

BEFORE THE IDAHO PUBLIC UTILITIES COMMISSION

IN THE MATTER OF THE APPLICATION OF)
IDAHO POWER COMPANY FOR A) **CASE NO. IPC-E-10-51**
DETERMINATION REGARDING A FIRM)
ENERGY SALES AGREEMENT BETWEEN)
IDAHO POWER AND ALPHA WIND, LLC)

IN THE MATTER OF THE APPLICATION OF)
IDAHO POWER COMPANY FOR A) **CASE NO. IPC-E-10-52**
DETERMINATION REGARDING A FIRM)
ENERGY SALES AGREEMENT BETWEEN)
IDAHO POWER AND BRAVO WIND, LLC)

IN THE MATTER OF THE APPLICATION OF)
IDAHO POWER COMPANY FOR A) **CASE NO. IPC-E-10-53**
DETERMINATION REGARDING A FIRM)
ENERGY SALES AGREEMENT BETWEEN)
IDAHO POWER AND CHARLIE WIND, LLC)

IN THE MATTER OF THE APPLICATION OF)
IDAHO POWER COMPANY FOR A) **CASE NO. IPC-E-10-54**
DETERMINATION REGARDING A FIRM)
ENERGY SALES AGREEMENT BETWEEN)
IDAHO POWER AND DELTA WIND, LLC)

IN THE MATTER OF THE APPLICATION OF)
IDAHO POWER COMPANY FOR A) **CASE NO. IPC-E-10-55**
DETERMINATION REGARDING A FIRM)
ENERGY SALES AGREEMENT BETWEEN)
IDAHO POWER AND ECHO WIND, LLC) **ORDER NO. 32298**

On December 16, 2010, Idaho Power Company filed five Applications each requesting acceptance or rejection of a 20-year Firm Energy Sales Agreement (“Agreements”) between Idaho Power and Alpha Wind, LLC; Bravo Wind, LLC; Charlie Wind, LLC; Delta Wind, LLC; and Echo Wind, LLC, respectively (collectively “the Projects”). On February 24, 2011, the Commission issued a consolidated Notice of Application and Notice of Modified Procedure for the five Applications. Timely comments in response to the Notice of Modified Procedure were filed by the Commission Staff and the Projects. On March 25, 2011, Idaho Power filed reply comments. On June 8, 2011, the Commission issued a consolidated final

Order disapproving each of the five Agreements. Order No. 32254 at 9. The Commission found that the Agreements “were not fully executed (signed by both parties) prior to December 14, 2010” – the date that the Commission lowered the eligibility cap for the published avoided cost rate from 10 MW to 100 kW. Thus, the Agreement contained an essential term that was no longer available to the Projects. *Id.*

On June 29, 2011, the Projects timely filed a Joint Petition for Reconsideration of the Commission’s final Order. The Projects allege that the Commission’s final Order is arbitrary and capricious, is not in conformity with controlling federal or Idaho state case law, and is a violation of the rulemaking requirements of the Idaho Administrative Procedures Act.

Idaho Power filed an answer to the Projects’ Petition on July 6, 2011. Idaho Power maintains that the Commission’s final Order is based on substantial and competent evidence. Idaho Power argues that the Commission was acting within its discretion and, therefore, reconsideration should be denied.

BACKGROUND

A. The Agreements

On December 15, 2010, Idaho Power and the five wind projects entered into their respective Agreements. Under the terms of the Agreements, each wind project agrees to sell electric energy to Idaho Power for a 20-year term using the 10 aMW non-levelized published avoided cost rates. Applications at 4. The Applications recite that Alpha, Bravo, Delta and Echo will each have a maximum capacity amount of 29.9 MW, and Charlie will have a maximum capacity of 27.6 MW. *Id.* at ¶ 7. Under normal and/or average conditions, each QF will not generate more than 10 aMW on a monthly basis. Idaho Power warrants that the Agreements comport with the terms and conditions of the various Commission Orders applicable to PURPA agreements for a wind resource. *Id.* at ¶ 6 *citing* Order Nos. 30415, 30488, 30738 and 31025.

