IDAHO POWER®
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DONOVAN E. WALKER
Lead Counsel
dwalker@idahopower.com

September 7, 2012

VIA HAND DELIVERY

Jean D. Jewell, Secretary
Idaho Public Utilities Commission
472 West Washington Street
Boise, Idaho 83702

Re: Case Nos. IPC-E-10-56, IPC-E-10-57, and IPC-E-10-58
Firm Energy Sales Agreements of Murphy Flat Mesa, LLC; Murphy Flat Energy, LLC; Murphy Flat Wind, LLC – Idaho Power Company's Answer and Motion to Dismiss

Dear Ms. Jewell:

Enclosed for filing in the above matter are an original and Seven (7) copies of Idaho Power Company's Answer and Motion to Dismiss.

Very truly yours,

Donovan E. Walker

DEW:evp
Enclosures

1221 W. Idaho St. (83702)
P.O. Box 70
Boise, ID 83707

DONOVAN E. WALKER (ISB No. 5921)
JULIA A. HILTON (ISB No. 7740)
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
jhilton@idahopower.com

Attorneys for Idaho Power Company

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IDAHO PUBLIC
UTILITIES COMMISSION

BEFORE THE IDAHO PUBLIC UTILITIES COMMISSION

IN THE MATTER OF THE APPLICATION OF IDAHO POWER COMPANY FOR A DETERMINATION REGARDING A FIRM ENERGY SALES AGREEMENT BETWEEN IDAHO POWER AND MURPHY FLAT MESA, LLC	CASE NO. IPC-E-10-56 IDAHO POWER COMPANY'S ANSWER AND MOTION TO DISMISS
IN THE MATTER OF THE APPLICATION OF IDAHO POWER COMPANY FOR A DETERMINATION REGARDING A FIRM ENERGY SALES AGREEMENT BETWEEN IDAHO POWER AND MURPHY FLAT ENERGY, LLC	CASE NO. IPC-E-10-57 IDAHO POWER COMPANY'S ANSWER AND MOTION TO DISMISS
IN THE MATTER OF THE APPLICATION OF IDAHO POWER COMPANY FOR A DETERMINATION REGARDING A FIRM ENERGY SALES AGREEMENT BETWEEN IDAHO POWER AND MURPHY FLAT WIND, LLC	CASE NO. IPC-E-10-58 IDAHO POWER COMPANY'S ANSWER AND MOTION TO DISMISS

Idaho Power Company ("Idaho Power" or "Company"), pursuant to RP 57, hereby Answers the Petition of Murphy Flat Mesa, LLC; Murphy Flat Energy, LLC; and

Murphy Flat Wind, LLC (collectively "Murphy Wind")[1] to Modify Order No. 32255 ("Petition") and to approve the previously disapproved Firm Energy Sales Agreements ("FESA") between Murphy Wind and Idaho Power. Any allegation not specifically admitted herein shall be considered to be denied. *See* RP 57.02.a.

In addition, Idaho Power, pursuant to RP 56, hereby respectfully moves the Idaho Public Utilities Commission ("Commission") to dismiss Murphy Wind's Petition.

I. INTRODUCTION

The Commission issued Final Order No. 32255 rejecting Murphy Wind's three proposed FESAs with Idaho Power for its Public Utility Regulatory Policies Act ("PURPA") qualifying facility ("QF") wind projects on June 8, 2011. Murphy Wind did not petition for reconsideration of Order No. 32255, nor has it sought any other type of state, federal, administrative, or judicial review of that Order. On August 16, 2012, more than 14 months after the Commission's Order, Murphy Wind filed a Petition asking the Commission to modify Order No. 32255. Murphy Wind's Petition also contained a request for expedited treatment, which was denied in Order No. 32629. Murphy Wind contends that two Federal Energy Regulatory Commission ("FERC") orders, regarding Cedar Creek Wind and Rainbow Ranch Wind, "constitute new facts or information justifying modification of the Murphy Flat Order." Petition p. 2.

