

4-18-2013

# Idaho Power Co. v. Public Utilities Com'n Supplemental Appellant's Brief Dckt. 39151

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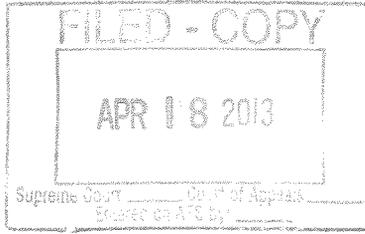
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Attorneys for Petitioners-Appellants Grouse Creek Wind Park, LLC and Grouse Creek Wind Park II, LLC

**IN THE SUPREME COURT OF THE STATE OF IDAHO**

IN THE MATTER OF THE APPLICATION OF )  
 IDAHO POWER COMPANY FOR A )  
 DETERMINATION REGARDING A FIRM )  
 ENERGY SALES AGREEMENT BETWEEN )  
 ROCKY MOUNTAIN POWER AND GROUSE )  
 CREEK WIND PARK, LLC (10-61) AND )  
 GROUSE CREEK WIND PARK II, LLC (10-62). )

**SUPREME COURT  
 DOCKET NO. 39151-2011**

\_\_\_\_\_  
 GROUSE CREEK WIND PARK, LLC, and )  
 GROUSE CREEK WIND PARK II, LLC, )

**IDAHO PUBLIC UTILITIES  
 COMMISSION NO. IPC-E-10-61  
 AND IPC-E-10-62**

Petitioners-Appellants, )

**APPELLANT'S SUPPLEMENTAL  
 BRIEF**

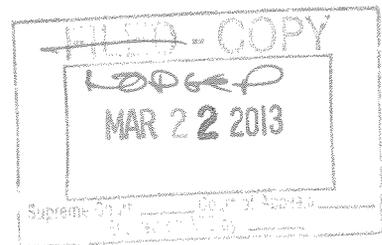
vs. )

IDAHO PUBLIC UTILITIES COMMISSION, )

and )

IDAHO POWER COMPANY, )

Respondents-Respondents on Appeal. )



**SUPPLEMENTAL TABLE OF CASES AND AUTHORITIES**

**Cases**

*Grouse Creek Wind Park, LLC, et. al.*, 142 FERC ¶ 61,187, ¶ 37 (2013)..... 4  
*JD Wind 1*, 129 FERC ¶ 61,148 ¶ 29..... 6

**A. BACKGROUND FACTS RELEVANT TO FERC GROUSE CREEK ORDER.**

On June 8, 2011, the Idaho Public Utilities Commission (“Idaho PUC” or “Commission”) rejected two power purchase agreements (“PPAs” or “Agreements”) between Idaho Power and Grouse Creek, for the reason that both parties had not executed the PPAs before the date on which the Commission changed the eligibility criteria for published avoided cost rates.<sup>1</sup> In that order, the Commission announced a new “bright line rule” that “a Firm Energy Sales Agreement/Power Purchase Agreement must be executed, i.e., signed by both parties to the agreement, prior to the effective date of the change in eligibility criteria.”<sup>2</sup> That date for Grouse Creek, the Commission found, was December 28, 2010, the date when Idaho Power signed the Agreements.

On October 4, 2011, the Federal Energy Regulatory Commission (“FERC”), in *Cedar Creek Wind*, issued a declaratory order determining that the Idaho PUC’s “bright line” rule was a violation of PURPA and FERC’s implementing regulations. FERC concluded that the IPUC had failed to recognize that “a legally enforceable obligation may be incurred before the formal memorialization of a contract to writing.”<sup>3</sup> Consequently, the parties to this appeal requested, and this Court granted, a stay of appeal and remand back to the Idaho PUC, to allow the Commission to consider FERC’s ruling in *Cedar Creek Wind*. Specifically, Grouse Creek asserted that its legally enforceable obligation under PURPA was established no later than December 9, 2010 — the date by which the Grouse Creek projects finalized their in-service dates, had returned Idaho Power’s proposed contracts to Idaho Power, and had agreed to all of

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<sup>1</sup> IPUC Order No. 3225, June 8, 2010, R. p. 229

<sup>2</sup> *Id.*, R. p. 230

<sup>3</sup> *Cedar Creek Wind LLC*, 137 FERC ¶ 61,006 at ¶ 36 (2011)

the terms therein. The Idaho PUC Staff agreed that Grouse Creek had established a “legally enforceable obligation” as of December 9, 2010.<sup>4</sup>

