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IDAHO PUBLIC  
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**DONOVAN WALKER**  
Lead Counsel  
[dwalker@idahopower.com](mailto:dwalker@idahopower.com)

October 1, 2020

**VIA ELECTRONIC FILING**

Jan Noriyuki, Secretary  
Idaho Public Utilities Commission  
11331 W. Chinden Boulevard  
Building 8, Suite 201-A  
Boise, Idaho 83714

Re: Case No. IPC-E-20-28  
Wood Hydro, LLC v. Idaho Power Company

Dear Ms. Noriyuki:

Attached for electronic filing in the above matter is Idaho Power Company's Answer to Cross-Respondents' Motions to Dismiss. If you have any questions about the enclosed documents, please do not hesitate to contact me.

Very truly yours,

Donovan Walker

DEW/ cld  
Enclosures

DONOVAN E. WALKER (ISB No. 5921)  
Idaho Power Company  
1221 West Idaho Street (83702)  
P.O. Box 70  
Boise, Idaho 83707  
Telephone: (208) 388-5317  
Facsimile: (208) 388-6936  
[dwalker@idahopower.com](mailto:dwalker@idahopower.com)

Attorney for Idaho Power Company

BEFORE THE IDAHO PUBLIC UTILITIES COMMISSION

WOOD HYDRO, LLC,	)	
	)	CASE NO. IPC-E-20-28
Complainant,	)	
v.	)	IDAHO POWER COMPANY'S
	)	ANSWER TO CROSS-
IDAHO POWER COMPANY,	)	RESPONDENTS' MOTIONS TO
	)	DISMISS
Respondent/Cross-	)	
Complainant,	)	
v.	)	
	)	
WOOD HYDRO, LLC,	)	
	)	
Cross-Respondent,	)	
	)	
ENEL GREEN POWER NORTH	)	
AMERICA, INC.	)	
	)	
Cross-Respondent,	)	
v.	)	
	)	
CENTRAL RIVERS POWER US, LLC	)	
	)	
Cross-Respondent.	)	

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COMES NOW, Idaho Power Company (“Idaho Power” or “Company”) and pursuant to Rule 56 and 256 hereby Answers the Motions to Dismiss for lack of subject matter jurisdiction filed by Cross-Respondents Enel Green Power North America, Inc. (“Enel” or “Rock Creek #2”) and Central Rivers Power US, LLC (“Central Rivers” or “Lowline #2”).

### **I. INTRODUCTION, FACTS, AND BACKGROUND**

This case concerns whether the Idaho Public Utilities Commission (“Commission”) properly has jurisdiction over the terms and conditions of power purchase contracts entered into as must-take obligations under the federal obligations of the Public Utility Regulatory Policies Act of 1978 (“PURPA), including the payment terms of those contracts, that the Commission itself approved. As described in more detail below, well-established federal and state law, both statutory and judicial, as well as the terms of the contracts in question themselves, squarely and unequivocally vest jurisdiction in this Commission.

On June 25, 2020, Wood Hydro, LLC (“Wood Hydro” or “Mile 28”) filed a Complaint with the Commission alleging that Idaho Power had improperly withheld Net Firm Energy payments due to Wood Hydro under its PURPA<sup>1</sup> Firm Energy Sales Agreement (“FESA”). Complaint at p 1. On July 13, 2020, the Commission issued a Summons to Idaho Power directing it to Answer Wood Hydro’s Complaint. On August 3, 2020, Idaho Power filed its Answer to Wood Hydro’s Complaint, and additionally brought a Cross-Complaint against Wood Hydro/Mile 28, Enel/Rock Creek #2, and

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<sup>1</sup> Public Utility Regulatory Policies Act of 1978.



Central Rivers/Lowline #2<sup>2</sup> regarding the similar provisions contained in each of the entities' Commission-approved FESAs under PURPA.