The projects have all selected October 31, 2014, as the Scheduled First Energy Date and December 31, 2014, as the Scheduled Operation Date. Applications at 5. Idaho Power asserts that various requirements have been placed upon the projects in order for Idaho Power to accept the project’s energy deliveries. Idaho Power states that it will monitor each project’s compliance with initial and ongoing requirements through the term of the Agreement. The parties have agreed to liquidated damage and security provisions of \$45 per kW of nameplate capacity. Agreements ¶¶ 5.3.2, 5.8.1.

Idaho Power asserts that it has advised each project of the project's responsibility to work with Idaho Power's Delivery business unit to ensure that sufficient time and resources will be available for the Delivery unit to construct the interconnection facilities, and transmission upgrades if required, in time to allow the projects to achieve their December 31, 2014, Scheduled Operation Date. The Applications state that the projects have been advised that delays in the interconnection or transmission process do not constitute excusable delays and if a project fails to achieve its Scheduled Operation Date, delay damages will be assessed. Applications at 7. The Applications further maintain that each project has acknowledged and accepted the risk inherent in proceeding with its Agreement without knowledge of the requirements of interconnection and possible transmission upgrades. *Id.* at 7.

Idaho Power also states that each project has been made aware of and accepted the provisions in the Agreement and Idaho Power's approved Schedule 72 regarding non-compensated curtailment or disconnection of the project should certain operating conditions develop on Idaho Power's system. The Applications note that the parties' intent and understanding is that "non-compensated curtailment would be exercised when the generation being provided by the Facility in certain operating conditions exceeds or approaches the minimum load levels of [Idaho Power's] system such that it may have a detrimental effect upon [Idaho Power's] ability to manage its thermal, hydro, and other resources in order to meet its obligation to reliably serve loads on its system." *Id.* at 7-8.

By their own terms, the Agreements will not become effective until the Commission has approved all of the terms and conditions and declares that all payments made by Idaho Power to each project for purchases of energy will be allowed as prudently incurred expenses for ratemaking purposes. Agreements ¶ 21.1.

B. The Utilities' Joint Petition

On November 5, 2010, prior to the date that Idaho Power and the Projects entered into their Agreements, Idaho Power, Avista Corporation, and PacifiCorp dba Rocky Mountain Power filed a Joint Petition requesting that the Commission initiate an investigation to address various avoided cost issues related to the Commission's implementation of PURPA. Case No. GNR-E-10-04. On December 3, 2010, the Commission issued Order No. 32131 declining a motion made by the utilities to immediately reduce the published avoided cost rate eligibility cap from 10 aMW to 100 kW. Order No. 32131 at 5. However, the Order did notify parties that the

Commission's decision regarding whether to reduce the published avoided cost eligibility cap would become effective on December 14, 2010. *Id.* at 5-6, 9.

Section 210 of PURPA generally requires electric utilities to purchase power produced by QFs at "avoided cost" rates set by the Commission. "Avoided costs" are those costs which a public utility would otherwise incur for electric power, whether that power was purchased from another source or generated by the utility itself." 18 C.F.R. § 292.101(b)(6). Order No. 32176 at 1. Under PURPA regulations issued by the Federal Energy Regulatory Commission (FERC), the Commission must "publish" avoided cost rates for small QFs with a design capacity of 100 kW or less. Order No. 32176 at 1. However, the Commission has the discretion to set eligibility for the published avoided cost rate at a higher capacity amount – commonly referred to as the "eligibility cap." 18 C.F.R. § 292.304(c)(1-2). When a QF project is larger than the Commission-established eligibility cap the avoided cost rate for the project must be individually negotiated by the QF and the utility using the Integrated Resource Plan (IRP) Methodology. Order No. 32176.

The purpose of utilizing the IRP Methodology for large QF projects is to more precisely value the energy being delivered. *Id.* at 10. The IRP Methodology recognizes the individual generation characteristics of each project by assessing when the QF is capable of delivering its resources against when the utility is most in need of such resources. The resultant pricing is reflective of the value of QF energy to the utility. Utilization of the IRP Methodology does not negate the requirement under PURPA that the utility purchase the QF energy.

