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** **ORDER NO. 35455**

On May 5, 2022, Idaho Power Company ("Idaho Power" or "Company"), Coleman Hydroelectric, LLC ("Seller" or "Coleman Hydro"), and Staff (collectively, the "Parties") filed a Settlement Stipulation ("Settlement") and Motion to Approve Settlement Stipulation for Commission review and approval. The Parties agree that the Settlement resolves the issues in Coleman Hydro's appeal in Idaho Supreme Court Docket No. 48812-2021. The Parties request the Commission issue an order approving the Settlement and the Energy Sales Agreement ("ESA"), as amended by the First Amendment to the ESA between Coleman Hydro and the Company without material change.

Having reviewed the record, including the Settlement between Coleman Hydro, the Company, and Staff, we issue this final Order approving the Settlement as filed incorporating the First Amendment to the ESA.

BACKGROUND

On June 25, 2020, the Company applied for approval or rejection of its proposed ESA with Coleman Hydro for energy generated by the Coleman Hydro Project ("Facility"). *Application* at 1. The Facility has a nameplate capacity of 800 kW[1] and is near Leadore, Idaho. *Id*. The Facility is a qualifying facility ("QF") under the Public Utility Regulatory Policies Act of 1978 ("PURPA"). The Company requested its Application be processed by Modified Procedure. *Id.* at 5.

On July 16, 2020, the Commission issued a Notice of Application and Notice of Modified Procedure establishing public comment and reply deadlines. *See* Order No. 34726. Staff filed comments on August 6, 2020, and the Company filed reply comments on August 13, 2020.

[1] This was later adjusted in the First Amendment to the ESA as agreed to in the proposed Settlement.

In its August 13, 2020 comments, the Seller filed brief comments and requested an extension of time to file additional comments.[2] The Commission granted the Seller's request in Order No. 34756 and the Seller filed supplemental reply comments on August 21, 2020.

On December 17, 2020, the Commission issued Order No. 34870. The Commission's Final Order No. 34870 conditioned approval of the ESA upon the Order No. 34350 rates being replaced with the Order No. 34683 rates.

On January 4, 2021, Seller petitioned for reconsideration ("Petition"), requesting the Commission reconsider Order No. 34870 and approve the ESA as filed—with rates established by Order No. 34350. In support, Seller submitted additional declarations in support of its position.

On April 5, 2021, after granting the Seller's Petition, the Commission issued Reconsideration Order No. 34991—denying Seller's request to revise its final Order No. 34870 and confirming its decision to approve the ESA with rates established by Order No. 34683. *See* Order No. 34991.

On May 11, 2021, Seller filed a Notice of Appeal to the Idaho Supreme Court, informing the Commission of its decision to appeal its decisions in Order Nos. 34909 and 34991.

Before the Seller's opening brief was due, the Parties initiated settlement discussions. Based upon the settlement discussions—as a compromise of the respective positions of the parties; to provide certainty and to avoid the uncertainties and cost of litigation before the Commission, courts, and other administrative bodies; and for other consideration as set forth below—the Parties agreed to terms resolving the outstanding issues in the case, conditioned upon and subject to approval by the Commission.

APPLICATION

The Seller signed the ESA on June 8, 2020. The Company signed it on June 19, 2020. *Id*. at 2. According to the ESA, the ESA's "Effective Date" is June 19, 2020—the date by which all parties had signed. *See* ESA at 3, § 1.11 (the ESA's "Effective Date" is "[t]he date stated in the opening paragraph of this [ESA] representing the date upon which this [ESA] was fully executed by both Parties"); ESA at 35 (reflecting the Seller signed the ESA on June 8, 2020, and the Company signed the ESA on June 19, 2020).

[2] The August 13, 2020, request for an extension of time and brief comments were filed by counsel, C. Tom Arkoosh of Arkoosh Law Offices. On August 21, 2020, Gregory Adams of Richardson Adams, PLLC filed a Notice of Appearance and Supplemental Comments for the Seller.

The ESA is a new contract for a QF. *Id*. According to the Company, the Seller would sell the Facility's electric energy to the Company at the published non-levelized, seasonal hydroelectric avoided cost rates as set by Order No. 34350 (dated May 31, 2019), for a 20-year term. *Id*. Because this is a new QF (and ESA), capacity payments will not begin until 2026. *Id*.

The Company stated the Seller selected June 1, 2021, as the Facility's Scheduled First Energy Date[3] and Scheduled Operation Date. *Id.* at 4; *See also* ESA, Appendix B, p. 39, § B-3. The Company also represented the ESA was executed in compliance with past Commission orders. *Id*. Idaho Power asked the Commission to issue an order approving or rejecting the ESA and, if approved, declaring all payments for the purchases of energy under the proposed ESA to be allowed as prudently incurred expenses for ratemaking purposes. *Id.* at 7.

COMMENTS

1. Staff's Comments.

Staff recommended the Commission approve the proposed ESA *if the parties first updated the ESA's avoided cost rates to those set by Commission Order No. 34683*. Staff based its recommendation on its analysis of the ESA, which focused on: (1) the 90/110 rule, with at least five-day advanced notice for adjusting Estimated Net Energy Amounts; (2) eligibility for and the amount of capacity payments; and (3) review of published avoided cost rates.

