Office of the Secretary
Service Date
October 12, 2012

BEFORE THE IDAHO PUBLIC UTILITIES COMMISSION

IN THE MATTER OF THE PETITION OF MURPHY FLAT MESA, LLC TO MODIFY ORDER NO. 32255 AND APPROVE A FIRM ENERGY SALES AGREEMENT ENTERED INTO BETWEEN ITSELF AND IDAHO POWER COMPANY	**CASE NO. IPC-E-10-56**
IN THE MATTER OF THE PETITION OF MURPHY FLAT ENERGY, LLC TO MODIFY ORDER NO. 32255 AND APPROVE A FIRM ENERGY SALES AGREEMENT ENTERED INTO BETWEEN ITSELF AND IDAHO POWER COMPANY	**CASE NO. IPC-E-10-57**
IN THE MATTER OF THE PETITION OF MURPHY FLAT WIND, LLC TO MODIFY ORDER NO. 32255 AND APPROVE A FIRM ENERGY SALES AGREEMENT ENTERED INTO BETWEEN ITSELF AND IDAHO POWER COMPANY	**CASE NO. IPC-E-10-58** **ORDER NO. 32664**

On June 8, 2011, the Commission issued final Order No. 32255 declining to approve three Power Purchase Agreements ("PPAs" or "Agreements") entered into between Idaho Power Company and Murphy Flat Mesa, LLC; Murphy Flat Energy, LLC; and Murphy Flat Wind, LLC (collectively referred to as the "Murphy projects" or "Petitioners") pursuant to the federal Public Utility Regulatory Policies Act of 1978 (PURPA). After issuance of Order No. 32255 (hereinafter the "*June 2011 Order*") the Murphy projects did not seek reconsideration of the Commission's *June 2011 Order* pursuant to *Idaho Code* § 61-626.

On August 16, 2012, the Murphy projects filed a Petition requesting that the Commission "modify" its *June 2011 Order* by reversing the decision and approving the three PPAs. More specifically, the projects maintain that two declaratory orders issued by the Federal Energy Regulatory Commission (FERC) subsequent to the *June 2011 Order* "constitute new facts or information justifying modification of this Commission's [*June 2011*] *Order*." Petition at 2. "Accordingly, pursuant to *Idaho Code* § 61-624 and the Idaho PUC's rules of procedure, Murphy Flat respectfully petitions the Commission to modify its [*June 2011*] *Order* and approve the [three] Agreements." *Id.* at 1-2 (footnotes omitted). In the alternative, the Petitioners request

that the Commission approve the PPAs (without reference to the FERC Orders) based upon the underlying record. The projects also requested that the Commission issue its Order on an expedited basis no later than August 31, 2012, "without an evidentiary hearing or further proceedings." *Id.* at 12.

On August 24, 2012, Idaho Power submitted a "Limited Answer" objecting to the request for expedited treatment. Limited Answer at 2. Idaho Power advanced several reasons why it should be permitted an opportunity to answer the Petition. *Id.* at 3-7. In particular, Idaho Power requested that it be granted "at least 21 days from the date of the Commission's Order" addressing the request for expedited treatment to file its full answer. *Id.* at 6-7. In the alternative, the Company urged the Commission to deny the Petition because the Murphy projects failed to exhaust their administrative remedies. *Id.* at 7.

On August 30, 2012, the Commission partially granted each party's request and issued a Scheduling Order setting an expedited schedule. Order No. 32629. The Scheduling Order directed Idaho Power to file its answer no later than September 7, 2012, and allowed the Petitioners to file a reply no later than September 14, 2012. Idaho Power filed a timely answer that included a Motion to Dismiss. The Murphy projects filed a timely but abbreviated reply. Based upon our review of the entire record in this consolidated case,[1] we deny the Petition to modify our June 2011 final Order No. 32255 and grant Idaho Power's Motion to Dismiss as set out in greater detail below.

BACKGROUND

A. The Eligibility Cap Case

The historical background for this consolidated case is lengthy but the pertinent points are summarized here. On November 5, 2010, Avista Corporation, Idaho Power and PacifiCorp dba Rocky Mountain Power (collectively "the Utilities") petitioned the Commission to initiate a generic investigation to address various PURPA issues. The Utilities requested that during the investigation the Commission "immediately" reduce the "eligibility cap" or ceiling for the "published" avoided cost rates[2] from 10 average megawatts (aMW) per month to 100

[1] Because of the similarity of the three Agreements, the Commission consolidated the three cases. Order No. 32255 at 2, n.1; Rule 247, IDAPA 31.01.01.247.

[2] Pursuant to FERC's PURPA regulations, State commissions must "publish" an avoided cost rate for small qualifying facilities (QFs) with a design capacity of 100 kW or less. 18 C.F.R. § 292.304(c)(1). However, PURPA regulations also provide that State commissions "may" set standard or published rates at a higher capacity amount.

kilowatts (kW) per month.[3] Order Nos. 32212 and 32302. On December 3, 2010, the Commission issued a Notice to open an investigation (Case No. GNR-E-10-04), solicit initial and reply comments from interested parties, and schedule an oral argument to address the proposed reduction in the eligibility cap. Order No. 32131 at 6-7. The Commission's Notice also stated that its decision on whether to lower the eligibility cap would become effective on December 14, 2010. *Id.* at 6, 9.

The Commission subsequently found that the Utilities made a convincing case to temporarily "reduce the eligibility cap for published avoided cost rates from 10 aMW to 100 kW for wind and solar [QFs] while the Commission further investigates" other PURPA issues. Order No. 32176 at 9 (emphasis original). The Commission ordered that the eligibility cap be reduced effective December 14, 2010. Order Nos. 32176, 32212, 32255. No party appealed from the Commission's Orders reducing the eligibility cap. Order No. 32302 at 5, 14-15.

B. The Three Murphy Agreements

The Utilities' November 2010 petition precipitated a rush of filings by wind qualifying facilities (QFs) (including the Murphy projects) seeking to lock-in published avoided cost rates. On December 15, 2010, the Murphy projects and Idaho Power executed separate PPAs for the three wind projects to be located near Murphy, Idaho. Brian Jackson, Manager of American Wind Group, LLC signed each of the Agreements as the authorized manager for each of the Murphy projects. Application at 2. Under the terms of each Agreement, the Murphy projects agreed to sell electric power to Idaho Power for a 20-year term using the non-levelized published avoided cost rates for power deliveries of less than 10 aMW per month. *Id.* at 4. The nameplate rating for each Murphy project was 25 MW and each Agreement provided that the wind project would not sell more than 10 aMW of power to Idaho Power on a monthly basis. Each Murphy project selected December 31, 2012, as its Scheduled Commercial Operation Date (COD). *Id.* at 5.