Based upon the record in the GNR-E-10-04 case, the Commission subsequently found that a "convincing case has been made to temporarily reduce the eligibility cap for published avoided cost rates from 10 aMW to 100 kW for wind and solar only while the Commission further investigates" other avoided cost issues. Order No. 32176 at 9 (emphasis original). On reconsideration, the Commission affirmed its decision to temporarily reduce the eligibility cap for published avoided cost rates from 10 aMW to 100 kW. Order No. 32212. Thus, the eligibility cap for the published avoided cost rate for wind and solar QF projects was set at 100 kW effective December 14, 2010. No party appealed from the Orders in Case No. GNR-E-10-04.

C. The Prior Final Order in this Case

On June 8, 2011, the Commission issued Order No. 32254 disapproving the Agreements between Idaho Power and each of the five wind projects – Alpha, Bravo, Charlie, Delta and Echo.¹ The Commission determined that the Agreements were not fully executed (signed by both parties) prior to December 14, 2010, the date upon which the eligibility for published avoided cost rates changed from 10 aMW to 100 kW for wind and solar projects. Consequently, the Commission found that the rates contained in the Agreements did not comply with Order No. 32176 because each of the projects requesting published avoided cost rates are in excess of 100 kW. Order No. 32254 at 10. The “old” 10 aMW published rate is available only to non-wind and non-solar QFs.

The Projects signed the Agreements on December 13, 2010, and Idaho Power signed on December 15, 2010. The Commission noted that the Agreements contain language regarding the effective date. The terms of the Agreements unequivocally state that the “Effective Date” of the Agreements is “The date stated in the opening paragraph of this . . . Agreement representing the date upon which this [Agreement] was fully executed by both Parties.” Agreements ¶ 1.10 (emphasis added). The opening paragraph is dated “this 15 day of December, 2010.” We stated that “[t]he Commission does not consider a utility and its ratepayers obligated until both parties have completed their final reviews and signed the agreement.” Order No. 32254 at 9. We found that “a thorough review is appropriate and necessary prior to signing Agreements that obligate ratepayers to payments in excess of \$700 million” over the 20-year term of the Agreements. *Id.* at 8. The Commission established a bright line rule that for a wind or solar QF larger than 100 kW to be eligible for published avoided cost rates, a Firm Energy Sales Agreement/Power Purchase Agreement must have been executed, i.e., signed by both parties, prior to the December 14, 2010, effective date of the change in eligibility criteria. *Id.* at 10. The Commission additionally found that it was “not in the public interest to allow parties with contracts executed on or after December 14, 2010, to avail themselves of an eligibility cap that is no longer applicable.” *Id.* at 9.

¹ The five projects had previously filed consolidated comments maintaining that the “relevant facts for each of these five projects are substantially similar.” Project Comments at n.1. Consequently, the Commission found it reasonable and appropriate to consolidate the cases and issue a consolidated final Order. Order No. 32254 n.1.

PETITION FOR RECONSIDERATION

On June 29, 2011, the Projects filed a timely Joint Petition for Reconsideration. *Idaho Code* § 61-626. The Projects allege that the Commission's Order is arbitrary and capricious and not in conformity with state or federal law. Specifically, the Projects raise four arguments: (1) a QF is entitled to the rates that are in effect on the date the QF incurred a legally enforceable obligation; (2) the Commission's bright line rule is contrary to controlling Idaho case law regarding contract formation; (3) the Commission erroneously failed to apply "grandfather tests" to determine the Projects' eligibility for published rates; and (4) the Commission's bright line rule is in violation of the rulemaking requirements of the Idaho Administrative Procedures Act. The Projects request that the Commission reconsider its decision and allow "written briefing submitted by the parties, and evidentiary proceedings." Reconsideration at 7.

Idaho Power filed an answer to the Projects' Petition for Reconsideration. Idaho Power states that the Commission's Order is based on substantial and competent evidence. Idaho Power further maintains that the Commission regularly pursued its authority and was acting within its discretion in choosing to disapprove the Agreements. Answer at 2. Consequently, Idaho Power asks that the Projects' Petition for Reconsideration be denied.