90/110 Rule and 5-Day Advanced Notice for Adjusting Estimated Net Energy Amounts

Staff confirmed the ESA contained the 90/110 Rule as required by Commission Order 29632. *Staff Comments* at 2. The 90/110 Rule requires a QF to provide utilities with a monthly estimate of the amount of energy the QF expects to produce. *Id*. Staff also confirmed the ESA required the Seller to give the Company five-day advanced notice if the Seller wants to adjust its Estimated Net Energy Amounts to comply with 90/110 firmness requirements. *Id*. at 2-3.

Staff noted that the Commission has approved a five-day notice in other cases which allows the Company to more accurately plan its short-term operations if the QF submits its Estimated Net Energy Amounts closer to delivery. *Id*. at 3; *see also*, e.g., Case Nos. IPC-E-19-01, IPC-E-19-03, IPC-E-19-04, IPC-E-19-07, and IPC-E-19-12. *Id*. Staff believed that even though these cases involved existing QFs with ample historical generation data, the principle remained the same here where the ESA involves a new QF project. *Id*. Staff's position was that for short-term planning on any project— old or new—the Company benefits because forecasts are more

[3] *See* ESA, Appendix B, p. 39, § B-3.

accurate when made closer to actual delivery. *Id*. Staff believed that while five-day notice is appropriate here, longer notice could sometimes benefit the Company. *Id*. Staff and the Company agreed that the benefits of short-term planning outweigh the need for month-ahead planning. *Id*.

Capacity Payment

Staff stated that utilities pay QFs for capacity only when the utility is capacity deficient, unless the QFs are renewal projects that have been paid for capacity or the QFs have contributed to meeting the utility's capacity needs at the end of the original contracts. *Id*.; *see also* Order Nos. 32697 and 34295. Staff noted that because this QF is a new project, the Company will not pay the Seller for capacity until 2026, which is the Company's first capacity deficit year as determined in Order No. 33898. Staff Comments at 3.

Avoided Cost Rates

Staff argued that the Commission has determined that QFs cannot lock-in a certain rate until the QF has: (1) a signed contract to sell at that rate; or (2) filed a meritorious complaint that the project is mature and the QF has attempted and failed to negotiate a contract with the utility; that is, there would be a contract but for the utility's conduct. *Id*. at 3-4. Staff stated that in this case the Seller can lock-in a rate because it has a legally enforceable obligation with the Company that entitles the Seller to sell at a specified rate. *Id*. at 4.

Here, Staff disputed the rate specified in the ESA. *Id*. Staff noted that the ESA's Effective Date of June 19, 2020, occurred after the Commission updated its published non-levelized, seasonal hydroelectric avoided cost rates on June 1, 2020. *Id*.; *see also* Order No. 34683 (updating published avoided rates); ESA p. 1, p. 3, § 1.11, and p. 35 (Effective Date is June 19, 2020, which is the date by which all parties had signed the ESA). Thus, Staff asserted that the Company's proposed published avoided cost rates for the ESA—the old rates set by Order No. 34350—are unavailable because the ESA was fully executed and effective after the updated rates took effect on June 1, 2020, per Order No. 34683. *Id*. Staff contended that the Commission should condition its approval of the ESA on the Company and Seller updating the ESA's published avoided cost rates to those set in Order No. 34683, which Staff included as Attachments A and B to its comments. *Id*.

2. Idaho Power Reply Comments.

In response to Staff's comments, Idaho Power contacted the Seller to inquire if it wanted to amend the ESA. *Idaho Power Reply Comments* at 2. The Company represented that the Seller wished for the matter to be submitted to the Commission for decision. *Id.*

Idaho Power asserted that the Seller began the Schedule 73 contracting process on May 8, 2019 and was sent an executable version of the submitted ESA on May 27, 2020. *Id*. The Company provided a timeline of the Seller's movement through the tariffed contracting process in its Reply Comments. *Id*. at 2-3.

The Company stated that a QF's entitlement to a previously effective avoided cost rate under a contract that contains that old rate, or through a non-contractual but legally enforceable PURPA obligation, is a determination left to the Commission's discretion. *Id*. at 3. Idaho Power agreed with Staff that a utility has no legally enforceable obligation ("LEO") to buy QF energy at a previously effective avoided cost rate unless the QF has: (1) a signed contract requiring the utility to buy the energy at that rate, or (2) a meritorious complaint that the project is mature and the QF has attempted and failed to negotiate a contract with the utility. *Id*.

Idaho Power asserted that it tendered the final, executable version of the ESA to the Seller before avoided cost rates changed on June 1, 2020. *Id*. at 3-4. Additionally, Idaho Power represented that the Company did not refuse to contract nor delay the process. Rather, drafts of the ESA were sent back and forth over the contracting process. *Id*. The Company asserted that the only element absent when rates changed on June 1 was the actual signatures on the ESA, which occurred on June 8, 2020 and June 19, 2020. *Id*. at 4. Idaho Power represented that the Seller had been pursuing an ESA since May of 2018 and there were no material terms in dispute when the contract was circulated for signature prior to June 1, 2020. *Id*. Under these facts, and PURPA's mandatory purchase obligation, the Company did not believe it could refuse to sign the ESA. *Id*. Idaho Power acknowledged, though, that the parties did not sign the contract by the June 1, 2020, effective date of the updated avoided cost rates. *Id*. at 4. The Company also acknowledged that determining a QF's eligibility for previously effective rates is the sole province and within the discretion of the Commission to determine. *Id*.

