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BEFORE THE IDAHO PUBLIC UTILITIES COMMISSION

IN THE MATTER OF THE APPLICATION OF IDAHO POWER COMPANY FOR APPROVAL OR REJECTION OF AN ENERGY SALES AGREEMENT WITH COLEMAN HYDROELECTRIC LLC, FOR THE SALE AND PURCHASE OF ELECTRIC ENERGY FROM THE COLEMAN HYDRO PROJECT	CASE NO. IPC-E-20-27 **COLEMAN HYDROELECTRIC, LLC'S PETITION FOR RECONSIDERATION OF ORDER NO. 34870**

INTRODUCTION AND SUMMARY

Pursuant to Idaho Public Utilities Commission ("IPUC" or "Commission") Rule of Procedure 331, IDAPA 31.01.01.313, and Idaho Code § 61-626, Coleman Hydroelectric, LLC ("Coleman Hydro") hereby respectfully petitions the Commission for reconsideration of Order No. 34870 (hereafter also referred to as the "Order"). In accordance with Rule 331, this Petition for Reconsideration sets forth specifically the grounds that Coleman Hydro contends the Order is unreasonable, unlawful, erroneous or not in conformity with the law, and contains legal briefing in support thereof. In support of this Petition, Coleman Hydro is also concurrently submitting the Supplemental Declaration of Jordan Whittaker and the Declaration of Gregory M. Adams to supply additional information implicated by the findings and reasoning of the Order. Although

Coleman Hydro submits that this Petition should be granted without further proceedings, Coleman Hydro will offer evidence at hearing or additional argument should the Commission deem it necessary to resolve the issues presented herein.

For the reasons set forth below, Coleman Hydro requests that the Commission reconsider the Order and issue a new order approving the Energy Sales Agreements ("ESA") entered into between Coleman Hydro and Idaho Power Company ("Idaho Power") containing the published avoided cost rates established by Order No. 34350 and in effect prior to June 1, 2020 (the "Order No. 34350 rates"), as submitted by Idaho Power in this proceeding. As explained below, although the parties' written agreement was not finally executed prior to June 1, 2020, Coleman Hydro perfected its entitlement to the Order No. 34350 rates prior to June 1, 2020. Despite the Order's conclusion, this Commission has consistently approved ESAs executed after the expiration of the published rates contained therein in similar circumstances. Indeed, Coleman Hydro has located 20 such instances where the Commission approved of ESAs with an "Effective Date" occurring after expiration of the contracted rates. Accordingly, the Commission's Order No. 34870 erred to reject inclusion of the Order No. 34350 rates in the Coleman Hydro ESA and, especially when considering the substantial expenditure Coleman Hydro already incurred in reliance on those rates, the Commission should approve use of those rates in the Coleman Hydro ESA.

BACKGROUND

The Coleman Hydro Project is a planned hydroelectric project that will harness the waterpower potential of an existing irrigation pipeline, which is currently unused and wasted. *See Whittaker Declaration* at ¶ 3. The project would be located near Leadore, Idaho, in Lemhi County, and would have a maximum capacity of 800 kilowatts ("kW").

The developers of the Coleman Hydro Project had been in discussions with Idaho Power for over a year prior to expiration of the Order No. 34350 rates and incurred substantial expense in the expectation that Coleman Hydro's energy would be sold under those rates. *Id.* at ¶¶ 4-11. Coleman Hydro representatives initially completed Idaho Power's Schedule 73 application for qualifying facilities ("QF") for the project's current configuration and submitted it to Idaho Power on May 8, 2019. *Id.* at ¶ 9. In subsequent discussions, Coleman Hydro revised the initially proposed Scheduled Operation Date, clarified that Coleman Hydro sought the seasonal hydropower rates since it will only produce energy in the irrigation season, and provided additional information requested for the purpose of completing the Energy Sales Agreement by Idaho Power's representative, Jerry Jardine. *Id.* at ¶ 9. As of May 19, 2020, Coleman Hydro had agreed to all terms and conditions of the Energy Sales Agreement and communicated to Idaho Power that Coleman Hydro was ready to execute the agreement. *Id.* at ¶ 11; *accord Idaho Power's Reply Comments* at p. 2.

Both Idaho Power and Coleman Hydro agree that all material terms were resolved and all that remained as of May 19, 2020, was the mere formality of affixing signatures to the ESA. Coleman Hydro's representative, Jordan Whittaker, attested:

> As of May 19, 2020. I understood that we had completed negotiation of the Energy Sales Agreement, including the rates contained therein, and both parties were committed to that agreement. Idaho Power's Reply Comments state that the only element absent at the time of the June 1 rate change was the actual signatures on the ESA, which occurred on June 8, and June 19. 2020. I agree that both parties had resolved all material terms before June 1 and all that remained was the actual signatures on the written agreement.

Whittaker Declaration at ¶ 10. Likewise, Idaho Power explained:

> The only element absent at the time of the June 1 rate change was the actual signatures on the ESA, which occurred on June 8, and June 19, 2020. The project had been pursuing an ESA since May of 2018 and there were no material terms in

> dispute. Under these facts, and under PURPA's mandatory purchase obligation, Idaho Power did not believe it could refuse to sign the contract.

Idaho Power's Reply Comments at p. 4.