On December 16, 2010, Idaho Power filed three Applications requesting that the Commission "accept or reject" each of the three PPAs. Application at 1, 9. On February 24,

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18 C.F.R. § 292.304(c)(1-2). In February 2008, the Commission established the eligibility cap for published avoided cost rates for each of the three Utilities at 10 aMW. Order No. 30488 at 17.

[3] PURPA "avoided costs" are those costs which a public utility would otherwise incur for electric power, whether the power was purchased from another source or generated by the utility itself. 18 C.F.R. § 292.101(b)(6); Order No. 32255 at 2.

2011, the Commission initiated a case by issuing a Notice of Application and Notice of Modified Procedure requesting written comments regarding the three PPAs. Order No. 32189. Written comments were submitted by Idaho Power, Commission Staff, the Murphy projects, American Wind Group (the manager of the projects), and members of the public.

On June 8, 2011, the Commission issued its final Order No. 32255 (i.e., the *June 2011 Order*) finding that the three PPAs were not effective prior to December 14, 2010. More specifically, the Commission noted that the PPAs expressly state that the "effective date" of [each] Agreement – December 15, 2011 – is "the date stated in the opening paragraph of this . . . Agreement representing the date upon which this [Agreement] was fully executed by both Parties." Agreement at 1, ¶ 1.10. The Commission noted that the Murphy projects signed the Agreements on December 13, and that Idaho Power signed on December 15, 2010. *Id.* Thus, based upon the expressed terms of the Agreements, the Commission found that the PPAs became effective after the eligibility capacity for the published rates was reduced to 100 kW on December 14, 2010. Order No. 32255 at 8-9. Neither the Murphy projects nor any other person sought reconsideration of the final Order pursuant to *Idaho Code* § 61-626(1).[4]

C. The FERC Declaratory Orders

In June 2011, the Commission also disapproved several PPAs between Idaho Power and Rainbow Ranch, and between Rocky Mountain Power and Cedar Creek Wind. Order Nos. 32256 and 32260, respectively. As in the case of the Murphy projects, the Commission found that the Rainbow and Cedar Creek PPAs were not effective until after December 14, 2010. Rainbow and Cedar Creek sought reconsideration of the Commission's Orders but the Commission reaffirmed its prior Orders. Order Nos. 32300 and 32302, respectively.

On August 5, 2011, Cedar Creek filed a petition with FERC requesting that the federal agency bring an enforcement action against the Commission or, in the alternative, make certain findings related to the Commission's decision to deny the Cedar Creek PPAs. FERC Docket No. EL11-59-000. Cedar Creek also filed a timely Notice of Appeal with the Idaho Supreme Court. On October 4, 2011, FERC issued an Order declining to bring an enforcement action against the Commission. However, FERC determined that the Commission's Orders were inconsistent with PURPA and FERC's implementing regulations. *Notice of Intent not to Act and*

[4] This section in pertinent part states that any person "shall have the right, within twenty-one (21) days after the date of said [final] order, to petition for reconsideration in respect to any matter determined therein." *Idaho Code* § 61-626(1).

Declaratory Order, 137 FERC ¶ 61,006 (Oct. 4, 2011) (hereinafter the "*Cedar Creek Order*"). FERC construed the Commission's final Order No. 32260 as "limiting the creation of a legally enforceable obligation only to QFs that have [PPAs] . . . signed by both parties to the agreement." *Id.* at ¶ 26. FERC concluded that the Commission did not recognize that "a legally enforceable obligation may be incurred before the formal memorialization of a [PPA] contract to writing." *Id.* at ¶ 36.[5]

Nearly five months later on March 1, 2012, Rainbow also filed a petition with FERC seeking an enforcement action against this Commission or, in the alternative, that FERC find that the Commission's Orders were inconsistent with PURPA and specifically FERC's *Cedar Creek Order*. On April 30, 2012, FERC declined to initiate an enforcement action against the Commission but issued a declaratory order concluding that the Commission's final Order No. 32256 in Rainbow was inconsistent with the requirements of PURPA. *Notice of Intent not to Act and Declaratory Order*, 139 FERC ¶ 61,077 (April 30, 2012) (hereinafter the "*Rainbow Order*"). Based upon the similarities between the underlying facts in the Cedar Creek and Rainbow cases, FERC applied its determination in the *Cedar Creek Order* to Rainbow's Petition. *Id.* at ¶ 23.

D. The Expedited Request and the Scheduling Order

As mentioned above, the Murphy projects asked that the Commission issue its Order approving the Murphy Flat PPAs "no later than August 31, 2012 without further briefing, hearing or other proceedings." *Id.* at 13. The projects advanced three reasons for the Commission to issue its Order within 15 days. First, they maintained that the issue raised in its Petition is "strictly one of law, there being no relevant factual disputes and no need for further factual support." *Id.* at 12. Second, although the projects acknowledged that certain federal financial incentives for QFs are to expire on December 31, 2012, they assumed "that Congress will extend the federal financial incentives another year," until December 31, 2013. *Id.* Consequently, they argued time is of the essence so that the wind projects may be constructed to meet the extended deadline. *Id.* Finally, the projects stated that the process leading up to the issuance of the *June 2011 Order* "was lengthy, and the matters presented in this Petition are straight-forward; they do not require a similar extended process." *Id.*

On August 24, 2012, Idaho Power submitted its "Limited Answer" listing three reasons why the Commission should deny the Murphy projects' request for an Order by August

[5] The Commission approved a subsequent settlement in the Cedar Creek case.