ISSUES ON RECONSIDERATION

A. Legal Standards

Reconsideration provides an opportunity for a party to bring to the Commission's attention any question previously determined and thereby affords the Commission an opportunity to rectify any mistake or omission. *Washington Water Power Co. v. Kootenai Environmental Alliance*, 99 Idaho 875, 879, 591 P.2d 122, 126 (1979). The Commission may grant reconsideration by reviewing the existing record, by written briefs, or by evidentiary hearing. IDAPA 31.01.01.311.03. If reconsideration is granted, the Commission must complete its reconsideration within 13 weeks after the deadline for filing petitions for reconsideration. *Idaho Code* § 61-626(2).

Consistent with the purpose of reconsideration, the Commission's Procedural Rules require that petitions for reconsideration "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." Rule 331.01, IDAPA 31.01.01.331.01. Rule 331

further requires that the petitioner provide a “statement of the nature and quantity of evidence or argument the petitioner will offer if reconsideration is granted.” *Id.*

B. Legally Enforceable Obligation – Federal Law

The Projects argue that, pursuant to 18 C.F.R. § 292.304(d)(2)(ii), a QF is entitled to the rates that are in effect on the date the QF incurred a legally enforceable obligation to provide energy. The Projects maintain that the “obligation to purchase a QF’s output is created by the QF committing itself to sell to an electric utility, which also commits the electric utility to buy from the QF.” Reconsideration Petition at 5. Based on this premise, the Projects argue that the Commission’s Order is arbitrary and capricious and not in conformity with controlling federal law because it requires a utility’s signature to establish a legally enforceable obligation.

Commission Findings: The Idaho Supreme Court has held that “[t]he implementation of PURPA as it relates to cogeneration and small power producers, and the regulations promulgated by FERC, have been largely left to the regulatory authorities of the individual states.” *A.W. Brown Company, Inc. v. Idaho Power Company*, 121 Idaho 812, 816, 828 P.2d 841, 845 (1992). “FERC regulations grant the states latitude in implementing the regulation of sales and purchases between QFs and electric utilities.” Order No. 32262 *citing Federal Energy Regulatory Commission v. Mississippi*, 456 U.S. 742, 102 S.Ct. 2126, 72 L.Ed.2d 532 (1982). As we stated in our final Order, “[a]ccording to the FERC, ‘it is up to the States, not [FERC] to determine the specific parameters of individual QF power purchase agreements, including the date at which a legally enforceable obligation is incurred under State law.’” Order No. 32254 at 9 *citing Rosebud Enterprises v. Idaho PUC*, 128 Idaho 609, 623-624, 917 P.2d 766, 780-781 (1996) *citing West Penn Power Co.*, 71 FERC ¶ 61,153 (1995).

The premise of the Projects’ argument is correct: QFs have the right to choose to have rates calculated at the time that a legally enforceable obligation is incurred. Reconsideration at 5. However, this Commission determined that the parties entered into a legally enforceable obligation at the time that both parties executed the power purchase agreement. We find that, for each of these five projects, a legally enforceable obligation was incurred on December 15, 2010. By their very terms the Agreements were not effective until December 15, 2010. Agreement ¶ 1.10. On that date, wind projects larger than 100 kW were no longer entitled to the 10 MW published avoided cost rate. In determining when the parties incurred a legally enforceable obligation, we properly exercised the authority granted us by

FERC. “For purposes of [FERC] regulations, the critical date is the date on which a legally enforceable obligation is incurred, and choosing that date for a specific QF is the responsibility of the States, not of [FERC].” *West Penn Power Co.*, 71 FERC ¶ 61153, 61495 (1995).