After Coleman committed to the terms of the ESA on May 19, 2020, Idaho Power controlled finalization of the document for signatures. First, Idaho Power routed the agreement through its Sarbanes-Oxley compliance review, which Idaho Power appears to assert was not completed until May 27, 2020. *Idaho Power's Reply Comments* at pp. 2-3. Notably, unlike some other utilities in the Northwest, Idaho Power still uses physical paper and ink signatures for its ESAs, which in this case guaranteed the execution process would not be complete before June 1, 2020.[1] The parties were physically separated by quite a distance – with Idaho Power personnel being located in Boise and Coleman Hydro's representative being located approximately a four-and-half-hour drive away in Leadore – and Idaho Power placed the executable agreement in the mail to Coleman Hydro. *Whittaker Declaration* at ¶ 11. Coleman Hydro's representative, Mr. Whittaker, attested that he received and executed the agreement on June 8, 2020, and mailed it back to Idaho Power. *Id.* Idaho Power executed the agreement on June 19, 2020, with full knowledge that it contained the rates in effect only until June 1, 2020, in the ESA's Exhibits E and F – which directly cite to Order No. 34350 as the source of the rates. *See* ESA at §§ 7.3-7.5 & Exs. E & F.

As the evidence submitted to the Commission further demonstrates, the developers of Coleman Hydro expended substantial sums to develop the facility prior to the Effective Date of

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[1] *See, e.g., Rocky Mountain Power's Application for Approval of Power Purchase Agreement Between PacifiCorp and Birch Hydro Company*, IPUC Case No. PAC-E-20-07, at Agreement p. 39 (filed June 3, 2020) (containing the electronic signature of PacifiCorp's representative dated May 18, 2020, just one day before the signature of the Seller's representative dated May 19, 2020, thus ensuring full execution prior to the same June 1, 2020 rate change at issue here).

the rate change on June 1, 2020. Before June 1, 2020, the developers of the project had expended approximately $2.35 million in the completing the development of this 800 kW facility. *Whittaker Declaration* at ¶¶ 4-5, 8, & Ex. 1. Such development included completion of the following critical development steps: installation of six miles of 24-inch penstock; purchase of the Pelton turbine, generator, and switch gear; completion of construction of the project's powerhouse; and commencement of construction of the privately owned segments of the interconnection tie line, which is almost completed. *Id.* The interconnection study process had also advanced to the final step of executing the Generator Interconnection Agreement and funding Idaho Power's interconnection construction with an additional $300,000 expenditure to timely bring the facility online once the ESA was approved. *Id.* at ¶ 7. Additionally, the project obtained necessary approval from the Federal Energy Regulatory Commission ("FERC") of its status as a qualifying in-conduit hydropower facility exempt from the lengthy licensing process under the Federal Power Act. *Id.* at ¶ 6. In short, Coleman Hydro merely awaited the Commission's timely approval of the Energy Sales Agreement to complete construction and place the facility in service by the ESA's Scheduled Operation Date of June 1, 2021.

However, in Order No. 34870, issued on December 17, 2020, the Commission rejected the Coleman Hydro ESA's use of the Order No. 34350 rates, and the Order instead conditioned approval of the ESA on the use of the substantially lower rates contained in Order No. 34683. As a basis for this conclusion, Order No. 34780 provided the following reasoning:

> The mutually negotiated ESA has an Effective Date of June 19, 2020. If the Company and Seller had intended a different Effective Date, they could have negotiated one. Because the ESA's Effective Date is after the June 1, 2020 rate change, the Seller is not entitled to the previously effective rates.

Order No. 34780 at 7 (citing *A.W. Brown Co., v. Idaho Public Utilities Commission*, 121 Idaho 812, 816-818, 828 P.2d 841, 845-847 (1992)).

The Commission further rejected Coleman Hydro's citation to extensive federal and state precedent establishing that a QF may lock in its entitlement to extant rates prior to execution of a formal written contract under FERC's legally enforceable obligation (or "LEO") rule. The Commission reasoned as follows:

> Notwithstanding the arguments made in this case, we accept the parties' representations in their contract – that they intended the "Effective Date" to be when the ESA was fully executed by both parties on June 19, 2020. Furthermore, a LEO argument is inappropriate based on the facts of this case. The parties entered negotiations that, ultimately, resulted in an agreement. Neither party asserts that the other caused undue delay. FERC's LEO standards, prior to the issuance of Order No. 872 and after it, are intended to prevent intransigence and undue delay by a utility in negotiating with a QF. None of those circumstances apply here.

Id.

The consequence of the Commission's Order is that Coleman Hydro's 800 kW facility will be subjected to the much lower rates upon which it did not rely in expending $2.35 million developing a hydro facility with the expectation it would receive the Order No. 34350 rates. Coleman Hydro now respectfully petitions for reconsideration.

STATEMENT OF GROUNDS FOR RECONSIDERATION

This Petition for Reconsideration is based upon the following grounds:

I. The Commission's Order is not in conformity with, and unlawfully applied, controlling federal law under the Public Utility Regulatory Policies Act of 1978 ("PURPA") and the applicable FERC regulation, 18 C.F.R. § 292.304(d)(2)(ii), under which the Commission should have approved Coleman Hydro's entitlement to the Order No. 34350 rates.

II. The Commission's Order is arbitrary and capricious, and not in conformity with state law, because it ignores, and fails to properly apply, the Commission's own longstanding precedent applying 18 C.F.R. § 292.304(d)(2)(ii), under which the

Commission has consistently approved of QFs' right to rates in effect prior to the Effective Date of a written Energy Sales Agreement under similar circumstances.

III. The Commission's Order rests on an erroneous finding of fact, supported by insufficient evidence, that Coleman Hydro and Idaho Power intended the Effective Date of the executed Energy Sales Agreement to override the Order No. 34350 rates included in the Agreement.