31, 2012. First, Idaho Power asserts that it is entitled to at least 21 days in which to file an answer to a petition. Limited Answer at 6 *citing* Rule 57.02. Second, it questioned the need for expedited treatment based upon Murphy's assumption that Congress might continue the financial incentives for QFs that are scheduled to expire at the end of this year. Idaho Power maintained that such speculation is "not a valid reason for the Commission to grant expedited treatment of Murphy Wind's request." *Id.* at 3. Finally, Idaho Power claimed that any alleged need for expedited treatment is undercut by Murphy Flat's failure "to take any action with regard to Order No. 32255 for over one year/more than 14 months. . . ." *Id.* Idaho Power observed that the Murphy projects neither sought reconsideration of the Commission's *June 2011 Order* nor did they "seek any other type of judicial or FERC review for over one year." *Id.* at 5.

The Commission's Scheduling Order No. 32629 denied the projects' request for a final Order no later than August 31, 2012, but granted an expedited proceeding. Without addressing the substantive merits of the Petition, the Commission found that Section 61-624 provides that the Commission may rescind, alter or amend any prior Order or decision after "notice to the public utility affected, and after opportunity to be heard as provided in the case of complaints." *Idaho Code* § 61-624 (emphasis added). "By its very terms, this statute requires that Idaho Power be provided with an opportunity 'to be heard' as provided in the case of complaints." Order No. 32629 at 3. The Commission found that its procedural Rule 57.02 provides that answers to complaints shall generally be made within 21 days. *Id.* citing IDAPA 31.01.01.057.02. Second, the Commission found that the need for an expedited Order is not supported by speculation as to whether Congress may or may not extend the financial incentives. *Id.* Finally, the Commission found that the request for expedited treatment is undercut by the projects' own conduct in this case.

The Commission directed Idaho Power to file its answer by September 7, and directed the projects file a reply (if any) no later than September 14, 2012. The Commission also ordered the parties to disclose whether the PPAs in this case have been assigned to another entity, and if so, when and to whom. *Id.* at 4.

THE PETITION FOR MODIFICATION

The Murphy projects request this Commission modify its *June 2011 Order* and approve the three Murphy PPAs. Murphy advances two primary arguments why the Commission should reverse its prior Order. First, the projects maintain the two FERC Orders

issued after the *June 2011 Order* "constitute new facts or information justifying modification of the [prior] *Order*." Petition at 2. Although the projects acknowledge they did not seek reconsideration or appeal the Commission's Order, they argue that there "simply is no legal basis upon which to distinguish the *[June 2011] Order* from FERC's *Cedar Creek* and *Rainbow Orders*. *Id.* at 4. Because the factual circumstances in the Murphy case is "in all material respects" similar to the *Cedar Creek* and *Rainbow Orders*, the projects insist that the Commission's *June 2011 Order* "likewise is inconsistent with PURPA and FERC's regulations." *Id.*

In their FERC petitions, both Cedar Creek and Rainbow argued that a "legally enforceable obligation"[6] arose before the effective dates of their PPAs. In its Petition, the Murphy projects maintain that they too had perfected a legally enforceable obligation prior December 14, 2010. *Id.* at 4. The projects maintain that the fact they "did not seek reconsideration of or appeal the [*June 2011*] *Order* in state court likewise is immaterial as to whether and, if so, when Idaho Power became legally obligated to purchase [power] from Murphy Flat." *Id.* at 4. Consequently, the Petitioners maintain the FERC *Cedar Creek* and *Rainbow Orders* constitute "sufficient grounds for modifying [the *June 2011*] *Order* and approving the Agreements." *Id.*

Second, in the alternative, the Murphy projects request that the Commission exercise its discretion and re-examine the underlying facts in the consolidated case and determine that a "legally enforceable obligation" was incurred prior to December 14, 2010. *Id.* at 7-10. The Murphy projects maintain that the Commission has sometimes used a broad array of factors to determine when QFs have established "a legally enforceable obligation for published rate entitlement." *Id.* at 5 (footnote omitted). Rather than utilizing the date when an executed PPA became effective, the projects stated that the Commission has used looser criteria in the past. For example, past criteria has included when a signed PPA was submitted to the utilities, or where the QF could "demonstrate 'other indicia of substantial progress and project mature.'" *Id.* at 5. The projects maintain that factors showing substantial progress and maturity include: completion

[6] The term "legally enforceable obligation" is found in 18 C.F.R. § 292.304(d). This subsection provides in pertinent part that a QF has the option to sell power to a public utility "pursuant to a legally enforceable obligation for the delivery of [power] over a specified term . . . based upon either: (1) the avoided cost calculated at the time of delivery; or (2) the avoided costs calculated at the time the obligation is incurred." 18 C.F.R. § 292.304(d)(2).

of wind studies; contracts for wind turbines; arranged financing for the project; and progress on permitting and licensing. *Id.* at 5-6.

The projects maintain that without reference to the FERC Orders, "if the Commission were to choose to exercise its discretion and discontinue using a fully executed contract standard, then it would be entirely appropriate for the Commission . . . to employ the aforementioned criteria to determine whether a 'legally enforceable obligation' had been incurred" by the Murphy projects. *Id.* at 7. More to the point, the Petitioners maintain that a legally enforceable obligation arose on December 13, 2010 – the date Murphy executed the three PPAs. *Id.* at 8. Consequently, the Petitioners state "that as of December 13, 2010 the Projects were more than sufficiently mature so as to require Idaho Power to negotiate and eventually execute a contract pursuant to PURPA." *Id.* at 10.

Having demonstrated that the Murphy projects were significantly mature and that a legally enforceable obligation existed as of December 13, 2010, the projects request that the Commission exercise its discretion and modify its prior Order. *Id.* at 11. More specifically, they request that the Commission find that a legally enforceable obligation existed; that Murphy projects are entitled to receive the published avoided cost rates for projects up to 10 aMW; and that the Agreements should be approved by the Commission without further hearings or proceedings. *Id.*

The Murphy projects acknowledged that they did not seek reconsideration of the final *June 2011 Order*. However, they maintain that the Commission may modify that Order pursuant to *Idaho Code* § 61-624. That section provides in pertinent part that the Commission "may at any time, upon notice to the public utility affected, and after opportunity to be heard as provided in the case of complaints, rescind, alter or amend [an] order or decision made by it." *Id.* at 11 *quoting Idaho Code* § 61-624. "Because the holdings in Cedar Creek and Rainbow Ranch apply equally here, the Commission should exercise its authority under *Idaho Code* § 61-624 and modify the [*June 2011*] *Order* so as to approve the Agreements." *Id.*

IDAHO POWER ANSWER

In its answer, Idaho Power advances three arguments why the Petition should be denied and why its Motion to Dismiss should be granted. First, Idaho Power asserts that the Murphy projects' request that the Commission approve the three PPAs is "an impermissible collateral attack on the Commission's final June 2011 Order." Answer at 3. Second, the

Petitioners 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." *Id.* at 3, 5. The utility insists that because of Murphy'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." *Id.* at 3. Thus, Idaho Power argues that Murphy is procedurally barred by state law from the relief it requests.

