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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 PETITION FOR RECONSIDERATION OF THE J.R. SIMPLOT COMPANY AND THE CLEARWATER PAPER CORPORATION

Pursuant to Rule of Procedure ("RP") 331 of the Idaho Public Utilities Commission ("Commission" or "IPUC"), IDAPA 31.01.01.331.01, the J. R. Simplot Company ("Simplot") and the Clearwater Paper Corporation ("Clearwater") hereby respectfully request reconsideration of the Commission's Order No. 33357 (or the "Order"). The Order modified the IPUC's implementation of the mandatory purchase provisions of the Public Utility Regulatory Policy Act of 1978 ("PURPA") by reducing the term of PURPA contracts containing non-standard rates from 20 years to two years for all Idaho utilities under the IPUC's rate-setting jurisdiction. The new two-year contract term fails to provide each qualifying facility ("QF") with the option to sell its energy and capacity at a fixed price for such energy and capacity calculated at the time the QF obligates itself to sell its output to an Idaho utility, as required by 18 C.F.R. § 292.304(d)(2)(ii) and related regulations of the Federal Energy Regulatory Commission ("FERC"). Thus, as explained below, Simplot and Clearwater respectfully request that the Commission reconsider its determinations in the Order, and replace the Order with another order or rule that lawfully implements PURPA.

I.

PROCEDURAL AND FACTUAL BACKGROUND

Under the IPUC's implementation of PURPA, standard rates are available for wind and solar QFs with nameplate capacity of up to 100 kilowatts ("kW") and any other QF resource type up to 10 average monthly megawatts ("MW" and "aMW"). QFs ineligible for standard rates must negotiate a rate based upon a computer modeling methodology referred to as the integrated resource plan methodology (or "IRP Methodology").

Idaho Power Company ("Idaho Power") commenced this proceeding with its petition requesting that the Commission reduce the contract length for PURPA contracts containing non-standard rates from 20 years to two years. Shortly thereafter, Rocky Mountain Power and Avista

Corporation ("Avista") filed similar petitions seeking to limit the contract terms of PURPA contracts applicable to them. Simplot and Clearwater intervened in this proceeding because shortening PURPA contract terms materially limits their rights to utilize PURPA to sell electricity at wholesale to Idaho utilities.

Simplot operates a 15.9 MW QF that has the capability to generate in excess of 10 aMW at its Pocatello fertilizer plant. This QF produces electricity from waste heat that is produced in an exothermic reaction in the production of sulfuric acid at the fertilizer plant, and additionally uses the thermal energy remaining after the electricity production in functions at the plant. This is a highly efficient use of a waste product that would otherwise be vented but for PURPA. Although Simplot has thus far chosen to enter into standard rate contracts for QFs generating up to 10 aMW of generation, Simplot has also requested IRP Methodology rates and considered increasing the generation at its Pocatello QF to a level in excess of 10 aMW. Additionally, Simplot has been investigating development of another cogeneration QF project sized up to 25 MW at its recently completed Caldwell potato processing facility, and is regularly considering electricity generation as a means of increasing the economic viability of its other Idaho facilities. Simplot thus actively opposed the proposal to shorten PURPA contract lengths.

Clearwater is a customer of Avista and currently owns generation facilities that are certified to sell electric energy and capacity as PURPA QFs at its paper production plant near Lewiston, Idaho. Clearwater's existing QFs have a cumulative generation capacity of approximately 111 MW. These generators utilize a biomass waste product from the paper production process as the fuel to generate electricity, and further utilize the remaining thermal output after electricity generation in other useful processes at the paper plant. Like Simplot's generator in Pocatello, Clearwater's generators near Lewiston use the available fuel in a highly efficient manner. Additionally, Clearwater has discussed with Avista the possible installation of additional cogeneration units at its Idaho plant, which will require a long-term contract to support development of this new generation facility. Clearwater thus actively opposed the proposal to shorten PURPA contract lengths.