IV. The Commission should reconsider its Order because it results in an unreasonable and unjust result for Coleman Hydro, which invested substantial sums with the reasonable expectation it would be paid the Order No. 34350 rates.

ARGUMENT ON RECONSIDERATION

The Commission should approve the Energy Sales Agreement containing the Order No. 34350 rates, as submitted by Idaho Power in this proceeding. The facts presented in the record warrant a finding that Coleman Hydro is entitled to those rates.

I. The Commission's Order is not in conformity with, and unlawfully applied, controlling federal law under PURPA and the applicable regulation, 18 C.F.R. § 292.304(d)(2)(ii), under which the Commission should have acknowledged Coleman Hydro's entitlement to the Order No. 34350 rates.

The Commission should reconsider the Order because it misunderstands and incorrectly applies FERC's LEO rule. Under any fair application of the LEO rule, the Commission should approve the ESA as submitted by Idaho Power with the Order No. 34350 rates.

A. The Order misunderstands the LEO rule.

Focusing solely on the "Effective Date" written on the Coleman Hydro ESA, the Order mistakenly concludes that the ESA necessarily revokes any previously created entitlement to the Order No. 34350 rates. In doing so, the Order misunderstands the LEO rule.

FERC's LEO rule allows a QF to form a "legally enforceable obligation" to the long-term avoided cost rates calculated at the time that it commits itself to sell power to the utility. *See* 18 C.F.R. § 292.304(d)(2)(ii). FERC has made unequivocally clear that a LEO – and the date on

which a vintage of rates is locked in – can predate the execution of the written contract, and that the subsequent execution of a written contract does not nullify the right to such vintage of rates locked in through the LEO rule. The Order incorrectly assumes that there is a strict dichotomy between a legally enforceable obligation under FERC's rules and fully executed contracts. Instead, FERC has explained that in creating the LEO concept, it used the "terms 'contract' and 'legally enforceable obligation' in the disjunctive to demonstrate that a legally enforceable obligation includes, but is not limited to, a contract." *Cedar Creek Wind, LLC*, 137 FERC ¶ 61,006, at P 35 (2011). The Commission's order incorrectly determines that the executed contract necessarily negates any prior commitment to the Order No. 34350 rates – even where that executed contract contains the LEO rates to which both parties agreed.

In a line of cases where this Commission relied on the use of an "Effective Date" in written contracts to deny QFs the right to LEOs formed prior to execution of such contracts, FERC unequivocally rejected such application of the LEO rule. *See Grouse Creek Wind Park, LLC*, 142 FERC ¶ 61,187 (2013); *Murphy Flat Power, LLC*, 141 FERC ¶ 61,145 (2012); *Rainbow Ranch Wind, LLC*, 139 FERC ¶ 61,077 (2012); *Cedar Creek Wind, LLC*, 137 FERC ¶ 61,006. FERC repeatedly "found that the Idaho Commission's limitation on the conditions for legally enforceable obligation formation overlooked 'the fact that a legally enforceable obligation may be incurred before the formal memorialization of a contract to writing.'" *Grouse Creek Wind Park, LLC*, 142 FERC ¶ 61,187, at P 36 (quoting *Cedar Creek Wind, LLC*, 137 FERC ¶ 61,006 at P 36). FERC stressed that "the phrase legally enforceable obligation is broader than simply a contract[.]" *Id.* (internal quotation omitted). FERC declared:

> The Idaho Commission's June 8, 2011 rejection [of entitlement to previously effective rates] rests on the fact that neither party signed the Agreements, and thus no Agreement existed, until after the December 14, 2010 deadline. As our

> decisions in *Cedar Creek*, *Rainbow Ranch*, and *Murphy Flat* point out, however, a legally enforceable obligation between a QF and a utility may exist regardless of the existence of a contract. The Idaho Commission's June 8 Order is thus defective under PURPA and our PURPA precedent.

Id. at P 38.

The Commission's Order here also incorrectly asserts that the LEO rule may only be used in cases where the QF proves the utility caused a delay in execution of a written agreement. But this same line of reasoning was rejected by FERC as inconsistent with the LEO rule in the following passage:

> In order to protect the rights of a QF, once a QF makes itself available to sell to a utility, a legally enforceable obligation may exist prior to the formation of a contract. A contract serves to limit and/or define bilaterally the specifics of the relationship between the QF and the utility. A contract may also limit and/or define bilaterally the specifics of the legally enforceable obligation at the heart of that relationship. But the obligation can pre-date the signing of the contract. Moreover, the tool of "seek[ing] state regulatory authority assistance to enforce the PURPA-imposed obligation" does not mean that seeking such assistance is a necessary condition precedent to the existence of a legally enforceable obligation. The Idaho Commission's requirement that a QF formally complain "meritorious[ly]" to the Idaho Commission before obtaining a legally enforceable obligation would both unreasonably interfere with a QF's right to a legally enforceable obligation and also create practical disincentives to amicable contract formation. Such obstacles to QFs are at odds with the Commission's regulations implementing PURPA. They are not reasonable conditions for a state PURPA process.

Id. at P 40 (footnotes omitted). As in that case, the Order here unlawfully requires Coleman Hydro to forego execution of a mutually agreeable ESA containing the rates to which both parties understood Coleman Hydro to be entitled and instead litigate against Idaho Power.

