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UTILITIES COMMISSION

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June 23, 2015

**VIA HAND DELIVERY**

Jean D. Jewell, Secretary  
Idaho Public Utilities Commission  
472 West Washington Street  
Boise, Idaho 83702

Re: Case Nos. IPC-E-15-01, AVU-E-15-01, and PAC-E-15-03  
Modify Terms and Conditions of PURPA Purchase Agreements – Idaho  
Power Company's Motion to Strike the Testimony of Adam Wenner

Dear Ms. Jewell:

Enclosed for filing in the above matters please find an original and seven (7) copies of Idaho Power Company's Motion to Strike the Testimony of Adam Wenner.

Very truly yours,

Donovan E. Walker

DEW:csb  
Enclosures

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UTILITIES COMMISSION

Attorney for Idaho Power Company

BEFORE THE IDAHO PUBLIC UTILITIES COMMISSION

IN THE MATTER OF IDAHO POWER	)	
COMPANY'S PETITION TO MODIFY	)	CASE NO. IPC-E-15-01
TERMS AND CONDITIONS OF PURPA	)	
PURCHASE AGREEMENTS	)	
_____	)	
IN THE MATTER OF AVISTA	)	
CORPORATION'S PETITION TO	)	CASE NO. AVU-E-15-01
MODIFY TERMS AND CONDITIONS OF	)	
PURPA PURCHASE AGREEMENTS	)	
_____	)	
IN THE MATTER OF ROCKY MOUNTAIN	)	
POWER COMPANY'S PETITION TO	)	CASE NO. PAC-E-15-03
MODIFY TERMS AND CONDITIONS OF	)	
PURPA PURCHASE AGREEMENTS	)	IDAHO POWER COMPANY'S
_____	)	MOTION TO STRIKE THE
	)	TESTIMONY OF ADAM WENNER
	)	

Idaho Power Company ("Idaho Power" or "Company") hereby moves the Idaho Public Utilities Commission ("Commission") to issue an order striking the direct and rebuttal testimony of Adam Wenner on behalf of the Idaho Conservation League and the Sierra Club ("ICL/SC"). Mr. Wenner's testimony consists entirely of legal analysis,

argument, and conclusions and is not admissible as either lay or expert testimony. Testimony as to issues and conclusions of law is improper and inadmissible. Expert opinion is admissible only if it is based on facts or data and will assist the Commission in understanding specialized matters outside of its own area of competency, and testimony regarding legal conclusions is inadmissible because interpreting and applying the law is the role of the Commission. For the reasons set forth below, Idaho Power requests that the Commission strike Mr. Wenner's direct and rebuttal testimony from the record of this case.

### **I. BACKGROUND**

On January 30, 2015, Idaho Power filed a petition asking the Commission to reduce the length of its Integrated Resource Plan-based Public Utility Regulatory Policies Act of 1978 ("PURPA") contracts from 20 years to two years. The Commission granted Idaho Power interim relief, reducing the term for new PURPA contracts to five years while the Commission investigates the matter. Order No. 33222. Shortly thereafter, Avista Corporation and Rocky Mountain Power each filed petitions seeking the same or similar permanent and interim relief (Case Nos. AVU-E-15-01 and PAC-E-15-03). On March 13, 2015, the Commission consolidated the three cases and granted Avista Corporation and Rocky Mountain Power the same interim relief granted Idaho Power. Order No. 33250. The Commission also granted petitions to intervene from a number of parties, including both the Idaho Conservation League and the Sierra Club. In preparation for the upcoming hearing, ICL/SC submitted the direct and rebuttal testimony of Adam Wenner on April 22, 2015, and May 14, 2015, respectively.

According to his testimony, Mr. Wenner is a California-based private practice lawyer who worked in the Office of General Counsel at the Federal Energy Regulatory Commission (“FERC”) over three decades ago. By way of describing his qualifications to provide expert testimony, Mr. Wenner explains that he worked on PURPA matters and that he was one of four staff members extensively involved in drafting FERC’s proposed rules implementing PURPA and the FERC’s final order adopting those regulations. According to Mr. Wenner, the purpose of his testimony is to provide his opinion as to whether Idaho Power’s requested relief in this case—reduction of the maximum required term for qualifying facility (“QF”) agreements to two years—is consistent with PURPA and FERC’s PURPA regulations and decisions. Wenner DI at 2. Mr. Wenner concludes that “an Idaho PUC policy that limits legally enforceable obligations to purchase from QFs to a two year period would be inconsistent with and in violation of the FERC’s regulation.” Wenner DI at 3.

The purpose of this Motion is not to respond to the legal arguments in Mr. Wenner’s testimony—with which the Company disagrees—but rather to demonstrate that Mr. Wenner’s opinions do not constitute proper evidence in this case.