1. Impermissible Attack. As mentioned above, Idaho Power maintains that the Petition should be dismissed because it is an impermissible collateral attack upon a final Order of this Commission and prohibited by *Idaho Code* § 61-625. This statute provides that "[a]ll orders and decisions of the commission which have become final and conclusive shall not be attacked collaterally." Answer at 6-7 *citing Idaho Code* § 61-625. Thus, Idaho Power argues that the law of the case is now settled and the Commission's *June 2011 Order* cannot be attacked on appeal or collaterally. *Id.* at 7. Idaho Power notes that the Idaho Supreme Court has explained that

> the legislature has afforded the orders of the [Idaho Public Utilities] Commission a degree of finality similar to that possessed by the judgments made by a court of law. I.C. § 61-625. . . . Final orders of the Commission should ordinarily be challenged either by petition to the Commission for [reconsideration] or by appeal to this Court as provided by *Idaho Code* § 61-626 and 627; Idaho 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.*

Answer at 8 *quoting Utah-Idaho Sugar Co. v. Intermountain Gas Co.*, 100 Idaho 368, 373-74, 595 P.2d 1058, 1063-64 (1979) (emphasis added).

Idaho Power observed that the projects do not dispute that they did not file a petition for reconsideration within 21 days of the Commission's *June 2011 Order*. *Id.* at 5-6. Idaho Power insists that final Orders of the Commission must be challenged either by petitioning the Commission for reconsideration, or by appeal to the Idaho Supreme Court as provided by *Idaho Code* §§ 61-626 and 61-627.[7] Idaho Power states that the projects did neither. Answer at 6.

Having failed to seek reconsideration within 21 days, Idaho Power asserts that Order No. 32255 "was no longer subject to reconsideration, appeal, or review" as of June 30, 2011.

[7] Section 61-626(1) provides that after a final Order has been issued, any "person interested therein shall have the right, within twenty-one (21) days after the date of said order, to petition for reconsideration in respect to any matter determined therein." Section 61-627 provides that only after "a petition for reconsideration is denied, or, if the petition is granted, then after the [Commission issues its] decision on reconsideration, the state of Idaho or any party aggrieved may appeal to the Supreme Court. . . ."

Answer at 7. The Company also notes that Idaho Appellate Rule (I.A.R.) 21 states that the failure to 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. . . ." Answer at 7 (emphasis added); *Welch v. Del Monte Corp.*, 128 Idaho 513, 516, 915 P.2d 1371, 1374 (1996).

Idaho Power argues that the projects waited more than 14 months after the deadline for reconsideration, "and more than 10 months after the issuance of FERC's Cedar Creek Order," before seeking reversal of the Commission's prior Order. Answer at 9. The fact that FERC issued two subsequent orders does not entitle the projects to modification. The Petition is impermissible collateral attack upon the Commission's final *June 2011 Order* and should be dismissed. *Id.*

2. Collateral Estoppel. Idaho Power next claims that the Murphy Petition is barred by the doctrine of collateral estoppel (issues preclusion). Answer at 10. The Company maintains that Murphy's "failure to raise judiciable issues in a prior administrative proceeding precludes that [party] from raising them in a later administrative proceeding and in subsequent litigation." *Id. citing Astoria Fed. Sav. & Loan Ass'n v. Solimino*, 501 U.S. 104, 107-108, 111 S.Ct. 2166, 2169 (1991); Rest. 2d Judgments § 83, cmt. b ("where an administrative forum has the essential procedural characteristics of a court, . . . its determinations should be accorded the same finality as that accorded the judgment of a court. The importance of bringing a legal controversy to conclusion is generally no less when the tribunal is administrative tribunal than when it is a court.").

Idaho Power asserts the Idaho Supreme Court requires five factors to be met for the doctrine of collateral estoppel to bar re-litigation of an issue decided in an earlier proceeding. As delineated by the Court in *Ticor Title Co. v. Stanion*, 144 Idaho 119, 124, 157 P.3d 613, 618 (2007), the five factors are:

> (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.

Answer at 10.

Idaho Power maintains that all five factors are satisfied in the Commission's *June 2011 Order*. More specifically, Idaho Power insists the Murphy projects had ample opportunity to make their case prior to issuance of the *June 2011 Order* and they could have reiterated their arguments in a petition for reconsideration. *Id.* Idaho Power insists that the projects' Petition seeking approval of the three PPAs is "the identical issue the Commission ruled on in the [*June 2011 Order*]." *Id.* at 11; Murphy Wind Petition at 13. Addressing the third factor, Idaho Power states that the Commission's *June 2011 Order* is the identical issue raised in the current Petition and was expressly decided in the prior Order. *Id.* Finally, Idaho Power avers that "Murphy Wind is the same party, or has privity with, the party bound by the [*June 2011 Order*]." *Id.* Consequently, having met all five factors, the projects are "colleratally estopped from being heard on the same issues again before this Commission." *Id.*

3. *Res Judicata*. Idaho Power also argues the Petition is barred by the doctrine of *res judicata* (claim preclusion). "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.'" *Id.* at 11 *quoting Magee v. Thompson Creek Mining Co.*, 152 Idaho 196, 202, 268 P.3d 464, 470 (2012) (internal quotations omitted); *Idaho Code* § 61-625. *Res judicata* applies to decisions of Idaho administrative agencies. *Magee*, 152 Idaho at 202, 268 P.3d at 470 (2012).

For purposes of applying the doctrine of *res judicata*, the "sameness" of a cause of action "is determined by examining the operative fact underlying the two lawsuits." Answer at 11 *quoting Farmers Nat'l Bank v. Shirley*, 126 Idaho 63, 69, 878 P.2d 762, 768 (1994) (internal citation and quotations omitted). Idaho Power argues that the Petition seeks an Order finding that a legally enforceable obligation arose prior to December 14, 2010. "This is the same claim that the Commission considered and rejected, in the June [2011 Order], and which Murphy Wind elected not to petition for reconsideration or appeal to the Idaho Supreme Court." Answer at 11-12. Idaho Power asserts that because the projects

> 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.