As stated in Idaho Power's Cross-Complaint, Mile 28, Rock Creek #2, and Lowline #2 each have an old version of a 35-year, levelized rate, mandatory purchase, PURPA QF<sup>3</sup> contract with Idaho Power.<sup>4</sup> Each of the three projects are in the later portions of their respective contract terms: Mile 28 expires in June of 2029; Rock Creek #2 expires in April of 2024; and Lowline #2 expires in April of 2023. Each of the projects have had extended periods of non-generation constituting a permanent curtailment, or failure to deliver their contractual Annual Net Energy amounts as required in those agreements. Their contracts contain specific provisions, designed to ensure that the projects continue to generate through the later years of their levelized rate contracts when they are paying back customers for the early years' overpayments. When each project permanently curtailed its Annual Net Energy amounts, Idaho Power calculated the appropriate Lump Sum Repayment amount from the contracts and assessed the same in a letter to the projects. Each project responded in writing alleging that there had been no permanent curtailment and contesting the Lump Sum Repayment amounts claimed by Idaho Power on behalf of its customers. Mile 28 filed a formal complaint alleging it has not permanently curtailed delivery of its Annual Net Energy amounts and that the "liquidated damages clause in the Agreement is unenforceable under Idaho law." Wood Hydro Complaint, p 2.

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<sup>2</sup> Wood Hydro, LLC owns/controls the Mile 28 hydroelectric QF, Enel Green Power NA, Inc., owns/controls the Rock Creek #2 hydroelectric QF, and Central Rivers Power US, LLC owns/controls the Lowline #2 hydroelectric QF.

<sup>3</sup> QF, or Qualifying Facility under PURPA.

<sup>4</sup> Each QF's FESA was attached as Attachments 1 through 3 to Idaho Power's Answer and Cross-Complaint.



All three contracts contain a nearly identical provision in Section 21 of the Agreements stating,

If, at any time prior to the end of the term of the Agreement, Seller permanently curtails in whole or in part its long-term average deliveries of the Annual Net Firm Energy amount specified in paragraph 6.3, Seller shall pay to Idaho Power, as reasonable liquidated damages arising out of this permanent curtailment of Annual Net Firm Energy deliveries, the appropriate lump sum repayment amount specified in Appendix D, multiplied by the difference in megawatt-hours between the Annual Net Firm Energy amount specified in paragraph 6.3 and the reduced Annual Net Firm Energy amount after the permanent curtailment.

All three contracts also contain a table, Appendix D, that provides a Lump Sum Repayment amount to be applied by contract year for which there is permanent curtailment of the Annual Net Energy amounts. This is designed as a mechanism to protect customers in the levelized agreement and to make sure projects continue to generate in the later years to "pay back" customers for the levelized overpayment amount from the early years of the contract.

In its Answer and Cross-Complaint Idaho Power respectfully requests that the Commission address the relevant contract provisions relating to the Annual Net Energy Amount, Permanent Curtailment of the Annual Net Energy Amount, Lump Sum Rayment Amount, and any other necessary contractual provisions for all three Cross-Respondents, and provide direction to Idaho Power and the QF Cross-Respondents as to the proper interpretation of the contractual provisions as they relate to the Commission's implementation of PURPA's mandatory purchase, legally enforceable obligation for these projects in the state of Idaho.<sup>5</sup>

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<sup>5</sup> Idaho Power did not plead and does not seek a judgment from the Commission for an award of damages as claimed by Cross-Respondents. Idaho Power seeks a determination from the Commission

On August 27, 2020, the Commission issued Order No. 34764, Notice of Cross-Complaint, directing Wood Hydro to file a reply to Idaho Power's Answer and Cross-Complaint, and directing Rock Creek #2 and Lowline #2 be issued Summonses giving each QF 21 days with which to answer Idaho Power's Cross-Complaint. On September 17, 2020, Rock Creek #2 and Lowline #2 filed separate Motions to Dismiss Idaho Power's Cross-Complaint alleging the Commission lacked subject matter jurisdiction. Neither filed an Answer to the Cross-Complaint.

## **II. SUMMARY OF ANSWER TO MOTIONS TO DISMISS**

The Commission has jurisdiction to hear these matters not only based upon the express agreement of the parties, but also based upon its express, statutory authority under state and federal law.