[1] In its Notice of Petition, Order No. 32629, for this matter, the Commission directed Idaho Power "to address whether the three Murphy Flat PPAs in these cases have been assigned to other principals or owners pursuant to Section 22 of the PPAs dated December 15, 2010." Idaho Power is not aware of any "official" assignment pursuant to Section 22 of the PPA, and has not consented to the same for any entity. An entity called First Wind requested consent to assignment of the PPAs, but Idaho Power refused as those PPAs were not approved by the Commission, and therefore not effective with no contract to assign. Idaho Power is aware of numerous and various legal entities and individuals that have been involved with the ownership/development/control of the wind projects associated with the FESAs, and at times this has caused significant confusion, delay, and other problems.

Murphy Wind's Petition misstates and exaggerates the FERC orders. First of all, Murphy Wind's requested relief is an impermissible collateral attack on a final order of this Commission that Murphy Wind failed to take action on for over one year. Secondly, Murphy Wind's requested relief is barred by the doctrines of collateral estoppel and res judicata. Third, and most importantly, Murphy Wind's requested relief is contrary to the public interest and should be denied.

FERC has stated nothing with regard to Murphy Wind's Order No. 32255. Even if one assumes that FERC would say the same thing that it said in the Cedar Creek and Rainbow Wind FERC orders with regard to Murphy Wind, it still does not require this Commission to grant the relief requested by Murphy Wind. In fact, FERC expressly stated in its orders that it is not making a determination as to whether a legally enforceable obligation actually existed pursuant to the facts of those cases, as that determination is a matter that must be decided by the Idaho Commission. In delegating that authority to the State in its implementation of PURPA, FERC is precluded from conducting such "as applied" determinations. In a case such as Murphy Wind's, where because of Murphy Wind's own failure to act, pursue its legal claims, or preserve its ability to challenge the Commission's order for over one year, a procedural bar exists at the State level. Because such "as applied" and public interest determinations are improper for a federal authority to make, and Murphy Wind is procedurally barred at the state level from the relief it requests, there may be no legal remedy for Murphy Wind to pursue. Murphy Wind confuses the issues related to whether a QF can bring actions pursuant to 210(g) and 210(h) of PURPA with whether or not there is an available remedy as a result of such actions. These two are separate and distinct questions.

FERC has addressed the fact that a QF can bring a 210(h) action independently of a 210(g), or state, action with regard to the implementation of PURPA, but this is a separate and distinct question from whether there is any available relief that can be granted, especially here where the federal authority has been delegated and consequently limited with regard to "as applied" determinations, and the action may be barred at the state level, which is the appropriate authority for granting the relief requested.

Murphy Wind asks the Commission to consider "new facts or information" that have arisen subsequent to its final determination in Murphy Wind's case, of which Murphy Wind failed to adequately challenge or preserve. Without waiving the arguments that such requested relief is procedurally barred, if the Commission is to consider these arguments when determining whether to exercise its discretion, it should consider all of "new facts or information" that have occurred over the course of those 14 months. This includes the Commission's determination in GNR-E-11-03 that the avoided cost rates contained in Murphy Wind's disapproved FESAs do not reflect Idaho Power's avoided costs and are not just and reasonable, nor in the public interest. Order No. 32498 at 2 (March 22, 2012). Murphy Wind's request for this Commission to exercise its discretion in modifying its previously final Order No. 32255, asks the Commission to reinstate FESAs containing rates that have subsequently found to be contrary to the public interest and inconsistent with PURPA. Therefore, even if the Commission determines there is not a procedural bar, it should dismiss Murphy Wind's Petition in the public interest.

Idaho Power's Answer and Motion to Dismiss is based upon the procedural status of the Murphy Wind Order No. 32255. The questions related to if a legally enforceable obligation arose, if so when did it arise, and if so what does it mean are all questions that are separate and apart from whether this Commission can and/or will modify its previously final, conclusive, non-appealable Order. Idaho Power advocates in this Answer that the Commission not do so. Should the Commission determine that it will modify Order No. 32255, then Idaho Power requests that a prehearing conference be scheduled to set the schedule and procedure for the required factual investigation, case schedule, and possible hearing needed to make the required determinations.