Id. Consequently, Idaho Power concludes that the Petition is also barred by the doctrine of *res judicata.*

4. Disputed Facts. Idaho Power next argues that the Commission need not decide whether a legally enforceable obligation arose prior to December 14, 2010, because the parties entered into a subsequent written agreement. *Id.* at 13. Despite the Murphy projects' claim to the contrary, Idaho Power asserts there are disputed facts regarding whether a legally enforceable obligation existed. *Id.* at 14. While Idaho Power alleges these disputed facts "are numerous," it particularly asserts that there is a legitimate question whether Brian Jackson (American Wind Group) was actually authorized to sign the three Murphy Agreements. *Id.* at 14. Idaho Power reports that it received several calls from one of the projects' partners questioning who was authorized to sign the three PPAs. Given this uncertainty, "Idaho Power could not verify whether the signature [on the PPAs] was authorized until December 15, 2010. This is but one of many factual issues in dispute." *Id.*

5. The Prior Rates are Unreasonable. Finally, Idaho Power questions how the Commission would determine the appropriate avoided cost rate for the three PPAs when it has subsequently found that the then avoided cost rates were unjust and unreasonable and no longer in the public interest in the Commission's GNR-E-11-03 case. Answer at 14-15. In the 11-03 case the Commission found that the avoided cost "methodologies previously approved by this Commission, as utilized and applied 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." *Id.* at 4 *quoting* Order No. 32498 at 2 (March 22, 2012). Consequently, Idaho Power states that the Commission cannot approve the rates contained in the three PPAs after it has subsequently found those same rates to be neither just and reasonable, nor in public interest. Thus, Murphy Wind's request to reverse the *June 2011 Order* "is contrary to the public interest, should be denied, and [the] Petition [should] be dismissed." *Id.* at 18.

THE MURPHY PROJECTS' REPLY

On September 14, 2012, the Murphy projects submitted an abbreviated reply. Rather than respond to the arguments raised by Idaho Power in its answer, the projects state that those arguments "simply are wrong, as we believe will be obvious to the Commission. However,

rather than respond here, Murphy Flat wishes to notify Idaho Power and the Commission that it will be filing a *Petition for Enforcement*" with FERC.[8] Reply at 2-3.

The Murphy projects also responded to the Commission's inquiry regarding assignment of the PPAs. They disclosed that on May 16, 2012, they signed an "Asset Purchase Agreement" with a newly formed LLC, Murphy Flat Power, which is wholly owned by First Wind Energy. Reply at 2. The reply further reports that on June 6, 2012, the owners of the Murphy projects "transferred and assigned to First Wind, and First Wind took possession of, all . . . Murphy Flat assets. . . ." *Id.* The three PPAs "were part of the assets assigned to First Wind." *Id.* Although the Murphy projects and First Wind asked Idaho Power to consent to the assignment of the PPAs, they insist that Idaho Power "unreasonably" refused to consent to the assignment. *Id.*

DISCUSSION AND FINDINGS

It is well settled that the Commission has been granted authority to implement PURPA, review QF contracts, and resolve disputes between QFs and electric utilities. *Idaho Code* §§ 61-502, 61-503; *A.W. Brown v. Idaho Power*, 121 Idaho 812, 816, 828 P.2d 841, 845 (1992); *Empire Lumber Co. v. Washington Water Power*, 114 Idaho 191, 755 P.2d 1229 (1987). We have implemented PURPA guidelines and standards by issuing general procedures and engaging in case-by-case analysis. *Rosebud Enterprises v. Idaho PUC*, 128 Idaho 609, 615, 917 P.2d 766, 772 (1996); Order No. 15746, 38 P.U.R. 4th 352 (1980. In this Petition, the Murphy projects have asked the Commission to reverse its decision made in the *June 2011 Order* and instead approve the three PPAs pursuant *Idaho Code* § 61-624. Based upon the findings set out below we deny the Petition.

A. Assignment

In Scheduling Order No. 32629, we directed Idaho Power and the Murphy projects to disclose whether the three PPAs in this case have been assigned to another entity. Order No. 32629 at 4. Each PPA contains an assignment provision which states in part: "no assignment [of this Agreement] by either Party shall become effective without the written consent of both

[8] On September 25, 2012, the Murphy projects filed a Petition with FERC seeking an enforcement action against this Commission. Docket No. EL12-108-000. The FERC docket is pending.

Parties being first obtained. Such consent shall not be unreasonably withheld." Agreement § 22.1 (emphasis added).[9]

In their reply, the Murphy projects disclosed that their assets had been "transferred and assigned" to a newly formed limited liability company (Murphy Flat Power) which is wholly owned by First Wind Energy, LLC. Reply at 2. The reply further states that the Murphy projects (the "Assignors") transferred to Murphy Flat Power and First Wind Energy (collectively the "Assignees") all "interest in Murphy Flat assets" on June 6, 2012. *Id.* "The three [PPAs] were part of the assets assigned to First Wind." *Id.* The Assignors and Assignees contend they "asked Idaho Power to consent to the assignment of the [PPAs], but Idaho Power unreasonably and in bad faith refused to do so. . . ." *Id.*

In its answer, Idaho Power declared that "it has not consented to the [assignment of the three PPAs to] any entity. An entity called First Wind requested consent to assignment of the PPAs, but Idaho Power refused [because] those PPAs were not approved by the Commission, and therefore not effective . . . to assign." Answer at 2, n.1.

Based upon the comments, we find the Murphy projects (the Assignors) are in privity with Murphy Flat Power and First Wind (the Assignee). The Assignees acknowledge that they entered into an Asset Purchase Agreement with the Assignors where the Assignees took "all right title and interest in [the] Murphy [projects'] assets" including the three PPAs. Reply at 2. Under Idaho law an assignor is in privity with an assignee. *Foster v. City of St. Anthony*, 122 Idaho 883, 889, 841 P.2d 413, 419 (1992). The Asset Purchase Agreement was closed June 6, 2012, and the Petition filed subsequently. From these facts we can reasonably find and infer that the Assignees (Murphy Power and First Wind) have filed the current Petition in an attempt to revive the same PPAs disapproved by the Commission more than 14 months ago.

