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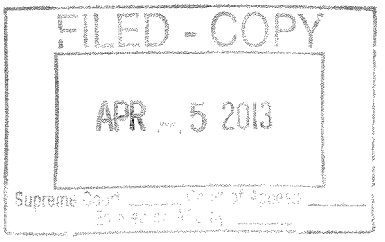
Idaho Power Co. v. Public Utilities Com'n Respondent's Brief 2 Dckt. 39151

IN THE SUPREME COURT OF THE STATE OF IDAHO

GROUSE CREEK WIND PARK, LLC, and GROUSE CREEK WIND PARK II, LLC, Petitioners-Appellants, v. IDAHO PUBLIC UTILITIES COMMISSION, Respondent-Respondent on Appeal, and IDAHO POWER COMPANY, Respondent-Intervenor/Respondent on Appeal.	SUPREME COURT DOCKET NO. 39151-2011 Idaho Public Utilities Commission Case Nos. IPC-E-10-61 and IPC-E-10-62



RESPONDENT'S BRIEF OF IDAHO POWER COMPANY

Appeal from the Idaho Public Utilities Commission
Commissioner Mack A. Redford, Presiding

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A. Nature of the Case.

This is an appeal from a Final Reconsideration Order on Remand of the Idaho Public Utilities Commission ("Idaho PUC" or "Commission"). Grouse Creek Wind Park, LLC, and Grouse Creek Wind Park II, LLC ("Grouse Creek") appeal the determination of the Idaho PUC that Grouse Creek was not entitled to avoided cost rates in effect prior to December 14, 2010, and the Commission's disapproval of Grouse Creek's two Firm Energy Sales Agreements ("FESA").

This case is about the Commission's authority to determine whether Grouse Creek, as a Public Utility Regulatory Policies Act of 1978 ("PURPA") qualifying facility ("QF"), is entitled to a previously effective, higher avoided cost rate pursuant to a legally enforceable obligation in the state of Idaho and the Commission's authority to determine the proper avoided cost rates, including whether such rates are in the public interest and just and reasonable to the customers of Idaho Power.

B. Course of Proceedings.

1. Background.[1]

On November 5, 2010, Idaho Power Company ("Idaho Power"), Avista Corporation, and PacifiCorp, d\b\a Rocky Mountain Power filed a Joint Petition requesting that the Commission initiate an investigation to address various avoided cost issues related to the Commission's implementation of PURPA. R. p. 222. "Avoided costs" are those costs which a public utility

[1] The relevant Course of Proceedings Background is sufficiently set forth in the Idaho PUC's Order No. 32257. R. pp. 222-23.

would otherwise incur for electric power, whether that power was purchased from another source or generated by the utility itself. 18 C.F.R. § 292.101(b)(6). R. p. 222.

While the Commission pursued its investigation, the utilities also moved the Commission to "lower the published avoided cost rate eligibility cap from 10 aMW to 100 kW [to] be effective immediately. . . ." R. p. 222 (quoting Joint Petition at 7). Under PURPA regulations issued by the Federal Energy Regulatory Commission ("FERC"), the Commission must "publish" avoided cost rates for small QFs with a design capacity of 100 kilowatts ("kW") or less. R. p. 222. However, the Commission has the discretion to set the published avoided cost rate at a higher capacity amount—commonly referred to as the "eligibility cap." 18 C.F.R. § 292.304(c)(1-2). R. p. 222. For small QFs below the eligibility cap, the avoided cost is determined using a surrogate avoided resource ("SAR") methodology based upon the cost of a natural gas-fired combined cycle combustion turbine. When a QF project is larger than the published eligibility cap, the avoided cost rate for the project must be individually negotiated by the QF and the utility using the Integrated Resource Plan ("IRP") methodology. *Id.*

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

On December 3, 2010, the Commission issued Order No. 32131 declining the utilities' motion to immediately reduce the published avoided cost rate eligibility cap from 10 average

megawatts ("aMW") to 100 kW. *Id.* However, the Order did notify parties that the Commission's decision regarding the motion to reduce the published avoided cost eligibility cap would become effective on December 14, 2010. R. pp. 222-23.

Based upon the record in the GNR-E-10-04 case, the Commission subsequently found that a "convincing case has been made to temporarily reduce the eligibility cap for published avoided cost rates from 10 aMW to 100 kW for wind and solar only while the Commission further investigates" other avoided cost issues. R. p. 223 (emphasis in original). On reconsideration, the Commission affirmed its decision to temporarily reduce the eligibility cap for published avoided cost rates from 10 aMW to 100 kW. R. p. 223. No party appealed the Commission's final order on reconsideration. R. p. 255. Thus, the eligibility cap for the published avoided cost rate for wind and solar QF projects was set at 100 kW effective December 14, 2010. R. p. 223

2. The Grouse Creek Agreements.

On December 28, 2010, Idaho Power and Grouse Creek entered into the respective agreements at issue in this case. R. p. 223. On December 29, 2010, each agreement was filed with the Commission for its review. R. pp. 10-74; R. pp. 75-139. Under Idaho's implementation of PURPA, those signed contracts do not become effective, and the rates therein do not lock in, until the Idaho PUC approves them. *See A.W. Brown Co. v. Idaho Power Co.*, 121 Idaho 812, 814, 828 P.2d 841, 843 (1992) ("The [Idaho PUC] established a rule that power purchase contracts, once negotiated, be presented to the [Idaho PUC] for approval.").

On February 24, 2011, the Commission issued a Notice of the Applications and set a deadline of March 24, 2011, for the submission of written comments in support or opposition to

the Application. R. pp. 140-45. Comments were filed by Commission Staff, R. pp. 146-53, by Grouse Creek, R. pp. 158-83, and by Idaho Power, R. pp. 184-98.

On June 8, 2011, the Idaho PUC rejected Grouse Creek's two FESAs in Order No. 32257. R. pp. 221-31. On June 29, 2011, Grouse Creek filed a Petition for Reconsideration of the Commission's Order No. 32257. R. pp. 233-40. On July 6, 2011, Idaho Power filed an Answer to Grouse Creek's Petition for Reconsideration, R. pp. 242-51. On July 27, 2011, the Commission, in Order No. 32299, upheld its previous decision, rejecting Grouse Creek's agreements. R. pp. 252-66. Grouse Creek then filed a Notice of Appeal to this Court on September 7, 2011. R. pp. 267-72.

On October 4, 2011, FERC issued a Declaratory Order in the Cedar Creek Wind, LLC ("Cedar Creek") case, finding in its Declaratory Order, that the Idaho PUC's decision not to approve Cedar Creek's FESAs was inconsistent with PURPA and FERC regulations. *Cedar Creek Wind, LLC*, 137 FERC ¶ 61,006 (Oct. 4, 2011) ("Cedar Creek Declaratory Order").

In response to the Cedar Creek Declaratory Order, on November 4, 2011, Idaho Power, Grouse Creek, and the Idaho PUC filed a Stipulated Motion to suspend the appeal and remand the case to the Idaho PUC. R. pp. 285-89. On January 5, 2012, the Idaho PUC in Order No. 32430 set a schedule for briefing and oral arguments to reconsider its denial of the Grouse Creek FESAs in light of FERC's Cedar Creek Declaratory Order. R. pp. 292-95. On February 6, 2012, Idaho Power filed its Memorandum on Remand, R. pp. 297-310, as well as an additional factual submission containing the Affidavit of Randy Allphin and numerous documents evidencing the communications between Grouse Creek and Idaho Power. Ex. pp. 281-532. Also on February 6, 2012, Commission Staff filed a Legal Brief on the remand. R. pp. 311-17. Grouse Creek filed a

Reply Brief on February 27, 2012. R. pp. 318-45. The Commission heard oral argument from the parties on March 7, 2012. Tr. pp. 1-44.

