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IDAHO PUBLIC UTILITIES COMMISSION

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Attorneys for Coleman Hydroelectric, LLC

BEFORE THE IDAHO PUBLIC UTILITIES COMMISSION

IN THE MATTER OF THE APPLICATION ) CASE NO. IPC-E-20-27  
OF IDAHO POWER COMPANY FOR )  
APPROVAL OR REJECTION OF AN ) **SUPPLEMENTAL COMMENTS OF**  
ENERGY SALES AGREEMENT WITH ) **COLEMAN HYDROELECTRIC, LLC**  
COLEMAN HYDROELECTRIC LLC, FOR )  
THE SALE AND PURCHASE OF ELECTRIC )  
ENERGY FROM THE COLEMAN HYDRO )  
PROJECT )  
)

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Pursuant to Idaho Public Utilities Commission (“IPUC” or “Commission”) Order No. 34756, Coleman Hydroelectric, LLC (“Coleman Hydro”) hereby respectfully submits its Supplemental Comments through its counsel. Coleman Hydro requests that the Commission approve the Energy Sales Agreement (or “ESA”) containing the published avoided cost rates established by Order No. 34350 and in effect prior to June 1, 2020 (the “Order No. 34350 rates”), as submitted for approval by Idaho Power Company (“Idaho Power”) in this proceeding. As explained below, although the parties’ written agreement was not finally executed prior to June 1, 2020, Coleman Hydro perfected its entitlement to a legally enforceable obligation to the Order No. 34350 rates prior to June 1, 2020. Indeed, Idaho Power agreed with such entitlement to the Order No. 34350 rates and therefore executed the written agreement containing those rates.

## BACKGROUND

The Coleman Hydro Project is a planned hydroelectric project that will harness the waterpower potential of an existing irrigation pipeline, which is currently unused and wasted. *See Whittaker Declaration* at ¶ 3. The project would be located near Leadore, Idaho, in Lemhi County, and would have a maximum capacity of 800 kilowatts (“kW”).

The developers of the Coleman Hydro Project have been in discussions with Idaho Power for over a year. Coleman Hydro representatives initially completed Idaho Power’s Schedule 73 application for qualifying facilities (“QF”) for the project’s current configuration and submitted it to Idaho Power on May 8, 2019. In subsequent discussions, Coleman Hydro revised the initially proposed Scheduled Operation Date, clarified that Coleman Hydro sought the seasonal hydropower rates since it will only produce energy in the irrigation season, and provided additional information requested for the purpose of completing the Energy Sales Agreement by Idaho Power’s representative, Jerry Jardine. *Id.* at ¶ 9. As of May 19, 2020, Coleman Hydro had agreed to all terms and conditions of the Energy Sales Agreement and communicated to Idaho Power that Coleman Hydro was ready to execute the agreement. *Id.* at ¶ 11; *accord Idaho Power’s Reply Comments* at p. 2.

Based on Idaho Power’s Reply Comments, Idaho Power had to then route the agreement through its standard Sarbanes-Oxley compliance review, after which Idaho Power apparently internally approved the agreement and sent the written document for execution to Coleman Hydro on May 27, 2020. *Idaho Power’s Reply Comments* at p. 2-3. The agreement sent to Coleman Hydro contained the Order No. 34350 rates and all other terms and conditions to which the parties had previously agreed. Because the parties are physically separated by quite a distance, Idaho Power placed the executable agreement in the mail to Coleman Hydro.

*Whittaker Declaration* at ¶ 11. Coleman Hydro executed it upon receipt on June 8, 2020, and mailed it back to Idaho Power. *Id.* Idaho Power executed the agreement on June 19, 2020.