Under Idaho law, where "the language of a contract is clear and unambiguous, its interpretation and legal effect are questions of law. An unambiguous contract will be given its plain meaning." *Shawver v. Huckleberry Estates*, 140 Idaho 354, 361, 93 P.3d 685, 692 (2004) (internal citations omitted). Based upon our review of the PPAs, we find that the assignment provision of the Agreements is clear and unambiguous. The provision provides that assignment

[9] In addition, Section 18.1 of each Agreement provides that the Agreement "shall be construed and interpreted in accordance with the laws of the State of Idaho. . . ." Section 18.2 also provides that "Venue for any litigation arising out of or related to this Agreement will lie in the District Court of the Fourth Judicial District of Idaho in and for the County of Ada."

of the PPA shall not become effective "without the written consent of both Parties being first obtained." Agreement § 22.1.

Despite the Murphy projects (i.e., the Assignees) allegation that Idaho Power acted unreasonably in refusing to consent to the assignment of the PPAs, we find this argument unpersuasive. Given the Commission's decision to disapprove the PPAs, the failure of the projects to timely seek reconsideration, and the passage of 14 months, we do not find it unreasonable for Idaho Power to withhold its consent. *See Haag v. Pollack*, 122 Idaho 605,611, 836 P.2d 551, 557 (Ct. App. 1992). Although the projects may have assigned their other assets to Murphy Power and First Wind, the PPAs clearly conditioned such assignment on Idaho Power's consent – consent it did not give.

B. The Petition is Time Barred

We note it is undisputed that the Murphy projects did not file a timely petition for reconsideration within 21 days pursuant to *Idaho Code* § 61-626(1). The procedures for review of Commission final Orders are well settled. The Idaho Constitution provides that the Idaho Supreme Court "shall have jurisdiction to review, upon appeal, . . . any order of the public utilities commission . . .; the legislature may provide conditions of appeal, scope of appeal, and procedure on appeal from orders of the public utilities commission. . . ." Idaho Const. Art. V, § 9 (emphasis added). *Idaho Code* § 61-627 sets out the "conditions, scope, and procedures" for an appeal from an Order of the Commission. This section provides is pertinent part:

> After a petition for reconsideration is denied, or, if the petition is granted, then after the rendition of the decision on reconsideration, the state of Idaho or any party aggrieved may appeal to the supreme court from any order of the public utilities commission by filing a notice of appeal and serving the same in the manner provided by the rules of the supreme court.

Idaho Code § 61-627 (emphasis added). Parties aggrieved by a Commission Order must exhaust their administrative remedies (i.e., seek reconsideration) before appealing to the Idaho Supreme Court. *Id.* The purpose of reconsideration is to bring to the Commission's attention any alleged error and allow the Commission to rectify any mistake or omission. *Washington Water Power v. Kootenai Environmental Alliance*, 99 Idaho 875, 591 P.2d 122 (1979). Thus, before a party may file an appeal, it must have filed a petition for reconsideration thereby exhausting its administrative remedies. *See Eagle Water Co. v. Idaho PUC*, 130 Idaho 314, 940 P.2d 1130 (1997).

Returning to the facts of this case, the Murphy projects waited more than 14 months before seeking redress from the Commission. Although they had a statutory right to ask the Commission to reconsider its *June 2011 Order*, they failed to seek reconsideration within the statutory deadline of 21 days. *Idaho Code* § 61-626(2). Having failed to timely pursue their administrative remedy, the projects' Petition is time barred by the deadline contained in *Idaho Code* § 61-626(1). In *Utah-Idaho Sugar v. Intermountain Gas*, our Supreme Court observed that the "legislature has afforded the orders of the Commission a degree of finality similar to that possessed by judgments made by a court of law." 100 Idaho 368, 373, 597 P.2d 1058, 1063 (1979). In that case, the Court noted that the Commission has a specific statute that provides that "all orders and decisions of the commission which shall have become final and conclusive shall not be attacked collaterally." *Idaho Code* § 61-625. The Court concluded that final Orders of the Commission should ordinarily be challenged either by petition to the Commission for [reconsideration] or by appeal to this Court as provided by *Idaho Code* §§ 61-626 and -627; Idaho Const. Art. V, § 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*, 100 Idaho at 373-74, 597 P.2d at 1063-64; *Eagle Water*, 130 Idaho at 317, 940 P.2d at 1135.

We find the Supreme Court's opinion in *Eagle Water* instructive in this case. In that case, an adjacent water utility filed a petition for reconsideration from a final Order and Eagle Water filed a cross-petition for reconsideration. Eagle Water did not file its own petition for reconsideration. 130 Idaho at 316, 940 P.2d at 1135. The Court noted that a party seeking judicial review of an Order of the Commission must comply with *Idaho Code* §§ 61-626 and 61-627. The Court declined to consider the issues raised by Eagle Water in its subsequent appeal "because Eagle Water did not file a timely petition for reconsideration." 130 Idaho at 317, 940 P.2d at 1136 (emphasis added). The Court also stated that "it is a well settled rule that . . . where the objections [to a Commission Order] were not raised in the petition for [reconsideration], they will not be considered by this Court." *Id.* at 316-17, 940 P.2d at 1135-36 *quoting Key Transport v. Trans Magic Airlines*, 96 Idaho 110, 112-13, 524 P.2d 1338, 1340-41 (1974).[10]

[10] More recently, our Supreme Court has stated that a "party seeking judicial review must 'run the full gamut of administrative proceedings before an application of judicial relief may be considered'". *Hart v. State Tax Commission*, ___ Idaho ___, ___ P.3d ___, 2012 WL 1434336 (April 26, 2012) (subject to revision or withdrawal citing) *quoting Park v. Banbury*, 143 Idaho 576, 578, 149 P.3d 851, 853 (2006). In that case, the taxpayer filed his

A review of the statutory history surrounding *Idaho Code* § 61-626 is also instructive in this instance. Prior to 1957, Section 61-626 did not contain a specific time requirement for filing a petition for reconsideration. In 1957, our Legislature amended this section to require that a petition for reconsideration be filed "within twenty (20) days after the date of said order." 1957 Idaho Sess. Laws, Ch. 126. Again, in 1984 the Legislature amended Section 61-626 changing the deadline for filing a petition for reconsideration from 20 days to 21 days. 1984 Idaho Sess. Laws, Ch. 110. As the preamble to House Bill 457 noted, changing the deadline for petitions for reconsideration dovetails with the appellate rules which utilize seven-day increments in establishing filing deadlines. *Id.* Thus, our Legislature has enacted a statutory scheme for review of Commission Orders with specific jurisdictional deadlines. *Idaho Code* § 61-626 bars relief in this case when the Petition was filed more than 14 months after issuance of the Commission's *June 2011 Order*.