On September 7, 2012, the Commission issued its Final Reconsideration Order on Remand, Order No. 32635, which, after examining the additional legal and factual submissions of the parties and considering FERC's Cedar Creek Declaratory Order, again declined to approve the Grouse Creek FESAs. R. pp. 346-63. Based upon its examination of the record, and the facts in the case, the Commission found, among other things, that: Idaho Power did not refuse to sign a contract; that no conduct by Idaho Power unnecessarily delayed or impeded Grouse Creek's ability to enter into its agreements; that the evidence and the conduct of the parties do not support that a legally enforceable obligation was formed; and that a legally enforceable obligation did not arise prior to December 14, 2010, because material terms to the agreements were still incomplete on that date. R. pp. 360-61.

Grouse Creek filed an Amended Notice of Appeal to this Court on October 19, 2012. R. pp. 364-69. The Idaho PUC settled the record for appeal in Order No. 32720 on January 18, 2013. R. pp. 393-97.

C. Statement of the Facts.

Idaho Power had numerous and frequent contacts and communications with Grouse Creek regarding several iterations of its proposed projects over the course of most of 2010. Ex. pp. 282-88 (referencing Attachments to the Affidavit of Randy Allphin, R. pp. 290-532). Idaho Power negotiated and proceeded with Grouse Creek in good faith negotiations and attempts to move Grouse Creek's proposed projects to final agreements pursuant to its PURPA obligations. *Id.* Any delay was not attributable to a refusal by Idaho Power to negotiate, nor any refusal by

Idaho Power to execute a contract. R. pp. 360-61. Any delay that occurred was attributable to the fact that Grouse Creek changed the configuration of its project numerous times, did not agree to previously approved standard contract terms and conditions until December 9, 2010, did not provide final and complete information about its projects' configuration until December 15, 2010, and did not commit itself to sell its output to Idaho Power until December 21, 2010. Ex. pp. 282-88.

The course of dealings and many of the written communications between Grouse Creek and Idaho Power are set forth in the Affidavit of Randy Allphin and its attachments. Ex. pp. 281-532. The totality of these communications demonstrate that Idaho Power proceeded in good faith and fair dealings with Grouse Creek through many iterations of its proposed projects and did not unreasonably delay the projects. *Id.* Idaho Power was first contacted by Grouse Creek in late February 2010. Ex. p. 282. The initial Grouse Creek project was a single 150 megawatt ("MW") project spread across 4,000 acres of private and public land located in northern Utah. R. p. 65 (Grouse Creek Comments at 8). Discussions between Grouse Creek and Idaho Power on the single 150 MW project continued until April 2010 when Grouse Creek informed Idaho Power that it was now considering a single 65 MW project instead of the previously discussed 150 MW project. Ex. pp. 282-83. Because this proposed project was a QF larger than 10 aMW, Idaho Power prepared pricing for the proposed project based upon its IRP-based pricing methodology, pursuant to Commission requirements. Ex. p. 283. Idaho Power analyzed this proposal pursuant to the requirements of the IRP-based methodology and provided Grouse Creek with the results, including a proposed price. *Id.*, Attachment No. 4.

Three months later, Grouse Creek once again changed the configuration of its proposed project and informed Idaho Power on July 14, 2011, that it "intended to reduce its overall footprint and wished to discuss power sales contracts for two single 10 aMW projects, instead of a large 65 MW project." R. p. 170 (quoting Grouse Creek Comments at 13). Idaho Power records indicate that initially Grouse Creek was anticipating two projects, one with a 30 MW nameplate capacity and the other with a 21 MW nameplate capacity. Ex. pp. 282-85. Consistent with its existing processes, Idaho Power began drafting power purchase agreements ("PPA") for these two projects. *Id.* During negotiations, Grouse Creek continued to object to certain terms in the PPAs related to Idaho Power's standard security deposit requirements. R. p. 172 (Grouse Creek Comments at 15). In addition, and consistent with prudent utility business practices, Idaho Power required confirmation from Grouse Creek that, because its proposed projects were located off Idaho Power's system, the projects would need to provide sufficient evidence of the proper arrangements to deliver its output to Idaho Power's system. Ex. p. 283. As Grouse Creek is an off-system QF, Idaho Power's obligation to contract with the projects pursuant to PURPA does not arise until the projects demonstrate a firm delivery to a point on Idaho Power's system.

Discussions continued between the parties and, during August, communications were exchanged regarding clarification as to the project configuration, the number of proposed projects, accuracy of the data, and the requirements of 10 aMW and one-mile separation. Ex. p. 284. On October 1, 2010, Grouse Creek sent formal correspondence through legal representation for now two projects, Grouse Creek Wind and Grouse Creek Wind II. Ex. p. 284. The letter requests PPAs, provides information, objects to the posting of security required by the contracts, changes the project from 30 MW to 21 MW, and requests revision of the transmission service

request ("TSR") from 30 MW to 21 MW, among other things. *Id.* On November 1, 2010, Idaho Power sent formal correspondence to counsel for Grouse Creek responding to the October 1, 2010, letter and pointing out several of the open items remaining with the various proposed projects. *Id.* Also forwarded with these letters were copies of required Network Resource Integration Study Agreements, required Transmission Capacity Application Questionnaires, and Draft Firm Energy Sales Agreements. *Id.* On November 4, 2010, Idaho Power notified the projects that the submitted TSRs were rejected because the information provided by the project did not sync up with the project's transmission requests on Bonneville Power Administration's ("BPA") system. Ex. pp. 284-85. The communication asks for updated transmission information from the project that was needed to proceed with the TSRs, and advised of the need for ancillary services. *Id.* On November 24, 2010, Idaho Power sent correspondence confirming a prior letter and meeting between the project and Idaho Power and summarizing the current status of negotiations as to some of the previously contested terms and conditions. *Id.*

On December 2, 2010, Grouse Creek sent marked-up versions of draft PPAs previously sent by Idaho Power. Ex. p. 285; R. p. 174 (Grouse Creek Comments at 17). These mark-ups were the first time Idaho Power was definitively informed of the projects' size and configuration (i.e., two 21 MW projects). Negotiations continued between the parties and, on December 6, 2010, Idaho Power received a revised Transmission Questionnaire from the projects containing corrected information for resubmission of the TSRs, which was forwarded to Idaho Power transmission on the same day. Ex. p. 285. On December 7, 2010, Idaho Power forwarded updated draft PPAs for the projects, incorporating the information provided by the projects, and working toward executable versions of the FESAs. Ex. pp. 285-86. This communication also

notifies the projects of missing information from the projects, necessary to confirm the required one-mile separation between the projects and necessary to complete the draft FESAs. *Id.* Also on December 7, 2010, Idaho Power began the internal review process on the draft FESAs, even though they were not yet complete, nor accepted by the projects, so as not to unduly impede the ultimate execution of the FESAs once accepted by the projects since the December 14, 2010, date previously set by the Commission as the effective date for the reduction in the published rate eligibility cap to 100 kW was drawing near. *Id.*

On December 9, 2010, Grouse Creek sent communication confirming the projects' agreement to the security provisions of the contract and requesting a change in the Scheduled First Energy Dates as well as the Scheduled Operation Dates. *Id.* On December 14, 2010, Idaho Power sent communications to Grouse Creek requesting that the projects provide missing information required for completion of the draft FESAs. Ex. p. 286. This information included naming the proper transmission entity, as previous communications from the projects had indicated at different times both BPA and PacifiCorp. *Id.*; Tr. pp. 28-29. This communication also requested, again, that the project provide a complete location designation, which is necessary to establish the proper one-mile separation and legal description of the projects' location. *Id.*