Simplot and Clearwater (along with other parties) argued that FERC's regulations require the utilities to enter into fixed-price contracts for the sale of energy and capacity with such rates calculated on the date the QF obligates itself, and that the proposals for two-year contracts simply failed to satisfy that requirement. In a compromise effort to provide middle ground, Simplot and Clearwater proposed that the Commission could maintain the 20-year contract length but re-price the energy component of new contracts in year 10 of the contract while leaving the capacity rate fixed for the entire 20-year term. *See* Order No. 33357 at 23. Notably, except in the case of a replacement contract for an existing QF, the QF would not be compensated for capacity under this alternative proposal until the date that the utility projects it will be capacity deficient, thus ensuring that the avoided costs do not overcompensate the QF for capacity prior to when it is planned to be added to the system. *Id.* at 14, 25; Order No. 32697 at 21. Other parties made similar proposals that sought to address the issues raised by the utilities' filings. Order No. 33357 at 23. However, Idaho Power maintained that the contract length for non-standard rates should be shortened to two years.

In the Order, the Commission sided with the utilities. The Order first concluded that "PURPA and FERC regulations do not specify a mandatory length for PURPA contracts." Order No. 33357 at 12. Because FERC's regulations "do not dictate a specific number of years or establish a time period for PURPA contracts," the Commission stated, "we find the issue of contract length is left to this Commission's discretion." *Id.*

The Order noted the evidence that the avoided cost rate for each new QF will decrease "as the 'older' QFs add capacity to the system," *id.* at 14, and found that the "abundance of PURPA generation extends the utilities' capacity surpluses to 2024 for Idaho Power and 2028 for PacifiCorp." *Id.* at 24. The Order correctly concluded that the capacity deficiency date extends out with each new QF, and that each successive QF should displace lower and lower cost resources in the IRP Methodology, resulting in lower avoided costs offered to each successive IRP-based QF. *See also id.* at 26-28 (implementing a change to the pricing queue to ensure that the prices offered to new IRP-based QFs will be lower even during a rush of contract requests).

Yet the Order used this undisputed fact – that each new IRP-based QF will be offered a lower rate than the immediately preceding QF in the queue with identical generation characteristics – to illogically find it is therefore "axiomatic that long-term avoided cost rates determined at the time parties enter into their contract will 'overestimate' future avoided costs collected from utility ratepayers." *Id.* at 22-23. The Order further found that an adjustable rate contract – such as Simplot and Clearwater's proposal to update the energy price in year 10 of a 20-year contract – "runs the risk of violating FERC regulations that mandate a 'fixed rate' at the time of contracting." *Id.* at 24 (citing 18 C.F.R. § 292.304(d)(2)(ii); Tr. at 213-15). Although the Order found that a rate that will be *partially* adjusted after 10 years may violate 18 C.F.R. § 292.304(d)(2)(ii), the Order somehow concluded a rate that remains fixed for only two years will not violate that regulation. *Id.* at 25.

The Order then acknowledged that IRP-based QFs will not be able to sell capacity under a two-year contract and sought to address this shortcoming through a "clarification in calculating the capacity deficiency[.]" *Id.* Specifically, the Order provides:

> We recognize that a new two-year contract would be unlikely to reach a capacity deficiency date. Therefore, we find it reasonable for utilities to establish capacity deficiency at the time the initial IRP-based contract is signed. As long as the QF renews its contract and continuously sells power to the utility, the QF is entitled to capacity based on the capacity deficiency date established at the time of its initial contract. For example, if the QF comes on-line in 2017 and the utility is capacity deficient in 2020, the QF would be eligible for capacity payments in the second year of its second contract and thereafter if in continuous operation. This adjustment recognizes that in ensuing contract periods, the QF is considered part of the utility's resource stack and will be contributing to reducing the utility's need for capacity. This mitigates the concern that short-term contracts will not contribute to the avoidance of utility capacity/generation.

Id. at 25-26.

II.

LEGAL STANDARD

IPUC RP 331.01 provides, "Petitions for reconsideration must set forth specifically the ground or grounds why the petitioner contends that the order or any issue decided in the order is unreasonable, unlawful, erroneous, or not in conformity with the law, and a statement of the nature and quantity of evidence or argument the petition will offer if reconsideration is granted." *See also* I.C. § 61-626.