II. MOTION TO DISMISS

Murphy Wind petitions the Commission to modify its final Orders in Case Nos. IPC-E-10-56, ICP-E-10-57, and IPC-E-10-58, and asks the Commission for approval of the FESAs that the Commission denied in those final Orders. Murphy Wind asserts that the Commission should modify an otherwise final order under IC § 61-624. Murphy Wind's Petition at 11.

Murphy Wind's Petition is an impermissible collateral attack upon the final Orders of the Commission, is barred by the doctrines of res judicata and collateral estoppel, is contrary to the public interest, and, therefore, Idaho Power respectfully moves the Commission to dismiss Murphy Wind's Petition.

A. Murphy Wind's Petition Is an Impermissible Collateral Attack on Final Orders of the Commission.

On June 8, 2011, the Commission determined that the Murphy Wind projects did not create a legally enforceable obligation prior to December 14, 2010, and denied approval of the FESAs. Order No. 32255 ("Murphy Wind Order"). Murphy Wind chose

not to file a Petition for Reconsideration and therefore when it failed to Petition for Reconsideration within 21 days of the Commission's Order, the Murphy Wind Order became final and non-appealable on June 30, 2011. RP 331; I.A.R. 14(b) ("An appeal as a matter of right from an administrative agency may be made only by physically filing a notice of appeal with the Public Utilities Commission within 42 days... from when an application for rehearing is denied."); I.A.R. Rule 21 ("The failure to physically file a notice of appeal... within the time limits prescribed by these rules shall be jurisdictional and shall cause automatic dismissal of such appeal or petition.").

"All orders and decisions of the commission which have become final and conclusive shall not be attacked collaterally." Idaho Code § 61-625. A final order of the Commission must be challenged either by petition to the Commission for rehearing or by appeal to the Idaho Supreme Court as provided by Idaho Code §§ 61-626 and 61-627. *Utah-Idaho Sugar Co. v. Intermountain Gas Co.,* 100 Idaho 368, 373-374, 595 P.2d 1058 (1979). A party or interested person seeking to challenge a Commission order must file a Petition for Reconsideration within 21 days of the Commission's order. Commission Orders must be appealed to the Idaho Supreme Court within 42 days of the Commission's action either denying reconsideration or, if granted, the Commission's decision on reconsideration. I.A.R. 14(b); Idaho Code § 61-627. Rule 14(b) of the Idaho Appellate Rules reads:

> An appeal as a matter of right from an administrative agency may be made only by physically filing a notice of appeal with the Public Utilities Commission or the Industrial Commission within 42 days from the date evidenced by the filing stamp of the clerk or secretary of the administrative agency on any decision, order or award appealable as a matter of right. *** The time for an appeal from such decision, order or award of the public utilities commission begins to run when an

> application for rehearing is denied, or, if the application is granted, after the date evidenced by the filing stamp on the decision on rehearing.

I.A.R. 14(b); *see Neal v. Harris*, 100 Idaho 348, 350 (1979) (noting that Rule 14 limits time to appeal decisions of Commission). No party or entity challenged the Commission's February 7, 2011, Order No. 32176 determining to lower the standard, or published, rate eligibility cap from 10 average megawatts to 100 kilowatts. The Commission issued its Murphy Wind Order on June 8, 2011. Murphy Wind did not file a Petition for Reconsideration, nor did it challenge the Order in any manner, or in any other forum. Therefore, the Murphy Wind Order became final on June 30, 2011, and was no longer subject to reconsideration, appeal, or review. I.A.R. 21 (2011) ("*Effect of failure to comply with time limits*. The failure to physically file a notice of appeal . . . with the . . . administrative agency... within the time limits prescribed by these rules, shall be jurisdictional and shall cause automatic dismissal of such appeal or petition . . ."); Idaho Code § 61-625 (2011) ("All orders and decisions of the [Idaho Public Utilities] Commission which have become final and conclusive shall not be attacked collaterally."); *see Welch v. Del Monte Corp.*, 128 Idaho 513, 516 (1996) (applying I.A.R. 14(b) to un-appealed order of Idaho Industrial Commission; holding that findings of fact and conclusions of law contained in agency's order are conclusive and preclude further adjudication of those facts and issues).