On December 15, 2010, Idaho Power sent an e-mail confirming Idaho Power's receipt and acceptance of the projects' revised First Energy and Scheduled Operation dates, and indicating the same would be incorporated into the final draft FESAs. Ex. pp. 286-87. This communication also reiterates Idaho Power's December 14, 2010, request from the previous day for additional required information regarding the transmitting entity and completion of the

location description for the projects. *Id.* The projects were informed that this information was required to continue processing the proposed agreements. *Id.*

On December 15, 2010, Idaho Power requested Grouse Creek's confirmation that the Scheduled First Energy and Scheduled Operation Dates, as well as the location description for the projects, were correct. Ex. p. 287. This information was confirmed on December 16, 2010, by the projects. *Id.* On that same day, Idaho Power provided executable copies of the FESAs that were picked up from Idaho Power's office by the projects' counsel. *Id.* From December 16 through December 21, 2010, Grouse Creek reviewed the draft FESAs, and on December 21, 2011, Grouse Creek executed the PPAs and sent them via overnight mail to Idaho Power. *Id.* Idaho Power executed the PPAs on December 28, 2010, and filed them at the Commission the next day. *Id.*

II. ISSUES PRESENTED ON APPEAL

Although Idaho Power addresses Grouse Creek's designated Issues on Appeal in its Respondent's Brief, the issues in this matter may more succinctly be stated as follows:

1. Did the Idaho Public Utilities Commission properly apply Idaho law in its determination that Grouse Creek did not establish entitlement to the avoided cost rates in effect prior to December 14, 2010?

III. STANDARD OF REVIEW

The standards of review for orders of the Idaho PUC are well settled. Under the Idaho Constitution, this Court has only limited jurisdiction to review decisions of the Commission. Idaho Const., Art. V § 9; *A.W. Brown Company v. Idaho Power Company*, 121 Idaho 812, 815, 828 P.2d 841, 844 (1992). "The review on appeal shall not be extended further than to determine

whether the commission has regularly pursued its authority, including a determination of whether the order appealed from violates any right of the appellant under the constitution of the United States or the state of Idaho." *Idaho Code* § 61-629.

With regard to findings of fact, if the Commission's findings are supported by substantial, competent evidence, this Court must affirm those findings, *Industrial Customers of Idaho Power v. Idaho PUC*, 134 Idaho 285, 288, 1 P.3d 786, 789 (2000), even if this Court would have made a different choice had the matter been before it *de novo*. *Hulet v. Idaho PUC*, 138 Idaho 476, 478, 65 P.3d 498, 500 (2003). Substantial, competent evidence is defined as more than a mere scintilla, but something less than the weight of the evidence. *Industrial Customers*, 134 Idaho at 292-93, 1 P.3d at 793-94. "This Court will not displace the agency's choice between two fairly conflicting views, even though the Court may justifiably arrive at a different conclusion if the matter were before it *de novo*." *Rosebud Enterprises v. Idaho PUC*, 128 Idaho 609, 618, 917 P.2d 766, 775 (1996)("the *PacifiCorp* case")(citation omitted).

On questions of law, review is limited to the determination of whether the Commission has regularly pursued its authority. *A.W. Brown*, 121 Idaho at 815, 828 P.2d at 844; *Hulet*, 138 Idaho at 478, 65 P.3d at 500. The Commission's order or ruling will not be set aside unless it has failed to follow the law or has abused its discretion. *Application of Boise Water Corp.*, 82 Idaho 81, 86, 349 P.2d 711, 713 (1960)(citing cases).

The Commission's order must contain the reasoning behind its conclusions to sufficiently allow the reviewing court to determine that the Commission did not act arbitrarily. *Rosebud*, 128 Idaho at 618. "What is essential are sufficient findings to permit the reviewing court to determine that the IPUC has not acted arbitrarily." *Id.*, 128 Idaho at 624 (citations omitted).

IV. SUMMARY OF ARGUMENT

The factual, "as-applied" determination of when a PURPA QF establishes the right to a particular avoided cost rate pursuant to a legally enforceable obligation in the state of Idaho is a determination that lies exclusively with the state authority, the Idaho PUC, and not with FERC. As such, the legality and reasonableness of the Idaho PUC's determination in Grouse Creek's case is a question proper for this Court's review, and not for FERC.

The Commission and this Court have long recognized, and approved as consistent with state and federal law, the application in the state of Idaho of FERC requirements with regard to determining a QF's eligibility for a certain avoided cost rate pursuant to a legally enforceable obligation. The Idaho PUC has applied the legally enforceable obligation requirements, confirmed as valid and lawful by this Court, to the facts presented by Grouse Creek's proposed QF projects. The Commission found that Grouse Creek did not establish entitlement to the avoided cost rates that were in effect for QFs prior to December 14, 2010, pursuant to the state of Idaho's implementation of PURPA. Further, the Commission found it to be contrary to the public interest of the people of the state of Idaho for Grouse Creek's proposed projects to receive the avoided cost rates in effect prior to December 14, 2010. The Idaho PUC's findings of fact are supported by substantial, competent evidence. The Commission regularly pursued its lawful authority in applying the regulatory scheme for the implementation of PURPA in the state of Idaho to Grouse Creek's proposed projects. Accordingly, the final order of the Idaho PUC should be affirmed by this Court.

V. ARGUMENT

A. The Determination as to When a Legally Enforceable Obligation Is Incurred Is Within the Exclusive Jurisdiction of the State.

The factual, "as-applied" determination of when a PURPA QF establishes the right to a particular avoided cost rate pursuant to a legally enforceable obligation in the state of Idaho is a determination that lies exclusively with the state authority and the Idaho PUC, not with FERC. As such, the legality and reasonableness of the Idaho PUC's determination in Grouse Creek's case is a question proper for this Court's review, and not for FERC, or the federal courts. Consequently, Grouse Creek's reliance upon the declaratory orders issued by FERC in *Cedar Creek Wind, LLC*, 137 FERC ¶ 61,006 (Oct. 4, 2011), *Rainbow Ranch Wind, LLC*, 139 FERC ¶ 61,077 (April 30, 2012), *Murphy Flat Power, LLC*, 141 FERC ¶ 61,145 (Nov. 20, 2012), and *Grouse Creek Wind Park, LLC*, 142 FERC ¶ 61,187 (March 15, 2013) (collectively hereinafter, "FERC's Declaratory Orders") is without merit.

1. Legally Enforceable Obligation.

Congress enacted PURPA to encourage the development of cogeneration and small power production facilities, and directed FERC to promulgate regulations to further this goal. 16 U.S.C. § 824a-3(a); *FERC v. Mississippi*, 456 U.S. 742, 750-51, 102 S.Ct. 2126, 72 L.Ed.2d 532 (1982). PURPA also requires that the state regulatory authorities, such as the Idaho PUC, implement FERC regulations. 16 U.S.C. § 824a-3(f). In *FERC v. Mississippi*, the U.S. Supreme Court found that a state may comply with its obligation to implement PURPA and FERC regulations "by issuing regulations, by resolving disputes on a case-by-case basis, or by taking any other action reasonably designed to give effect to FERC's rules." 456 U.S. at 751, 102 S.Ct. 2126, 72 L.Ed.2d 532. FERC has further stated that states may fulfill the requirement to

implement its rules by "either 1) through the enactment of laws or regulations at the State level; 2) by application on a case-by-case basis by the State regulatory authority, or nonregulated utility, of the rules adopted by the Commission [FERC]; or 3) by any other action reasonably designed to implement the Commission's [FERC's] rules." *Policy Statement Regarding the Commission's Enforcement Role Under Section 210 of the Public Utility Regulatory Policies Act of 1978*, 23 FERC P 61304, 61644, 1983 WL 39627 (May 31, 1983).