III.

GROUNDS FOR RECONSIDERATION

The Order is not in conformity with the law because it fails to implement the bare minimum requirements in FERC's PURPA regulations. As explained below, the Order establishes a new implementation of PURPA that fails to provide each QF with the option to sell its energy and capacity to a utility at prices fixed for energy and capacity on the date of the QF's obligation. The Order thus fails to implement FERC's PURPA regulations.

A. FERC's PURPA Regulations Require Long-Term Contracts with Prices Fixed for Energy and Capacity On the Date the Obligation Is Incurred.

Section 210 of the PURPA "seeks to *encourage* the development of cogeneration and small power production facilities." *FERC v. Mississippi*, 456 U.S. 742, 750, 102 S.Ct. 2126 (1982) (emphasis added); 16 U.S.C. § 824a-3(a). Congress found this to be necessary because electric utilities were monopsonies, lone buyers of energy in a market with many potential producers of energy, and "traditional electricity utilities were reluctant to purchase power from ... nontraditional facilities." *Mississippi*, 456 U.S. at 750. Thus, PURPA gave FERC authority to promulgate rules "to encourage cogeneration and small power production" including rules that "require electric utilities to offer to ... purchase electric energy from such facilities." 16 U.S.C. § 824a-3(a). PURPA in turn provided that "each State regulatory authority shall ... implement [any] rule [prescribed by FERC under § 824a-3(a)] for each electric utility for which it has ratemaking authority." *Id.* § 824a-3(f). Consequently, if a state chooses to regulate certain electric utilities, it must implement FERC's regulations for such utilities. *See Mississippi*, 456 U.S. at 751, 759-61.

To ascertain whether a federal agency's regulation has spoken unambiguously to the question at issue, federal courts use traditional means of statutory interpretation, which include the text itself, its history, and its purpose. *See Bassiri v. Xerox Corp.,* 463 F.3d 927, 929-33 (9th Cir.2006). If the regulation is silent or ambiguous – that is, it does not answer the precise question at issue – federal courts will defer to the agency's own interpretation of the regulation.

See Decker v. N.W. Envtl. Def. Ctr., 133 S. Ct. 1326, 1337 (2013) ("When an agency interprets its own regulation, the Court, as a general rule, defers to it unless that interpretation is plainly erroneous or inconsistent with the regulation." (internal quotation omitted)).

Among other requirements, FERC's regulations provide that each QF shall have the option to sell its energy and capacity at rates calculated on the date the obligation is incurred. The applicable regulation provides:

> Each qualifying facility shall have the option either:
>
> (1) To provide energy as the qualifying facility determines such energy to be available for such purchases, in which case the rates for such purchases shall be based on the purchasing utility's avoided costs calculated at the time of delivery; or
>
> (2) To provide energy or capacity pursuant to a legally enforceable obligation for the delivery of energy or capacity over a specified term, in which case the rates for such purchases shall, at the option of the qualifying facility exercised prior to the beginning of the specified term, be based on either:
>
> > (i) The avoided costs calculated at the time of delivery; or
> >
> > (ii) The avoided costs calculated at the time the obligation is incurred.

18 C.F.R. § 292.304(d). The pertinent provisions of this regulation provide: "*Each* qualifying facility *shall have the option* . . . (2) *To provide* energy *or capacity* pursuant to a legally enforceable obligation for the delivery of energy or capacity *over a specified term*, in which case *the rates* for such purchases *shall*, at the option of the qualifying facility,... *be based on* . . . (ii) The *avoided costs calculated at the time the obligation is incurred*." 18 C.F.R. § 292.304(d)(2)(ii) (emphasis added). This regulation is known as FERC's legally enforceable obligation ("LEO") rule.

