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IDAHO PUBLIC
UTILITIES COMMISSION

BEFORE THE IDAHO PUBLIC UTILITIES COMMISSION

IN THE MATTER OF IDAHO POWER COMPANY'S PETITION TO MODIFY TERMS AND CONDITIONS OF PURPA PURCHASE AGREEMENTS	)	**CASE NO. IPC-E-15-01**
IN THE MATTER OF AVISTA CORPORATION'S PETITION TO MODIFY TERMS AND CONDITIONS OF PURPA PURCHASE AGREEMENTS	)	**CASE NO. AVU-E-15-01**
IN THE MATTER OF ROCKY MOUNTAIN POWER COMPANY'S PETITION TO MODIFY TERMS AND CONDITIONS OF PURPA PURCHASE AGREEMENTS	)	**CASE NO. PAC-E-15-03** **IDAHO CONSERVATION LEAGUE AND SIERRA CLUB** **OPPOSITION TO STAFF AND IDAHO POWER MOTION TO STRIKE**

The Idaho Conservation League (ICL) and Sierra Club oppose the Staff and Idaho Power Motions to Strike the testimony of Adam Wenner. Mr. Wenner is an expert witness with almost 40 years of experience and specialized knowledge of the Public Utilities Regulatory Policy Act (PURPA) and the federal regulations promulgated by the Federal Energy Regulatory Commission

(FERC).[1] ICL and Sierra Club filed Mr. Wenner's direct testimony on April 23, 2015, and rebuttal testimony on May 14, 2015 as required by the Scheduling Order No 33253, so admitting it will not prejudice or surprise any party. The Commission, sitting as fact finder, is well suited to consider whether the expert opinion testimony of Mr. Wenner, and several other witnesses who offer the same type of testimony, will assist their decision-making. Idaho R. Evid. 702 and 704. "The public utility commission is a fact-finding, administrative agency and as such is not bound by the strict rules of evidence governing courts of law." *Application of Citizens Utilities Co.*, 82 Idaho 208, 213, 351 P.2d 487, 489 (1960); Idaho Code § 61-601. To exclude Mr. Wenner's testimony, but not the testimony of other witnesses who also describe and opine on the law would be an abuse of discretion. Rather, the Commission has substantial discretion to admit all relevant evidence to ensure a complete record and substantial discretion to give such evidence the weight it deserves. For these reasons, fully explained below, the Commission should deny the Staff and Idaho Power Motions.

ARGUMENT

I. Mr Wenner's Direct Testimony is Admissible Expert Opinion That can Assist the Commission's Decision Making.

The outlines of PURPA and the FERC regulations, and whether the utility proposals on contact length and pricing methodologies conform, is relevant to this case, as evidenced by the direct testimony of Mr. Sterling[2], the direct testimony of Mr. Clements[3], the direct testimony of Mr. Dickman[4], and the direct testimony of Mr. Yankle[5], among others.[6] Mr. Wenner's expert opinion on how the facts here relate to the law is admissible evidence in this proceeding. The Idaho Rules of Evidence are generally permissive: "all relevant evidence is admissible . . . except as otherwise provided by these rules or by other rules applicable in the courts of this state." Idaho R. Evid. 402. An expert may express an opinion, which "embraces an ultimate issue." Idaho R. Evid.

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[1] Page 1, line 3 of Mr. Wenner's direct testimony identifies him as a Washington D.C. based attorney, not a California based attorney as Idaho Power alleges. Idaho Power Motion at 3.
[2] Sterling Direct at page 10, line 24 through page 11 line 10; page 11 line 13 through page 12 line 4; page 20 lines 7 - 21.
[3] Clements Direct at page 2 line 2 – 4; page 5 lines 6 – 9; page 6 lines 17 – 23; page 7 line 3 through page 10 line 10.
[4] Dickman Direct at page 6 line 6 though page 7 line 12; page 8 line 18 through page 9 line 19.
[5] Yankle Direct at page 3 lines 4 – 17 and page 5 lines 7 – 12.
[6] ICL and Sierra Club provide these references as examples and acknowledge these and other witnesses have similar direct and rebuttal testimony.

704. In this proceeding, the ultimate issue is whether or not reducing long-term PURPA contracts from twenty years to two years violates the purpose of PURPA and FERC's regulations.