The Projects cite *JD Wind 1, LLC*, 129 FERC ¶ 61,148, in support of their proposition that a legally enforceable obligation is incurred at the time the QF commits itself to sell to an electric utility. In that case, six separate QFs developed by John Deere Renewables petitioned FERC to overturn a Texas PUC decision denying the projects long-term contracts at avoided cost rates calculated at the beginning of the contract. The Texas PUC found that wind QFs were not entitled to long-term legally enforceable obligations because of the intermittent, or non-firm, nature of the resource. FERC concluded that the Texas PUC’s Order, limiting the award of a legally enforceable obligation to only those QFs that provide firm power, was inconsistent with FERC regulations implementing PURPA. *JD Wind* does not consider or analyze when a legally enforceable obligation is incurred under PURPA. The Projects’ effort to argue that this case is controlling on the issues of contract formation and timing of a legally enforceable obligation is misleading and without merit.

Nothing cited by the Projects demonstrates that the Commission’s Order is arbitrary or capricious or inconsistent with federal law. On the contrary, FERC specifically delegated authority to the States to determine when and how a legally enforceable obligation is created. We find that a legally enforceable obligation is incurred and a contract is fully executed upon obtaining the signature of both parties. This finding is based on substantial and competent evidence. The Commission’s finding is also in the public interest and strikes a balance between “the local public interest of a utility’s electric consumers and the national public interest in development of alternative energy sources.” *Rosebud Enterprises*, 128 Idaho at 613, 917 P.2d at 770. Allowing a project to avail itself of an eligibility cap (and therefore published rates) that is no longer applicable could cause ratepayers to pay more than the utility’s avoided cost which “would be in direct violation of PURPA policies.” *A.W. Brown Company v. Idaho Power Company*, 121 Idaho 812, 818, 828 P.2d 841, 847 (1992). Based on the foregoing, the Projects’ request for reconsideration on this issue is denied.

C. Bright Line Test – Contrary to Idaho Contract Formation Case Law

The Projects argue that the Commission’s bright line rule that a firm energy sales agreement/power purchase agreement is not enforceable until it is executed by both parties is

erroneous because it is not in conformity with controlling Idaho case law regarding contract formation. Reconsideration at 5. The Projects maintain that the parties satisfied the requirements of contract formation before December 14, 2010, despite the lack of Idaho Power's signature. The Projects cite *Evco Sound & Electronics*, 148 Idaho 357, 365, 223 P.3d 740, 748 (2009), for the proposition that contracts can be enforceable "regardless of whether signed by either party." Reconsideration at 5.

Commission Findings: As a threshold matter, we note that a firm energy sales agreement/power purchase agreement differs from a standard offer and acceptance contract. Unlike standard offer and acceptance contracts, PURPA agreements are subject to review and approval by this Commission pursuant to Idaho statutes. *Idaho Code* §§ 61-502 and 61-503. "The Commission, as part of its statutory duties, determines reasonable rates and investigates and reviews contracts." *A.W. Brown Company v. Idaho Power Company*, 121 Idaho 812, 816, 828 P.2d 841, 845 (1992). Thus, QF power purchase agreements are different from typical or standard contracts. Furthermore, the Court's analysis supports our decision in this case. In *Evco Sound*, the Idaho Supreme Court stated that a meeting of the minds "is evidenced by a manifestation of intent to contract which takes the form of an offer and acceptance." *Evco Sound & Electronics, Inc. v. Seaboard Surety Company*, 148 Idaho 357, 365, 223 P.3d 740, 748 (2009) (emphasis added). Here we find that Idaho Power did not accept the Projects' offer to sell power until after it completed a final review of the contract terms and conditions and signed the Agreement.

Prior to signing, Idaho Power performs a thorough review of the terms of the contract. As we stated in our final Order, a comprehensive review of a power purchase agreement is consistent with this Commission's directive to utilities that they assist the Commission in its gatekeeper role when reviewing QF contracts. Order No. 32254 at 9. We find that it is reasonable and consistent with the authority granted us under PURPA, and that the public interest requires that each party have a full and final review of the contract before signing and obligating the utility and its ratepayers to hundreds of millions of dollars in energy payments over the 20-year life of the agreement. The Projects were given unrestricted time to adequately review the contracts before signing. Idaho Power is obligated to be as diligent in its review prior to asking the Commission to commit ratepayer dollars.