C. Res Judicata

Idaho Power argues that the Petition is barred by the doctrines of *res judicata* and collateral estoppel. As our Supreme Court explained in *Ticor Title Co. v. Stanion*, the "doctrine of *res judicata* covers both claim preclusion (true *res judicata*) and issue preclusion (collateral estoppel)." 144 Idaho 119, 123, 157 P.3d 613, 617 (2007). The Court also distinguished the differences between claim preclusion (true *res judicata*) and issue preclusion (collateral estoppel). "Claim preclusion bars a subsequent action between the same parties upon the same claim or upon claims 'related to the same cause of action . . . which might have been made.'" Issue preclusion protects litigants from litigating an identical issue with the same party or its privity. *Id.* (internal citation omitted). The Court in *Ticor* held that *res judicata* serves three fundamental purposes:

> (1) it preserves the acceptability of judicial dispute resolution against the corrosive disrespect that would follow if the same matter were twice litigated to inconsistent results; (2) it serves the public interest in protecting the courts against the burdens of repetitious litigation; and (3) it advances the private interest in repose from the harassment of repetitive claims.

Id.; *Hindmarsh v. Mock*, 138 Idaho 92, 94, 57 P.3d 803, 805 (2002).

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appeal of a State Tax Commission decision nearly three months after the taxpayer's petition to the district court was required. *Id.* at *1, 2 *citing Idaho Code* § 63-3812(a).

The United States Supreme Court and the Idaho Supreme Court have held that the doctrine of *res judicata* applies to agency decisions. *Astoria Fed. Sav. & Loan Assoc. v. Solimino*, 501 U.S. 104, 107-08, 1111 S.Ct. 2166, 2169 (1991) ("We have long favored application of the common-law doctrines of collateral estoppel (as to issues) and res judicata (as to claims) to those determinations of administrative bodies that have attained finality."); *University of Tennessee v. Elliott*, 478 U.S. 788, 798, 106 S.Ct. 3220, 3225-26 (1986); *Magee v. Thompson Creek Mining Co.*, 152 Idaho 196, 268 P.3d 464 (2012); *Welch v. Del Monte Corp.*, 128 Idaho 513, 915 P.2d 1371 (1976). In Idaho, "the doctrine of *res judicata* means that 'in action between the same parties upon the same claim or demand, the former adjudication concludes parties and privities 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*, 152 Idaho at 202, 268 P.3d at 470 *quoting Farmers Nat'l Bank v. Shirey*, 126 Idaho 63, 70, 878 P.2d 762, 769 (1994).

There are three requirements that must be met for claim preclusion to bar a subsequent action. For a claim preclusion to apply, there must be: (1) the same parties; (2) the same claim; and (3) a final judgment. *Ticor*, 144 Idaho at 124, 157 P.3d at 618. Idaho Power and the three Murphy projects were parties in the *June 2011 Order*. For purposes of *res judicata*, we find Murphy Flat Power and First Wind are in privity with the Murphy projects, and the projects were parties to the Commission's *June 2011 Order*. *Schuler v. Ford*, 10 Idaho 739, 80 P. 219 (1905) ("every person is privy to a judgment or decree who has succeeded to an estate or interest held by one who was a party to such judgment or decree, if the succession occurs after the bringing of the action."). In *Schuler*, the Court noted that "it is well settled that a judgment is conclusive not only to those who were actual parties to the litigation, but also upon all persons who are in privity with them." *Id.* at 746, 80 P. at 220 q*uoting Black on Judgments*, Vol. 2, § 549.

Turning to the second requirement, claim preclusion "bars adjudication not only on the matters offered and received to defeat the claim, but also as to 'every matter which might and should have been litigated in the first suit.'" *Ticor*, 144 Idaho at 126, 157 P.3d at 620 *quoting Magic Valley Radiology v. Kolouch*, 123 Idaho 434, 437, 849 P.2d 107, 110 (1993) (internal quotations and citations omitted). In other words, when the Commission issued its final Order in the prior Murphy proceeding, that Order "extinguishes all claims arising out of the same

transaction or series of transactions out which the cause of action arose." *Id. quoting Diamond v. Farmers Group*, 119 Idaho 146, 150, 804 P.2d 319, 323 (1990). The Court noted in *Ticor* that "the transactional concept of a claim is broad." *Id.* Returning to the facts of this case, the Murphy projects urge us to modify the *June 2011 Order* based upon FERC's rulings in *Cedar Creek* and *Rainbow*. Petitions at 3. More specifically, the Petitioners maintain that a legally enforceable obligation arose by at least December 13, 2010. *Id.* at 3-4. In addition, they maintain that the *Cedar Creek* and *Rainbow* orders represent "new facts or information not available at the time the order was issued." *Id.* at 3, n.6.

We find the second requirement met for several reasons. First, despite the projects' arguments to the contrary, the underlying facts surrounding the Murphy projects and PPAs in the first proceeding and the current Petition arise out of the same transaction – they have not changed and do not constitute "new facts." What has changed is that the projects have advanced a new legal argument as to why the Commission should modify its prior Order. Second, a review of the record in this case reveals that the term "legally enforceable obligation" does not appear in the first proceeding but was first used by the Petitioners 14 months after the Commission issued its *June 2011 Order* and after the assets of the Murphy projects were assigned to Murphy Flat Power and First Wind. Thus, we find that the projects' argument that they had perfected a legally enforceable obligation arose out of the same transaction as in the prior proceeding. Third, the Murphy Petition relies entirely on the record developed in the prior consolidated record for the three Murphy projects and resulted in the Commission's final *June 2011 Order*. Consequently, we find that the claims in the Petition could have been litigated in the first proceeding but the projects failed to do so. The new claims advanced by the projects are barred by the doctrine of claim preclusion.