As resolution of the dispute in those prior cases, this Commission formally agreed that a LEO may be formed prior to execution of a written agreement. The stipulated dismissal and memorandum of understanding filed in federal court states as follows: "The Idaho PUC acknowledges that a legally enforceable obligation may be incurred prior to the formal

memorialization of a contract to writing." *FERC v. Idaho PUC*, Case 1:13-cv-00141-EJL-REB, Doc. No. 49-1 (D. Ct. Id., Dec. 24, 2013). Yet now the Commission's Order asserts in this case that the Coleman Hydro ESA negates any previous entitlement to the Order No. 34350 rates because it was physically signed after such rates became unavailable. But that cannot be correct. If the written contract – which is necessary for purposes of documentation and practicality – negates the right to the vintage of rates in a previously formed LEO, the LEO rule would be useless. Such a rule "unreasonably interfere[s] with a QF's right to a legally enforceable obligation and also create[s] practical disincentives to amicable contract formation." *Grouse Creek Wind Park, LLC*, 142 FERC ¶ 61,187 at P 40.

Furthermore, FERC's recently issued Order No. 872 reaffirmed its prior LEO precedent quoted above and confirmed that a QF may be entitled to previously effective avoided costs before finalization of an executed written contract. *See Qualifying Facility Rates and Requirements; Implementation Issues Under the Public Utility Regulatory Policies Act of 1978*, Order No. 872, 172 FERC ¶ 61,041, at P 685 (July 16, 2020).[2] FERC specifically cited *Grouse Creek Wind Park, LLC*, 142 FERC ¶ 61,187, at P 40 (2013), for the proposition that requiring the QF to file a complaint proving the utility caused the delay is an unlawful condition for a LEO. *Id.* at P 689. The Order here ignores that FERC has repeatedly rejected the requirement it imposes on Coleman Hydro.

The Order's reliance on the ESA's "Effective Date" also leaves QFs without a contracting right that exists even outside the context of PURPA where parties may be bound

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[2] Order No. 872 states that the new rules become effective 120 days after publication of the Order in the Federal Register, but it is relevant to the continued applicability of the prior FERC precedent discussed herein. *Id.* at P 753.

before formal memorialization of an agreement to an executed written document. *See Cedar Creek Wind LLC*, 137 FERC ¶ 61,006 at P 36 & n.62 (citing contract formation rules). For example, in *First National Mortgage Co. v. Federal Realty Investment Trust*, the Ninth Circuit held that a "Final Proposal" was binding because it clearly stated that its terms "are *hereby accepted* by the parties *subject only to* approval of the terms and conditions of a formal agreement." 631 F.3d 1058, 1065 (9th Cir. 2011) (emphasis in original). Unless an oral agreement is merely an "agreement to agree" without specification of material terms, it is binding even before formal memorialization to an executed written format and indeed even if it is never formally executed. *Id.*; *accord Evco Sound & Electronics, Inc. v. Seaboard Surety Company,* 148 Idaho 357, 365, 223 P.3d 740, 748 (2009).

In this case, there was unequivocally far more than a mere agreement to make an agreement before June 1, 2020. After months of discussion, Coleman Hydroelectric had fully committed itself to all material terms of the final written ESA drafted by Idaho Power on May 19, 2020, and the parties subsequently executed those previously agreed-to terms and conditions. Yet the Order deprives Coleman Hydro of the right to form a binding commitment prior to final execution of documents – even though the parties subsequently formalized their agreement by executing the written document in the same form to which they previously agreed. That result turns the purpose of FERC's LEO rule on its head. FERC's LEO rule is intended to make contracting *easier* on QFs that must attempt to negotiate with a reluctant utility purchaser.

In sum, therefore, the Order here violates FERC's LEO rule. Under the LEO rule, the Commission cannot deny a LEO on the grounds used in the Order, which are instead unreasonable barriers to amicable contract formation by a QF and a utility.

B. Under any fair application of the LEO rule, the Commission should approve the Energy Sales Agreement executed by Coleman Hydro and Idaho Power containing the Order No. 34350 rates.

In this case, under any fair application of FERC's LEO rule, Coleman Hydro its entitlement to the Order No. 34350 rates prior to June 1, 2020, and the Commission should approve the Energy Sales Agreement as executed and submitted by Idaho Power in this proceeding. As noted above, the Energy Sales Agreement was fully negotiated prior to the rate change. Coleman Hydro's representative, Jordan Whittaker, understood that Idaho Power and Coleman Hydro had completed negotiation of the Energy Sales Agreement, including the rates contained therein, and both parties were committed to that agreement prior to June 1, 2020. *Whittaker Declaration* at ¶¶ 9-10. The only element absent at the time of the June 1 rate change was the actual signatures on the Energy Sales Agreement, which occurred shortly thereafter on June 8, and June 19, 2020. *Id.* All that remained to be done as of the last days before the rate change occurring on June 1, 2020, was the mere "formality of executing the written agreement, including the rates, to which both parties had previously agreed." *Id.* at ¶ 11. Those facts are undisputed in the record.

Furthermore, Coleman Hydro even satisfies FERC's more stringent test for proof of commercial viability and commitment to construct the facility in Order No. 872, which was not even yet in effect as the date of the LEO in this case. Order No. 872, 172 FERC ¶ 61,041, at PP 685-687. Coleman Hydro's developers had expended $2.35 million dollars in development of the facility and had already purchased all major equipment aside from the interconnection equipment that must be installed by Idaho Power. *Whittaker Declaration* at ¶¶ 4-8.