The plain language of 18 C.F.R. § 292.304(d)(2)(ii) states that each QF shall have the option to enter into a legally enforceable obligation to deliver energy or capacity over a term wherein the rates shall be based upon the avoided costs calculated at the time the obligation is incurred. It provides that each QF "shall" be provided with the following options: (1) to elect to sell energy and capacity; (2) to elect to sell such energy and capacity over a term specified by the QF; and (3) to elect that the obligation contain rates for energy and capacity calculated at the time the QF incurs that obligation. FERC spoke "in terms of the mandatory 'shall,' which normally creates an obligation impervious to judicial discretion." *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach,* 523 U.S. 26, 35, 118 S.Ct. 956 (1998).

Aside from the plain language of the regulation, the history and purpose of the regulation supports a conclusion that the regulation requires long-term, fixed-price contracts or other legally enforceable obligations. According to FERC's preamble to the LEO rule, "use of the term 'legally enforceable obligation' is intended to prevent a utility from circumventing the requirement that provides capacity credit to the qualifying facility merely by refusing to enter into a contract with the qualifying facility." *Small Power Prod. and Cogeneration Facilities; Regulations Implementing Sec. 210 of the Pub. Util. Reg. Pol. Act of 1978*, FERC Order No. 69, 45 Fed. Reg. 12,214, 12,224 (Feb. 25, 1980). The preamble further explains that this rule "enables a qualifying facility to establish a *fixed contract price for its energy and capacity* at the outset of its obligation . . . ." *Id.* (emphasis added). FERC recognized that to encourage the sort of energy production required by PURPA, its regulations had to provide the certainty that comes with having a long-term obligation. Thus, FERC invoked "the need for qualifying facilities to be able to enter into contractual commitments" and "the need for certainty with regard to return on investment in new technologies" that only those long-term legally enforceable obligations could provide. *Id.*

FERC has consistently relied upon its statements in its Order No. 69 in subsequent interpretations of its LEO rule. *See Virginia Electric and Power Co.*, 151 FERC ¶ 61,038, P 24 (2015) (quoting FERC Order No. 69 and stating, "Section 292.304(d) and the requirement that a QF can sell and a utility must purchase pursuant to a legally enforceable obligation were specifically adopted to prevent utilities from circumventing the requirement of PURPA that utilities purchase energy and capacity from QFs"); *Hydrodynamics Inc. et al.*, 146 FERC ¶ 61,193, P 31 (2014) (same); *Cedar Creek Wind, LLC*, 137 FERC ¶ 61,006, P 32 (2011) (same); *New York State Electric & Gas Corp.*, 71 FERC ¶ 61,027, 61,115-61,116 (1995) ("[FERC] intended the regulations described above 'to reconcile the requirement that the rates for purchases equal the utilities' avoided cost with the need for [QFs] to be able to enter into contractual commitments based, by necessity, on estimates of future avoided costs.'" (quoting FERC Order No. 69, 45 Fed. Reg. at 12,224)).

In *Hydrodynamics Inc. et al.*, FERC directly stated that a state commission violated the LEO rule where the state's rule "offers the competitive solicitation process as the only means by which a QF greater than 10 MW can obtain *long-term avoided cost rates*." *Hydrodynamics Inc. et al.*, 146 FERC ¶ 61,193 at P 33 (emphasis added). FERC additionally found that a 50-MW cap for purchases from certain QFs violated the LEO rule by prohibiting such QFs from obtaining "forecasted avoided cost rates." *Id.* at P 34. Thus, it is clear that FERC understood, and still understands, the LEO rule as entitling each QF to a long-term contract to sell energy and capacity based on forecasting the purchasing utility's avoided costs at the time the obligation is incurred.

Importantly, FERC's explanation of the meaning of its own LEO rule is entitled to substantial deference. *Decker*, 133 S. Ct. at 1337. "[U]nless an alternative reading is compelled by the regulation's plain language or by other indications of the [agency]'s intent at the time of the regulation's promulgation," deference is required. *Thomas Jefferson Univ. v. Shalala,* 512 U.S. 504, 512, 114 S.Ct. 2381 (1994). Deference is especially appropriate where the federal agency's "approach is consistent with [its] stated purpose for promulgating the regulation." *Barboza v. California Ass'n of Prof. Firefighters*, 651 F.3d 1073, 1079 (9th Cir. 2011); *see also Thomas Jefferson Univ.,* 512 U.S. at 512 (deferring to statement of agency intent contained in a regulatory preamble); *Bassiri,* 463 F.3d at 929-33 (same). Thus, to the extent there is any ambiguity, FERC's clarifying statement in the LEO rule's preamble that each QF is entitled to a "fixed contract price for its energy *and* capacity at the outset of its obligation" controls our inquiry. 45 Fed. Reg. at 12,224 (emphasis added).