As an expert witness[7], Mr. Wenner's testimony is admissible to the extent it "will assist the trier of fact to understand the evidence or to determine a fact in issue[.]" Idaho R. Evid. 702. As Staff recognizes, "the Commission generally follows '[r]ules as to the admissibility of evidence used by the district court of Idaho in non-jury civil cases.'" Staff Motion at 2. In jury trials, courts do not allow experts to give legal conclusions because to do so would interfere with a judge's instructions and confuse the jury. *See Hygh v. Jacobs*, 961 F.2d 359, 364 (2d Cir. 1992); *United States v. Milton*, 555 F.2d 1198, 1203 (5th Cir. 1977). Here there is no jury and the "[t]he public utility commission is a fact-finding, administrative agency and as such is not bound by the strict rules of evidence governing courts of law." *Application of Citizens Utilities Co.*, 82 Idaho 208, 213, 351 P.2d 487, 489 (1960). This conforms to Idaho Code § 61-601 that states, "neither the commission nor any commissioner shall be bound by the technical rules of evidence." Admitting Mr. Wenner's testimony, along with the similar testimony from other parties describing and opining on the law,[8] is appropriate here because there is no jury to confuse. Rather the Commission is well suited to consider the testimonies and give them the appropriate weight.

Mr. Wenner's testimony regarding his opinion as to whether the fact of a two-year contract conforms to the intent of PURPA could help the Commission understand the evidence as applied to a complex regulatory scheme. Idaho Power's Motion cites cases for the proposition "that the expert opinion of a lawyer regarding a question of law is improper and inadmissible." Idaho Power Motion at 5. But Courts do admit attorney-witnesses to provide expert opinion on mixed questions of fact and law. *See Generally,* Note, Expert Legal Testimony, 97 Harv. L. Rev. 797 (1984).

In *United States v. Van Dyke*, the 8th Circuit held that excluding an expert's testimony by the author of the regulation at issue and a practicing attorney who dealt with the regulation frequently, was a "reversible error." 14 F.3d 415, 422 (8th Cir. 1994). The court concluded the expert opinion would "clearly have assisted the jury in understanding the regulation", and the court was concerned because the opponent had been allowed to use an expert witness who gave his opinion explaining how the regulation had been violated. *Id.* In *Peckham v. Continental*

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[7] ICL and Sierra Club offer Mr. Wenner as an expert witness under Idaho R. of Evid. 702, not as a lay witness under Idaho R. of Evid. 701. Accordingly, the Commission may disregard Idaho Power's assertion this is impermissible lay testimony. Idaho Power Motion at 6.
[8] Supra notes 2 – 6; Infra notes 14 – 17.

Casualty Insurance, Co., two "attorneys versed in the nuances of insurance law" were allowed to offer "opinion evidence as to proximate cause." 895 F.2d 830, 837 (1st Cir. 1990). The court found that because insurance is a complicated subject where "[a]rcana abound," the attorneys could be "expected to shed some light" on the practice and the court found it significant that the opponent's expert witness had also presented an opinion on the ultimate issue of causation. *Id.* Mr. Wenner helped develop the regulation at issue, which is part of a complex regulatory system, and is a practicing attorney in this field since 1976.[9] His testimony can assist the Commission in understanding the evidence in this case in the context of the PURPA regulations. Other parties to the case offer similar testimony, to which the Staff and Idaho Power do not object.[10] Mr. Wenner's testimony is just the type of expert opinion on a mixed question of law and fact that is admissible under the Rules of Evidence.

The other cases relied upon by Staff and Idaho Power are distinguishable. In *United States v. Tamman*, the non-attorney expert witness "provided only a recitation of facts and the legal conclusion that Tamman acted in conformity with the unidentified SEC rules and regulations and otherwise did not break the law." 782 F.3d 543, 553 (9th Cir. 2015). The court concluded, without analysis, "this is not proper expert opinion." *Id.* In the current matter, Mr. Wenner is offering much more than a recitation of facts followed by a legal conclusion. Instead, Mr. Wenner identifies the applicable legal rules and offers his expert opinion on the ultimate issue; just as witnesses (none of them lawyers) for other parties have done.[11]

Next, in *Crow Tribe of Indians v. Racicot*, the Crow Tribe offered expert testimony defining the term "lotteries" as used in a contract. 87 F.3d 1039, 1045 (9th Cir. 1996). The Court concluded, again with little discussion, that expert witness' testimony, who spoke only to the general meaning of a lottery, was not admissible. Rather "experts interpret and analyze factual evidence." *Id.* Here, Mr. Wenner, just as other witnesses, interprets the fact of a two-year contract term in the context of PURPA.

In citing to *Carnell v. Barker Management, Inc.*, the Staff and Idaho Power Motions disregard the compelling facts that made it clear that the so-called expert was anything but one. 48 P.3d 651, 657 (Idaho 2002). The court found that the expert witness was not qualified in the

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[9] Idaho Power alleges ICL and Sierra Club rely only on Mr. Wenner's FERC experience to establish his qualifications. Idaho Power Motion at 2. As explained on page 1 of Mr. Wenner's testimony it is the combination of experience as a FERC Attorney and decades in private practice that qualifies Mr. Wenner as an expert in this field.