Finally, there is little doubt that the Commission's *June 2011 Order* represented a final Order and decision on the matter. Aggrieved parties such as the projects have a statutory right to seek reconsideration from the Commission. They failed to do so. Moreover, the Murphy projects offered no rebuttal to Idaho Power's *res judicata* arguments. In conclusion, we find that the *June 2011 Order* resulted in a final judgment on the same claims between the same parties (or privies) as in the present Petition. Consequently, the application of claim preclusion at this late date effectively bars the Murphy projects from raising the claims in the present Petition because such claims were raised or should have been raised in the prior case.

C. Collateral Estoppel

In Idaho, courts have set out five requirements for collateral estoppel (issue preclusion) 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, 144 Idaho at 124, 157 P.3d at 618 (internal citations omitted). We find all five factors have been met to bar modification of the Commission's *June 2011 Order*.

First, we find that the Murphy projects had a full and fair opportunity to litigate the issues decided in the Commission's prior proceeding and final Order. The Murphy projects filed two sets of written comments in the prior case. Despite the statutory right to petition the Commission for reconsideration, the Murphy projects failed to do so. Second, in the Commission's prior Order, we found that the issue to be decided was whether to approve the PPAs – the same issue raised in the current Petition. Third, we found that the executed contract was controlling and that it was not effective until after December 14, 2010. Order No. 32255. The Commission also 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 was no longer applicable. *Id.* at 8-9. Fourth, we further find that our *June 2011 Order* No. 32255 was a final Order based upon the merits in the prior proceeding. Finally, we find that the Murphy projects were parties in the prior proceeding, and in privity with Murphy Flat Power and First Wind. *Ticor*, 144 Idaho at 124, 157 P.3d at 618. We conclude that the doctrine of collateral estoppel precludes re-litigation of every matter or issue that was litigated in the first suit. *Magee*, 152 Idaho at 202, 268 P.3d at 470. The issue of whether to approve the three PPAs was litigated in the prior proceeding more than 14 months ago.

The law of the case is now settled and the doctrine of *res judicata* bars a subsequent attack on the Commission's *June 2011 Order*. As the U.S. Supreme Court held in *Federated Depart. Stores v. Moitie*:

> A final judgment on the merits of an action precludes the parties or their privies from re-litigating 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 *Baltimore S.S. Co. v. Phillips*, 274 U.S. 316, 325 (1927) . . . "A judgment merely avoided 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]."

452 U.S. 394, 398, 101 S.Ct. 2424, 2428 (1981) (emphasis added and internal citations omitted); *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 doctrine of *res judicata* is supported by strong policy considerations. As previously mentioned, the Legislature has afforded "orders of the commission a degree of finality similar to that possessed judgments made by a court of law." *Utah-Idaho Sugar*, 100 Idaho at 373-74, 597 P.2d at 1064.

The Murphy projects urge us to exercise our discretion and amend our prior Order No. 32255. "The [trier of fact] does not abuse its discretion if it (1) correctly perceives the issue as discretionary, (2) acts within the bounds of discretion and applies the correct legal standards, and (3) reaches the decision through an exercise of reason." *Fragnella v. Petrovich*, 153 Idaho 266, 281 P.3d 103, 114 (2012) (internal citations omitted), *citing West Wood Invs. Inc. v. Acord*, 141 Idaho 75, 82, 106 P.3d 401, 408 (2005).

Given the passage of time, the statute of limitation in *Idaho Code* § 61-626(1), the finality of the Commission's prior Order, and the *res judicata* bar applicable to the Petition, we decline to modify our prior Order No. 32255. In addition, although Section 61-624 states that the Commission "may at any time" amend a prior Order, such authority is used sparingly and must be read in conjunction with other sections of the Public Utilities Law. The authority to amend or modify is applicable when the Commission amends a prior Order under Section 61-626(3) on reconsideration, and on remand from the Supreme Court under Section 61-629.[11] These two latter statutes establish the scope of when the Commission "may" amend a prior

[11] Section 61-626(3) provides that if after reconsideration the Commission "shall be of the opinion that the original order or any part thereof is in any respect unjust or unwarranted or should be changed, the commission may abrogate or change the same. In order made after any such reconsideration, abrogating or changing the original order, shall have the same force and effect as an original order. . . ." Likewise, Section 61-629 provides that if the Supreme Court sets aside a Commission Order or a part of the Commission Order, the Commission "may alter or amend the order appealed from to meet the objections of the court in the manner prescribed in section 61-624."

Order. The Commission's ability to amend an Order cannot be used to create a right of appeal or other remedy lost by a party's lack of diligence. Given the facts of this case and the reasons set out above, we decline to reverse our prior final Order No. 32255.

In summary, we decline the Murphy projects' invitation to modify our prior Order No. 32255 and approve the three PPAs. As set out in greater detail above, the Commission denies the Murphy projects' request to reverse our prior Order because they failed to timely file a petition for reconsideration and are time-barred from requesting such relief at this late date. We further find that the Petition is barred by the doctrine of *res judicata* (both claim preclusion and issue preclusion). The Petition represents an impermissible collateral attack on the Commission's final Order No. 32255 prohibited by *Idaho Code* § 61-625.

ORDER

IT IS HEREBY ORDERED that the Petition for Modification filed by the Murphy projects is denied. Idaho Power's Motion to Dismiss the Petition is granted.

THIS IS A FINAL ORDER. Any person interested in this Order (or in issues finally decided by this Order) or in interlocutory Orders previously issued in this Case Nos. IPC-E-10-56, IPC-E-10-57, and IPC-E-10-58 may petition for reconsideration within twenty-one (21) days of the service date of this Order with regard to any matter decided in this Order or in interlocutory Orders previously issued in these cases. Within seven (7) days after any person has petitioned for reconsideration, any other person may cross-petition for reconsideration. See *Idaho Code* § 61-626.

DONE by Order of the Idaho Public Utilities Commission at Boise, Idaho this 12th day of October 2012.

PAUL KJELLANDER, PRESIDENT

MACK A. REDFORD, COMMISSIONER

MARSHA H. SMITH, COMMISSIONER

ATTEST:

Jean D. Jewell
Commission Secretary

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