B. The Order Fails to Implement FERC's PURPA Regulations.

The Order fails to implement FERC's PURPA regulations because it deprives the IRP-based QFs of a long-term, fixed contract price to sell energy *and* capacity with prices calculated at the outset of the obligation. Although FERC provides states with "latitude in determining the *manner* in which [FERC's] regulations are to be implemented" – whether that "manner" be issuance of regulations, resolution of disputes on a case-by-case basis or some other manner – the state's chosen "manner" of implementing PURPA must be "reasonably designed to give effect to FERC's rules." *FERC,* 456 U.S. at 751 (emphasis added). As noted above, the plain language of FERC's LEO rule states that each QF shall have the option to enter into a legally enforceable obligation to sell both energy *and* capacity wherein the rates shall be based upon the avoided costs calculated at the time the obligation is incurred. 18 C.F.R. § 292.304(d)(2)(ii). FERC's long-standing interpretation of the rule is that it provides each QF with the option to sell energy and capacity at forecasted avoided cost rates calculated at the start of the long-term obligation.

Here, however, the Order's two-year limit for new contracts is so short that it completely fails to allow the QF to the exercise the right to sell at long-term, forecasted rates for either energy or capacity. It thus falls far short of implementing FERC's requirement that each QF be provided the option to sell at forecasted avoided cost rates. *See Hydrodynamics Inc. et al.*, 146 FERC ¶ 61,193 at PP 33-34.

In fact, although the Order allows for short-term, fixed-price compensation for energy limited to two years, the Order allows for *no* fixed-price compensation for capacity. The QF is deprived of a "fixed contract price for its energy *and* capacity at the outset of its obligation" because, as the Order expressly acknowledges, a two-year contract will not provide a price for capacity that is fixed at this time. 45 Fed. Reg. at 12,224; *see* Order No. 33357 at 25 ("We recognize that a new two-year contract would be unlikely to reach a capacity deficiency date"). It will provide no price at all for capacity and thereby deprive the QF of the right to sell capacity. The utility will thus evade the requirement to provide a capacity credit to the QF "merely by refusing to enter into a contract" of sufficient length to provide such credit to the QF. 45 Fed. Reg. at 12,224

Instead of providing a contractual right to sell capacity, the Order attempts to justify its result through a contract renewal mechanism. The Order's "clarification in calculating capacity deficiency" sets up a regime where the QF could hypothetically, several years in the future, have a contractual right to sell capacity at a fixed price. *See* Order No. 33357 at 25-26. For example, according to the dates established in the Order, Idaho Power's deficiency period is currently set at 2024. Thus, a QF entering into a two-year contract today, would need to enter into the following successive two-year contract terms to eventually obtain a contractual right to sell its capacity: (1) 2015 to 2017, (2) 2017 to 2019, (3) 2019 to 2021, (4) 2021 to 2023 and (5) 2023 to 2025. Thus, the Order sets up a regime where a QF entering into a 2015 contract can only secure the contractual right to sell its capacity if the current regulatory regime is still in place when the QF enters into its *fifth* consecutive contract in 2023.