On September 7, 2012, the Idaho PUC issued its Order on Remand,<sup>5</sup> for the third time rejecting the Grouse Creek Agreements, primarily on the basis that the Agreements were not signed until after December 14, 2010, because the Agreements showed an effective date of December 28, 2010. Specifically, the Idaho PUC held that “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.”<sup>6</sup> Secondly, the Idaho PUC re-established a prior grandfathering rule that a QF can only obtain prior avoided cost rates through one of two methods: “Either the parties enter into a contract or, if the utility is failing to negotiate or refusing to enter into a contract with a QF, the QF can file a complaint with this Commission, at which time the Commission will make a determination as to whether and when a legally enforceable obligation arose.”<sup>7</sup>

The Idaho PUC determined that the Idaho Power and Grouse Creek had chosen the contract path, instead of the complaint path, with the effective date noted in the contract extinguishing any claim by Grouse Creek that the date of the legally enforceable obligation could be other than the contract effective date.<sup>8</sup> The Idaho PUC also found irrelevant the fact that Grouse Creek had filed a complaint against Idaho Power in November 2010.<sup>9</sup>

Finally addressing FERC’s *Cedar Creek* decision, the Idaho PUC said that such a Declaratory Order was “not binding” on the Commission; that the Idaho PUC doubted “whether

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<sup>4</sup> Staff Legal Brief, Case No. IPC-E-10-61 *et al.* (Feb. 6, 2012) at 5. R. p. 315

<sup>5</sup> IPUC Order No. 32635, R. p. 346, *et. seq.*

<sup>6</sup> *Id.*, R. p. 358

<sup>7</sup> *Id.*, R. p. 358

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*, R. pp. 359, 360

FERC understood” the Idaho PUC’s basis for rejecting the Cedar Creek contracts; that Grouse Creek, unlike Cedar Creek, has not petitioned FERC for PURPA enforcement; and that Grouse Creek’s facts differed from *Cedar Creek* facts.<sup>10</sup>

**B. SUPPLEMENTAL ARGUMENT**

1. *Grouse Creek Established a Legally Enforceable Obligation Prior to December 14, 2010:* The Idaho PUC determined in its Grouse Creek Remand Order of September 7, 2011, that the date of Grouse Creek’s legally enforceable obligation was December 28, 2010, the “effective date” of the Agreements.<sup>11</sup> The Idaho PUC also determined that the parties were “actively negotiating terms of the two PPAs” subsequent to December 14, 2010.<sup>12</sup>

To the contrary, FERC holds in *Grouse Creek Wind Park*, (“*FERC Grouse Creek Order*”) that Grouse Creek unequivocally established a legally enforceable obligation with Idaho Power before December 14, 2010:

Several similarities exist between the facts before the Commission [FERC] in *Cedar Creek*, *Rainbow Ranch*, and *Murphy Flat* and the facts presented here. In all four cases, the petitioners, all self-certified QFs, had engaged in formal negotiations to enter into power purchase agreements with electric utilities during November and December 2010, and all four QF petitioners had unequivocally committed themselves to sell to the utilities prior to the new rules concerning eligibility for published avoided cost rates went into effect, i.e., before December 14, 2010.<sup>13</sup>

Consequently, the Idaho PUC’s determination that a PURPA based legally enforceable obligation was not established until December 28, 2010, was in error.

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<sup>10</sup> *Id.*, R. p. 357

<sup>11</sup> *Id.*, R. pp. 358 – 360

<sup>12</sup> *Id.*, R. p. 361

<sup>13</sup> *Grouse Creek Wind Park, LLC, et. al.*, 142 FERC ¶ 61,187, ¶ 37 (2013) (emphasis added)

FERC also found as illegal the Idaho PUC’s decision that, when presented with a signed contract, it need not make any determination as to the existence of “any other legally enforceable obligation”<sup>14</sup>:

In order to protect the rights of a QF, once a QF makes itself available to sell to a utility, a legally enforceable obligation may exist prior to the formation of a contract. A contract serves to limit and/or define bilaterally the specifics of the relationship between the QF and the utility. A contract may also limit and/or define bilaterally the specifics of the legally enforceable obligation at the heart of the relationship. But the obligation can pre-date the signing of the contract.<sup>15</sup>

Consequently, the Idaho PUC also erred in holding that the written effective date of the Grouse Creek Agreements also became the date the PURPA legally enforceable obligation was established, and that it need look no further than “the four corners of the Agreements” in determining such a date.<sup>16</sup>