The law of the case is now settled, and may not be attacked on appeal or collaterally. This is true even if the Commission's application of the law later is determined to be incorrect.

> A final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or

> could have been raised in that action . . . . Nor are the *res judicata* consequences of a final, unappealed judgment on the merits altered by the fact that the judgment may have been wrong or rested on a legal principle subsequently overruled in another case . . . . As this Court explained in *Baltimore S.S. Co. v. Phillips*, 274 U.S. 316, 325 (1927) ... "A judgment merely voidable because based upon an erroneous view of the law is not open to collateral attack, but can be corrected only by a direct review and not by bringing another action upon the same cause [of action]."

Federated Dept. Stores v. Moitie, 452 U.S. 394, 398 (1981); *see also* Idaho Code § 61-625 ("All orders and decisions of the commission which have become final and conclusive shall not be attacked collaterally.").

The legal proscriptions barring collateral attack are supported by strong policy considerations, as explained by the Idaho Supreme Court:

> The legislature has afforded the orders of the [Idaho Public Utilities C]ommission a degree of finality similar to that possessed by judgments made by a court of law. I.C. § 61-625 ... Final orders of the [Idaho Public Utilities] Commission should ordinarily be challenged either by petition to the [Idaho Public Utilities] Commission for rehearing or by appeal to this Court as provided by I.C. § 61-626 and 627; Id. Const. Art. 5, § 9. *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, 373-374 (1979) (emphasis added). Such policy concerns are highly relevant here because, in addition to Murphy Wind, there are three similarly situated developers whose power purchase agreements the Commission rejected on June 8, 2011, and who chose not to appeal. The three other developers together with Murphy Wind represent eleven projects with a combined capacity over 270 MW. Uncertainty regarding whether all developers affected by the December 14 Order remain eligible for standard rate power purchase

agreements would frustrate the ability of the Commission to ensure that published rates are just and reasonable and would frustrate Idaho Power's ability to accurately plan how it will serve its load. If the remaining parties could retain their right to appeal their June 8 Order for an indefinite future period, Idaho Power and the Commission would have to plan as though the power purchase agreements do not exist and yet run the risk of overabundance in the event they do materialize. Such a situation ultimately would result in additional cost to Idaho Power's customers and is a good example of the kind of harm prevented by Idaho's prohibition on collateral attacks of Commission orders.

Murphy Wind, without explanation, chose not to file a Petition for Reconsideration, and consequently did not file an appeal of the Commission's Orders to the Idaho Supreme Court, and now seeks to rely upon a declaratory order issued by FERC related to different projects. FERC's Notice of Intent Not to Act and Declaratory Order in the Cedar Creek and Rainbow Ranch cases does not entitle Murphy Wind to now, over one year/more than fourteen months after the deadline for reconsideration, and more than 10 months after the issuance of FERC's Cedar Creek Order, to challenge the final Murphy Wind Order disapproving its FESAs.

Consequently, the Commission should dismiss Murphy Wind's Petition as it is an impermissible collateral attack upon the final orders of the Commission.

B. Murphy Wind's Petition Is Barred By the Doctrines of Collateral Estoppel and Res Judicata.

Murphy Wind's claims were fully considered by the Commission, a final judgment was rendered on the merits, Murphy Wind failed to petition for reconsideration or subsequently appeal such decision, and Murphy Wind's claims rely upon the same operative facts that were before the Commission for the initial determination. Murphy

Wind's claims are barred by collateral estoppel (issue preclusion) and res judicata (claim preclusion).