The Projects also argue that their Agreements were effective prior to December 14, 2010, because of the Projects' offer to sell their energy to Idaho Power. However, this argument has no basis given the very terms of the Agreements themselves. Each Agreement states that the "effective date" of the Agreement is represented by the date upon which the Agreement was fully executed by both parties. Agreements ¶ 1.10. It is not disputed that December 15, 2010, is the date upon which the Agreements were fully executed by both parties. It is clear and unambiguous that the Agreements became effective and a legally enforceable obligation occurred when both parties signed the Agreements.

We also recognize that the Agreements also provide that the Agreement will not become effective *until the Commission has approved* all of the terms and conditions and declares that all payments made by Idaho Power to each project for purchases of energy will be allowed as prudently incurred expenses for ratemaking purposes. Agreements ¶ 21.1 (emphasis added). An effective date based on Commission approval of the Agreement has been supported on Idaho Supreme Court review.² No one has argued that the legally enforceable obligation arises only when the Commission has approved the Agreements. Based upon this record, we find that the legally enforceable obligation is the date that the parties executed the Agreements and agreed to be bound by the terms contained therein. The considerations made by this Commission are authorized by PURPA and FERC regulations. The Projects have failed to demonstrate that we were not regularly pursuing our authority. Consequently, reconsideration of this issue is denied.

D. Grandfather Tests

The Projects next argue that the Commission's decision to not consider the application of grandfathering criteria is arbitrary and capricious. The Projects claim that they have "satisfied all of the Commission's prior tests for establishing grandfathered rights to previously available avoided cost rates, including a prior test used the other time rates became unavailable because the Commission reduced the eligibility cap for published rates." Reconsideration at 6 citing *In the Matter of Petition of Cassia Wind to Determine Exemption Status*, IPC-E-05-35, Order No. 29954. The Projects contend that they satisfied the requirements

² "Rosebud is not entitled to a lock-in of an avoided cost rate until it has entered into a legally enforceable *and IPUC approved* obligation for the delivery of energy and capacity." *Rosebud Enterprises*, 128 Idaho at 620, 917 P.2d at 777 (emphasis added).

of the Commission's grandfathering precedent before the effective date of the eligibility cap reduction.

Commission Findings: The Projects' reliance on Order No. 29954 is misplaced. First, the Commission explicitly stated that "we look at the totality of the facts" in assessing entitlement to grandfathering status. Order No. 29954 at 2. In these Agreements, the "effective date" of each Agreement is after the Commission lowered the eligibility cap for the published avoided cost rate to 100 kW. Thus, the parties' own Agreement does not support that use of grandfathering. Second, the Idaho Supreme Court has stated that "[c]onferment of grandfathered status on [a] qualifying facility is essentially an IPUC finding that a legally enforceable obligation to sell power existed by a given date. *Such a finding is within the discretion of the state regulatory agency.*" *Rosebud Enterprises*, 128 Idaho 624, 917 P.2d at 781 (emphasis added). In this consolidated case, we found that each of the five projects incurred a legally enforceable obligation on December 15, 2010. Thus, there is no occasion to resort to the use of grandfathering criteria. Based upon this record, we find that the two days time Idaho Power took to complete its final review of the Agreements was reasonable. This finding is consistent with our authority under federal and state law.

Third, our Supreme Court has noted, "Because regulatory bodies perform legislative as well as judicial functions in their proceedings, they are not so rigorously bound by the doctrine of *stare decisis* that they must decide all future cases in the same way as they have decided similar cases in the past." *Rosebud Enterprises v. Idaho PUC*, 128 Idaho 609, 618, 917 P.2d 766, 775 (1996) *citing Intermountain Gas Co. v. Idaho PUC*, 97 Idaho 113, 119, 540 P.2d 775, 781 (1975). "So long as the Commission enters sufficient findings to show that its action is not arbitrary and capricious, the Commission can alter its decisions." *Washington Water Power v. Idaho PUC*, 101 Idaho 567, 579, 617 P.2d 1242, 1254 (1980). Therefore, simply because grandfathering criteria have been used in consideration of QF eligibility to published rates in the past does not mean that this Commission must decide all future QF eligibility cases in the same manner.