3. Seller's Comments and Supplemental Comments.

On August 13, 2020, the Seller filed comments arguing a LEO existed before May 31, 2020 because the Facility had completed the Schedule 73 contracting process, except for having

signed the ESA. *Coleman Hydroelectric, LLC Comments* at 1. The Seller alternatively argued for grandfathering; i.e., that even if a LEO did not exist because Idaho has determined one does not arise until the QF has a signed contract or a meritorious complaint, the Commission still should approve the ESA with the old rates because the Commission has grandfathered old rates in previous contracts even without a LEO. *Id*. at 2.

On August 21, 2020, the Seller filed Supplemental Comments and the Declaration of Jordan Whittaker, who attested that he was a developer of the Facility. *Declaration of Jordan Whittaker* at 1. The Seller again requested the Commission approve the ESA with the published avoided cost rates from Order No. 34350 that were effective until June 1, 2020. *Supplemental Comments of Coleman Hydroelectric, LLC* at 1. The Seller agreed with the timeline in Idaho Power's Reply Comments outlining the parties' contracting process that began on May 8, 2019. *Id*. at 2. The Seller also asserted that before the June 1, 2020 rate update, the Seller had taken steps to commit to developing the Facility, including: (1) installing six miles of 24-inch penstock from May through October of 2018; (2) buying a turbine generator and switch gear by the summer of 2019; and (3) completing construction of the powerhouse in May of 2020. *Decl. Whittaker* at 2. The Seller estimated that as of June 1, 2020, it had expended approximately $2,350,000 to develop the Facility. *Id*. at p. 3, ¶ 8.

The Seller also asserted that the interconnection study process has advanced to the final step of executing the Generator Interconnection Agreement and funding Idaho Power's interconnection construction with an additional $300,000. *Id*. at 3. The Seller noted the Federal Energy Regulatory Commission ("FERC") has approved the Facility as a qualifying in-conduit hydropower facility that is exempt from the Federal Power Act's lengthy licensing process. *Id*.

The Seller disagreed with Staff's position that a QF is entitled to the previously effective avoided cost rates only if the QF and utility have signed a written agreement—LEO—for the old rates before the new avoided cost rates take effect. *Id*. at 4.

The Seller asserted that under FERC's regulations—which this Commission implements—a QF is entitled to form a LEO with the rates and terms in effect when the QF commits to selling power to the utility. *Id*.; citing 18 C.F.R. § 292.304(d)(2)(ii). The Seller argued FERC has explained that each QF "has the right to choose to sell pursuant to a [LEO], and, in turn, has the right to choose to have rates calculated at avoided costs calculated at the time that obligation is incurred." *Id*.; citing *JD Wind 1, LLC*, 129 FERC ¶ 61,148 at ¶ 29 (2009). The Seller

contended that under the LEO rule, "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, [LEOs]." *Id.*; citing *Virginia Electric and Power Co.*, 151 FERC ¶ 61,038 at ¶ 25 (2015). The Seller alleged that the Commission implemented the LEO rule to uphold the QF's right to sell power at rates in effect before a written ESA is signed, especially where, as here, both parties represent they had agreed on all of the ESA's material terms before the date of the rate change. *Id*. at 4-5; citing Order No. 32104, Case No. IPC-E-10-22. The Seller argued that in Order No. 32104, the Commission approved an executed energy sales agreement between Idaho Power and Yellowstone Power, Inc. ("Yellowstone") containing rates that expired before the agreement was signed despite "the apparent lack of any written documentation . . . evidencing that the terms of a power purchase agreement were materially complete [before the rate change]." *Id*. at 5. The Seller claimed the Commission did so because the QF was familiar with the standard terms of Idaho Power's power purchase agreements and both parties agreed on the agreement's material terms before the effective date of the rate change.[4,5] *Id*.; citing Order No. 32104 and *FERC v. Idaho PUC*, Case 1:13-cv-00141-EJL-REB, Doc. No. 49-1 (D. Ct. Id., Dec. 24, 2013) (memorandum of understanding agreeing that a LEO may predate the execution of a contract).

[4] The Commission found in the Yellowstone case that:

> [Yellowstone's] familiarity with PURPA projects and the standard terms of Idaho Power's power purchase agreements led the parties to neglect written documentation evidencing that the parties' agreement was materially complete prior to March 16, 2010. However, both the oral assertions of the parties and the circumstantial evidence indicating that Yellowstone made decisions in reliance on the existence of a contract demonstrate the existence of an agreement prior to March 16.

Order No. 32104 at 10-11 (emphasis added).

[5] The Commission made the following findings in support of allowing the Yellowstone Project to use previously expired rates in the ESA:

> The Yellowstone Project will provide steady, predictable generation for Idaho Power around the clock. This high capacity factor, renewable, cogeneration project will be a valuable addition to help diversify Idaho Power's resource portfolio. The Project will also inject jobs and revenue into an Idaho county that has been economically hit hard over the past 10 years. Furthermore, the Agreement allows Idaho Power to recover more than $100,000 in non- performance damages, for the benefit of ratepayers, that it could not otherwise collect. This combination of factors, coupled with evidence of an agreement prior to March 16, 2010, make it clear that approval of the Agreement's grandfathered avoided cost rate is in the public interest.