The lack of a fully executed written agreement prior to June 1, 2020, was solely due to the mechanics of executing the document, which was a matter largely beyond Coleman Hydro's

control. As noted above, there is no requirement under FERC's LEO rule to demonstrate Idaho Power caused the agreement to be executed after June 1, 2020, but even if such a requirement could lawfully be imposed, the record demonstrates that the delay in final execution was attributable to Idaho Power's lengthy execution process. Coleman Hydro communicated that it approved and was ready to execute the final ESA on May 19, 2020. *Idaho Power's Reply Comments* at pp. 2-3. However, Idaho Power controlled finalization of the document for signatures, and Idaho Power's process took an entire month. First, Idaho Power took over a week to complete its Sarbanes-Oxley compliance review before sending the document to Coleman Hydro on May 27, 2020. *Id.* Even so, had Idaho Power emailed the document for signature, as is done by some other utilities, it could have easily been fully executed before June 1, 2020. However, Idaho Power used physical paper and ink signatures for the ESA, which in this case guaranteed the execution process would not be complete before June 1, 2020, because it took another 11 days for the document to reach Coleman Hydro through the mail on June 8, 2020. *Whittaker Declaration* at ¶ 11. Coleman Hydro could not execute the document before it received the document on June 8, 2020, but it was executed upon receipt. *Id.* Idaho Power executed the agreement on June 19, 2020, which was again an 11-day delay due to the time to mail the physical document from Leadore, Idaho, to Boise, Idaho during a global pandemic.

In sum, the record is undisputed that all material terms of the ESA were agreed to prior to June 1, 2020, and that both parties understood themselves to be committed to the Order No. 34350 rates. Under these facts, Idaho Power itself "did not believe it could refuse to sign the contract." *Idaho Power's Reply Comments* at p. 4. Coleman Hydro agrees with that assessment. Therefore, under any reasonable application of the LEO rule, the Commission should reconsider its Order and approve the ESA as submitted by Idaho Power.

II. The Commission's Order is arbitrary and capricious, and not in conformity with state law, because it ignores, and fails to properly apply, the Commission's own longstanding precedent applying 18 C.F.R. § 292.304(d)(2)(ii), under which the Commission has consistently approved of QFs' right to rates in effect prior to the Effective Date of a written Energy Sales Agreement under similar circumstances.

The Commission should reconsider the Order because it fails to apply the Commission's precedent implementing the LEO rule. As explained below, the Commission has an extensive line of precedent – including at least 20 prior orders – where it has approved of QFs' entitlement, under FERC's LEO rule, to rates in effect prior to the Effective Date of the subsequently executed written Energy Sales Agreement. The Order arbitrarily ignores this precedent in denying approval of the Coleman Hydro ESA. It is a basic tenet of administrative law that an administrative agency must supply a reasoned and non-arbitrary basis to depart from its past precedent. Yet in this case, the Order supplies no basis to ignore the Commission's own past precedent, and indeed there is no non-arbitrary basis to do so.

The Idaho Supreme Court has held the Commission "must explain the reasoning employed to reach its conclusions in order to ensure that the IPUC has applied relevant criteria prescribed by statute or its own regulations and thus has not acted arbitrarily or capriciously." *Rosebud Enterprises, Inc. v. Idaho Pub. Utils. Comm'n*, 128 Idaho 609, 618, 917 P.2d 766, 775 (1996). Although the Commission is not is "not so rigorously bound by the doctrine of *stare decisis* that it must decide all future cases in the same way[,]" the Commission must at least "adequately explained the departure from prior rulings so that a reviewing court can determine that the decisions are not arbitrary and capricious." *Id.* Simply put, "the discretion given the Commission is not absolute[,]" and the Commission may not act "arbitrarily or on an *ad hoc*

basis." *Washington Water Power v. Idaho Pub. Utils. Comm'n*, 101 Idaho 567, 575, 617 P. 2d 1242, 1250 (1980) (internal quotation omitted).

There is a long line of precedent that approves entitlement to rates in effect prior to the "Effective Date" on which the final written agreement is executed. These cases often refer to such treatment as "grandfathering" treatment. However, as the Supreme Court has explained, "[c]onferment of grandfathered status on qualifying facility is essentially an IPUC finding that a legally enforceable obligation to sell power existed by a given date." *Rosebud Enterprises*, 128 Idaho at 624, 917 P.2d at 781. Thus, these "grandfathering" cases are simply application of FERC's LEO rule, and they should be applied here to approve the Coleman Hydro ESA.

Contrary to the Order's reliance on the "Effective Date" in the Coleman Hydro ESA, the Commission has previously approved entitlement to a LEO and rates in effect prior to the executed agreement's "Effective Date" on at least 20 different occasions. In several cases, the Effective Date of the ESA has been over a year after the date the approved rates expired – far more than the 19 days it took to get the agreement executed during a global pandemic in this case. The following table demonstrates the "Effective Date" of the written agreement does not override the rates included in the agreement under the Commission's precedent applying the LEO rule.

Docket Number	**Effective Date**	**Rates Approved for Agreement**	**Days b/w Expiration of Rates and Effective Date**
IPC-E-05-30 Milner Dam	10/14/2005	Order No. 29646 rates Unavailable 8/4/2005 (*See* Order No. 29948, pp. 1-2)	71 days
IPC-E-05-31 Lava Beds Wind	10/14/2005	Order No. 29646 rates Unavailable 8/4/2005 (*See* Order No. 29949, pp. 1-2)	71 days
IPC-E-05-32	10/14/2005	Order No. 29646 rates	71 days