The criteria considered in Order No. 29954 for determining project eligibility to published avoided cost rates following a change in the eligibility cap are substantially different than the grandfathering criteria that these five projects initially presented and argued as

precedent in their comments.³ Regardless of whether it is a change in the eligibility cap for access to published rates or a change in the rates themselves, the Commission is not bound by prior grandfathering treatment decisions so long as our decision is based on substantial and competent evidence in the record and we enter sufficient findings to demonstrate that is the case. In contrast to the change in eligibility for published rates in 2005,⁴ no criteria were enunciated or established by this Commission to determine project eligibility through the use of grandfathering for QF agreements executed on or after December 14, 2010. Because the Commission's decision to not utilize grandfathering criteria was not arbitrary and/or capricious, we deny reconsideration on this issue. As stated in our final Order, it is adverse to the public interest to allow parties who have not executed contracts to avail themselves of an eligibility cap that is no longer in place. *Id.* at 9. Grandfathering contracts that were executed on or after December 14, 2010, and allowing them to utilize an eligibility cap that is no longer applicable would be contrary to our determination regarding what the public interest requires. This finding is supported by substantial and competent evidence in the record and as explained in our orders.

Moreover, no appeal was taken from the Commission's Order to lower the eligibility cap. *Idaho Code* § 61-625 prohibits collateral attacks of Commission Orders that are final and conclusive. "A different rule would lead to endless consideration of matters previously presented to the Commission and confusion about the effectiveness of Commission orders." *Utah-Idaho Sugar Co. v. Intermountain Gas Co.*, 100 Idaho 368, 373, 597 P.2d 1028, 1063 (1979). The Projects are, in essence, collaterally attacking the Commission's prior Order reducing the eligibility cap by arguing that grandfathering criteria should apply. However, no party timely appealed the Commission's decision in that case. Case No. GNR-E-10-04; Order Nos. 32176 and 32212. Therefore, the Commission's decision to lower the eligibility cap from 10 aMW to 100 kW for wind and solar projects effective December 14, 2010, is a final and conclusive Order of the Commission that is not subject to collateral attack.

³ The Projects initially argued that, "[w]hen the published rates change, or become otherwise unavailable to a QF before the QF can obtain a contract, the QF is entitled to grandfathered rates if it can 'demonstrate that 'but for' the actions of [the utility, the QF] was otherwise entitled to a power purchase contract." Comments at 7. The Projects also alleged that they satisfied the "pre-filed complaint" test. These criteria have been utilized by this Commission for *rate changes*, not changes in the eligibility cap.

⁴ The Commission outlined criteria that it would consider in determining whether a project was eligible for the previous, no longer applicable, eligibility cap for published avoided cost rates, i.e., whether a project would be "grandfathered" and permitted to utilize the old eligibility cap. Order No. 29839.

E. Rulemaking and the Idaho Administrative Procedures Act

Finally, the Projects argue that the Commission’s bright line rule is in violation of the rulemaking requirements of the Idaho Administrative Procedures Act and is, therefore, void. The Projects contend that because the Commission explicitly stated that it was not implementing a rate change, the APA is applicable to the Commission’s non-ratemaking act of establishing a new rule. Reconsideration at 7 citing *A.W. Brown*, 121 Idaho 812, 828 P.2d 841.

Commission Findings: The Projects mischaracterize the nature of the Commission’s actions and misconstrue the APA analysis of the Court in *A.W. Brown*. “The Commission, as part of its statutory duties, determines reasonable rates and investigates *and reviews contracts*.” *A.W. Brown Company v. Idaho Power Company*, 121 Idaho 812, 816, 828 P.2d 841, 845 (1992) (emphasis added). These duties are legislative, not adjudicative, in nature. The Projects’ attempt to void the Commission’s findings and its basis for disapproval of the Agreements by arguing a violation of the APA is without merit. The Commission, as an agency of the legislative branch of government, exercises delegated legislative powers to make rates. *Id. Idaho Code* § 61-502 defines “Determination of rates” as