Legally enforceable obligation ("LEO") in the context of PURPA is a phrase found in FERC's regulations, 18 C.F.R. § 292.304, Rates for Purchases, in subsections (b)(5) and (d)(2). The portion relevant to the issues in this proceeding states:

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

18 C.F.R. § 292.304(d). Upon enacting the above regulation, FERC stated, "Use of the term 'legally enforceable obligation' is intended to prevent a utility from circumventing the requirement that provides capacity credit for an eligible qualifying facility merely by refusing to

enter into a contract with the qualifying facility." *Small Power Production and Cogeneration Facilities; Regulations Implementing Section 210 of the Public Utility Regulatory Policies Act of 1978*, 45 Fed.Reg. 12,214, 12,224 (Feb. 25, 1980). "This provision allows QFs to provide energy to utilities either by entering into a contract or pursuant to a LEO." *Power Resource Group, Inc., v. Public Utility Commission of Texas*, 422 F.3d 231, 237 (5th Cir. 2005)(*citing Small Power Production and Cogeneration Facilities; Regulations Implementing Section 210 of the Public Utility Regulatory Policies Act of 1978*, 45 Fed.Reg. 12,214, 12,224 (Feb. 25, 1980)).

The Idaho PUC has implemented the provisions of § 292.304(d) with regard to Idaho Power by making available the two pricing options referred to in § 292.304(d) at the election of the QF. First, a QF may select to sell "as available" pursuant to Idaho Power's Tariff Schedule 86, Cogeneration and Small Power Production Non-Firm Energy. IPUC No. 29, Tariff No. 101, Sheet No. 86-1 through 86-7 (Mar. 1, 2008). This pricing option is available for QFs selecting to receive rates based upon the utility's avoided cost at the time of delivery. Second, for QFs that select to have pricing established for a specified term according to the utility's avoided cost at the time of contracting, or when the obligation is incurred, the Commission has authorized the use of two avoided cost pricing methodologies. A surrogate avoided resource, or SAR, methodology is used for small projects below the published rate eligibility cap, currently set at 100 kW for wind and solar QFs and 10 aMW for all other QFs. For QFs that are larger than the published rate eligibility cap, an avoided cost methodology based upon the utility's IRP is used to establish the starting point for negotiating the avoided cost rate for each specific project. The Commission reviews each QF PPA, and Commission approval of each agreement is required prior to such agreement being effective.

2. "As-Applied" vs. "As-Implemented."

It is well settled that "[i]t is up to the States, not this Commission [FERC], to determine the specific parameters of individual QF power purchase agreements, including the date at which a legally enforceable obligation is incurred under State law." *W. Penn Power Co.,* 71 FERC ¶ 61,153, 61,495 (May 8, 1995). FERC even quotes this exact passage itself in its recent declaratory order regarding Grouse Creek. *Grouse Creek Wind*, 142 FERC ¶ 61,187 at P 41 (March 15, 2013).

An important distinction that defines jurisdictionally the respective authority of the federal government, through FERC and the federal courts, and the state government, through the Idaho PUC and the Idaho Supreme Court, is the distinction between "as-applied" and "as-implemented." FERC has no authority over "as-applied" claims under PURPA. This is the exclusive province of the state. FERC has only limited authority as to "as-implemented" claims that must be brought to the federal district court to be given effect. The Idaho PUC expressly recognized the proper weight and authority of FERC's Declaratory Orders in its application of legally enforceable obligation analysis to Grouse Creek:

> It is important to note that a declaratory order issued by FERC is not legally binding on this Commission. A declaratory order "that does no more than announce the [FERC's] interpretation of the PURPA or one of the agency's implementing regulations is of no legal moment unless and until a district court adopts that interpretation when called upon to enforce PURPA." *Niagra Mohawk Power Corp., v. FERC*, 117 F.3d 1485, 1488, 326 U.S.App.D.C. 135, 138 (1997).
>
> > ["]Unlike the declaratory order of a court, which does fix the rights of the parties, this [FERC] Declaratory Order merely advised the parties of the [FERC's] position. It was much like a memorandum of law prepared by the FERC staff in anticipation of a

> possible enforcement action; the only difference is that the [FERC] itself formally used the document as its own statement of position. While such knowledge of the FERC's position might affect the conduct of the parties, the Declaratory Order is legally ineffectual apart from its ability to persuade (or to command the deference of) a [district] court that might later have been called upon to interpret the Act and the agency's regulations in an [sic] private enforcement action. . . ."

R. pp. 356-57 (quoting *Industrial Cogenerators v. FERC*, 47 F.3d 1231, 1235 (D.C. Cir. 1995)).

This distinction is well illustrated and discussed in a series of cases from Texas, similar to the case now brought by Grouse Creek and before this Court. *Power Resource Group, Inc., v. Public Utility Commission of Texas*, 73 S.W.3d 354 (Tex.2002); *Power Resource Group, Inc., v. Klein,* No. A-03-CA-762-H, slip op. at 12 (W.D.Tex. Feb. 18, 2004); *Power Resource Group, Inc., v. Public Utility Commission of Texas*, 422 F.3d 231 (5th Cir. 2005) *cert. denied*, 547 U.S. 1020, 126 S.Ct. 1583, 164 L.Ed.2d 301 (Mar. 20, 2006). Power Resource Group ("PRG"), a PURPA QF, challenged Texas's application and implementation of PURPA in both state and federal court. *Power Resource*, 422 F.3d at 232-33. After purchase negotiations between PRG and the utility failed, PRG sought to compel the utility to purchase power pursuant to a legally enforceable obligation. *Id.* at 233. The Public Utility Commission of Texas ("Texas PUC") determined that because its rules implementing PURPA provide for a legally enforceable obligation only if a facility is within ninety days of delivering power, the utility had no obligation to purchase power from PRG. *Id.* PRG sought relief in Texas state courts, which denied its request to overturn the Texas PUC's decision. *Id.* PRG then brought suit in federal district court, which held that it had jurisdiction only to determine whether the Texas PUC had fully implemented PURPA, and dismissed PRG's remaining, "as-applied" claims. *Id.* Finding

that the Texas PUC did, in fact, fully implement PURPA, including providing for the option of a legally enforceable obligation, the federal district court granted summary judgment in favor of the Texas PUC and the utility. *Id.* PRG appealed to the 5th Circuit, which affirmed the district court's decision. *Id.*

"An implementation claim involves a contention that the state agency . . . has failed to implement a lawful implementation plan under 16 U.S.C. § 824a-3(f) of PURPA, whereas an 'as-applied' claim involves a contention that the state agency's . . . implementation plan is unlawful, as it applied to or affects an individual petitioner." *Power Resource*, 422 F.3d at 235 (quoting the federal district court)(citations omitted). "Federal courts may not hear 'as applied' claims, because jurisdiction over such claims is reserved to the state courts." *Id.* (*citing Indust. Cogenerators v. FERC,* 47 F.3d 1231, 1234 (D.C.Cir. 1995); *Mass. Inst. of Tech. v. Mass. Dep't of Puc.Utils.,* 941 F.Supp. 233, 236 (D.Mass.1996); *Greensboro Lumber Co. v. Ga. Power Co.,* 643 F.Supp. 1345, 1374 (N.D.Ga.1986)). The district court in *Power Resource* determined that the only issue properly before the federal court was whether the Texas PUC failed to implement PURPA, and that all other "as-applied" claims would stand as determined by the Texas state courts. *Id.* at 231. Upon its review affirming the district court, the 5th Circuit concluded, "defining the parameters for creating a LEO is left to the states and their regulatory agencies." *Id.* at 239.