Order No. 32104 at 11.

The Seller also asserted that the Commission has looked to the project's maturity and the QF developer's level of commitment to completing it in determining whether to approve the use of pre-existing rates. *Id*. citing Order No. 29954. The Seller argued that in Order No. 29954, the Commission found that a QF was entitled to pre-existing rates based on the maturity of development of the project when the QF had merely applied and paid the fee for an interconnection study, performed wind studies, commenced preliminary permitting and licensing activities, and tried to secure sites to place turbines. *Id*.; citing Order No. 29954 at 2-4.

The Seller argued that FERC's recent Order No. 872 proposed new rules reaffirming FERC's prior LEO precedent and confirm that a QF may be entitled to previously effective avoided costs without an executed written contract. The Seller argued FERC's order is instructive here even though FERC's new rules are not effective yet. *Id*. at 5; citing *Qualifying Facility Rates and Requirements; Implementation Issues Under the Public Utility Regulatory Policies Act of 1978*, Order No. 872, 172 FERC ¶ 61,041 at ¶ 685 (July 16, 2020). The Seller claimed FERC's new rule adopts a new and more onerous LEO standard that would preclude a LEO from arising unless the QF first demonstrates commercial viability and financial commitment to build the facility. For example, the QF might show it had obtained site control, applied for all local permitting and zoning, and applied for interconnection. *Id*. at 6. However, the Seller asserted, FERC clarified the state cannot require the QF to receive interconnection studies, *id*., and "[o]btaining a [power purchase agreement] or financing cannot be required to show proof of financial commitment." *Id*. citing Order 872 at ¶ 687. The Seller asserted it unquestionably satisfies even the new and more stringent test recently created for commercial viability, which FERC created to "rais[e] the bar to prevent speculative QFs from obtaining LEOs," *id*. at ¶ 688, even though that new test does not apply yet. *Id.*

The Seller also cited Order No. 872 as being notable for FERC's assessment of the current state of the law. *Id*. The Seller asserted that in explaining its new commercial viability rule, FERC listed requirements it has previously found to be inconsistent with the LEO rule. *Id.* These unlawful LEO requirements include: "a requirement for a utility's execution of an interconnection agreement or power purchase agreement, or requiring that QFs file a formal complaint with the state commission, or limiting LEOs to only those QFs capable of supplying firm power, or requiring the QF to be able to deliver power in 90 days." *Id.* citing Order No. 872 at ¶¶ 689-90 (emphasis added) (footnotes omitted). The Seller highlighted that FERC specifically cited *Grouse*

Creek Wind Park, LLC, 142 FERC ¶ 61,187 at ¶ 40 (2013), for the proposition that requiring the QF to file a complaint to establish a LEO is unlawful. *Id.* In sum, the Seller argued that FERC reiterated that requiring a QF to obtain a fully executed power purchase agreement or to file a complaint at the state commission are not lawful prerequisites to creation of a LEO, and are instead unreasonable barriers to amicable contract formation by a QF and a utility. *Id.*

The Seller asserted that under these LEO criteria, it created a LEO before June 1, 2020, and the Commission should approve the ESA as submitted. *Id.* at 7. The Seller also asserted this Commission has acknowledged that pre-existing rates should apply where a facility has matured to the level that demonstrates the QF's commitment to the project, arguing it unquestionably satisfies such test. *Id.* The developers have spent approximately $2.35 million to develop the Facility and are merely awaiting the funding and commencement of Idaho Power's construction of the interconnection. *Id.*

The Seller disagreed with Staff's conclusion that the old rates set by Order No. 34350 were unavailable and was not informed by the additional facts supplied with the Seller's Supplemental Comments. *Id.* at 8. The Seller reiterated that requiring a QF to obtain an executed contract before the rate change or file a complaint against the utility is unlawful according to FERC. *Id.* citing Order No. 872, 172 FERC ¶ 61,041, at ¶¶ 689-90. Further, the complaint requirement does not apply here because before the rate change, the QF and utility had agreed that the old rates would apply. *Id.*

The Seller concluded that the parties' inability to sign the written agreement before the rates changed on June 1, 2020, even though both parties had approved it for signature by May 27, 2020, was simply due to logistics like the parties' physical separation, the resulting need to mail the document back and forth, and remote working conditions caused by COVID-19. *Id.* The Seller contended it would be unjust to deprive the Seller—which has expended $2.35 million to develop its Facility—of the benefits of an ESA that Idaho Power agreed to sign and submit to the Commission. *Id.* at 8-9. The Seller thus asked the Commission to approve the ESA as submitted by Idaho Power, with the Order No. 34350 rates. *Id.* at 9.

FINAL ORDER 34870

On December 17, 2020, the Commission issued Order No. 34870 approving the ESA conditionally. Order No. 34870 required the Company and Seller update the ESA's published avoided cost rates to include the new rates from Order No. 34683 that took effect on June 1, 2020

instead of the old rates from Order No. 34350 that expired on May 31, 2020, before the ESA took effect.