[10] Supra notes 2 – 6; Infra notes 14 - 17

[11] Supra notes 2 – 6; Infra notes 14 - 17

area of fire investigation and cited the "lack of information in his affidavit concerning his education, training, and experience." *Id.* Next, it "tried to determine if [the witness's] testimony was based on "scientific, technical, or other specialized knowledge" as required by I.R.E. 702." *Id.* And it found there was "no explanation of the methodology" used and his "testimony lacked factual foundation." *Id.* It is only after finding the expert wholly lacking that the court mentioned that his affidavit contained only "conclusions as to questions of law." *Id.* Unlike in *Tamman, Crow Tribe,* and *Carnell,* Mr. Wenner is qualified to testify about the regulations of PURPA and grounds his testimony in the facts of this case in the context of the law and regulations.

Finally, Idaho Power's argument that Mr. Wenner's testimony is irrelevant misses the mark. Idaho Power Motion at 8. ICL and Sierra Club do not offer Mr. Wenner's testimony in an attempt to argue deference to FERC. Even if that was true, the first step in statutory interpretation is to consider the plain language of the statute and only if this is ambiguous may a court look to other sources, none of which include later statements by former agency employees. *Chevron USA Inc. v. NRDC Inc.,* 467 U.S. 837, 842-843 (1984). Idaho Power then offers that testimony on this issue is irrelevant because the Commission is free to "preform a first hand review" of FERC orders and regulations. Idaho Power Motion at 8. ICL and Sierra Club encourage the Commission to do so. However, several other parties found it relevant witness testimony to explain the outlines of PURPA and FERC regulations including the testimonies of Mr. Sterling, Mr. Clements, Mr. Dickman, and Mr. Yankle, among others.[12] Idaho Power does not appear to object to this type of testimony as irrelevant.

Like these other witnesses, who do not appear to be objectionable to Staff and Idaho Power, Mr. Wenner's testimony can assist the Commission in understanding the facts of this case in the context of the law. "The public utility commission is a fact-finding, administrative agency and as such is not bound by the strict rules of evidence governing courts of law." *Application of Citizens Utilities Co.*, 82 Idaho 208, 213, 351 P.2d 487, 489 (1960). ICL and Sierra Club agree with Staff that Commission generally follows the rules of evidence for non-jury civil cases. Staff Motion at 2. The rules of evidence are generally permissible and allow for expert opinion on ultimate issues in the case. Idaho R. of Evid. 402, 704. Mr Wenner's is a qualified expert who addresses relevant issues by interpreting the fact of a two-year contract in the context of a complex regulatory scheme. This testimony can assist the Commission to understand the evidence. Idaho R. Evid 702. Other parties submit direct and rebuttal testimony that recites

[12] Supra notes 2 – 6; Infra notes 14 - 17

PURPA law and regulations and make conclusions based thereon.[13] Instead of striking all of Mr. Wenner's testimony, the better course is to allow all relevant testimony and for the Commission to exercise the discretion to give each testimony the weight it deserves.

II. EXCLUDING MR. WENNER'S TESTIMONY ONLY WOULD BE AN ABUSE OF DISCRETION.

"The trial court's broad discretion in admitting evidence will only be disturbed on appeal when there has been a clear abuse of discretion." *State v. Merwin*, 131 Idaho 642, 646 (Idaho 1998). Staff and Idaho Power Motions are overbroad and excluding all of Mr. Wenner's testimony beyond page 1, line 14, as requested by Staff and all of Mr. Wenner's direct and rebuttal testimony as requested by Idaho Power, but not other witnesses who describe and opine on the law, would exclude admissible expert opinion and be a clear abuse of discretion. For example, the very next potion of Mr. Wenner's direct testimony following page 1 line 14 provides further background regarding his qualifications and the purpose of his testimony.[14] There is no legitimate reason to exclude this type of truthful testimony. Further, other sections of Mr. Wenner's direct testimony sets forth some basic PURPA regulations, just as Mr. Clements does on page 7 line 3 through page 10, line 10, and similar to Mr. Sterling's testimony that "FERC's regulations implementing PURPA are silent on contract length. Furthermore, I am not aware of any FERC case or court decision involving a requirement for a minimum contract length."[15] Beyond identifying the applicable law, other witnesses also make legal conclusions like this question and answer in Mr. Sterling's direct:

> Q. Is a 20-year maximum contract length inconsistent with PURPA's objectives?
>
> A. Yes, it can be. One of the Commission's primary duties under PURPA is to set avoided cost rates that are just and reasonable to customers, in the public interest, and not discriminatory to QFs. Such rates must not exceed incremental costs to the utility. The concern arises when contracts extend for many years and the forecast of avoided cost becomes inaccurate. Long-term contracts based on forecasted rates create greater risks for customers because the rates in the later years are not reflective of avoided costs.[16]

And this exchange from Mr. Dickman's direct:

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[13] Supra notes 2 – 6; infra notes 14 - 17

[14] Wenner Direct at page 1 line 15 – 19.