> PRG failed to show that PURPA and the FERC regulations mandate that all QFs, including unbuilt ones, must be able to create a LEO at any time. To the contrary, states must provide for legally enforceable obligations as distinct from contractual obligations, but "[i]t is up to the States, not [FERC], to determine the specific parameters of individual QF power purchase agreements, including the date at which a legally enforceable obligation is incurred under State law." *W. Penn Power Co.,* 71 F.E.R.C. ¶ 61,153, 61,495

> (May 8, 1995). *West Penn* and its progeny *Jersey Central Power & Light Co.*, 73 F.E.R.C. ¶ 61,092, 61,297 (Oct. 17, 1995), and *Metropolitan Edison Co.*, 72 F.E.R.C. ¶ 61,015, 61,050 (July 6, 1995), supports the proposition that the FERC regulations grant the states discretion in setting specific parameters for LEOs.

Id. at 238.

The Idaho PUC has applied a regulatory scheme that provides for both the formation of contractual obligations and also a distinct LEO. Grouse Creek contends that the Commission has limited, improperly, the determination regarding LEO to only the terms of the contract. Appellant's Brief, pp. 22-24. This is clearly not the case. The Commission, in this case, directly addressed this distinction in Order No. 32635, "At the outset, we note that this Commission did not and has never made a determination that the creation of a legally enforceable obligation only occurs when a QF and a utility enter into a written and signed agreement." R. p. 355 (emphasis in original). "We clearly did not make a finding that the creation of a legally enforceable obligation only occurs when a QF and a utility enter into a written and signed agreement." R. p. 356 (emphasis in original).

The entire premise of Grouse Creek's case is flawed. Grouse Creek's first designated issue on appeal states, "Whether the Idaho PUC's decision . . . is an improper and illegal ***implementation*** of PURPA." Appellant's Brief, p. 17 (emphasis added). Implementation is the sole province and jurisdiction of federal courts, not the state, and not FERC—while application is sole province of the states, and proper for the Idaho PUC and the Idaho Supreme Court. *Power Resource Group, Inc. v. Public Utility Commission of Texas*, 422 F.3d 231, 235 (5th Cir. 2005) *cert. denied*, 547 U.S. 1020, 126 S.Ct. 1583, 164 L.Ed.2d 301 (Mar. 20, 2006). "Federal courts may not hear 'as applied' claims, because jurisdiction over such claims is reserved to the

state courts. Federal jurisdiction over implementation claims, the district court held, is exclusive." *Id.* (citations omitted)(affirming decision of district court to grant summary judgment in favor of PUC and utility). Grouse Creek bases nearly all of its arguments and justifications upon the series of FERC's Declaratory Orders (all of which deal with the same Commission determinations, issued on the same day, for several similarly situated QF projects and claims) that have no controlling or precedential value or effect upon this Court's determination as to the lawful application of the Commission's rules to the facts of this case pursuant to Idaho law. FERC has no authority or jurisdiction to make findings of fact with regard to the application of Idaho law to Grouse Creek, and where it has attempted to apply its interpretation of regulations to the facts of Grouse Creek, it has acted outside of its jurisdiction and authority. Moreover, as properly recognized by the Idaho PUC, until FERC's arguments and positions are considered and determined by a federal court, FERC's Declaratory Orders in these matters have no more authority or weight than a memorandum of law prepared by FERC staff, and is legally ineffectual. *Industrial Cogenerators v. FERC*, 47 F.3d 1231, 1235 (D.C.Cir. 1995). Consequently, the relevant determination for this case is whether the Idaho PUC's determination that Grouse Creek was not entitled to a previously effective avoided cost rate was proper under Idaho law.

B. <u>The Commission's Application of Legally Enforceable Obligation is Proper Under Idaho Law</u>.

The Commission and this Court have long recognized, and approved as consistent with state and federal law, the implementation in the state of Idaho of FERC requirements with regard to determining a QF's eligibility for a certain avoided cost rate pursuant to a LEO. The Idaho PUC has applied the LEO requirements, confirmed as valid and lawful by this Court, to the facts

presented by Grouse Creek's proposed QF projects. The Commission found that Grouse Creek did not establish entitlement to the avoided cost rates that were in effect for QFs prior to December 14, 2010, pursuant to the state of Idaho's implementation of PURPA. Further, the Commission found it to be contrary to the public interest of the people of the state of Idaho for Grouse Creek's proposed projects to receive the avoided cost rates in effect prior to December 14, 2010. The Idaho PUC's findings of fact are supported by substantial, competent evidence. The Commission regularly pursued its lawful authority in applying the regulatory scheme for the implementation of PURPA to Grouse Creek's proposed projects. Accordingly, the final order of the Idaho PUC should be affirmed by this Court.

1. The Commission Properly Applied Idaho's Legally Enforceable Obligation Analysis to Grouse Creek.

This Court has specifically affirmed, on at least two occasions, the Commission's application of the "meritorious complaint rule" employed by the Commission to determine on a case-by-case basis a QF's entitlement to a previously effective avoided cost rate pursuant to a LEO. *A.W. Brown Company, Inc., v. Idaho Power Company,* 121 Idaho 812, 828 P.2d 841 (1992); *Rosebud Enterprises, Inc., v. Idaho Public Utilities Commission*, 131 Idaho 1, 951 P.2d 521 (1997)("*Rosebud II*"). This rule is designed to address the express purpose of the existence of the legally enforceable obligation language from FERC's regulation: "Use of the term "legally enforceable obligation" is intended to prevent a utility from circumventing the requirement that provides capacity credit for an eligible qualifying facility merely by refusing to enter into a contract with the qualifying facility." *Small Power Production and Cogeneration Facilities; Regulations Implementing Section 210 of the Public Utility Regulatory Policies Act of 1978*, 45 Fed.Reg. 12,214, 12,224 (Feb. 25, 1980).

In *A.W. Brown*, Brown, a PURPA QF, appealed an order of the Commission denying its request that the Commission order Idaho Power to purchase electricity from Brown at an earlier, superseded avoided cost rate. 121 Idaho at 813. What can be called the "meritorious complaint rule" is set forth in *A. W. Brown* where the Commission had determined that:

> the right to obtain the higher [previously effective] rates, would be extended only to those potential CSPP's[2] who, on or before April 29, 1985, [effective date of the new rates] had either already signed a contract with Idaho Power to produce and sell energy or who had filed meritorious complaints with the PUC alleging that Idaho Power had declined to enter into a contract with them and that they were otherwise entitled to sell energy at the earlier [avoided cost] rates. In a subsequent order, the Commission held "that in order to be 'meritorious' a complainant must allege and prove (1) that the project was substantially mature to the extent that would justify finding that the developer was ready, willing and able to sign a contract and (2) that the developer had actively negotiated for a contract which, but for the reluctance of the utility, would have been executed."

Id. at 814.

In *A.W. Brown*, the Court first addressed "whether the Commission had authority to establish the requirement that, before a CSPP can lock-in a certain rate, there must be a signed contract to sell at that rate or a meritorious complaint alleging that the project was mature and that the developer had attempted, and failed, to negotiate a contract with the utility." *Id.* at 816. The court directly addressed the issue, "Does the PUC have authority, under federal and state law, to establish a regulatory scheme to determine whether and when a qualifying CSPP is entitled to a contract to sell energy at avoided cost rates?" *Id.* at 815. The court affirmed the

[2] CSPP stands for "cogenerators and small power producers," which is synonymous with referring to a PURPA QF.

Commission's authority, the application of the meritorious complaint rule, and the Commission's order. *Id.* at 818-819.