Each year the Commission updates the published avoided cost rates available to Sellers at energy generated by QFs who wish to enter ESAs with electric utilities. This annual update is effective each year on June 1. The Commission issued Order No. 34683, which updated the published avoided cost rates by setting new rates that took effect on June 1, 2020. In the order that the Seller asks the Commission to reconsider—Order No. 34870—the Commission observed that the parties explicitly agreed to the ESA's "Effective Date" within the terms of their negotiated ESA. Notwithstanding the Seller's arguments to the contrary, the Commission accepted "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." *Id*. Consequently, the Commission found it just and reasonable to approve published avoided cost rates that took effect on June 1, 2020.

The Commission also found that a LEO did not occur before the old rates from Order No. 34350 expired on June 1, 2020:

> [T]he parties entered negotiations that, ultimately, resulted in an agreement. Neither party asserts that the other caused undue delay…. [FERC] 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 Commission noted if the Company and Seller intended for the ESA to have a different effective date, they should have negotiated one. *Id*. citing *A.W. Brown Co., v. Idaho Public Utilities Commission*, 121 Idaho 812, 816-818, 828, P.2d 841, 845-847 (1992). As a result, and based on the plain language of the contract, the ESA became effective on June 19, 2020 which made the Seller eligible for the published avoided cost rates approved by Order No. 34683 (rates that took effect on June 1, 2020). *Id.*

The Commission also found that the Company's payments for purchases of energy under the ESA would be prudently incurred expenses for ratemaking purposes. *Id*.

SELLER'S PETITION FOR RECONSIDERATION AND COMMISSION DECISION

On January 4, 2021, the Seller petitioned the Commission to reconsider Order No. 34870 and issue a new order approving the ESA with the old rates from Order No. 34350 even though the ESA "was not finally executed before June 1, 2020" when these rates expired. *See*

Petition at 2. On February 2, 2021, the Commission granted the Seller's Petition, finding it appropriate to consider the additional issues raised. Order No. 34909 at 2. The Commission also found that the existing record was sufficient to enable it to consider these issues. *Id*. The Seller's Petition asserted four grounds for reconsideration, which are set forth below. The Commission's decision for each ground of the Seller's Petition follows.

1. **<u>Ground I of the Petition</u>. The Commission's Order unlawfully applied federal law under PURPA and 18 C.F.R. § 292.304(d)(2)(ii).**

The Seller argued it was entitled to pre June 1, 2020 avoided cost rates because it had established a LEO by committing to sell electricity to the Company before those rates expired. *Id*. at 7. The Seller thus asserted Order No. 34870 violates PURPA, 18 C.F.R. § 292.304(d)(2)(ii), and FERC decisions allowing a QF to form a LEO. The LEO entitles the QF to long-term avoided cost rates in effect when the QF commits to selling power to the utility, even if a contract has not yet been executed.[6] *Petition for Reconsideration* at 7-11, citing *Cedar Creek Wind, LLC*, 137 FERC ¶ 61,005 (2011), *Grouse Creek Wind Park, LLC*, 142 FERC ¶ 61,187 (2013), *Murphy Flat Power, LLC*, 141 FERC ¶ 61,145 (2012) and *Rainbow Ranch Wind, LLC*, 139 FERC ¶ 61,077 (2012).

The Seller asserted that the cases cited by the Commission to deny QFs the right to LEOs based on effective dates contained in the written contracts has been rejected by FERC. *Id*. at 8 citing *Grouse Creek Wind Park, LLC*, 142 FERC ¶ 61,187 (2013); *Murphy Flat Power, LLC*, 14l FERC ¶ 61,145 (2012); *Rainbow Ranch Wind, LLC*, 139 FERC ¶ 61,077 (2012); *Cedar Creek Wind, LLC*, 137 FERC ¶ 61,006; *see also* citing *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).[7] The Seller further asserted the Commission erred in finding that a LEO may be used only where a QF proves the utility caused a delay in the execution of a written agreement. *Petition* at 9. The Seller argued that FERC rejected this reasoning. *Petition* at 9, citing *Grouse Creek Wind Park, LLC*, 142 FERC ¶ 61,187 at P. 40 (2013).

[6] The Seller also claimed that in a stipulated dismissal of a dispute in federal court the Commission acknowledged that a LEO may be formed before a contract has been executed. *Petition* at 9-10.

[7] FERC amended 18 C.F.R. § 292.304 by Order 872-A, 173 FERC ¶ 61,158, 85 Fed. Reg. 86656 (December 30, 2020), which became effective on February 16, 2021.

Commission Decision

The Seller argued it was entitled to the expired, Order No. 34350 rates, because it had formed a LEO with the Company before June 1, 2020. The Seller cites FERC decisions it claims require this Commission to modify its final order and approve an ESA with expired published avoided cost rates.

The Commission stated, the FERC cases cited by the Seller are declaratory orders that do not bind it. A declaratory order "does no more than announce the [FERC's] interpretation of the PURPA or one of the agency's implementing regulations." *Niagara Mohawk Power Corp., v. FERC,* 117 F.3d 1485, 1488, 326 U.S. App. D.C. 135, 138 (1997). It is "of no legal moment unless and until a district court adopts that interpretation when called upon to enforce the PURPA." *Id.*

Furthermore, the Idaho Supreme Court has affirmed Commission orders that addressed similar facts and applied the same legal authorities as in Order No. 34870. *See A.W. Brown Co., v. Idaho Power Co.,* 121 Idaho 812, 828 P.2d 841 (1992); *Rosebud Enterprises, Inc. v. Idaho Public Utilities Commission,* 131 Idaho 1, 951 P.2d 521 (1997); and *Idaho Power Company v. Idaho Public Utilities Commission*, 155 Idaho 780, 316 P.3d 1278 (2013).