Whenever the commission, after a hearing had upon its own motion or upon complaint, shall find that . . . the rules, regulations, practices, or contracts [by any public utility] affecting such rates . . . are unjust, unreasonable, discriminatory or preferential, or in any wise in violation of any provision of law . . . the commission shall determine the just, reasonable or sufficient rates, fares, tolls, rentals, charges, classifications, rules, regulations, practices or contracts to be thereafter observed and in force

Review of contracts or agreements that contain PURPA rates falls clearly within the Commission’s ratesetting, i.e., legislative, function. “The APA specifically does not apply to ‘those in the legislative or judicial branch.’ I.C. § 67-5201.” *A.W. Brown Company v. Idaho Power Company*, 121 Idaho 812, 819, 828 P.2d 841, 848 (1992). Therefore, reconsideration of this issue is denied.

CONCLUSION

The Commission has jurisdiction over Idaho Power, an electric utility, and the issues raised in this matter pursuant to the authority and power granted it under Title 61 of the Idaho Code and the Public Utility Regulatory Policies Act of 1978 (PURPA). The Commission has authority under PURPA and the implementing regulations of the Federal Energy Regulatory Commission (FERC) to set avoided cost rates, to order electric utilities to enter into fixed-term

obligations for the purchase of energy from qualified facilities (QFs) and to implement FERC rules. *Rosebud Enterprises, Inc. v. Idaho Public Utilities Commission*, 128 Idaho 609, 612, 917 P.2d 766, 769 (1996).

Although FERC promulgated the general scheme and rules, it left the actual implementation of PURPA to the state regulatory authorities. *Id.*, 128 Idaho at 614, 917 P.2d 771. FERC rules insist that rates for purchases from QFs be just and reasonable to ratepayers, in the public interest, and not discriminatory against QFs. 18 C.F.R. § 292.304(a)(1). Notably, PURPA and the implementing regulations require only that published/standard avoided cost rates be established and made available to QFs with a design capacity of 100 kW or less. 18 C.F.R. § 292.304(c). When this Commission reduced wind and solar projects' eligibility to published avoided cost rates we unequivocally stated that continuing to allow large wind and solar projects access to published avoided cost rates for projects greater than 100 kW was "clearly not in the public interest." Order No. 32262. We reaffirmed that determination in the present case by finding that "it is not in the public interest to allow parties with contracts executed on or after December 14, 2010, to avail themselves of an eligibility cap that is no longer applicable." Order No. 32254 at 9. The Projects have failed to demonstrate that the Commission's findings are unreasonable, unlawful, erroneous, or not in conformity with the law. Rule of Procedure 331, IDAPA 31.01.01.331.01.

The Firm Energy Sales Agreements between Idaho Power and the five projects were executed on December 15, 2010. The Agreements recite that each project will have a maximum capacity amount of 29.9 MW (except Charlie – 27.6 MW). Under normal and/or average conditions, each project will not exceed 10 aMW on a monthly basis. Because the size of each of these wind projects exceeds 100 kW, they are not eligible to receive the published avoided cost rate. Nevertheless, the Projects are entitled to PURPA contracts with avoided cost rates calculated using the IRP Methodology.

ORDER

IT IS HEREBY ORDERED that the Joint Petition for Reconsideration filed by Alpha, Bravo, Charlie, Delta and Echo wind projects is denied.

THIS IS A FINAL ORDER ON RECONSIDERATION. Any party aggrieved by this Order or other final or interlocutory Orders previously issued in this Case Nos. IPC-E-10-51,

10-52, 10-53, 10-54, or 10-55 may appeal to the Supreme Court of Idaho pursuant to the Public Utilities Law and the Idaho Appellate Rules. See *Idaho Code* § 61-627.

DONE by Order of the Idaho Public Utilities Commission at Boise, Idaho this 27th day of July 2011.



PAUL KJELLANDER, PRESIDENT



MACK A. REDFORD, COMMISSIONER



MARSHA H. SMITH, COMMISSIONER

ATTEST:



Jean D. Jewell
Commission Secretary

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