Similar to *A.W. Brown*, in *Rosebud II*,[3] a PURPA QF appealed an order of the Commission denying its request that the Commission order Idaho Power to purchase electricity at an earlier, superseded avoided cost rate. 131 Idaho at 3. This Court found that Rosebud did not obligate itself to sell power to the utility prior to the change in rates; that Rosebud did not have a legally enforceable obligation to sell power to the utility at the previously effective avoided cost rates; and rejected Rosebud's contention that federal law preempts the Idaho PUC from adopting a signed contract or complaint rule. *Id.* at 6. The Court stated:

> In *A.W. Brown Co.,* this Court ruled that IPUC has authority, under state and federal law, to require that before a developer can lock in a certain rate, there must be either a signed contract to sell at that rate or a meritorious complaint alleging that the project is mature and that the developer has attempted and failed to negotiate a contract with the utility; that is, there would be a contract but for the conduct of the utility. 121 Idaho at 816, 828 P.2d at 845. Rosebud has neither signed a contract nor established that Idaho Power will not negotiate with it.

Rosebud II, 131 Idaho at 6. In addressing Rosebud's claim to federal preemption, this Court referred to its decision in the *PacifiCorp* case, 128 Idaho 609, 917 P.2d 766 (1996), stating:

> In [the *PacifiCorp* case] the Court ruled that "[a]ccording to the FERC, it is up to the State, not [FERC], to determine the specific parameters of individual [qualified facility] power purchase

[3] There are four Idaho Supreme Court cases entitled, *Rosebud Enterprises, Inc. v. Idaho Public Utilities Commission* Three of these cases dealt with substantially the same facts and issues, while the fourth, 128 Idaho 633, 917 P.2d 790, dealt with a non-related, utility rate base issue that was deemed moot and dismissed by the Court. For purposes of clarity, in Respondent-Intervenor Idaho Power's Respondent's Brief, the other three *Rosebud* cases will be referred to with the same nomenclature as that given to them by the Court in *Rosebud* 131 Idaho 1, 951 P.2d 521, as follows: *Rosebud*, 128 Idaho 624, 917 P.2d 781 (1996)("*Rosebud I*"); *Rosebud*, 131 Idaho 1, 951 P.2d 521 (1998)("*Rosebud II*"); and *Rosebud*, 128 Idaho 609, 917 P.2d 766 (1996)("the *PacifiCorp* case"). *Rosebud I* and *Rosebud II* both deal with Idaho Power.

> agreements, including the date at which a legally enforceable obligation is incurred under State law." In the *PacifiCorp* case, the Court noted that "Rosebud is not entitled to a lock-in of an avoided cost rate until it has entered into a legally enforceable and IPUC approved obligation for the delivery of energy and capacity."

Rosebud II, 131 Idaho at 6 (citations omitted).

It is important to note that the main components of the meritorious complaint rule are directly tied to the directives of FERC's regulations regarding legally enforceable obligation. Idaho's rule addresses a determination as to whether the QF was ready, willing, and able to sign a contract with the utility. *A.W. Brown,* 121 Idaho at 814; *Rosebud II*, 131 Idaho at 6. This directly corresponds to FERC's guidance that "a QF, by committing itself to sell to an electric utility, also commits the electric utility to buy from the QF; these commitments result either in contracts or in non-contractual, but binding, legally enforceable obligations." *Grouse Creek Wind*, 142 FERC ¶ 61,187 at P 40 (2013)(quoting *JD Wind 1, LLC,* 129 FERC ¶ 61,148 at P 29 (2009) (internal footnotes omitted))(citations omitted). Likewise, Idaho's rule also addresses a determination as to whether there was a refusal, or a delay, by the utility to contract and negotiate; that the developer had actively negotiated for a contract which, but for the reluctance of the utility, would have been executed. *A.W. Brown*, 121 Idaho at 814; *Rosebud II*, 131 Idaho at 6. This directly comports with FERC's own, and numerous, statements that the very purpose for the creation and existence of the phrase "legally enforceable obligation" is "to prevent a utility from circumventing the requirement that provides capacity credit for an eligible qualifying facility merely by refusing to enter into a contract with the qualifying facility." *Small Power Production and Cogeneration Facilities; Regulations Implementing Section 210 of the Public Utility Regulatory Policies Act of 1978*, 45 Fed.Reg. 12,214, 12,224 (Feb. 25, 1980).

Grouse Creek cites to other Commission "grandfathering" cases, and argues that the Commission has unreasonably departed from the meritorious complaint rule. Appellant's Brief, pp. 27-31. This characterization is not correct. The Idaho PUC has always conducted the same analysis aimed at the two above-referenced core determinations of the meritorious complaint and legally enforceable obligation analysis: Did the QF obligate itself? Has there been a refusal or delay by the utility to contract? It is within the Commission's discretion and authority to require a "formal complaint" or some other means with which to analyze a legally enforceable obligation, or grandfathering claim. The Commission's determinations regarding grandfathering and legally enforceable obligations have always centered around the reasoned, case-by-case determination as to whether the QF has obligated itself, whether it has diligently pursued its project and negotiation of rate and contract, and whether the utility has refused to negotiate and/or contract or delayed the process. The Commission has not always required a "formal complaint" to be filed but has always conducted the same reasoned analysis in the context of an ongoing proceeding with full participation of both the QF parties and the utility, or utilities. Grouse Creek's characterization of the Idaho PUC changing or abandoning the "rule" as set forth in *A.W. Brown* and *Rosebud II* is incorrect.

An examination of the Commission's Order No. 32635, Final Reconsideration Order on Remand, (Sept. 7, 2012), R. pp. 346-62, clearly shows that the Commission properly recognized and identified its lawful discretion and authority, as well as this Court's precedent regarding application of legally enforceable obligation in Idaho; that the Commission made findings supported by substantial competent evidence in the record; and that the Commission provided sufficient reasoning and analysis behind the conclusions in its Order to allow this Court to

determine that it did not act arbitrarily—it regularly pursued its authority. The Idaho PUC recognized its discretion and authority under Idaho law in its analysis as to the application of a legally enforceable obligation to Grouse Creek. R. pp. 357-358. The Commission stated:

> The Idaho Commission has aggressively and proactively enforced PURPA, as evidenced by the abundance of QF projects that now operate in our State. 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. *Rosebud Enterprises v. Idaho PUC*, 131 Idaho 1, 951 P.2d 521 (1997); *see also A.W. Brown v. Idaho Power Company*, 121 Idaho 812, 816, 828 P.2d 841, 845 (1992). Our application of this framework conforms with FERC's analysis of its standards. In *JD Wind 1*, FERC succinctly stated:
>
> > Thus, under our regulations, a QF has the option to commit itself to sell all or part of its electric output to an electric utility. *While this may be done through a contract, if the electric utility refuses to sign a contract,* the QF may seek state regulatory authority assistance to enforce the PURPA-imposed obligation on the electric utility to purchase form the QF, and *a non-contractual, but still legally enforceable, obligation will be created pursuant to the state's implementation of PURPA.* Accordingly, a QF, by committing itself to sell to an electric utility, also commits the electric utility to buy from the QF; *these commitments result either in contracts or in non-contractual, but binding, legally enforceable obligations.*
>
> *JD Wind 1*, 129 FERC ¶ 61,148 at 61,633 (Nov. 19, 2009)(emphasis added). FERC determined that, regardless of whether the energy offered was firm or non-firm power, the QF was entitled to a legally enforceable obligation because the utility in *JD Wind* was refusing to enter into a contract with the QF. FERC reiterated its conclusions on reconsideration. *JD Wind 1*, 130 FERC ¶ 61,127 at 61,628. The matter before this Commission involves two parties who voluntarily entered into PPAs with negotiated terms and conditions.

R. pp. 357-358. The Commission went on to find that because Idaho Power and Grouse Creek in this case had negotiated and executed contractual agreements, and submitted the same to the Commission for its review, "A determination regarding whether and when a legally enforceable obligation arose – outside the specific contract terms – was wholly unnecessary." R. p. 358.