The Commission has the express statutory jurisdiction and authority over utility rates, any contracts affecting such rates, and the power and authority to hear complaints and investigate any single rate, contract, or practice of a utility. *Idaho Code* §§ 61-129, 61-501, 61-502, 61-503. Case Precedent is rich with examples. The Idaho Supreme Court has recognized that the Commission may interpret contractual provisions, which may normally be within the jurisdiction of the courts, upon the consent of the parties for the Commission to hear such matters. *Afton Energy, Inc. v. Idaho Power Company*, 111 Idaho 925, 929, 729 P.2d 400, 404 (1986)(*Afton IV*) quoting *Bunker Hill Co. v. Washington Water Power Co.*, 98 Idaho 249, 252, 561 P.2d 391, 394

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regarding the proper avoided cost rates, and the mechanisms in the FESA (Annual Net Energy Amount, Permanent Curtailment of the Annual Net Energy Amount, Lump Sum Repayment Amount, Liquidated Damages, etc.) designed to protect customers and the proper allocation of rates to customers resulting from PURPA's mandatory purchase obligation and the levelized rate contract/legally enforceable obligation in each case.



(1977)(*Bunker Hill I*). The Court has recognized that the Commission has the jurisdiction and authority to determine whether an event of force majeure occurred pursuant to a FESA between Idaho Power and a PURPA QF. *Idaho Power Co. v. New Energy Two, LLC*, 156 Idaho 462, 465, 328 P.3d 442, 445 (2014). The Court has recognized that the Commission has the jurisdiction and authority to interpret the arbitration clause provisions in a contractual agreement between a regulated utility and an unregulated paging provider where the Commission was tasked with implementation of federal telecommunications law in the state of Idaho. *McNeal v. Idaho Public Utilities Commission*, 142 Idaho 685, 689, 132 P.3d 442, 446 (2006). The Court has held that the Commission has jurisdiction to examine common law contract issues between QFs and utilities. *A.W. Brown v. Idaho Power Co.*, 121 Idaho 812, 819, 828 P.2d 841, 848 (1992)(“Brown argues that the PUC had no jurisdiction ‘to litigate the common law contract issues ...’ We disagree.”) Additionally, federal courts have recognized a state regulatory agency’s jurisdiction and authority to interpret contractual provisions between a utility and a PURPA QF. *Wheelabrator Lisbon, Inc. v. Connecticut Dept. of Public Utility Control*, 531 F.3d 183, 188-89 (2d Cir.2008) (acknowledging state regulatory agency’s jurisdiction and authority to interpret contract between regulated public utility and PURPA QF) (citing *Wheelabrator Lisbon, Inc. v. Dept. of Public Utility Control*, 283 Conn. 672, 689, 931 A.2d 159, 171 (2007)(state Supreme Court upholding the state regulatory agency’s jurisdiction to interpret power purchase agreement).

All of the above-cited authorities illustrate the public policy rationale in favor of the Commission’s jurisdiction to resolve disputes and interpret PURPA power purchase agreements including: the conservation of judicial resources; the Commission’s duty to



protect retail electric consumers; the Commission's duty to implement federal PURPA law and regulations; as well as the fact that the Commission is best suited to make determinations and interpretations regarding claims arising from contractual provisions that it requires and approves for use. The Commission, particularly in this case, is best suited to interpret the required provisions in a PURPA mandatory-purchase, levelized-rate agreement where it has exercised its rate-making authority to require lump sum repayment provisions in the event the QF curtails its generation without fully compensating customers through the levelized rates contained therein.

### **III. ANSWER TO MOTION TO DISMISS**

Rock Creek #2 and Lowline #2 ("Cross-Respondents")<sup>6</sup> both maintain that the Commission lacks the subject matter jurisdiction to hear contractual matters, primarily relying upon the "general rule" that contract interpretation is for the courts, and not the Commission. Cross-Respondents, while acknowledging that the Court has recognized exceptions to this "general rule" erroneously seek to draw distinctions from the present cases and those recognized exceptions, either ignoring the Court's acknowledged exceptions where the Commission has proper jurisdiction or attempting distinctions without significance between themselves and the applicable cases. As set forth below, there are instances in which the Commission can, and does, interpret and enforce contracts entered into by public utilities that it regulates, and has the jurisdiction to do so. Cross-Respondents rely only upon the Court's "general rule" without regard to the exceptions thereto, or the specific facts of this case.

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<sup>6</sup> Wood Hydro, who initiated this matter by its own Complaint, has not objected to the Commission's jurisdiction.