Notably, the project is in an advanced stage of development. Before June 1, 2020, the effective date of the avoided cost rate change at issue in this proceeding, the developers of the project had expended approximately \$2.35 million, including completion of the following critical development steps: installation of six miles of 24-inch penstock; purchase of the Pelton turbine, generator, and switch gear, all of which are now awaiting installation; completion of construction of the project's powerhouse; and commencement of construction of the privately owned segments of the interconnection tie line, which is almost completed. *Id.* at ¶¶ 4-5, 8, & Ex. 1. The interconnection study process has advanced to the final step of executing the Generator Interconnection Agreement and funding Idaho Power's interconnection construction with an additional \$300,000 expenditure. *Id.* at ¶ 7. The developers of the project will fund that interconnection expenditure through third-party financing, which is ready to be promptly deployed if the Commission approves the Energy Sales Agreement containing the Order No. 34350 rates. *Id.* Additionally, the project has necessary approval from the Federal Energy Regulatory Commission ("FERC") of its status as a qualifying in-conduit hydropower facility exempt from the lengthy licensing process under the Federal Power Act. *Id.* at ¶ 6. In short, Coleman Hydro merely awaits the Commission's approval of the Energy Sales Agreement to timely complete construction and place the facility in service by the ESA's Scheduled Operation Date of June 1, 2021.

#### ARGUMENT

The Commission should approve the Energy Sales Agreement containing the Order No. 34350 rates, as submitted for approval by Idaho Power in this proceeding. The supplemental

facts presented here regarding the steps taken by Coleman Hydro prior to June 1, 2020, warrant a finding that Coleman Hydro is entitled to a legally enforceable obligation containing those rates, as memorialized in the finally executed written agreement submitted to the Commission by Idaho Power for approval in this case. Although Staff's Comments suggest that a QF may only be entitled to previously effective avoided cost rates in the case where the written agreement is executed prior to the date of the rate change, such a suggestion is mistaken. The law is clear that a legally enforceable obligation can – and in this case did – arise prior to final execution of a written contract between a QF and a utility.

**A. A Legally Enforceable Obligation Can Entitle a QF to Rates that Were in Effect Prior to the Date the Written Agreement is Formally Executed**

Under FERC's regulations which this Commission implements, a QF is entitled to form a legally enforceable obligation (or "LEO") to the rates and terms and conditions in effect at the time that it commits itself to sell power to the utility. *See* 18 C.F.R. § 292.304(d)(2)(ii). FERC has explained that each 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 avoided costs calculated at the time that obligation is incurred." *JD Wind I, LLC*, 129 FERC ¶ 61,148 at P 29 (2009). Under the LEO rule, "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." *Virginia Electric and Power Co.*, 151 FERC ¶ 61,038, P 25 (2015).

This Commission has implemented the LEO rule to uphold the rights of the QF to the rates in effect prior to the date of execution of the written agreement, especially in cases like the present case where both parties agree that all material terms were agreed to prior to the date of the rate change. *See Re Approval of a Firm Energy Sales Agreement with Yellowstone Power*

*Company*, Case No. IPC-E-10-22, Order No. 32104, at 12 (2010). In *Yellowstone Power*, the Commission approved an executed agreement containing rates that expired prior to execution of the agreement despite “the apparent lack of any *written documentation* . . . evidencing that the terms of a power purchase agreement were materially complete [before the rate change].” *Id.* (emphasis in original). The Commission did so because the QF had familiarity with the standard terms of Idaho Power’s power purchase agreements and both parties agreed as to the material terms of the agreement prior to the effective date of the rate change. *Id.*; see also *FERC v. Idaho PUC*, Case 1:13-cv-00141-EJL-REB, Doc. No. 49-1 (D. Ct. Id., Dec. 24, 2013) (memorandum of understanding agreeing that a LEO may predate the execution of a contract)

This Commission has also looked to the maturity of the project and level of commitment of the QF developer to completion of the project in determining whether to approve the use of pre-existing rates. See *In the Matter of Cassia Wind to Determine Exemption Status*, Case No. IPC-E-05-35, Order No. 29954, 2-4 (2006). For example, in *Cassia Wind*, the Commission found that a QF was entitled to pre-existing rates based on the maturity of development of project when it had merely submitted a completed application for interconnection study, including the applicable fee, and had performed wind studies, commenced preliminary permitting and licensing activities, and made efforts to secure sites to place turbines. *Id.*