Grouse Creek argues, based largely upon the FERC Declaratory Orders, that the Commission has limited, improperly, the determination regarding legally enforceable obligation to only the terms of the contract. As stated previously, this is clearly not the case. The Commission, in this case, directly addressed this distinction in Order No. 32635 stating, "At the outset, we note that this Commission did not and has never made a determination that the creation of a legally enforceable obligation only occurs when a QF and a utility enter into a written and signed agreement." R. p. 355 (emphasis in original). "We clearly did not make a finding that the creation of a legally enforceable obligation only occurs when a QF and a utility enter into a written and signed agreement." R. p. 356 (emphasis in original).

Furthermore, in addressing Grouse Creek's claims upon reconsideration and remand that, based upon FERC's Declaratory Orders, Grouse Creek had a legally enforceable obligation prior to the December 14, 2010, change in the eligibility cap for published rates, the Commission went on to find that, "Even assuming, *arguendo*, that a legally enforceable obligation could somehow preempt the terms of subsequently written and signed Agreements between the parties, we find that a legally enforceable obligation did not exist prior to December 14, 2010." R. p. 359. The Commission then addressed Grouse Creek's contentions that a legally enforceable obligation to the previously effective avoided cost rates in place on November 8, 2010, the date Grouse Creek filed a complaint, and/or on December 9, 2010, the date Grouse Creek claimed that all material

contractual terms were established, were without merit. R. pp. 359-61. Based upon its examination of the record, and the facts in the case, the Commission found that:

> The utility did not refuse to sign a contract. . . . that no conduct by the utility unnecessarily delayed or impeded Grouse Creek's ability to enter into its Agreements. . . . that the evidence and the conduct of the parties do not support that a legally enforceable obligation was formed . . . [and] that a legally enforceable obligation did not arise prior to December 14, 2010, because material terms to the Agreements were still incomplete on that date.

R. pp. 360-61.

Grouse Creek is highly critical of the Commissions' findings, claiming they are not supported by the substantial evidence standard. Appellant's Brief, pp. 32-39. Grouse Creek takes issue with the quantum of evidence, as it perceives the record, and takes the position that there was more evidence supporting Grouse Creek's arguments than there was supporting the Commission's findings that did not favor Grouse Creek. *Id.* Substantial evidence is defined as more than a scintilla, but something less than the weight of the evidence. *Industrial Customers*, 134 Idaho at 292-93, 1 P.3d at 793-94.

The Commission clearly states that it bases its findings upon the entirety of the evidence presented, and the conduct of parties. R. p. 360. In addition, the Commission's Final Reconsideration Order on Remand, R. pp. 346-63, contains a recitation of the documents filed in the case, a sample recitation of evidence, and the parties' respective positions, including their respective factual submissions, as well as specific reference to particular items in the record before it upon which it relied. *Rosebud*, 128 Idaho 609 at 624 (the *PacifiCorp* case) ("The IPUC's conclusion is preceded by a sample recitation of the evidence and the parties' respective positions. When viewed in context, the IPUC's conclusions indicate an implicit adoption of

Rosebud's position. . . . The IPUC's findings need not take any particular form so long as they fairly disclose the basic facts upon which the IPUC relies and support the ultimate conclusions.").

Moreover, the transcript from the March 7, 2012, hearing conducted by the Commission in this matter shows that the Commission actively engaged in a dialogue with counsel regarding whether the material terms of the agreement were complete, or not, prior to December 14, 2010. Tr. pp. 26-32. The Commission had before it extensive comments filed by Idaho Power, R. pp. 184-98, Commission Staff, R. pp. 146-53, and Grouse Creek, R. pp. 158-83. The Commission additionally had the lengthy factual submissions from both Grouse Creek and Idaho Power in the form of sworn affidavits with numerous documents attached. Idaho Power's Affidavit of Randy Allphin and attachments, Ex. pp. 281-582; Grouse Creek's Affidavit of Christine Mikell and attachments, Ex. pp. 3-280.

The Commission's findings are based upon substantial, competent evidence in the record, and certainly upon more than a scintilla. It is not this Court, nor anyone's, responsibility to make any judgments upon the adequacy of the Commission's findings beyond that. The standard is clear: If the Commission's findings are based upon substantial, competent evidence, something more than a scintilla, then they must be affirmed, even if the Court would make a different determination were the matter before it *de novo* to review. Additionally, the Commission's final order clearly shows the reasoning behind its conclusions, sufficient for this Court to review and determine that the Commission acted within its lawful authority and discretion—a regular pursuit of its authority. The Commission properly applied Idaho's legally enforceable obligation

analysis to Grouse Creek. As such this Court should affirm the Commission's final order, and deny Grouse Creek's requested relief.

2. The Commission Found Grouse Creek's Rates to be Contrary to the Public Interest.

The Idaho PUC, in its review of the executed Grouse Creek FESAs, found that approval of the contracts would be contrary to the public interest and refused to approve them. 16 U.S.C. § 824a-3(b)(1)(requiring the rates for purchases from QFs by utilities be just and reasonable and in the public interest); R. pp. 229-30, June 8 Grouse Creek Order at 9-10 ("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."); R. p. 265, July 27 Grouse Creek Order at 14 ("[I]t 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 available."); R. p. 361, September 7 Grouse Creek Order at 16 ("This Commission determined that it is not in the public interest to approve the Agreements. . . . For this Commission to approve a rate in excess of the utility's avoided cost would clearly be a violation of PURPA and FERC's implementing regulations.")(citation omitted). In addition, the Commission also subsequently found the methodology employed to derive the rates in Grouse Creek's FESAs to be unjust, unreasonable, contrary to PURPA, and not in the public interest. Case No. GNR-E-11-03, Interlocutory Order No. 32498, p. 2 (Mar. 22, 2012).

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 [Idaho] 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)); 16 U.S.C. § 824a-3(c), (f).

The Idaho PUC, 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 into by Idaho Power are in the public interest. *See Rosebud*, 128 Idaho 609, at 613-14 (1996)(the *PacifiCorp* case) (The [Idaho] 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 Ag. Prods. Corp. v. Utah Power & Light Co.*, 98 Idaho 23, 29, 557 P.3d 617, 623 (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.") Additionally, the provisions providing for a legally enforceable obligation in determining the proper price for a QF must be read in conjunction with—and not to conflict—the other provisions of the statutory, or regulatory scheme. *Moreland v. Adams*, 143 Idaho 687, 690, 152 P.3d 558 (2007)(citations omitted)(all parts of a statute should be given meaning and the Court will construe a statute so that effect is given to its provisions and no part is rendered superfluous or insignificant). Consequently, the Commission must retain the ability to give effect to the requirement in 16 U.S.C. § 824a-3(b)(1)(requiring the rates for purchases from QFs by utilities be just and reasonable and in the public interest) when considering the requirements of a legally enforceable obligation, used to determine rates for purchases in 18 C.F.R. § 292.304.

The duty of the Idaho PUC to ensure and protect 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. However, despite this constitutional protection, the Idaho PUC may annul, supersede, or reform the contracts of the public utilities it regulates in the public interest. *Ag. 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 Idaho PUC 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. *Ag. Prods. Corp.*, 98 Idaho at 29. Grouse Creek's contention that the Commission's order should be reversed because its agreements contain agreed-to-rates authorized by 18 C.F.R. § 292.301(b) is without merit. As stated herein, the Commission made specific findings that approval of Grouse Creek's agreements is contrary to the public interest and, further, subsequent proceedings additionally found the avoided cost rate methodologies employed to calculate the rates in Grouse Creek's agreements to be unjust unreasonable, and contrary to the public interest. Case No. GNR-E-11-03, Interlocutory Order No. 32498 at 2 (March 22, 2012). Grouse Creek's agreements were found to contain rates that exceed Idaho Power's avoided cost, which by definition are illegal as harmful to customers. Additionally, the wind resources proffered in Grouse Creek's agreements were not called for in Idaho Power's IRP, were not procured utilizing a request for proposal process, nor by any other means designed and required by the Commission to assure the least cost resource was acquired to meet the needs of Idaho Power's customers. As such, absent the must-purchase requirement

of PURPA, such agreement would not be executed by Idaho Power, nor approved by the Commission.