Notch Butte Wind		Unavailable 8/4/2005 (*See* Order No. 29950, pp. 1-2)	
IPC-E-05-33 Salmon Falls Wind	10/14/2005	Order No. 29646 rates Unavailable 8/4/2005 (*See* Order No. 29951, pp. 1-2)	71 days
IPC-E-06-10 Cassia Wind	4/07/2006	Order No. 29646 rates Unavailable 8/4/2005 (*See* Order No. 30086, pp. 1-2)	246 days
IPC-E-06-11 Cassia Gulch Wind Park	4/07/2006	Order No. 29646 rates Unavailable 8/4/2005 (*See* Order No. 30087, pp. 1-2)	246 days
IPC-E-06-26 Magic Wind	10/11/2006	Order No. 29646 rates Unavailable 8/4/2005 (*See* Order No. 30206, pp. 1-2, 5)	433 days
IPC-E-06-34 Hot Springs Wind	12/20/2006	Order No. 29646 rates Unavailable 8/4/2005 (*See* Order No. 30246, pp. 1-2)	503 days
IPC-E-06-35 Bennett Creek Wind	12/20/2006	Order No. 29646 rates Unavailable 8/4/2005 (*See* Order No. 30245, pp. 2, 9)	503 days
IPC-E-06-36 Alkali Wind	12/12/2006	Order No. 29646 rates Unavailable 8/4/2005 (*See* Order No. 30253, pp. 1, 7)	495 days
IPC-E-10-15 Cargill	5/4/2010	Order No. 30744 rates Unavailable 3/16/2010 (*See* Order No. 32024, pp. 1, 2)	49 days
IPC-E-10-16 Rock Creek Dairy	5/24/2010	Order No. 30744 rates Unavailable 3/16/2010 (*See* Order No. 32025, pp. 1, 2)	69 days
IPC-E-10-17 Swagger Farms Dairy	5/24/2010	Order No. 30744 rates Unavailable 3/16/2010 (*See* Order No. 32026, pp. 1, 4)	69 days
IPC-E-10-18 Double B Dairy	5/24/2010	Order No. 30744 rates Unavailable 3/16/2010 (*See* Order No. 32027, pp. 1, 4)	69 days
IPC-E-10-19 Grand View Solar	6/8/2010	Order No. 30744 rates Unavailable 3/16/2010 (*See* Order No. 32068, pp. 1, 5)	84 days
IPC-E-10-22 Yellowstone Power	7/28/2010	Order No. 30744 rates Unavailable 3/16/2010 (*See* Order No. 32104, p. 2)	134 days
IPC-E-10-26 AgPower Jerome	10/15/2010	Order No. 30744 rates Unavailable 3/16/2010 (*See* Order No. 32138, p. 3)	213 days

PAC-E-11-02 Coyote Hill PPA	12/14/2011	Order No. 31025 rates Unavailable 12/14/2010 (*See* Order No. 32419 at pp. 3, 6)	395 days
PAC-E-11-03 North Point PPA	12/14/2011	Order No. 31025 rates Unavailable 12/14/2010 (*See* Order No. 32419 at pp. 3, 6)	395 days
PAC-E-11-05 Five Pine PPA	12/14/2011	Order No. 31025 rates Unavailable 12/14/2010 (*See* Order No. 32419 at pp. 3, 6)	395 days

The relevant documents in these prior cases are included in the accompanying Declaration of Gregory M. Adams for inclusion in the record in this proceeding.

The Commission's reasoning in these prior decisions directly contradicts the reasoning supplied in the Order in this proceeding. For example, in the case of the Cargill ESA, Idaho Power represented that "approximately 10 days prior to March 16, 2010[, the date of the rate change,] Idaho Power's management started the process of reviewing the agreed-upon draft for final approval and execution." Order No. 32024 at 3. However, unlike Coleman Hydro, "[t]he final Sarbanes-Oxley review process and the routine internal approval had not been completed as of [the date of the rate change]." *Id.* Nevertheless, the Commission approved the subsequently executed ESA with the previously effective rates, stating as follows:

> On the May 4, 2010 date of contract signing the higher contract rates of Order No. 30744 had been replaced by the lower rates of Order No. 30125 (Case No. GNR-10-01) approved by the Commission on March 16, 2010. We find that the Company has fairly represented our past grandfathering criteria requirements. We further find the Company's approach in this case regarding contract rates to be in concert with the spirit of those prior grandfathering cases. *See A. W Brown v. Idaho Power*, 121 Idaho 812, 828 P.2d 841 (1992); Order No. 29872, Case No. IPC- 05-22.
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> In this case, Idaho Power and Staff believe that Cargill is entitled to grandfathering and the rates of Order No. 30744. Idaho Power represents that all outstanding contract issues had been resolved prior to March 16, 2010, and that but for the internal review process of the Company a contract would have been

> signed prior to March 16. Based on the record established in this case, we find that Cargill is entitled to the grandfathered rates of Order No. 30744.

Order No. 32024 at 4. The "Effective Date" of the executed Cargill ESA was after the date of the rate change, but the Commission nevertheless approved the executed agreement and entitlement to the rates no longer in effect as of the agreement's "Effective Date." As the above table and sources cited therein demonstrate, this has in fact occurred at least 20 different times.

Given this longstanding precedent, the Order is incorrect to invoke the "Effective Date" of the executed Coleman Hydro ESA as the basis to deny entitlement to the Order No. 34350 rates. The Order fails to even discuss the extensive prior precedent, and it certainly does not "adequately explained the departure from prior rulings so that a reviewing court can determine that the decisions are not arbitrary and capricious." *Rosebud Enterprises*, 128 Idaho at 618, 917 P.2d at 775. Moreover, it would not be possible to supply such an adequate explanation because the result here is arbitrary, ad hoc, and therefore unlawful.