Notably, FERC’s recently issued Order No. 872 reaffirmed its prior LEO precedent and confirmed that a QF may be entitled to previously effective avoided costs in the absence of an executed written contract. Although that new rule is not effective yet, FERC’s commentary is instructive here. See *Qualifying Facility Rates and Requirements; Implementation Issues Under the Public Utility Regulatory Policies Act of 1978*, Order No. 872, 172 FERC ¶ 61,041, at P 685

(July 16, 2020).<sup>1</sup> That new rule adopts a more onerous LEO standard than previously existed by requiring the QF to demonstrate commercial viability and financial commitment to construct the facility to create a LEO, through such steps as obtaining site control, applying for all local permitting and zoning, and applying for interconnection. *Id.* But FERC clarified the state cannot require the QF to receive interconnection studies, *id.*, and “[o]btaining a PPA or financing cannot be required to show proof of financial commitment.” *Id.* at P 687. Coleman Hydro unquestionably satisfies even the more stringent test recently created for commercial viability, which FERC created to “rais[e] the bar to prevent speculative QFs from obtaining LEOs,” *id.* at P 688, even though that new test does not apply yet.

However, Order No. 872 is also notable for its assessment of the current state of the law. In explaining its new commercial viability rule, FERC listed the following requirements that it has previously found to be inconsistent with the LEO rule. Those unlawful LEO requirements included: “a requirement for a utility’s execution of an interconnection agreement *or power purchase agreement*, or requiring that QFs file a formal complaint with the state commission, or limiting LEOs to only those QFs capable of supplying firm power, or requiring the QF to be able to deliver power in 90 days.” *Id.* at PP 689-90 (emphasis added) (footnotes omitted). In so explaining, FERC specifically cited *Grouse Creek Wind Park, LLC*, 142 FERC ¶ 61,187, at P 40 (2013), for the proposition that requiring the QF to file a complaint to establish a LEO is unlawful. In sum, therefore, FERC has reiterated that requiring a QF to obtain a fully executed power purchase agreement or to file a complaint at the state commission are not lawful prerequisites to creation of a LEO, and are instead unreasonable barriers to amicable contract formation by a QF and a utility.

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<sup>1</sup> Order No. 872 states that the new rules become effective 120 days after publication of the Order in the Federal Register. *Id.* at P 753.

**B. The Commission Should Approve the Energy Sales Agreement Executed by Coleman Hydro and Idaho Power containing the Order No. 34350 Rates**

In this case, under any fair application of the above LEO criteria, Coleman Hydro created a LEO prior to June 1, 2020, and the Commission should approve the Energy Sales Agreement as executed and submitted by Idaho Power in this proceeding. As noted above, the Energy Sales Agreement was fully negotiated prior to the rate change. Coleman Hydro's representative, Jordan Whittaker, understood that Idaho Power and Coleman Hydro had completed negotiation of the Energy Sales Agreement, including the rates contained therein, and both parties were committed to that agreement prior to June 1, 2020. Idaho Power's Reply Comments state that the only element absent at the time of the June 1 rate change was the actual signatures on the Energy Sales Agreement, which occurred on June 8, and June 19, 2020, and Mr. Whittaker agrees with that assessment. *Whittaker Declaration* at ¶ 9. As Mr. Whittaker explains, "[b]oth parties had resolved all material terms before June 1 and all that remained was the actual signatures on the written agreement." *Id.* at ¶ 10. All that remained to be done as of the last days before the rate change occurring on June 1, 2020, was the mere "formality of executing the written agreement, including the rates, to which both parties had previously agreed." *Id.* at ¶ 11.

Furthermore, this Commission has previously acknowledged that pre-existing rates should apply in the case where the facility has matured to the level that demonstrates the QF's commitment to the project, and Coleman Hydro unquestionably satisfies such test. The developers have expended \$2.35 million dollars in development of the facility and are merely awaiting the funding and commencement of Idaho Power's construction of the interconnection until the assurance of this Commission's approval of the Energy Sales Agreement. *Id.* at ¶¶ 4-8.