**A. The Commission Has Jurisdiction to Interpret and Enforce Contractual Provisions Contained in a Firm Energy Sales Agreement that it Requires and Approves Between a Public Utility and a QF Entered Into Pursuant to PURPA.**

The Idaho Supreme Court has specifically found, despite a “general rule” that contract interpretation is for the courts, that the Commission does have jurisdiction and the right to interpret contracts in certain instances and under certain exceptions to the “general rule.” *A.W. Brown v. Idaho Power Co.*, 121 Idaho 812, 819, 828 P.2d 841, 848 (1992)(Commission has jurisdiction to hear complaints and examine common law contract issues between QFs and utilities); *McNeal v. Idaho Public Utilities Commission*, 142 Idaho 685, 689, 132 P.3d 442, 446 (2006)(Commission has the authority to interpret arbitration provisions in telecommunications interconnection agreement); *Afton Energy, Inc. v. Idaho Power Co.*, 111 Idaho 925, 929, 729 P.2d 400, 404 (1986)(Commission may interpret contractual provisions, which may normally be within the jurisdiction of the courts, upon the consent of the parties for the Commission to hear such matters)(quoting, *Bunker Hill Co., v. Washington Water Power Co.*, 98 Idaho 249, 252, 561 P.2d 391, 394 (1977)); *Idaho Power Co. v. New Energy Two, LLC*, 156 Idaho 462, 465, 328 P.3d 442, 445 (2014)(Commission has the jurisdiction and authority to determine whether an event of force majeure occurred pursuant to a FESA between Idaho Power and a PURPA QF).

In *A.W. Brown*, the Court stated that “the Commission has jurisdiction to hear complaints against utilities alleging violation of any provision of law ...” 121 Idaho at 819, 828 P.2d at 848. The Court affirmatively disagreed with Brown’s contention that the Commission had no jurisdiction “to litigate the common law contract issues between Brown and Idaho Power” stating simply, “We disagree.” *Id.*



In *Afton IV*, the Court expressly affirmed two previously announced “exceptions” to the “general rule” that contract interpretation is normally a matter for the courts. 111 Idaho at 929, 729 P.2d at 404. The first exception is where the parties agree to submit the matter to the Commission. *Id.*, quoting *Bunker Hill Co. v. Washington Water Power Co.*, 98 Idaho 249, 252, 561 P.2d 391,394 (1977). The other exception is where “the Commission can use its expertise and supply a reasonable contract rate where the parties have an existing contract but are unable to agree to the specific rate.” *Id.*, citing *F.M.C. Corp v. Idaho Public Utilities Commission*, 104 Idaho 265, 658 P.2d 936 (1983).

In *McNeal*, the Commission’s interpretation of an arbitration provision in a Commission-approved contract between PageData, an unregulated paging provider, and Qwest, at that time a regulated public utility, was found to be properly within the jurisdiction of the Commission. *Id.* In *McNeal*, the Commission was tasked with implementation of federal regulations, which led to an interconnection agreement, a contract, between PageData and Qwest. PageData filed a complaint alleging that Qwest was not in compliance with certain provisions of the agreement. The Commission dismissed the complaint, finding that, under the arbitration clause of the contract, the parties were to first submit the matter to arbitration. The Supreme Court held that the Commission had authority to interpret the arbitration provision in the contract. *Id.*

Similarly, in *New Energy*, the Court citing to *McNeal* found that the Commission has the jurisdiction to determine whether or not an event of force majeure occurred that would excuse the QF’s performance under a PURPA FESA. 156 Idaho at 465, 328 P.3d at 445. *New Energy* being the most recent Idaho Supreme Court case regarding



the Commission's jurisdiction and dealing with a FESA between Idaho Power and a PURPA QF is both instructive and controlling. The Court not only found that the Commission properly exercised its jurisdiction based upon the express agreement by the parties to submit all disputes and interpretations to the Commission, but also recognized the Commission's statutory authority to interpret and enforce the contracts. *Id.*, 156 Idaho at 464-65, 329 P.3d at 444-45.