This clarification of the Order's two-year term limit fails to meet FERC's requirements for at least two different reasons. First, there is no legal effect to the Order's clarification from the QF's perspective because the 2015 Commission cannot bind the 2023 Commission to set a capacity deficiency date at any particular point in a hypothetical future PURPA contract.[1] The

[1] The reserved powers doctrine limits the ability of a state legislative body to bind a future legislative body. *See U.S. v. Winstar Corp.*, 518 U.S. 839, 874-91, 116 S.Ct. 2432 (1996). It is well established that "absent an 'unmistakable' provision to the contrary, 'contractual arrangements, including those to which a sovereign itself is a party, remain subject to subsequent legislation by the sovereign.'" *Id.*, 518 U.S. at 877 (quoting *Bowen v. Public Agencies Opposed to Social Security Entrapment,* 477 U.S. 41, 52, 106 S.Ct. 2390 (1986) (internal quotation omitted))); *see also Atlantic Coast Line R. Co. v. Goldsboro,* 232 U.S. 548, 558, 34 S.Ct. 364 (1914) ("[T]he power of the State to establish all regulations that are reasonably necessary to secure the health, safety, good order, comfort, or general welfare of the community ... can neither be abdicated nor bargained away, and is inalienable even by express grant"); *Stone v. Mississippi,* 101 U.S. 814, 817-19 (1880) (holding that reserved powers doctrine allowed legislature to repeal corporation's 25-year charter to conduct lotteries after only one year because "no legislature can curtail the power of its successors to make such laws as they may deem proper in matters of police"). Moreover, the future Commissions will not be bound by past Commission orders. *Idaho Power Co. v. Idaho Pub. Utilities Commn.*, 155 Idaho 780, 788, 316 P.3d 1278, 1286 (2013). The QF lacks any reasonable basis, therefore, to rely on the Order's promise for future capacity payments.

QF cannot rely on the Commission's non-binding statements to support its right to sell its capacity pursuant to such a hypothetical 2023 contract. Second, even if the Order could somehow bind future Commissions or this new regime could somehow be incorporated into the two-year contract commencing in 2015 and remain binding until the capacity deficiency in 2024, this arrangement still fails to provide the QF with the option to sell its energy *and* capacity at a forecasted rate calculated in 2015. Instead, the rate for capacity will not be calculated until 2023, based on circumstances as they exist in 2023. This hypothetical option to sell capacity at a price that is unknown today is obviously not what FERC had in mind when it stated its rule provides each QF with a "capacity credit" through in a "fixed contract price . . . at the outset of its obligation" that provides "certainty with regard to return on investment." 45 Fed. Reg. at 12,224.

The Order's own statements demonstrate non-compliance with FERC's LEO rule. The Commission found that a rate that is *partially* adjusted at year 10 may violate 18 C.F.R. § 292.304(d)(2)(ii). *See* Order No. 33355 at 24. But if the LEO rule requires fixed rates and prohibits adjusting the energy portion of the rates in new contracts even after 10 years, it must also require that fixed rates be provided for longer than two years in the first place. Additionally, the Order's "clarification" that attempts to allow the QF to eventually sell its capacity, implicitly recognizes that FERC's LEO rule entitles the QF to enter into an obligation to sell its capacity. Order No. 33357 at 25-26. Yet the Order's "clarification" overlooks that the LEO rule requires that the QF be provided a fixed price to sell that capacity at the time of commencement of the obligation – not a rate calculated at the commencement of the fifth successive obligation several years from now.

The Order relies heavily on the lack of a precise number of years for a minimum contract term specified in FERC's regulations. However, the LEO rule specifically provides the QF with the option to sell energy and capacity over a "specified term" – meaning that regulation provides the QF with the option to determine the length of the specified term. 18 C.F.R. § 292.304(d)(2)(ii). The lack of a precise number of years specified in the regulation does not mean a state may set the term so short that the QF has no option to enter into a long-term commitment to sell energy and capacity. Reading the regulation in this manner undermines the entire purpose of PURPA and FERC's regulations. As such, the Order creates an implementation plan that is not "reasonably designed to give effect to FERC's rules." *FERC,* 456 U.S. at 751.

The Commission should therefore reconsider the Order on the ground that it is not in conformity with the applicable laws. The Commission should replace the findings and conclusions with an order that meets the requirements of PURPA and FERC's regulations by providing each QF with the option to sell its energy and capacity at a fixed price for energy and capacity calculated on the date of the obligation. Simplot and Clearwater submit that either retaining the prior 20-year contract term or adopting Simplot and Clearwater's alternative proposal of a 20-year contract with an update to energy prices in new PURPA contracts in contract year 10, would meet the minimum requirements of FERC's LEO rule that QFs be provided a forecasted, long-term rate for energy and capacity.