Staff's Comments recommend against use of the Order No. 34350 rates. According to Staff's Comments, a "QFs cannot lock-in a certain rate until the QF has: (1) signed to sell at that

rate, or (2) a meritorious complaint alleging the project is mature and the QF has attempted and failed to negotiate a contract with the utility; that is, there would be a contract but for the utility's conduct." *Staff's Comments* at 3-4. Without the benefit of the additional facts supplied in Idaho Power's Reply Comments and these Supplemental Comments, Staff's Comments concluded that "the Company's proposed published avoided cost rates for the ESA – the old rates set by Order No. 34350 – are unavailable because the ESA was fully executed and effective after the new rates took effect on June 1, 2020 per Order No. 34683." *Id.* at 4.

Coleman Hydro respectfully disagrees with Staff's conclusion, which was not fully informed by the additional facts supplied with these Supplemental Comments. As noted above, the requirement that a QF obtain an executed contract prior to the rate change or file a complaint against the utility is not a lawful test under FERC's precedent. Order No. 872, 172 FERC ¶ 61,041, at PP 689-90. Furthermore, the complaint requirement has no reasonable applicability to the facts in this case where *both the QF and the utility agreed*, prior to the rate change, which rates would apply to the finally executed written agreement. In other words, there would have been no basis for Coleman Hydro to file a complaint in light of its understanding – which was mutually held by Idaho Power – that the parties both agreed that there was nothing left to negotiate or dispute and the Order No. 34350 rates would apply.

The parties' inability to execute the written agreement prior to June 1, 2020, even though both parties had approved it for signature by May 27, 2020, was due to the parties' physical separation, the resulting need to mail the document back and forth, and likely further delayed by ongoing remote working conditions caused by a global pandemic. Under the facts of this case, it would be unjust to deny Coleman Hydro – which has already expended \$2.35 million to develop its small hydro facility – of the benefits of the Energy Sales Agreement that Idaho Power agreed

to execute and submit for approval. Accordingly, Coleman Hydro respectfully requests that the Commission approve the agreement as submitted by Idaho Power with the Order No. 34350 rates.

### CONCLUSION

For the reasons set forth above, Coleman Hydro requests that the Commission approve the Energy Sales Agreement containing the Order No. 34350 rates, as submitted for approval by Idaho Power in this proceeding.

Respectfully submitted this 21<sup>st</sup> day of August 2020,

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Attorneys for Complainant Coleman Hydroelectric,  
LLC

## CERTIFICATE OF SERVICE

I HEREBY certify that I have on this 21st day of August 2020, served the foregoing Supplemental Comments of Coleman Hydroelectric, LLC and Declaration of Jordan Whittaker in Case IPC-E-20-27, by electronic mail to the following:

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BEFORE THE IDAHO PUBLIC UTILITIES COMMISSION

IN THE MATTER OF THE APPLICATION )  
OF IDAHO POWER COMPANY FOR )  
APPROVAL OR REJECTION OF AN ) **DECLARATION OF JORDAN**  
ENERGY SALES AGREEMENT WITH ) **WHITTAKER**  
COLEMAN HYDROELECTRIC LLC, FOR )  
THE SALE AND PURCHASE OF ELECTRIC )  
ENERGY FROM THE COLEMAN HYDRO )  
PROJECT )  
)

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I, Jordan Whittaker, declare under the penalty of perjury as follows:

1. This declaration is based on my personal knowledge and, if called to testify to the following facts, I could and would competently do so. I submit this declaration in support of Coleman Hydroelectric, LLC's request that the Idaho Public Utilities Commission ("IPUC" or "Commission") approve the Energy Sales Agreement submitted by Idaho Power Company ("Idaho Power") in this proceeding.

2. I am one of the developers of the hydroelectric facility at issue in this proceeding (the "Coleman Hydro Project"), which is owned by Coleman Hydroelectric, LLC.

3. The Coleman Hydro Project is a planned hydroelectric project that will use the motive force of an existing irrigation pipeline, the LTC-Tyler pipeline, running to irrigation

ditches, near Leadore, Idaho, in Lemhi County. The Coleman Hydro Project would harness the waterpower from the LTC-Tyler pipeline and would operate only during the irrigation season when the pipeline is used to deliver water to irrigators. Currently, the pipeline supplies water to a ditch, and the power potential is thus wasted. The Coleman Hydro Project would divert a portion of the water from the terminus of the pipeline to convey it under pressure to a new powerhouse containing a Pelton turbine and generator with a capacity of 750 kW. Water leaving the powerhouse would continue to be used for irrigation purposes. The project will be located on a ranch owned by my family and would use existing water rights, and therefore site control and water rights are already secured.