The Commission also based its order upon decisions of this Court regarding the Commission's statutory authority. The Agreements in this case were executed pursuant to the Public Utility Regulatory Policies Act of 1978 (PURPA), and the biogas generation facilities to be constructed by New Energy were to be qualifying facilities (QFs) under that act. The Commission wrote as follows:

We find that there is a statutory basis for our jurisdiction in this matter. Just as in the case where QFs may bring complaints against utilities under PURPA (*Afton I/III*, 107 Idaho at 781, 693 P.2d at 427 [1984]), the Commission is authorized under *Idaho Code* § 61-621 to hear complaints made by public utilities. As the Idaho Supreme Court noted in *Afton I/III*, Section 61-621 "gives the Commission jurisdiction to hear complaints against public utilities alleging violations of rules, regulations or any provision of laws; I.C. § 61-502 gives the Commission jurisdiction to determine reasonable rates, including rates collected under contracts; and I.C. § 61-503 gives the Commission power to investigate a single contract. ..." 107 Idaho at 784, 693 P.2d at 430. The PPAs at issue in this case directly affect Idaho Power's rates through the annual Power Cost Adjustment (PCA). *Idaho Code* § 61-502, *Kootenai*, 99 Idaho at 880, 591 P.2d at 127. The United States Supreme Court also noted in *FERC v. Mississippi*, PURPA "and the [FERC] implementing regulations simply require the [state regulatory] authorities to adjudicate disputes arising under [PURPA]. Dispute resolution of this kind in the *very type of activity* customarily engaged in by the Mississippi [Public Utilities] Commission. ..." 456 U.S. 742, 760, 102 S.Ct. 2126, 2138, 72 L.Ed.2d 532, 547-48

(1982)(emphasis added); *Afton I/III*, 107 Idaho at 789, 693 P.2d at 435 (emphasis original).

(Footnotes omitted.) New Energy did not address this analysis by the Commission.

In the Commission's above-quoted analysis, it noted the statement by the United States Supreme Court in *F.E.R.C. v. Mississippi*, 456 U.S. 742, 760, 102 S.Ct. 2126, 2137-38, 72 L.Ed.2d 532, 547-48 (1982), that PURPA "and the implementing regulations simply require the Mississippi [Public Utilities Commission] to adjudicate disputes arising under the statute." In *McNeal*, we held that because the Telecommunications Act of 1996 granted the Commission the Commission the authority to approve or disapprove the contract at issue, the Act necessarily granted the Commission the authority to interpret and enforce the provisions of the contract that it had approved. 142 Idaho at 689, 132 P.3d at 446. The agreements in this case had been approved by the Commission.

*New Energy*, 156 Idaho at 464, 329 P.3d at 444.

In this case, just as in *McNeal* and in *New Energy*, the Commission is tasked with implementation of a federal regulatory scheme, here PURPA, which led to an agreement between Idaho Power, a regulated utility, and Cross-Respondents, non-regulated PURPA QFs. Here, Idaho Power has also filed complaints due to the QFs' failure to meet contractual commitments in those agreements. The provisions at issue in this matter are specific ratemaking provisions in the contracts required by the Commission and designed to protect retail customers whose electric rates directly pay the costs of these contracts. Just as the Commission had the jurisdiction and authority to interpret the arbitration clause in *McNeal*, and the force majeure provisions in *New Energy*, the Commission here has the jurisdiction and authority to interpret the Annual Net Energy, Lump Sum Repayment, Liquidated Damages, and any other provision in the FESAs.



**B. The Parties Agreed to Submit Disputes to the Commission.**

The Commission has jurisdiction over the interpretation of contracts where the parties have agreed to submit a dispute involving contract interpretation to the Commission. *Afton Energy, Inc. v. Idaho Power Co.*, 111 Idaho 925, 929, 729 P.2d 400, 404 (1986) 929, 729 P.2d at 404 (citing *Bunker Hill Co. v. Wash. Water Power Co.*, 98 Idaho 249, 252, 561 P.2d 391, 394 (1977)); *McNeal v. Idaho Public Utilities Commission*, 142 Idaho 685, 132 P.3d 442 (2006); *Idaho Power Co. v. New Energy Two, LLC*, 156 Idaho 462, 328 P.3d 442 (2014).