In *A.W. Brown* the Idaho Supreme Court reviewed whether the Commission could require a QF either to have: (1) a signed contract with a utility; or (2) filed a meritorious complaint alleging that the project was mature, and that the developer had attempted, and failed, to negotiate a contract with the utility before locking in an avoided cost rate. *A.W. Brown Co.*, 121 Idaho at 815, 828 P.2d at 844. In that case, *A.W. Brown* asked the Commission to order the Company to buy electricity from it at a higher, superseded avoided cost rate. *Id.* at 814, 843 P.2d at 843. The Commission found that *A.W. Brown* was not entitled to the higher, superseded rate because *A.W. Brown* had not negotiated or contracted with the Company before the April 29, 1985 cutoff date on which the higher rates were superseded by new ones. *Id.* The Commission also found that *A.W. Brown* had not filed a meritorious complaint against the Company before the cutoff date. *Id.* at 815, 843 P.2d at 844. The Idaho Supreme Court affirmed the Commission's decision and ruled the Commission had the authority to require that, before a rate can be locked in, the developer QF either must have a signed contract or have filed a meritorious complaint alleging the project was mature and that the developer had attempted, and failed, to negotiate a contract with the utility. *A.W. Brown*, 121 Idaho at 845-847, 828 P.2d at 844.

In *Rosebud Enterprises, Inc., v. Idaho Public Utilities Commission*, 131 Idaho 1, 951 P.2d 521 (1997), the Idaho Supreme Court affirmed the holding in *A.W. Brown* and found the case followed state and federal law:

> In *A.W. Brown Co.*, this Court ruled that [the Commission] has authority, under state and federal law, to require that before a developer can lock in a certain rate, there must be either a signed contract to sell at that rate or a meritorious complaint alleging that the project is mature and that the developer has attempted and failed to negotiate a contract with the utility; that is, there would be a contract but for the conduct of the utility. Rosebud has neither signed a contract nor established that Idaho Power will not negotiate with it.

Rosebud, 131 Idaho at 6, 951 P.2d at 526.

Last, in *Idaho Power Company v. Idaho Public Utilities Commission*, 155 Idaho 780, 316 P.3d 1278 (2013), the Court considered whether the Commission had properly determined that two wind farms did not have LEOs to sell their power.[8] The Court found:

> Considering FERC's declared purpose for adopting the concept of a [LEO] and the broad discretion that [the Commission] has in implementing FERC's rules and in determining the requirements for a [LEO], we again affirm [the Commission's] requirement that a finding of a [LEO] requires a showing that there would have been a contract but for the actions of the utility.

Id. at 787, 316 P.3d at 1285. The Court upheld the Commission's findings of fact that the Company was not at fault for failing to have a written contract before December 14, 2010, the date when the 100-kW eligibility cap took effect. *Id*. The Court further reasoned that because the parties voluntarily negotiated their power purchase agreements, which provided that the effective dates were December 28, 2010, whether there could have been a LEO before entering those agreements was irrelevant under the rule adopted by the Commission. *Id*.

The Commission stated the facts in this case were similar. The Company and Seller have entered into an agreement that declares an Effective Date for the contract. Neither party has asserted undue delay in this matter. Order No. 34870 at 7. Therefore, there is no basis or need to

[8] By way of background, on December 3, 2010, the Commission declined several electric utilities' joint motion to immediately reduce the published avoided cost rate eligibility cap for QFs from 10 average megawatts ("aMW") to 100 kilowatts ("kW"). *See* Order No. 32131 at 5. However, the Commission ordered that the reduced eligibility cap of 100 kW would take effect on December 14, 2010. *Id*. at 5-6. The wind farms, larger than 100 kW, lacked signed contracts with the Company and had not filed a meritorious complaint before December 14, 2010. *Idaho Power Company*, 155 Idaho at 787, 316 P.3d at 1285.

determine whether or when a LEO might have attached because the parties entered into a written agreement that defines the operative terms.

The Seller also cited the Commission's and the FERC's settlement stipulation in *FERC v. Idaho PUC,* Case 1:13-cv-00141-EJL-REB, Doc. No. 49-1 (D. Ct. Id., Dec. 24, 2013) for the proposition that the Commission has formally agreed that a LEO may be formed before the execution of a written agreement. The Seller further argued that FERC Order No. 872 supports its position that a QF may be entitled to previously effective avoided cost rates before finalizing an executed written agreement. The Seller's arguments are misplaced. The Commission noted it has always acknowledged and applied FERC's basis for a LEO. The Commission noted that a LEO may be formed on the filing of a meritorious complaint with the Commission alleging that the project was mature and that the developer had attempted, and failed, to negotiate a contract due to the actions of the utility. Because there was no undue delay and, the parties negotiated terms that culminated in an agreement, the Commission found no reason to determine a date upon which a LEO would have attached. Based on the terms of the ESA, the Seller was entitled to a contract with published avoided cost rates that became effective on June 1, 2020.