In its Remand Order, The Idaho PUC also rejected the Grouse Creek Agreements based on factual differences between Grouse Creek, and *Cedar Creek/Rainbow Ranch*. The *FERC Grouse Creek Order* acknowledges those factual differences but found them to be irrelevant in relation to the core question of when Grouse Creek established a legally enforceable obligation with Idaho Power.<sup>17</sup>

In summary, Grouse Creek argued in its March 4, 2013, brief that it ‘locked-in’ Idaho Power to a legally enforceable obligation under PURPA, no later than December 9, 2010.<sup>18</sup> The Idaho PUC Staff agreed.<sup>19</sup> FERC too now agrees.<sup>20</sup> Grouse Creek also argued in its March 4,

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<sup>14</sup> IPUC Order No. 32635, R. p. 358

<sup>15</sup> *Id.* at ¶ 40

<sup>16</sup> IPUC Order No. 32635, R. pp. 358, 359

<sup>17</sup> *Id.* at ¶ 38

<sup>18</sup> Appellant’s Brief, p. 24

<sup>19</sup> Staff Legal Brief, Case No. IPC-E-10-61 *et al.* (Feb. 6, 2012) at 5. R. p. 315

<sup>20</sup> 142 FERC ¶ 61,187, ¶ 37. “[Grouse Creek] had unequivocally committed [itself] to sell to the utility[y] prior to the new rules concerning eligibility for published avoided cost rates went into effect, i.e., before December 14, 2010.

2013, brief that legally enforceable obligations under PURPA can be created with or without a contract, and that “the date by which a legally enforceable obligation arises is no more driven by whether a utility signs than by when it signs.”<sup>21</sup> FERC agrees with this assertion as well.<sup>22</sup>

2. *The Idaho PUC’s ‘Contract or Complaint’ Rule is a Violation of PURPA:* In its Grouse Creek Remand Order the Idaho PUC explains that its reinstated grandfathering requirement of either a ‘signed contract or complaint,’ in order to establish a PURPA legally enforceable obligation, is PURPA compliant and FERC approved: *i.e.*, “Idaho’s framework for determining whether and when a QF can obtain an avoided cost rate is entirely consistent with the federal standards as set out by FERC;”<sup>23</sup> *see also* “This finding [that the effective date written in the contract is the date of the legally enforceable obligation] is entirely consistent with . . . the authority granted to us by PURPA and FERC.”<sup>24</sup> To the contrary, *FERC’s Grouse Creek Order* explicitly refutes the Idaho PUC’s ‘contract or complaint’ rule:

The Idaho Commission’s requirement that a QF formally complain “meritorious[ly]” to the Idaho Commission before obtaining a legally enforceable obligation would both unreasonably interfere with a QF’s right to a legally enforceable obligation and also create practical disincentives to amicable contract formation. Such obstacles to QFs are at odds with the Commission’s regulations implementing PURPA. They are not reasonable conditions for a state PURPA process.<sup>25</sup>

Finally, FERC also noted that the Idaho PUC’s “specific parameters” imposed on Grouse Creek’s PPA contracting process were so inconsistent with PURPA as to warrant FERC bringing

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<sup>21</sup> Appellant’s Brief, pp. 25 – 26

<sup>22</sup> Appellant’s Brief, pp. 25 – 26 “The obligation can pre-date the signing of the contract.”

<sup>23</sup> *Id.*, R. p. 358

<sup>24</sup> *Id.*, R. p. 356

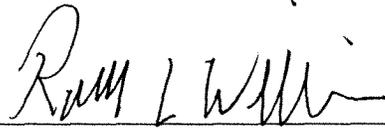
<sup>25</sup> 142 FERC ¶ 61,187, ¶ 40 (emphasis added), *citing JD Wind 1*, 129 FERC ¶ 61,148 ¶ 29 (“Under our regulations, [a QF] has the right to choose to sell pursuant to a legally enforceable obligation, and, in turn, has the right to choose to have rates calculated at the time that obligation is incurred.”)

its own enforcement action against the Idaho PUC, in order “to correct a state’s misreading of the Commission’s [FERC’s] PURPA regulations and precedent.”<sup>26</sup>

**C. CONCLUSION**

For the reasons outlined above, Grouse Creek requests reversal by this Court of the Idaho PUC Orders not approving the Grouse Creek Agreements, for the reason that such Orders are in violation of PURPA, as recently determined in the *FERC Grouse Creek Order*.

DATED this 22 day of March, 2013.



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<sup>26</sup> *Id.* at ¶ 41