Both the Rock Creek #2's and Lowline #2's FESAs contain similar language regarding Commission jurisdiction. Paragraph 7.3 of Rock Creek #2's and Lowline #2's FESAs each provide for the continuing jurisdiction of the Commission, are titled as such, and are nearly identical to each other and to language from the *New Energy* contract.<sup>7</sup> Paragraph 7.3 of Rock Creek #2's FESA states:

Continuing Jurisdiction of the Commission - This Agreement is a special contract and as such, the rates, terms and conditions contained in this Agreement will be construed in accordance with *Idaho Power Company v. Idaho Public Utilities Comm'n and Afton Energy, Inc.*, 107 Idaho 781, 693 P.2d 427 (1984), *Idaho Power Company v. Idaho Public Utilities Comm'n*, \_\_\_ Idaho \_\_\_, 695 P.2d 1261 (1985), *Idaho Power Company v. Idaho Public Utilities Comm'n and Afton Energy, Inc.*, \_\_\_ Idaho \_\_\_, \_\_\_ P.2d \_\_\_ (Slip Op No 155, 1986), Section 210 of the Public Utility Regulatory Policies Act of 1978 and 18 CFR §292.303-308.

Paragraph 7.3 of Lowline #2's FESA states:

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<sup>7</sup> Paragraph 7.7 of New Energy's FESA states: "Continuing Jurisdiction of the Commission. This Agreement is a special contract and, as such, the rates, terms and conditions contained in this Agreement will be construed in accordance with *Idaho Power Company v. Idaho Public Utilities Commission and Afton Energy, Inc.*, 107 Idaho 781, 693 P.2d 427 (1984), *Idaho Power Company v. Idaho Public Utilities Commission*, 107 Idaho 1122, 695 P.2d 1 261 (1985), *Afton Energy, Inc. v. Idaho Power Company*, 111 Idaho 925, 729 P.2d 400 (1986), Section 210 of the Public Utility Regulatory Policies Act of 1978 and 18 CFR §292.303-308."



Continuing Jurisdiction of the Commission - This Agreement is a special contract and as such, the rates, terms and conditions contained in this Agreement will be construed in accordance with *Idaho Power Company v. Idaho Public Utilities Comm'n and Afton Energy, Inc.*, 106 [sic] Idaho \_\_\_\_, 693 P.2d 427 (1984), *Idaho Power Company v. Idaho Public Utilities Comm'n*, \_\_ Idaho \_\_\_\_, 695 P.2d 1261 (1985), Section 210 of the Public Utility Regulatory Policies Act of 1978 and 18 CFR §292.303-308.

Article XXII of both Rock Creek #2's and Lowline #2's FESA also provides, "This Agreement is subject to the jurisdiction of those governmental agencies having control over either party of this Agreement." Additionally, Paragraph 21.1 of Rock Creek #2's FESA conclusively demonstrates that the parties have agreed to the Commission's jurisdiction regarding any and all disputes, providing that all disputes relating to the interpretation of the terms and conditions of the Agreement will be submitted to the Commission.

Disputes – All disputes related to or arising under this Agreement, including but not limited to the interpretation of the terms and conditions of this Agreement, will be submitted to the Commission for resolution.

Again, this is the exact same language considered by the Court in the *New Energy* case.<sup>8</sup> Lowline #2's FESA does not contain this paragraph.<sup>9</sup>

It is clear that Rock Creek #2's FESA was entered into by the parties with the very express understanding that all disputes or interpretation would be submitted to the Commission, and that both Rock Creek #2 and Lowline #2 agree to the jurisdiction of

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<sup>8</sup> Paragraph 19.1 of the *New Energy* FESA states, "Disputes – All disputes related to or arising under this Agreement, including, but not limited to, the interpretation of the terms and conditions of this Agreement, will be submitted to the Commission for resolution."

<sup>9</sup> Paragraph 21.1 of Wood Hydro/Mile 28's FESA contains the same language, "Disputes - All disputes related to or arising under this Agreement, including, but not limited to, the interpretation of the terms and conditions of this Agreement, will be submitted to the Commission for resolution." Wood Hydro/Mile 28 does not contest the Commission's jurisdiction.

the Commission, placing them solidly within the Court's precedent finding proper Commission jurisdiction from *Afton*, *McNeal*, and *New Energy*.

C. **The Commission's Statutory Grant of Authority Over Ratemaking Functions and Its Implementation of Federal Law Provides Express Authority for the Commission to Hear the Present Disputes Between a Regulated Public Utility and a PURPA QF.**

The Commission rightly has jurisdiction over interpretation and enforcement of contracts relating to utility rates, which contracts, when entered into pursuant to PURPA, it is required to implement and oversee under a federal regulatory scheme and pursuant to state law. The Commission is granted the requisite authority under both Idaho and federal law to do so.