Based on the foregoing, the Commission rejected Ground I of the Seller's Petition. Federal and State law support the Commission's decision in Order No. 34870 to approve the ESA with new rates from Order No. 34683 that took effect on June 1, 2020.

2. **Ground II of the Petition. The Commission's Order fails to properly apply state law because it ignores past Commission cases.**

The Seller argued Order No. 34870 ignored Commission precedent that approved a QF's right to rates in effect before the effective date of the QF's ESA. *Id*. at 14-18. The Seller cited 20 prior orders where the Seller alleges that the Commission approved rates in effect before the effective date of the subsequently executed ESA.

Commission Decision

The Seller argued that Order No. 34870 ignores Commission precedent where it allegedly approved a QF's right to rates in effect before the effective date of a written energy sales agreement under similar circumstances. In support of this argument, the Seller cites numerous cases wherein the Commission reviewed contracts between QFs and electric utilities. The Commission was unpersuaded.

The Commission believes the cases cited by Seller were clearly distinguishable from the facts of this case. This case does not present a sudden or unanticipated change or departure from Commission precedent such that "grandfathering" should even be considered. The Commission noted that changes to published avoided cost rates, relevant to this case, occur each year on June 1. It is a well-documented, established annual adjustment and should have been anticipated by the parties. *See* Order Nos. 32817, 33041, 33305, 33538, 33773, 34062, 34350, and 34683.

The Commission added that it may depart from prior decisions if its new decision is based on substantial and competent evidence in the record, and sufficient findings. *Rosebud Enterprises, Inc. v. Idaho Public Utilities Commission,* 128 Idaho 609, 618, 917 P.2d 766, 775 (1995) (regulatory bodies are not rigorously bound by the doctrine of stare decisis) *citing Intermountain Gas Co., v. Idaho Public Utilities Comm'n,* 97 Idaho 113, 119, 540 P.2d 775, 781 (1975). The Commission determined the decision to employ grandfathering criteria is within its discretion adding that substantial and competent evidence demonstrates that the parties intended the effective date to be when the agreement was fully executed by both parties on June 19, 2020—as plainly stated in the ESA. *Id*. The only published avoided cost rates in effect then were the new rates from Order No. 34683 that took effect on June 1, 2020.

3. **<u>Ground III of the Petition</u>. The Commission's Order rests on an erroneous finding of fact and is not supported by sufficient evidence.**

The Seller asserted that the Commission had insufficient evidence to find that the Seller and the Company intended their ESA's effective date to override the Order No. 34350 rates specified in the ESA. *Id*. at 19-22.

Commission Decision

The Commission found this argument ignored that it has long recognized a QF can lock in an existing avoided cost rate under PURPA in Idaho either by: (1) contracting with the utility; or (2) filing a meritorious complaint alleging that a LEO has arisen and, but for the conduct of the utility, there would be a contract. *See A.W. Brown,* 121 Idaho at 816, 828 P.2d at 845. Contracting with the utility necessarily involves an agreement. There must be a just and reasonable basis for determining the appropriate avoided cost rates in the agreement. The agreement itself designates when it becomes effective. The Commission stated that the ESA became effective on June 19, 2020.

4. **<u>Ground IV of the Petition</u>. The Commission's Order results in an unreasonable and unjust result for the Seller.**

Last, the Seller argued Order No. 34870 is unreasonable and unjust because Seller invested substantial sums expecting it would be paid the old rates through the ESA. *Id*. at 23-25. The Seller asserted the equities favor the Commission approving the ESA using the old rates. *Id*. at 23. The Seller asserted it would not have committed to such a large investment in the Facility had it been aware the old rates were unavailable. *Id*. at 23. The Seller also stated it was unrepresented by counsel when it negotiated and executed the ESA and was unaware that the Commission would not approve the ESA with the old rates. *Id*. at 24. The Seller also noted that the ESA was finalized during a global pandemic in the face of various government restrictions on business activities. *Id*.

Commission Decision

As stated previously, the Commission noted it updates its published avoided cost annually on June 1. Ultimately, the Seller must be responsible for negotiating and completing the ESA in a manner which ensures that it secured the desired terms, conditions, and rates. Further, the Commission rejected the Seller's argument that the COVID-19 Pandemic impeded its ability to finalize an agreement. Other than the unsupported assertion of an impediment, the Commission was unpersuaded how this impacted the Seller or hindered negotiations or finalization of the ESA.

THE SETTLEMENT

The Parties requested that the Commission issue an order approving the Settlement and the ESA, as amended by the First Amendment to the Energy Sales Agreement, between the Company and Coleman Hydro without material change or condition, and without further proceedings. The relevant terms of the Settlement are described below.

The Company and Coleman Hydro agree to a First Amendment to the Energy Sales Agreement to include the following amendments to the Agreement initially submitted to the Commission in this proceeding:

1. Rates: The Parties agree to rates that are less than the Order No. 34350 rates proposed for approval in Idaho Power's Application and higher than the Order No. 34683 rates initially recommended for use by Staff. *See* Appendix E and Appendix F of the First Amendment to the ESA.