The United States Supreme Court has clearly held that a litigant's failure to raise justiciable issues in a prior administrative proceeding precludes that litigant from raising them in a later administrative proceeding and in subsequent litigation. *See Astoria Fed. Sav. & Loan Ass'n v. Solimino*, 501 U.S. 104, 107–08 (1991); *see also* Rest. 2d. Judgments § 83, cmt. b (1982) ("Where an administrative forum has the essential procedural characteristics of a court,... its determinations should be accorded the same finality that is accorded the judgment of a court. The importance of bringing a legal controversy to conclusion is generally no less when the tribunal is an administrative tribunal than when it is a court."). Idaho courts require five factors be met for collateral estoppel to bar re-litigation of an issue decided in an earlier proceeding: (1) the party against whom the earlier decision was asserted had a full and fair opportunity to litigate the issue decided in the earlier case; (2) the issue decided in the prior litigation was identical to the issue presented in the present action; (3) the issue sought to be precluded was actually decided in the prior litigation; (4) there was a final judgment on the merits in the prior litigation; and (5) the party against whom the issue is asserted was a party or in privity with a party to the litigation. *Ticor Title Co. v. Stanion*, 144 Idaho 119, 124 (2007) (internal citations omitted).

All five factors are satisfied by the Commission's June 8 Murphy Wind Order. Murphy Wind had ample opportunity to make its case to the Commission prior to the June 8 Order, and it could also have chosen to make the arguments in a petition for reconsideration. Murphy Wind's requested relief seeks a determination that it is eligible

for standard rates, and seeks approval of the identical FESAs previously disapproved by the Commission—the identical issue the Commission ruled on in the June 8 Murphy Wind Order. Murphy Wind Petition at 13. The Commission reached a final judgment on Murphy Wind's eligibility in the June 8 Murphy Wind Order. Murphy Wind is the same party as, or has privity with, the party bound by the June 8 Murphy Wind Order. Murphy Wind, therefore, is collaterally estopped from being heard on the same issues again before this Commission.

Murphy Wind's Petition also is barred by claim preclusion, or *res judicata*. In Idaho, "*res judicata* means that in an action between the same parties upon the same claim or demand, the former adjudication concludes parties and privies not only as to every matter offered and received to sustain or defeat the claim but also every matter which might and should have been litigated in the first suit." *Magee v. Thompson Creek Mining Co.*, 268 P.3d 464, 470 (Idaho 2012) (internal citations and quotations omitted). *Res judicata* applies to decisions of administrative agencies. *Id.*; *see* Idaho Code § 61-625 ("All orders and decisions of the [Commission] which have become final and conclusive shall not be attacked collaterally.").

"The "sameness" of a cause of action for purposes of application of the doctrine of *res judicata* is determined by examining the operative fact underlying the two lawsuits." *Farmers Nat'l Bank v. Shirey*, 126 Idaho 63, 69 (1994) (internal citations and quotation marks omitted). In its petition, Murphy Wind seeks a determination from the Commission that it formed a legally enforceable obligation to sell output from its two QFs prior to December 14, 2010. Murphy Wind Petition at 7-10. This is the same claim that the Commission considered and rejected, in the June 8 Murphy Wind Order, and

which Murphy Wind elected not to petition for reconsideration or appeal to the Idaho Supreme Court. Because Murphy Wind already brought an identical claim before the Commission, and that claim resulted in a final judgment, Murphy Wind is barred by *res judicata* from bringing that same claim to this Commission again. The existence of FERC's Declaratory Order does not constitute authority to, nor require the Commission to set aside Idaho Code §§ 61-625, 61-627 and I.A.R. 14(b) and 21, and resuscitate a conclusive order in a closed docket.

C. Legally Enforceable Obligations are Not Appropriately Addressed in This Proceeding and If The Commission Determines No Procedural Bar Exists, Additional Proceedings Are Necessary to Address Murphy Wind's Substantive Claims.

The Commission should not address the substance of Murphy Wind's Petition because it is procedurally barred; however, if the Commission should determine that there is no procedural bar to Murphy Wind's Petition, Idaho Power requests additional proceedings to fully address the issues raised by its arguments surrounding a legally enforceable obligation.