4. The Coleman Hydro Project is in an advanced stage of development. Before the June 1, 2020 effective date of the avoided cost rate change at issue in this proceeding, I and the other developers of the Coleman Hydro Project had taken a number of steps to commit to the development of the project, which include:

- a. We installed six miles of 24-inch penstock in May 2018 through October 2018;
- b. We purchased the turbine, generator, and switch gear on or before the summer of 2019, and all of these critical project components are awaiting installation;
- c. We completed all cement work for the powerhouse in August 2019, and the powerhouse itself was constructed between December 2019 and May 2020;  
and
- d. We have commenced construction of the privately owned segments of the interconnection powerline, and it is almost completed.

5. Attached in Exhibit 1 to this Declaration are photographs of the powerhouse and several items of above-referenced equipment.

6. Additionally, on April 1, 2019, the Federal Energy Regulatory Commission issued a letter stating that the project meets the criteria of a qualifying conduit hydropower facility exempt from licensing under Section 30(a) of the Federal Power Act.

7. We have also proceeded through the interconnection study process to the point of being offered a Generator Interconnection Agreement. Upon execution of the Generator Interconnection Agreement, we must fund a deposit for interconnection construction of approximately \$300,000. Unlike the other expenditures to date that were made out-of-pocket with funds of the developers of the Coleman Hydro Project, this \$300,000 expenditure for interconnection construction will be secured by third-party financing, and we are waiting to secure such financing until after the Commission approves the Energy Sales Agreement. We plan to move forward with such financing and the interconnection construction promptly upon Commission approval of the Energy Sales Agreement.

8. In total, I estimate that as of June 1, 2020, the developers of the Coleman Hydro Project had expended the \$2,350,000 in the development efforts set forth above.

9. I have reviewed the timeline of events set forth in the Reply Comments of Idaho Power, filed on August 13, 2020, regarding the negotiation of the Energy Sales Agreement. Idaho Power's description of the events leading the Energy Sales Agreement are generally consistent with my recollection of those events. To summarize, we initially completed the Schedule 73 application for the project's current configuration and submitted it to Idaho Power on May 8, 2019. In subsequent discussions, we revised the proposed Scheduled Operation Date to May 1, 2021, clarified that we sought the seasonal hydropower rates, and provided additional

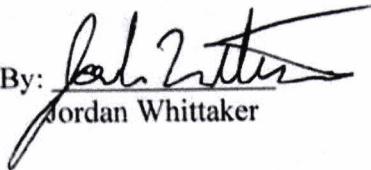
information requested for the purpose of completing the agreement by Idaho Power's representative, Jerry Jardine. We had agreed to all terms and conditions of the Energy Sales Agreement and communicated to Idaho Power we were ready for execution on or about May 19, 2020, which is the last date of communication on Idaho Power's list of events.

10. As of May 19, 2020, I understood that we had completed negotiation of the Energy Sales Agreement, including the rates contained therein, and both parties were committed to that agreement. Idaho Power's Reply Comments state that the only element absent at the time of the June 1 rate change was the actual signatures on the ESA, which occurred on June 8, and June 19, 2020. I agree that both parties had resolved all material terms before June 1 and all that remained was the actual signatures on the written agreement.

11. Idaho Power's Reply Comments state that Idaho Power sent the executable Energy Sales Agreement to Coleman Hydro on May 27, 2020. I would add that Idaho Power sent the document to us in paper format via the mail, not email, and I cannot confirm the precise date Idaho Power placed it in the mail. To the best of my recollection, I executed agreement upon receipt on June 8, 2020, and I mailed it back to Idaho Power for its execution. I understood this to be a formality of executing the written agreement, including the rates, to which both parties had previously agreed.