[15] Sterling Direct at page 11 line 13 through 16.

[16] Sterling Direct at page 10, line 24 through Page 11 line 10.

Q. Would reflecting proposed QFs in the determination of avoided cost rates be consistent with FERC PURPA regulations?

A. Yes. Federal regulations governing the rates for QF purchases state that, to the extent practicable, the following shall be taken into account: "[t]he availability of capacity or energy from a qualifying facility during the system daily and seasonal peak periods, including . . . [t]he individual and aggregate value of energy and capacity from qualifying facilities on the electric utility's system." This language makes it clear that considering QFs in the aggregate is an important consideration because it may impact the accuracy of avoided cost rates.[17]

Mr. Alphin's rebuttal testimony also describes PURPA law and regulations and offers legal conclusions like: "The must-take, or mandatory purchase, obligation of PURPA is the way PURPA was designed to promote the development of additional cogeneration and small power production facilities."[18] To exclude only the testimony of Mr. Wenner as improper legal opinion, without excluding other testimony that opines on the meaning PURPA and states a definitive conclusion would be an abuse of discretion. The better course is to allow all relevant testimony and for the Commission to exercise discretion to give each testimony the weight it deserves.

III. MR. WENNER IS NOT PRACTICING LAW IN IDAHO.

Staff's Motion offers a second argument: "To the extent Wenner asserts his testimony should be considered as legal memoranda, rather than expert opinion, such a submission would violate Idaho statutes governing the practice of law." Staff Motion at 4. ICL and Sierra Club offer Mr. Wenner's testimony as expert opinion, not a legal memorandum. Regardless, Mr. Wenner is not practicing law in Idaho. According to Idaho Code § 3-420 unlawful practice of law may occur when a person, who is not a member of the Idaho bar or otherwise authorized to practice here, "shall . . . practice or assume to act or hold himself out to the public as a person qualified to practice or carry on the calling of a lawyer within this state." The Idaho Supreme Court interpreted this rule to cover the act of representing another before a court of justice, and "in a larger sense, it includes legal advice and counsel, and the preparation of instruments and contracts by which legal rights are secured, although such matter may or may not be depending

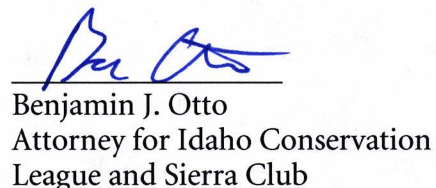
[17] Dickman Direct at page 6 line 6 – 14 (internal citations omitted).
[18] Alphin Rebuttal at page 14, lines 16 – 19.

in a court." *In re Mathews,* 58 Idaho 772, 776 (Idaho 1938); *State V. Bettwieser,* 143 Idaho 582, 586 (Idaho App. 2006). Mr. Wenner is not holding himself out to the public as practicing law in Idaho. Mr. Wenner did not prepare any instrument that secured legal rights. Mr. Wenner is not offering a legal advice to the public, or appearing before the Commission as a representative of another. Rather Mr. Wenner was retained by properly represented organizations[19] to provide expert witness testimony. Mr. Wenner is not practicing law in Idaho.

IV. CONCLUSION.

ICL and Sierra Club urge the Commission to reject the Staff and Idaho Power Motions to Strike the testimony of Mr. Wenner. "[N]either the commission nor any commissioner shall be bound by the technical rules of evidence." Idaho Code § 61-601. ICL and the Sierra Club encourage the Commission to follow their traditional course of action and use it's substantial discretion to ensure an adequate record and give the evidence the weight it deserves. To exclude a single witness but not other witnesses who submit similar testimony is the most obvious way the Commission could abuse this discretion. For these reasons, ICL and Sierra Club urge the Commission to deny the Staff and Idaho Power Motions to Strike.

Respectfully submitted this 25th day of June 2015,



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[19] Council for ICL is a member in good standing of the Idaho Bar. The Commission granted Pro Hac Vice status to Council for Sierra Club in Order No. 33245.

CERTIFICATE OF SERVICE

I hereby certify that on this 22nd day of April 2015, I delivered true and correct copies of the DIRECT TESTIMONY OF ADAM WENNER, DIRECT TESTIMONY OF R. THOMAS BEACH, and, EXHIBITS 301 – 303 on behalf of the Idaho Conservation League and the Sierra Club the following persons via the method of service noted:

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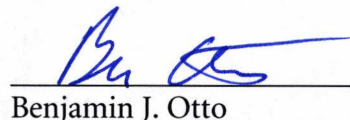

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