Legally enforceable obligation arguments are not appropriate in this case. Murphy Wind asserts that the purpose of a legally enforceable obligation is to secure and protect the rights of qualifying facilities under PURPA. However, FERC states that the purpose of the legally enforceable obligation language in its regulations is to address "the problem of an electric utility avoiding PURPA requirements simply by refusing to enter into a contract with a QF." 137 FERC 61006, pp 9,7,10. A legally enforceable obligation cannot come into play in a situation where there is: (1) no demonstrated delay; and (2) a signed contract submitted to the Commission for review. It is simply an inappropriate circumstance in which to apply a doctrine intended to

address the situation where a utility refuses to contract. Idaho Power was willing, and in fact did, contract with Murphy Wind.

In fact, the Commission recently discussed this principle in Order No. 32635, Case Nos. IPC-E-10-61, IPC-E-10-62 (September 7, 2012) (the "Grouse Creek Order"). "We have a long history of recognizing two methods by which a QF can obtain an avoided cost rate in Idaho: (1) by entering into a signed contract with the utility; ***or*** (2) by filing a meritorious complaint alleging that 'a legally enforceable obligation' has arisen and, but for the conduct of the utility, there would be a contract." Order No. 32635 p. 12 (emphasis added). The Commission explains:

> When a contract has been entered into by the parties and submitted for approval, there is no need for a determination regarding any other legally enforceable obligation. FERC refers to a legally enforceable obligation in the disjunctive – either a contract is entered into OR a legally enforceable obligation is created.

Id., p. 13 (emphasis in original).

The Commission goes on to find and conclude in the Grouse Creek Order that because the utility did not impede the QFs ability to enter into PPAs, and actually negotiated and entered into contracts with the QF, that a determination regarding a legally enforceable obligation was never triggered. *Id.*, p 15. "Because the parties have existing contracts, and we find no undue or unreasonable delay on the part of Idaho Power, a determination of the existence of a legally enforceable obligation at another point in time is unnecessary ... Here the Commission did not have to determine whether a legally enforceable obligation arose because the parties entered into written Agreements." *Id.*, p. 16-17.

In addition, if the Commission were to determine that it should consider arguments regarding a legally enforceable obligation, this would require more detailed analysis of the facts of the case. Murphy Wind claims that there are no factual issues contained in its Petition, yet its justifications for asserting that a legally enforceable obligation exists include allegations of fact that Idaho Power disputes. Petition at 12. These factual allegations are numerous, but one of the most noteworthy includes issues surrounding the authority of the signator to the Murphy Wind Project FESAs. As described in more detail in Idaho Power's Comments in IPC-E-10-56, IPC-E-10-57, and IPC-E-10-58, after receiving signed FESAs from Murphy Wind, Idaho Power received several calls from one of the projects' partners questioning who was authorized to sign the agreements and therefore, calling into doubt whether the signatures were valid. Idaho Power Comments at 7. Murphy Wind relies upon a statement that it signed the agreements prior to December 14, 2010, but fails to include information that, due to its own actions, Idaho Power could not verify whether the signature was authorized until December 15, 2010. This is but one of many factual issues in dispute.

If the Commission gets through all of the above analysis and issues, and ultimately determines that a substantive analysis regarding a legally enforceable obligation is appropriate for the circumstances of this case, and additionally that it exists in this case and when it arose, then questions still remain regarding what that legally enforceable obligation would entail. How the Commission would determine price, renewable energy credits, or other terms is unclear. In addition to the above referenced concerns, the Commission's review of each FESA must be meaningful. Asserting that a legally enforceable obligation supersedes a signed contract may, depending on its

implementation, remove the Commission's ability to determine that a signed FESA was not in the public interest. The legally enforceable obligation doctrine should not be implemented in a way that thwarts other PURPA provisions and renders Commission review of a FESA meaningless.

These issues are only some of what should be addressed in a full hearing on the substantive issues raised and therefore, if the Commission determines that it is appropriate to entertain Murphy Wind's substantive arguments, Idaho Power requests additional proceedings in order to fully address these issues.

D. The Commission Found Murphy Wind's Contracts to Be Contrary to the Public Interest, and Granting Murphy Wind's Petition for Modification would Also be Contrary to the Public Interest.