2. Scheduled First Energy and Operation Date: In light of a longer than expected approval process for the Energy Sales Agreement and an unexpected delay in the completion of construction of interconnection facilities, and to avoid future disputes over such matters, the Parties agree to amend the ESA's Scheduled First Energy Date and Scheduled Operation Date in Appendix B as follows:

   Scheduled First Energy Date: October 15, 2022

   Scheduled Operation Date: November 15, 2022

3. Facility Capacity: In light of the Commission's recent direction in Order No. 35239, the Parties agree to amend the Facility Nameplate Capacity and Maximum Capacity Amount in Appendix B as follows to reflect actual anticipated capacity based on the most current information available:

   Facility Nameplate Capacity: 750 kW

   Maximum Capacity Amount: 800 kW

4. Inadvertent Energy: The Parties agree to amend the ESA's provision for "Inadvertent Energy" to state that energy delivered in excess of the Facility's Nameplate Capacity amount, as measured on any hourly basis in kwh, shall be Inadvertent Energy which Idaho Power will accept but for which Idaho Power has no obligation to pay Seller. *See* First Amendment to the ESA's amendment to Paragraph 7.7.

5. Typographical Correction: The Parties agree to correct a typographical error regarding the description of the form of business organization in the ESA's opening paragraph to clarify that the Seller, Coleman Hydroelectric, LLC, is a limited liability company.

6. Effectiveness: The Parties agree that the effectiveness of the First Amendment to the ESA is expressly conditioned upon Commission approval of the ESA, as amended by the First Amendment to the ESA, without material change or condition, and should the Commission fail to issue an order providing such approval, the First Amendment will be of no legal effect whatsoever; in such

event of non-approval, the Parties will be restored to their prior positions under the initially submitted Energy Sales Agreement and applicable law.

COMMISSION DISCUSSION AND FINDINGS

The Commission has jurisdiction over this matter under *Idaho Code* §§ 61-502 and 61-503. The Commission has the express statutory authority to investigate rates, charges, rules, regulations, practices, and contracts of public utilities and to determine whether they are just, reasonable, preferential, or discriminatory, or in violation of any provision of law, and may fix the same by Order. *Idaho Code* §§ 61-502 and 61-503.

The Commission's process for considering settlement stipulations is set forth in its Rules of Procedure 271-277, IDAPA 31.01.01.271-277. When a settlement is presented to the Commission, it "will prescribe the procedures appropriate to the nature of the settlement to consider the settlement." IDAPA 31.01.01.274. Proponents of a proposed settlement must show "that the settlement is reasonable, in the public interest, or otherwise in accordance with law or regulatory policy." IDAPA 31.01.01.275. Finally, the Commission is not bound by settlement agreements. IDAPA 31.01.01.276. Instead, the Commission "will independently review any settlement proposed to it to determine whether the settlement is just, fair and reasonable, in the public interest, or otherwise in accordance with law or regulatory policy." *Id.*

The Commission has reviewed the record, including the Application, discovery, Petition for Reconsideration, Appeal, and Settlement. The Parties have built a substantial record through their filings, negotiations, and discovery setting forth their justifications for signing and supporting the proposed Settlement. We appreciate the investment of time and resources the Parties have committed to participate in this case and promote their positions necessary to resolve the Appeal before fully litigating the matter. The robust record has assisted the Commission in understanding the important issues raised in this case and the justification for diverging from Commission precedent in similar matters. Based on our review of the record, we find that the Settlement is fair, just, and reasonable, in the public interest, and fairly resolves the issue at hand. We therefore approve the Settlement as filed.

We appreciate the Parties working through the technical issues involved in this matter to resolve the differences that led to the Seller appealing to the Supreme Court. While we approve the Settlement in this case, we remind other PURPA developers and QF sellers that we are not abandoning our longstanding practice requiring QFs to (1) have a signed contract; or (2) file a

meritorious complaint that the project is mature and the QF has attempted and failed to negotiate a contract with the utility before locking in certain Commission-approved rates. This has been—and will continue to be—a metric this Commission uses to determine which avoided cost rates apply to Energy Sales Agreements and Power Purchase Agreements. Our acceptance of the Settlement shall not be construed as precedential in any future cases before this Commission.

We commend the Parties' attention to detail to ensure the First Amendment to the ESA reflects realistic first energy and scheduled operation dates based on delays due to interconnection and the lengthy appeal/Settlement process. We support the Parties' inclusion of the inadvertent energy provision to reflect the difference between the Facility's nameplate capacity and the maximum capacity amount. We feel this provision protects customers, the Company, and the Seller in the event the Facility generates more than its nameplate capacity.

ORDER

IT IS HEREBY ORDERED that the Settlement is approved.

IT IS FURTHER ORDERED that the First Amendment to the Energy Sales Agreement incorporating the terms agreed to in the Settlement, is approved as filed.

THIS IS A FINAL ORDER. Any person interested in this Order may petition for reconsideration within twenty-one (21) days of the service date of this Order about any matter decided in this Order. Within seven (7) days after any person has petitioned for reconsideration, any other person may cross-petition for reconsideration. *See Idaho Code* § 61-626.

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DONE by Order of the Idaho Public Utilities Commission at Boise, Idaho this 1st day of July 2022.

ERIC ANDERSON, PRESIDENT

JOHN CHATBURN, COMMISSIONER

//Abstained to Avoid Conflict//
JOHN R. HAMMOND JR., COMMISSIONER

ATTEST:

Jan Noriyuki
Commission Secretary

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