*Idaho Code* § 61-501 provides the Commission with authority to supervise and regulate utilities and to do "all things necessary to carry out the spirit and intent" of the act. *Idaho Code* § 61-129 states that utilities are subject to the jurisdiction, control, and regulation of the Commission. *Idaho Code* § 61-502 provides jurisdiction over rates, including rates "or contracts . . . affecting such rates." The Commission is also granted the power "upon its own motion or upon complaint, to investigate a single rate . . . contract or practice." *Idaho Code* § 61-503. The FESAs at issue are utility contracts which affect rates as defined under *Idaho Code* § 61-502 and which the Commission has specific authority to investigate under *Idaho Code* § 61-503. The payments made by Idaho Power, as well as any damages collected under the FESA, are directly assigned to Idaho Power's many customers through rates on an annual basis through the Power Cost Adjustment ("PCA"). As such, the contractual matters affecting the same fall directly under the express grant of authority to the Commission.



Additionally, this Court has stated, "the Commission has jurisdiction to hear complaints against utilities alleging violation of any provision of law," which includes common law contract issues. *A.W. Brown*, 121 Idaho at 819, 828 P.2d at 848. "I.C. § 61-612 gives the commission jurisdiction to hear complaints against utilities alleging violations of rules, regulations or any provision of law." *Afton Energy, Inc. v. Idaho Power Co.*, 107 Idaho 781, 784, 693 P.2d 427, 430 (1984) (*Afton I/III*). *Idaho Code* § 61-621 provides that "Any public utility shall have a right to complain on any of the grounds upon which complaints are allowed to be filed by other parties...."

Furthermore, PURPA itself grants the Commission jurisdiction over the implementation of the federal statute. *Afton I/III*, 107 Idaho at 784-85, 693 P.2d at 430-31. The Court recites the utility's federal obligations, which require that "each State regulatory authority shall . . . implement such rule." *Id.* (citing PURPA § 210(f)). This Court states that "it is clear that PURPA was intended to confer upon state regulatory commissions responsibilities not conferred under state law." *Afton I/III*, 107 Idaho at 784-85, 693 P.2d at 430-31. "Moreover, the United States Supreme Court has interpreted PURPA as imposing requirements on state regulatory authorities in excess of their duties under state law." *Id.* The Federal Energy Regulatory Commission ("FERC") itself states that "state 'implementation may consist of the issuance of regulations, an undertaking to resolve disputes between qualifying facilities and electric utilities arising under Subpart C, or any other action reasonably designed to implement such subpart.'" *Id.*, citing 18 CFR § 292.401(a)(1980).

This establishes a clear grant of authority to the Commission that confers upon it the express jurisdiction and authority to interpret and enforce utility contracts effecting

customer rates and establishes responsibilities under PURPA that are "in excess" of those that were granted under state law alone, and one which was anticipated to resolve disputes between QFs and utilities regarding PURPA matters. The present disputes between a utility and QFs over a PURPA matter is seemingly precisely what FERC envisioned when it promulgated 18 C.F.R. § 292.401(a). The *Afton I/III* Court cited language from the United States Supreme Court and federal laws that creates an additional basis of authority for the Commission's jurisdiction in these cases. This, combined with the specific state authority previously discussed, creates an explicit grant of authority to the Commission to interpret a PURPA contract, and payment terms in particular are squarely within that interpretive authority.

This Court in *Afton I/III* analogized *FERC v. Mississippi*, 102 S.Ct. 2126, 2137 (1982) to this situation, concluding that the Commission's actions of reviewing a dispute over a PURPA contract were:

similar to its everyday ratemaking functions which necessarily entail reviewing contracts and transactions which affect those rates. I.C. § 61-307. Contracts entered into by public utilities with CSPPs or decisions by utilities not to contract with CSPPs have a very real effect on the rates paid by consumers both at present and in the future.

*Afton I/III*, 107 Idaho at 789, 693 P.2d at 435 (emphasis added).