Finally, while FERC's regulations require the Commission to offer long-term, fixed-rate contracts, the regulations also provide the Commission with broad discretion in setting the avoided cost rates. *Cal. Public Util. Comm'n*, 133 FERC ¶ 61,059, at P 24 (2010) (explaining that FERC is reluctant to second guess a state commission's fact-specific rate-setting determinations, and therefore FERC's regulations provide state commissions with guidelines on factors to be taken into account, to the extent practicable, in determining a utility's avoided cost). The self-correcting mechanism in the IRP Methodology should ensure that the rates decline as more QFs enter the contracting queue, resulting in rates that – while reflecting the avoided costs – should become too low to support further QF development during times of a large influx of contract requests. *See* Order No. 33357 at 14, 24, 26-28. The Order itself further enables this result by allowing the contracting queue to be updated more regularly. *Id.* at 26-28. The correct solution to any remaining problems is to further adjust the avoided cost pricing mechanisms. The Commission could lawfully adjust any additional aspects of the IRP Methodology for calculating rates in long-term contracts instead of unlawfully setting the contract term at a length that is arbitrarily designed to deprive QFs of long-term avoided cost rates for energy and capacity.

C. The Order Is Arbitrary Because It Cuts a "Solution" from Whole Cloth Outside of the Record.

The solution landed upon by the Commission was not advocated by any party, and therefore no party has had an opportunity to address the Commission's capacity upon renewal scheme. It is made up of whole cloth. No party discussed this idea in testimony; it was not vetted at hearing. Adoption of a policy upon which no party had an opportunity to address and/or rebut is arbitrary. It is axiomatic that the Commission's findings and conclusions must be made upon the record developed before it, and that when an administrative agency strays from the record its findings are not supportable on review.

As the Idaho Supreme Court has repeatedly held:

> When the agency was required by the provisions of this chapter or by other provisions of law to issue an order, the court shall affirm the agency action unless the court finds that the agency's findings, inferences, conclusions, or decisions are:
>
> (a) in violation of constitutional or statutory provisions;
> (b) in excess of the statutory authority of the agency;
> (c) made upon unlawful procedure;
> (d) not supported by substantial evidence on the record as a whole; or
> (e) arbitrary, capricious, or an abuse of discretion.

A&B Irrigation Dist. v. Idaho Dep. of Water Resources, 153 Idaho 500, 506, 284 P.3d 225, 231 (2012); *accord Washington Water Power Co. v. Idaho Pub. Util. Commn.*, 101 Idaho 567, 575, 617 P.2d 1242, 1250 (1980) (holding, "(a)n order based upon a finding made without evidence ... or upon a finding made upon evidence which clearly does not support it ... is an arbitrary act against which courts afford relief" (quoting *Oregon Shortline Railroad v. Pub. Util. Commn.*, 47 Idaho 482, 484, 276 P. 970, 971 (1929))).

Here, the Commission's decision is "not supported by substantial evidence on the record as a whole;" in fact, it is not supported by any evidence on the record whatsoever. As such, the Order is arbitrary and an abuse of the Commission's discretion.

IV.

CONCLUSION

For the reasons set forth above, Simplot and Clearwater respectfully request that the Commission reconsider Order No. 33357, and replace the Order with another order or rule that lawfully implements PURPA. Simplot and Clearwater stand ready to present further briefing, oral argument, or any further technical testimony the Commission may request on the issues raised in this Petition.

Respectfully submitted on September 10, 2015.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 10th day of September, 2015, a true and correct copy of the within and foregoing PETITION FOR RECONSIDERATION of the CLEARWATER PAPER CORPORATION and the J.R. SIMPLOT COMPANY was served as shown to:

Jean D. Jewell, Secretary Idaho Public Utilities Commission 472 West Washington Boise, Idaho 83702 jean.jewell@puc.idaho.gov	_X_ Hand Delivery __ U.S. Mail, postage pre-paid __ Facsimile __ Electronic Mail
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