As previously noted in Comments, in addition to typical delays in the utility's execution process, this Commission has looked to the maturity of the project and level of commitment of the QF developer to completion of the project in determining whether to approve the use of pre-existing rates. *See In the Matter of Cassia Wind to Determine Exemption Status*, Case No. IPC-E-05-35, Order No. 29954, 2-4 (2006). For example, in *Cassia Wind*, the Commission found that a QF was entitled to pre-existing rates based on the maturity of development of the project when it had merely submitted a completed application for interconnection study, including the applicable fee, and had performed wind studies, commenced preliminary permitting and licensing activities, and made efforts to secure sites to place turbines. *Id.* In that case, the "Effective Date" in the executed agreements was ultimately 246 days after the date that the rates

became no longer available. Coleman Hydro has advanced its development further than most of these prior QFs and had committed to all final terms of the ESA prior to the rate change, yet the Order here ignores this prior precedent in rejecting approval of its ESA.

In sum, the Commission should reconsider the Order and correctly apply its own past precedent to conclude that Coleman Hydro – just like the 20 other QFs cited in the table above – is entitled to the rates in its executed ESA.

III. The Commission's Order rests on an erroneous finding of fact, supported by insufficient evidence, that Coleman Hydro and Idaho Power intended the Effective Date of the executed Energy Sales Agreement to override the Order No. 34350 rates included in the Agreement.

The Order's rejection of the parties' agreed-to use of the Order No. 34350 rates rests on its finding that the parties intended for the "Effective Date" of June 19, 2020, in the executed ESA, to override the Order No. 34350 rates included in that ESA, but such finding is supported by insufficient evidence. Specifically, the Order finds as a matter of fact that Coleman Hydro and Idaho Power "intended the 'Effective Date' to be when the ESA was fully executed by both parties on June 19, 2020" and for that "Effective Date" to override and to invalidate the Order No. 34350 rates included in the executed agreement. Order No. 34780 at 7. But this finding is supported by no evidence of such intent.

The Idaho Supreme Court has explained that the Commission's orders must be "supported by substantial, competent evidence in the record." *Rosebud Enterprises*, 128 Idaho at 618, 917 P.2d at 775. The substantial evidence rule requires more than a mere "scintilla" of evidence and "requires a court to determine whether [the agency's] findings of fact are reasonable." *Idaho State Insurance Fund v. Hunnicutt*, 110 Idaho 257, 260, 715 P. 2d 927, 930 (1985) (internal quotation omitted). The evidence supporting an agency's decision must be

"substantial, when viewed in the light that the record in its entirety furnishes, including the body of evidence opposed to the [agency's] view." *Id.*, 110 Idaho at 261, 715 P. 2d at 931 (internal quotation omitted).

In this case, the Commission's ultimate finding that the parties intended for the "Effective Date" of the executed agreement to override and invalidate the vintage of rates that were intentionally included in the agreement is supported by no evidence. Indeed, such finding directly contradicts the only evidence addressing the question, which instead firmly establishes that both Idaho Power and Coleman Hydro intentionally included the Order No. 34350 rates with the expectation those rates would apply. Each of the ESA's rate tables directly cite to "Order No. 34350, effective June 1, 2019," as the source of the rates. *See* ESA at Ex. E-1, E-2, E-3, F-1, F-2, & F-3. The Commission's Order cites no evidence that either party ever intended or understood for the "Effective Date" to override the use of such rates. No such evidence exists because that was not either party's intent. As Idaho Power stated, it included the Order No. 34350 rates and executed the agreement containing such rates on the "Effective Date" of June 19, 2020, because, under the circumstances here, it "did not believe it could refuse to sign the contract." *Idaho Power's Reply Comments* at p. 4. There is no evidence that the date of execution was intended to override the validity of the rates included in Coleman Hydro ESA.

The Order's finding is also illogical and inconsistent with other provisions of the ESA and this Commission's implementation of PURPA. As with all IPUC-approved PURPA agreements, the Coleman Hydro ESA states that it is not finally effective and binding on the parties until after approval by the Commission. Section 21.1 states as follows:

> Idaho Power shall file this Agreement for its acceptance or rejection by the Commission. 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.

See also Idaho Power's Schedule 37 states at sheet 73-5 (stating, "The prices and other terms contained in an ESA shall become final and binding upon full execution of such ESA by both parties *and approval by the Commission*" (emphasis added)). As with the "Effective Date" of final execution, Section 21.1 reflects the formalities and process of finalizing a written agreement, but neither provision can lawfully override entitlement under the LEO rule to previously effective rates contained in such agreement.

Indeed, in the case of PacifiCorp's Commission-approved contracts, the "Effective Date" is itself defined as the date that the Commission approves the agreement, not the date the contract is executed. For example, the Coyote Hill Power Purchase Agreement defines the "Effective Date" as follows:

> This Agreement shall become effective after execution by both Pares and after approval by the Commission pursuant to a final and non-appealable order ("Effective Date"), that the prices to be paid for energy and capacity are just and reasonable, in the public interest, and that the cost incurred by PacifiCorp for purchase of capacity and energy from Seller are legitimate expenses, all of which the Commission will allow PacifiCorp to recover in rates in Idaho in the event other jurisdictions deny recovery of their proportionate share of said expenses.

Coyote Hill Power Purchase Agreement at § 2.1, *see also* § 1.15 ("'Effective Date' shall have the meaning set forth in Section 2.1 of this Agreement.").[3] Yet the Commission approved this agreement with the rates in effect well prior to the agreement's defined "Effective Date" in Order No. 34219. Thus, there is no basis for any party to assume that the "Effective Date" in an IPUC-

[3] The Coyote Hill Power Purchase Agreement is contained in the Declaration of Gregory M. Adams at Ex. 18.

approved PURPA contract would be understood to override and invalidate the rates contained therein.