The Commission, in its review of the executed Murphy Wind FESAs, found that approval of the contracts would be contrary to the public interest and refused to approve them. *See* June 8 Murphy Wind Order at 8-9 ("We find 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."). Under PURPA's regulatory scheme, "state regulatory agencies have the authority to implement PURPA in reviewing and approving contracts for the sale of electricity." *Wheelabrator Lisbon, Inc. v. State of Conn. Dept. of Pub. Util. Control*, 531 F.3d 183, 188 (2d. Cir. 2008) (*citing Freehold Cogeneration Assocs., L.P. v. Bd. Of Reg. Comm'rs of State of N.J.*, 44 F.3d 1178, 1192 (3d. Cir. 1995)); *see also A.W. Brown*, 121 Idaho at 816 ("The Commission, as part of its statutory duties, determines reasonable rates and investigates and reviews contracts. I.C. §§ 61-502, -503." (quoting *Empire Lumber Co. v. Wash. Water Power Co.*, 114 Idaho 191, 193 (1988)). The Commission, in its role as

the regulatory authority for implementing PURPA in the state of Idaho, has an independent obligation and duty to assure that all PURPA contracts entered by Idaho Power are in the public interest. *See Rosebud Enters, Inc. v. Idaho PUC*, 128 Idaho 609, 613-14 (1996) (The Commission, in acting pursuant to PURPA, must strike a balance between "the local public interest of a utility's electric consumers and the national public interest in development of alternative energy resources."); *see also Agric. Prods. Corp. v. Utah Power & Light Co.*, 98 Idaho 23, 29 (1976) ("Private contracts with utilities are regarded as entered into subject to reserved authority of the state to modify the contract *in the public interest*." (Emphasis added)).

The duty to ensure the public interest even supersedes the State of Idaho's Constitutional protection of private contracts. In the State of Idaho, contracts are afforded constitutional protection against interference from the state. Idaho Const. Art. I § 16 (2011). However, despite this constitutional protection, the Commission may annul, supersede, or reform the contracts of the public utilities it regulates in the public interest. *Agric. Prods. Corp.*, 98 Idaho at 29 ("Interference with private contracts by the state regulation of rates is a valid exercise of the police power, and such regulation is not a violation of the constitutional prohibition against impairment of contractual obligations."). The Commission may interfere with the contracts of a public utility and disregard Idaho Constitutional protections of contract only to prevent an adverse affect to the public interest. *Agric. Prods. Corp.*, 98 Idaho at 29.

While the Commission may not annul, supersede, or revise a PURPA contract during its term because such action would constitute utility-type regulation of a QF in violation of 18 C.F.R. § 292.602(c)(1), the Commission may review and approve a

PURPA contract at the time it is submitted by the parties for final approval, in furtherance of its state duty to ensure that the agreement is consistent with the public interest. *Crossroads Cogeneration Corp.*, 159 F.3d at 138 ("In other words, while PURPA allows the appropriate state regulatory agency to approve a power purchasing agreement, once such an agreement is approved, the state agency is not permitted to modify the terms of the agreement."). This duty and requirement exists, and the Commission's determination in this case was made, independently of the Commission's "bright-line rule" that was the subject of FERCs Notice of Intent Not to Act and Declaratory Orders in Cedar Creek and Rainbow Wind. Murphy Wind's FESAs were determined not to be in the public interest of the State of Idaho, and not to be in the interest of Idaho Power's customers.

The Murphy Wind FESAs were subject to the Commission's public interest review of PURPA contracts upon submission to the Commission for approval. Each Murphy Wind FESA specifically states:

> This Agreement shall become finally effective upon the Commission's approval of all terms and provisions hereof without change or condition and declaration that all payments to be made to Seller hereunder shall be allowed as prudently incurred expenses for ratemaking purposes.