## **II. STANDARD FOR REVIEW OF MOTION TO STRIKE**

The Commission’s evaluation of evidence and determination of admissibility is governed by Rule 261 of its administrative rules of procedure, which provides that the presiding officer will generally follow the “rules as to admissibility of evidence used by the district courts of Idaho.” Pursuant to Rule 261, the presiding officer “may exclude evidence that is irrelevant, unduly repetitious, or inadmissible” and order the presentation of such evidence to stop. In determining whether to exclude Mr. Wenner’s

testimony, the Commission properly looks for guidance from the Idaho Rules of Evidence (“IRE”) and cases interpreting those rules. Additionally, the Idaho courts have repeatedly held that federal case law interpreting the Federal Rules of Evidence (“FRE”), where the FRE at issue is substantively similar to the IRE, is both “relevant and helpful.” *State v. Woodbury*, 127 Idaho 757, 758 (Ct. App. 1995); *State v. Carrasco*, 117 Idaho 295, 298 (1990); *State v. Vaughn*, 124 Idaho 576, 580 (Ct. App. 1993).

### **III. ARGUMENT**

The Commission should exclude Mr. Wenner’s testimony for the following reasons, described in detail below:

1. Mr. Wenner’s legal opinion testimony is not admissible evidence regardless of whether it is offered as either lay witness (IRE 701) OR expert witness testimony (IRE 702).

2. Even if admissible, the recollections of a former agency staffer do not form a proper basis for statutory interpretation and Mr. Wenner’s testimony is therefore irrelevant.

#### **A. Mr. Wenner’s Legal Opinion Testimony Is Inadmissible.**

As noted above, Mr. Wenner’s testimony in this case does not even purport to present facts or data. Other than alleging certain facts regarding his personal career and role at FERC—facts that are not at issue or relevant to this case—Mr. Wenner’s testimony contains nothing more than his legal argument and opinions regarding the very questions of law that the Commission must decide in this case. As such, his testimony is inadmissible.

The courts have concluded that testimony as to matters of law amounting to legal conclusions is not admissible, both because it is unhelpful and includes legal conclusions. The Idaho Supreme Court has expressly held that “Witnesses are not allowed to give opinion on questions of law . . . .” *Carnell v. Barker Management, Inc.*, 137 Idaho 322, 328 (2002). Additionally, Idaho courts have held that lay witnesses, including police officers, may not testify to opinions on questions of law. *Hawkins v. Chandler*, 88 Idaho 20 (1964)(citing 20 Am. Jur., Evidence, § 799; 32 C.J.S. Evidence § 453). The Ninth Circuit Court of Appeals has held that “an expert cannot testify to a matter of law amounting to a legal conclusion.” *U.S. v. Tamman*, 782 F.3d 543, 552-53 (9th Cir. 2015); citing *Aguilar v. Int’l Longshoremen’s Union*, 966 F.2d 443, 447 (9th Cir. 1992)(recitation of facts and the legal conclusion that defendant acted in conformity with SEC rules is not a proper expert opinion). “Experts interpret and analyze factual evidence. They do not testify about the law.” *Crow Tribe of Indians v. Racicot*, 87 F.3d 1039, 1045 (9th Cir. 1996)(finding that expert testimony is not proper for issues of law)(citations omitted).

The courts have further found that the expert opinion **of a lawyer** regarding a question of law is improper and inadmissible. In *United States v. Eastern Municipal Water District*, 2008 WL 4755420 (CD Cal. 2008), a defendant in a lawsuit regarding water rights presented the testimony of a water rights attorney to assist the court “in weighing the veracity and propriety of plaintiffs’ claims to any entitlement to water.” The plaintiffs moved to strike the attorney’s testimony on the basis that his opinions were impermissible legal conclusions. The court agreed, concluding that the lawyer’s opinions called for legal conclusions and would not help the trier of fact. In so holding,

the court cited numerous federal cases as support. *United States v. Scholl*, 166 F.3d 964, 973 (9th Cir. 1999)(stating that experts do not “testify about the law because the judge’s special legal knowledge is presumed to be sufficient”); *Pinal Creek Group v. Newmont Mining Corp.*, 352 F. Supp. 2d 1037, 1042 (D. Ariz. 2005)(“federal courts typically prohibit lawyers, professors, and other experts from interpreting the law for the court or from advising the court about how the law should apply to the facts of a particular case”).

Pursuant to IRE 701, a non-expert witness may testify in the form of an opinion only if the opinion is rationally based on the perception of the witness, helpful to a clear understanding of the testimony of the witness or the determination of a fact in issue, and not based on scientific, technical, or other specialized knowledge within the scope of Rule 702. IRE 701. Opinion testimony by a lay witness is appropriate where the witness is in a better position than the fact finder to draw a conclusion on an issue of fact. See Idaho Trial Handbook § 16.1 (Non-Expert Opinion Testimony)(November 2014)(citing numerous Idaho cases illustrating proper use of lay witness opinion testimony). To the extent that ICL/SC is offering Mr. Wenner’s testimony as the opinion of a lay witness, it is clearly inadmissible. It does not address a fact or facts at issue, and Mr. Wenner himself states that the very purpose of his testimony is to provide an opinion regarding a question of law. Wenner DI at 1-3.

