requesting a PURPA contract from a utility cannot reasonably be interpreted as a commitment by the QF to sell electricity to the utility from which it requests a draft contract. Something in furtherance of the QFs intent and *ability* to provide electricity is required.[1]

Based on a reasonable interpretation of the facts in this case, and the actions of both the projects and Idaho Power, Staff believes that a legally enforceable obligation was incurred no later than December 9, 2010 – the date upon which the projects modified their on-line dates. At that point in time, the projects had returned contracts to Idaho Power and agreed to all of the standard terms, including the delay liquidated damages provision. Negotiations had taken place since early 2010 and the projects had taken sufficient action to show that they had committed themselves to sell electricity to Idaho Power. Entitlement to published avoided cost rates changed for wind and solar projects on December 14, 2010. Because a legally enforceable obligation was created no later than December 9, 2010, the Grouse Creek projects are entitled to the published avoided cost rate in effect before December 14, 2010.

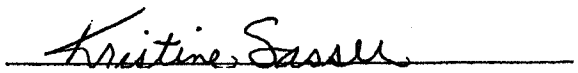
CONCLUSION

Extensive negotiations occurred between Idaho Power and the Grouse Creek projects during the course of 2010. The projects began with a single 65 MW project and disputed Idaho Power's delay liquidated damages provision. In July 2010, the projects submitted a formal request for two 10 aMW published avoided cost rate PURPA contracts. By the first week of December 2010, the facts show that the projects had accepted Idaho Power's delay liquidated damages provision in the agreements. On December 9, 2010, the projects changed their First Energy Date and Commercial Operation Date from December 2012 and June 2013 to June 2013

[1] In *Cedar Creek*, FERC observed that "Extensive negotiations between the parties are persuasive and point to the reasonable conclusion that [the QF] did commit itself to sell electricity to [the utility]." 137 FERC ¶ 61,006 at 17.)

and December 2013, respectively. Since December 9, 2010, all material terms to the Agreements have remained intact. Based on these facts, a legally enforceable obligation attached no later than December 9, 2010. At that time, QF projects with a design capacity of 10 aMW and smaller were entitled to Idaho's published avoided cost rates. Consequently, Grouse Creek Wind Park and Grouse Creek Wind Park II are entitled to published avoided cost PURPA contracts at published rates that were in effect on December 9, 2010. Order No. 31025.

Respectfully submitted this 6th day of February 2012.



Kristine A. Sasser
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for Commission Staff

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY THAT I HAVE THIS 6th DAY OF FEBRUARY 2012, SERVED THE FOREGOING **STAFF LEGAL BRIEF,** IN SUPREME COURT DOCKET NO. 39134-2011, IPUC CASE NOS. IPC-E-10-61 AND IPC-E-10-62 BY E-MAILING A COPY THEREOF TO THE FOLLOWING:

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