It cannot be disputed that the long-term, levelized rate FESAs in this case have a significant effect on customer rates. The very provisions that are disputed exist because of the nature of PURPA's legally enforceable obligation, mandatory purchase requirements which required the long-term lock in of rates for the duration of the contract estimated at the time of contracting or in creation of the legally enforceable obligation. Additionally, when such long-term, estimated, avoided cost rates are



levelized, the Commission employs mechanisms to protect customers for the entire duration of the contract, such as the Lump Sum Repayment and Liquidated Damages provisions of these FESAs, to ensure customers are made whole in their advancement of avoided cost rates during the levelization period. This is inherently and undeniably a rate-making function mandated and authorized by state law and required by PURPA which is within the exclusive jurisdiction and authority of the Commission. The Commission's express statutory grant of authority over ratemaking functions and authority to hear complaints arising pursuant to "any provision of law," including common law contract issues, creates a duty for the Commission to hear the present disputes.

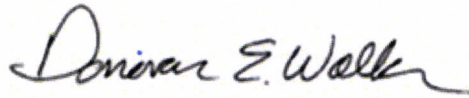
### **III. CONCLUSION**

The Commission properly has jurisdiction over these matters. Such a finding is consistent with state and federal law and prior decisions of the Idaho Supreme Court. The Commission has jurisdiction to hear these matters based upon the express agreement of the parties, and the Commission's express, statutory authority under state and federal law. These contracts including the rates, terms and conditions therein were mandated and approved by the Commission under its regulatory authority over Idaho Power, pursuant to federal law under PURPA, and pursuant to its rate-making authority and functions to protect retail customers.

Idaho Power respectfully requests that the Commission: deny Cross-Respondents' Motions to Dismiss; proceed to address the relevant contract provisions relating to Annual Net Energy Amounts, Permanent Curtailment of the Annual Net Energy Amounts, Lump Sum Repayment Amounts, and any other necessary

contractual provisions for all three Cross-Respondents; and provide direction to Idaho Power and the QF Cross-Respondents as to the proper interpretation of the contractual provisions as they relate to the Commission's implementation of PURPA's mandatory purchase, legally enforceable obligations as represented by the long-term, levelized-rate FESAs.

Respectfully submitted this 1<sup>st</sup> day of October 2020.



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DONOVAN E. WALKER  
Attorney for Idaho Power Company



## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 1<sup>st</sup> day of October 2020, I served a true and correct copy of IDAHO POWER COMPANY'S ANSWER TO CROSS-RESPONDENTS' MOTIONS TO DISMISS upon the following named parties by the method indicated below, and addressed to the following:

**Wood Hydro, LLC**

C. Thomas Arkoosh  
ARKOOSH LAW OFFICES  
802 w. Bannock St. Suite LP 103  
P.O. Box 2900  
Boise, Idaho 83701

Email: [tom.arkoosh@arkoosh.com](mailto:tom.arkoosh@arkoosh.com)  
[stacie.foor@arkoosh.com](mailto:stacie.foor@arkoosh.com)

Hand Delivered  
 U.S. Mail  
 Overnight Mail  
 FAX  
 Email

**Idaho Public Utilities Commission Staff**

Edward Jewell  
Deputy Attorney General  
Email: [edward.jewell@puc.idaho.gov](mailto:edward.jewell@puc.idaho.gov)

Hand Delivered  
 U.S. Mail  
 Overnight Mail  
 FAX  
 Email

**Enel Green Power North America, Inc.**

Gregory M. Adams  
Richardson Adams PLLC  
515 N. 27<sup>th</sup> Street  
Boise, ID 83702  
Email: [greg@richardsonadams.com](mailto:greg@richardsonadams.com)

Hand Delivered  
 U.S. Mail  
 Overnight Mail  
 FAX  
 Email

Randald Bartlett  
Sr. Director, Hydro O&M  
Email: [randald.bartlett@enel.com](mailto:randald.bartlett@enel.com)  
[generalcounsel@enel.com](mailto:generalcounsel@enel.com)

**Central Rivers Power US, LLC**

Preston N. Carter  
Givens Pursley LLP  
601 W. Bannock St.  
Boise, ID 83702

Email: [prestoncarter@givenspursley.com](mailto:prestoncarter@givenspursley.com)

Matthew Stanley  
VP and General Manager

Email: [mstanley@centralriverspower.com](mailto:mstanley@centralriverspower.com)

Hand Delivered  
 U.S. Mail  
 Overnight Mail  
 FAX  
 Email



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Christy Davenport, Legal Secretary