Idaho Power's Application, Attachment No. 1 "Firm Energy Sales Agreement" at 27, Case Nos. IPC-E-10-56, IPC-E-10-57, and IPC-E-10-58. The Commission's review of the FESAs has meaning, and is not simply a formality. Upon the parties' submittal and Commission review, the Commission specifically found that approval of the Murphy Wind FESAs would be contrary to the public interests of the citizens of Idaho, even when weighed against the national public interest in developing alternative energy

resources. June 8 Murphy Wind Order at 8-9. Additionally, subsequent to the nonapproval of Murphy Wind's FESAs the Commission determined that the rates contained in Murphy Wind's FESAs were not reflective of Idaho Power's avoided cost, and consequently do not comport with the requirements of PURPA. The Commission stated, "the methodologies previously approved by this Commission, as utilized by Idaho Power, do not currently produce rates that reflect Idaho Power's avoided costs and are not just and reasonable, nor in the public interest." Case No. GNR-E-11-03, Order No. 32498 at 2 (March 22, 2012). The requirement that the Commission finally review and approve or reject the FESAs entered into by Idaho Power and a PURPA QF is the Commission's mechanism that it utilizes to meet its obligation to assure not only that the agreements satisfy FERCs PURPA requirements but also that such agreements are just and reasonable to utility customers and in the public interest. The Commission determined on two occasions, independently of its legally enforceable analysis or bright line rule regarding both parties' signature on the FESAs, that Murphy Wind's FESAs are contrary to the public interest: first, in the June 8, 2011, Order denying approval of the FESAs, and second, in its March 22, 2012, Order finding the methodology employed to derive the rates in Murphy Wind's FESA to be unjust, unreasonable, contrary to PURPA, and not in the public interest.

The Commission acted pursuant to its discretion and obligation to protect the public interest of Idaho by denying the Murphy Wind FESAs. Murphy Wind's request to disturb and to collaterally attack the Commission's findings and final Orders is contrary to the public interest, should be denied, and its Petition be dismissed.

III. CONCLUSION

For the reasons set forth above, Idaho Power respectfully requests that the Commission dismiss Murphy Wind's Petition. The Petition is an impermissible collateral attack on the June 8 Murphy Wind Order. Murphy Wind's Petition is barred by collateral estoppel and res judicata. Additionally, Murphy Wind's FESAs were found to be contrary to the public interest; the rates contained in those FESAs were found to be unjust, unreasonable, contrary to PURPA, and not in the public interest; and their request now to impermissibly collaterally attack those final Orders, when they have failed to pursue a petition for reconsideration, or an appeal of the same to the Idaho Supreme Court, or any federal review or enforcement action is likewise contrary to the public interest. Idaho Power respectfully requests that Murphy Wind's Petition be dismissed.

Respectfully submitted this 7th day of September, 2012.

DONOVAN WALKER
Attorney for Idaho Power Company

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 7th day of September 2012 I served a true and correct copy of IDAHO POWER COMPANY'S ANSWER AND MOTION TO DISMISS upon the following named parties by the method indicated below, and addressed to the following:

Commission Staff
Kristine A. Sasser
Deputy Attorney General
Idaho Public Utilities Commission
472 West Washington (83702)
P.O. Box 83720
Boise, Idaho 83720-0074

_X_ Hand Delivered
____ U.S. Mail
____ Overnight Mail
____ FAX
_X_ Email Kris.Sasser@puc.idaho.gov

Murphy Flat Mesa, LLC; Murphy Flat Energy, LLC; and Murphy Flat Wind, LLC
Ronald L. Williams
WILLIAMS BRADBURY, PC
1015 West Hays Street
Boise, Idaho 83702

____ Hand Delivered
_X_ U.S. Mail
____ Overnight Mail
____ FAX
_X_ Email ron@williamsbradbury.com

Murphy Flat Mesa, LLC; Murphy Flat Energy, LLC; and Murphy Flat Wind, LLC
Larry F. Eisenstat
DICKSTEIN SHAPIRO LLP
1825 Eye Street, Northwest
Washington, DC 20006-5403

____ Hand Delivered
_X_ U.S. Mail
____ Overnight Mail
____ FAX
_X_ Email eisenstatl@dicksteinshapiro.com

Elizabeth Paynter, Legal Assistant