Given that no IPUC PURPA contract is technically "effective" and final until after Commission approval, it is hard to understand how the Commission could expect Coleman Hydro to know that the "Effective Date" inserted by Idaho Power on its ESA would impact the entitlement to the rates contained therein. Instead, Coleman Hydro – and indeed even parties far more familiar with the Commission's implementation of PURPA – would reasonably expect that the "Effective Date" stated on the written agreement would not be invoked to deprive the QF of the rates to which it previously committed. As noted above, the Commission has knowingly approved at least 20 prior agreements containing an "Effective Date" after the expiration of the vintage of rates contained in the agreement. Thus, there is no logical basis for the Order here to assume that Coleman Hydro intended for the "Effective Date" of June 19, 2020, in the executed ESA, to override the Order No. 34350 rates – especially when Coleman Hydro was not even represented by counsel at the time it accepted the Idaho Power-supplied terms for its 800-kW small hydro facility. *Supplemental Declaration of Jordan Whittaker* at ¶¶ 6-7.

In sum, the Order unreasonably concludes that the parties intended for the "Effective Date" of June 19, 2020, to override and invalidate the Order No. 34350 rates contained in the agreement in the absence of any evidence supporting such finding. Therefore, the Commission should reconsider the Order and approve the executed agreement as submitted by Idaho Power.

IV. The Commission should reconsider its Order because it results in an unreasonable and unjust result for Coleman Hydro, which invested substantial sums with the reasonable expectation it would be paid the Order No. 34350 rates.

Aside from this Petition's arguments on the legal requirements of the LEO rule, the Order should be reconsidered because it results in a patently unfair and unjust result for Coleman Hydro. To the extent the Commission perceives the determination of which rates should apply as a decision within its discretion, the equities weigh in favor of approving use of the Order No. 34350 rates.

The Coleman Hydro facility is designed to deliver power only during irrigation season and would capture the power potential of an existing conduit that is otherwise wasted. The project will be located on the Whittaker family's ranch and would support the economic viability of the ranching operations in a rural part of Idaho. *Supplemental Declaration of Jordan Whittaker* at ¶ 3. However, at the lower rates in effect after June 1, 2020, the Coleman Hydro Project would be uneconomic and would provide no economic support to the ranching operations. *Id.* at ¶ 5.

Coleman Hydro's investment-backed expectation of receiving the Order No. 34350 rates strongly support granting those rates. Similar to the LEO precedents cited above, the Commission has recently relied on investment-backed expectations in granting legacy treatment to commercial and industrial net metering facilities, which can easily be of similar generator size to the small QF at issue here. *See* Case No. IPUC-E-20-26, Order No. 34854 at 11 (explaining such treatment "is based in investment-backed decisions and the reasonable expectations."). Here, the developers invested $2.35 million in development of the facility prior to the rate change on June 1, 2020, and the vast majority of that investment occurred during period of

effectiveness of the Order No. 34350 rates with the expectation that facility would receive payment under those rates. *Supplemental Declaration of Jordan Whittaker* at ¶ 4. All that remained to be completed as of June 1, 2020, was completion of the installation of generation equipment and Idaho Power's completion of the interconnection. The developers would not have committed such a large sum had they been aware they would ultimately be denied the Order No. 34350 rates and instead provided the lower rates mandated by the Commission thus far in this proceeding, which would result in the project being uneconomic and not profitable. *Id.* at ¶ 5. Additionally, the commitment of those funds cannot be easily reversed or salvaged because much of the equipment is specifically designed for the project and already installed, *id.* at ¶ 4, – meaning the result of the Commission's Order is a significant hardship on the developers.

It is also notable that the months leading up to the finalization of these documents were during the occurrence of a global pandemic and various stages of government restrictions on business activities. In the weeks during which the ESA was prepared for execution, Governor Brad Little's Stage Two order was still in effect – placing strong recommendations against nonessential travel and placing strict restrictions on in-person business activities.[4] Furthermore, Mr. Whittaker was not represented by counsel in the transaction with Idaho Power and was not aware that there was a risk the Commission would reject entitlement to the Order No. 34350 rates if the parties did not fully execute the final documents before June 1, 2020. *Supplemental Declaration of Jordan Whittaker* at ¶ 6. Finally, Idaho Power, not Mr. Whittaker, inserted June 19, 2020, as the "Effective Date" of the ESA in its recitals, after Mr. Whittaker had already executed the agreement, and Coleman Hydro did not understand or intend for the use of the

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[4] State of Idaho Stay Healthy Order (May 16, 2020), available at: https://coronavirus.idaho.gov/wp-content/uploads/2020/06/stay-healthy-order-stage2.pdf.

"Effective Date" of June 19, 2020, to override the use of the Order No. 34350 rates included in the agreement that Mr. Whittaker executed. *Id.* at ¶ 7.

Under these circumstances, the equities weigh in favor of finding the Coleman Hydro is entitled to the Order No. 34350 rates as submitted to the Commission by Idaho Power.

CONCLUSION

For the reasons set forth above, Coleman Hydro requests that the Commission reconsider the Order and issue a new order approving the Energy Sales Agreements entered into between Coleman Hydro and Idaho Power containing the published avoided cost rates established by Order No. 34350, as submitted by Idaho Power in this proceeding.

Respectfully submitted this 4th day of January 2021.

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CERTIFICATE OF SERVICE

I HEREBY certify that I have on this 4th day of January 2021, served the foregoing Petition for Reconsideration of Coleman Hydroelectric, LLC and Declaration of Jordan Whittaker in Case IPC-E-20-27, by electronic mail to the following:

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