Pursuant to IRE 702, a witness qualified as an expert by knowledge, skill, experience, training, or education may provide opinion testimony if the witness has scientific, technical, or other specialized knowledge that “will assist the trier of fact to understand the evidence or to determine a fact in issue.” *Ryan v. Beisner*, 123 Idaho

42, 46 (1992)(holding that a party offering expert opinion testimony must show that the expert is a qualified expert in the field, the evidence will be of assistance to the trier of fact, experts in the field would reasonably rely upon the type of facts relied upon by the expert in forming his opinion, and the probative value of the opinion testimony is not substantially outweighed by its prejudicial effect). The Advisory Committee's notes regarding FRE 702, on which IRE 702 is modeled, emphasize that the key inquiry regarding the admissibility of expert testimony is whether it will be of assistance to the fact finder and recommend a common sense inquiry into whether the fact finder would be "qualified to determine intelligently" the subject of the dispute "without enlightenment from those having a specialized understanding." FRE 702 (Testimony by Expert Witnesses), *Notes of Advisory Committee on Proposed Rules* (1975)(quoting Ladd, *Expert Testimony*, 5 Vand. L. Rev., 414, 418 (1952)).

Here, Mr. Wenner's opinion regarding how PURPA and FERC's PURPA regulations should apply to Idaho Power and the similarly situated utilities does not meet the standard for admissibility, and should be stricken from the record. First, Mr. Wenner's legal opinion testimony regarding legal conclusions is inadmissible pursuant to the relevant case law authority on that basis alone. Second, it is very difficult to see how Mr. Wenner's legal argument and opinion testimony could appreciably help this Commission with the questions of law before it in this proceeding. The Commission is more than qualified to consider matters of public utility regulatory policy and interpret applicable laws; it can do so without the "enlightenment" offered by Mr. Wenner.



**B. The Recollections of a Former Agency Staffer do Not Form a Proper Basis for Statutory Interpretation.**

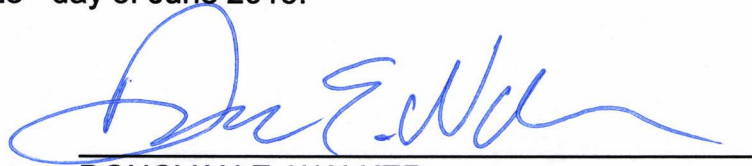
Even if Mr. Wenner's testimony were admissible, which, as demonstrated above, it is not, it would not be relevant. Pursuant to IRE 401, relevant evidence means "evidence having a tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."

It appears that ICL/SC and Mr. Wenner offer his credentials as a former FERC staff lawyer to suggest that Mr. Wenner's personal recollections and understandings are evidence of how PURPA should be interpreted or of FERC's legislative intent in drafting its PURPA regulations. To rely on Mr. Wenner's testimony for either purpose is plainly inconsistent with the governing principles of federal law. In interpreting PURPA, federal courts begin with a determination of whether Congress addressed the precise issue at hand. *Southern California Edison Co. v. FERC*, 195 F.3d 17 (1999)(applying *Chevron USA Inc. v. NRDC, Inc.*, 467 US 837, 842-43 (1984)). When applying the *Chevron* test, a court must exhaust the traditional tools of statutory construction (beginning with the plain meaning) before deference to an agency's reasonable interpretation is appropriate or warranted. *Id.* Even when deference to a federal agency's interpretation of a federal law is appropriate, it stands to reason that it is interpretations **by the agency itself** that are entitled to deference, not statements made by a former agency lawyer. Accordingly, Mr. Wenner's opinion testimony is simply not relevant here. If the Commission wishes to review FERC's statements interpreting PURPA, it may perform a firsthand review of publicly available agency documents, including the FERC orders and regulations that Mr. Wenner references in his testimony.

#### **IV. CONCLUSION**

For the reasons set forth above, the Commission should grant Idaho Power's motion to strike Mr. Wenner's direct and rebuttal testimony from the record.

Respectfully submitted this 23<sup>rd</sup> day of June 2015.



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DONOVAN E. WALKER  
Attorney for Idaho Power Company

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 23<sup>rd</sup> day of June 2015 I served a true and correct copy of IDAHO POWER COMPANY'S MOTION TO STRIKE THE TESTIMONY OF ADAM WENNER upon the following named parties by the method indicated below, and addressed to the following:

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