While the Idaho PUC may not annul, supersede, or revise a PURPA contract during its term because such action may constitute utility-type regulation of a QF in violation of 18 C.F.R. § 292.602(c)(1), the Idaho PUC may review and approve a PURPA contract at the time it is submitted by the parties for final approval, in furtherance of its state and federal duties to ensure that the agreement is consistent with the public interest. *Crossroads Cogeneration Corp. v. Orange & Rockland Utilities, Inc.*, 159 F.3d 129, 138 (3d.Cir.1998)("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 Idaho PUC's determination in this case was made, independently of Idaho's application of legally enforceable obligation and the meritorious complaint analysis. Grouse Creek'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.

Grouse Creek's FESAs were subject to the Idaho PUC's public interest review of PURPA contracts upon submission to the Idaho PUC for approval. Each Grouse Creek 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.

R. pp. 52, 117, Idaho Power's Application, Attachment No. 1, Firm Energy Sales Agreement, at 30, Case Nos. IPC-E-10-61 and IPC-E-10-62. The Idaho PUC's review of the FESAs has

meaning, and is not simply a formality. Upon the parties' submittal and Idaho PUC review, the Idaho PUC specifically found that approval of the Grouse Creek 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. R. pp. 229-30, June 8 Grouse Creek Order at 9-10; R. p. 265, July 27 Grouse Creek Order at 14 (*citing Rosebud*, 128 Idaho at 613)(the *PacifiCorp* case); R. p. 361, Sept 7 Grouse Creek Order at 16. The Idaho PUC acted within its discretion and obligation to protect the public interest by denying the Grouse Creek FESAs.

Commission approval of the final contractual agreement, including the rates contained therein, is a required part of the Commission's implementation of PURPA in the state of Idaho, approved by this Court. *Rosebud II*, 131 Idaho 1, 6, 951 P.2d 521 (1998). FERC regulations mandate that state commissions approve standard rates for QFs under 100 kW but give states the discretion to approve standard rates for QFs over 100 kW. 18 C.F.R. § 292.304(c). The United States Supreme Court has held that "the state, having power to deny a privilege altogether, may grant it upon conditions as it sees fit to impose." *Frost v. Railroad Com. of State of Ca.*, 271 U.S. 583, 593, 46 S.Ct. 605, 607, 70 L.Ed. 1101 (1926). The Court noted that the power is not unlimited—the state cannot impose conditions that require the relinquishment of constitutional rights. *Id.* at 593. However, QFs over 100 kW have no constitutional right to standard rates of which they can be deprived. *See* 18 C.F.R. § 292.304(c)(2) (states may approve standard rates for QFs over 100 kW). Therefore a state implementation that offers QFs a choice of project-specific modeled rates, negotiated rates, or standard rates subject to final state commission approval does not deprive QFs of a constitutional right. Accordingly, a state commission may

elect to provide QFs greater than 100 kW an option of standard rates which the state commission may review and, if necessary, disapprove prior to a FESA becoming final.

Additionally, subsequent to the non-approval of Grouse Creek's FESAs, the Idaho PUC determined that the rates contained in Grouse Creek's FESAs were not reflective of Idaho Power's avoided cost, and consequently do not comport with the requirements of PURPA. Case No. GNR-E-11-03, Interlocutory Order No. 32498 at 2 (March 22, 2012). The Idaho PUC 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." *Id.* The requirement that the Idaho PUC finally review and approve or reject the FESAs entered into by Idaho Power and a PURPA QF is the Idaho PUC's mechanism that it utilizes to meet its obligation to assure not only that the agreements satisfy FERC's PURPA requirements, but also the state of Idaho's requirements, that such agreements are just and reasonable to utility customers and in the public interest. 16 U.S.C. § 824a-3(b)(1); *Idaho Code* §§ 61-502, 61-503. The Idaho PUC determined in two cases, independently of its legally enforceable obligation analysis, that Grouse Creek's FESAs are contrary to the public interest. First, in its final order denying approval of Grouse Creek's FESAs and, second, in its March 22, 2012, order finding the methodology employed to derive the rates in Grouse Creek's FESA to be unjust, unreasonable, contrary to PURPA, and not in the public interest. Case No. GNR-E-11-03, Interlocutory Order No. 32498, p. 2 (Mar. 22, 2012).

The Idaho PUC acted pursuant to its discretion and obligations to protect the public interest of the state of Idaho by denying the Grouse Creek FESAs. Grouse Creek's requested

relief in its appeal to this Court is contrary to the public interest. This Court should affirm the final order of the Commission.

VI. ATTORNEY FEES ON APPEAL

Grouse Creek seeks an award of attorney fees citing as its sole basis *Idaho Code* § 12-121. Appellant's Brief, pp. 41-43. "Attorney fees are not available under I.C. §12-121 in an appeal from an order of the IPUC. . . ." *Eagle Water Co., Inc. v. Idaho Public Utilities Commission*, 130 Idaho 314, 318, 940 P.2d 1133, 1137 (1997). Accordingly, Grouse Creek's request for attorney fees in this appeal from an order of the Idaho PUC, should be denied outright.

VII. CONCLUSION

The factual, "as-applied," determination of when a PURPA QF establishes the right to a particular avoided cost rate pursuant to a legally enforceable obligation in the state of Idaho is a determination that lies exclusively with the state authority, the Idaho PUC and this Court, and not with FERC, nor the federal courts. As such, the legality and reasonableness of the Idaho PUC's determination in Grouse Creek's case is a question proper for this Court's review, and not for FERC.

The Commission and this Court have long recognized, and approved as consistent with state and federal law, the application in the state of Idaho of FERC requirements with regard to determining a QF's eligibility for a certain avoided cost rate pursuant to a legally enforceable obligation. The Idaho PUC has applied the legally enforceable obligation requirements, confirmed as valid and lawful by this Court, to the facts presented by Grouse Creek's proposed QF projects. The Commission found that Grouse Creek did not establish entitlement to the

avoided cost rates that were in effect for QFs prior to December 14, 2010, pursuant to the state of Idaho's implementation of PURPA. Further, the Commission found it to be contrary to the public interest of the people of the state of Idaho for Grouse Creek's proposed projects to receive the avoided cost rates in effect prior to December 14, 2010.

The Idaho PUC's findings of fact are supported by substantial, competent evidence. The Commission regularly pursued its lawful authority in applying the regulatory scheme for the implementation of PURPA in the state of Idaho to Grouse Creek's proposed projects. Accordingly, the final order of the Idaho PUC should be affirmed by this Court.

Respectfully submitted this 5th day of April 2013.

DONOVAN E. WALKER
Attorney for Respondent-Intervenor Idaho Power Company

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 5th day of April 2013 I served a true and correct copy of RESPONDENT'S BRIEF OF IDAHO POWER COMPANY AND ELECTRONIC BRIEF ON CD upon the following named parties by the method indicated below, and addressed to the following:

Jean D. Jewell, Secretary Idaho Public Utilities Commission 472 West Washington Street P.O. Box 83720 Boise, Idaho 83720-0074	_X_ Hand Delivered ____ U.S. Mail ____ Overnight Mail ____ FAX _X_ Email jean.jewell@puc.idaho.gov
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