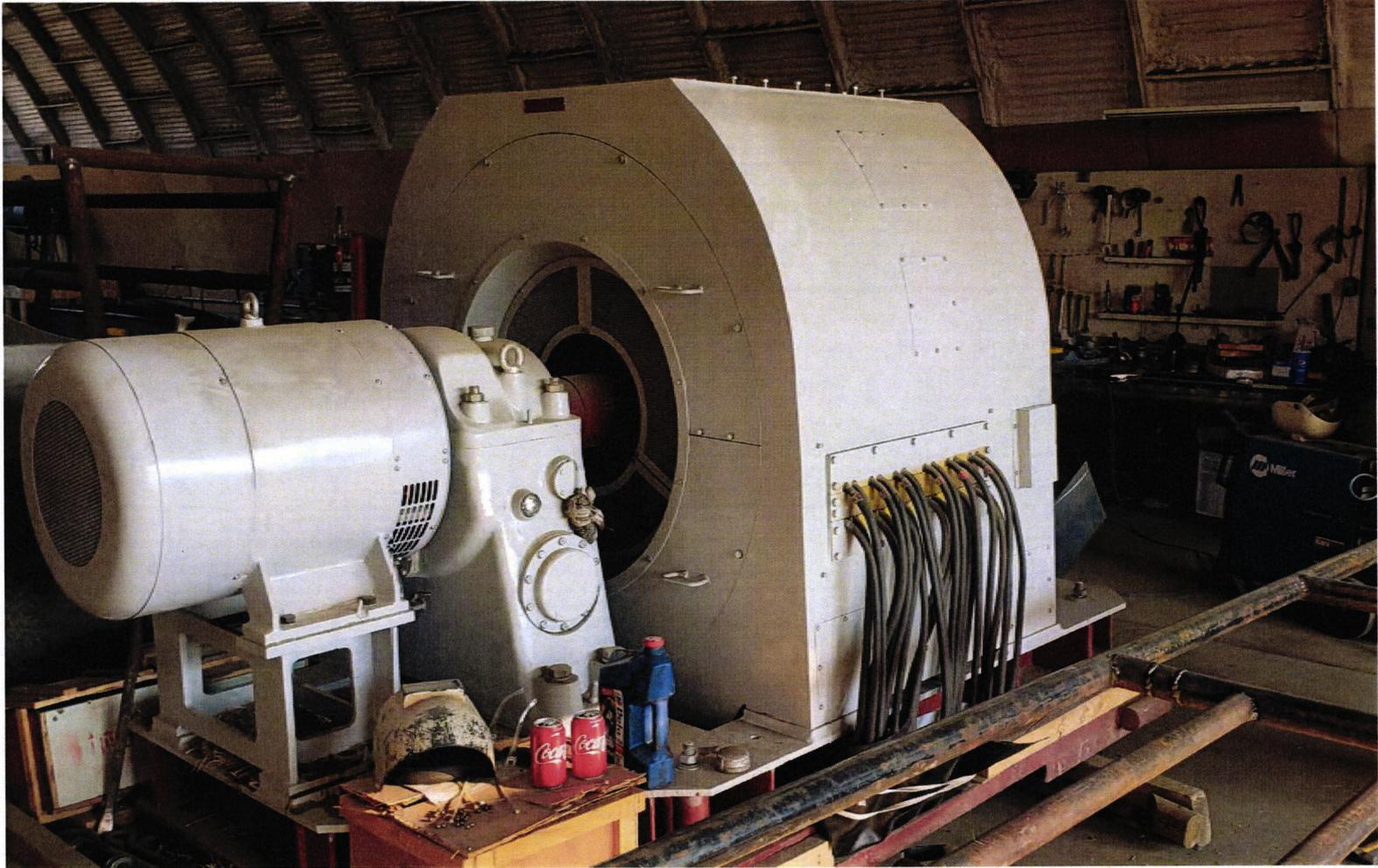
I hereby declare that the above statements are true to the best of my knowledge and belief, and that I understand they are made for use as evidence in the Idaho Public Utilities Commission and are subject to penalty of perjury.

DATED this 21<sup>st</sup> day of August 2020.

By:   
Jordan Whittaker

# **EXHIBIT 1**

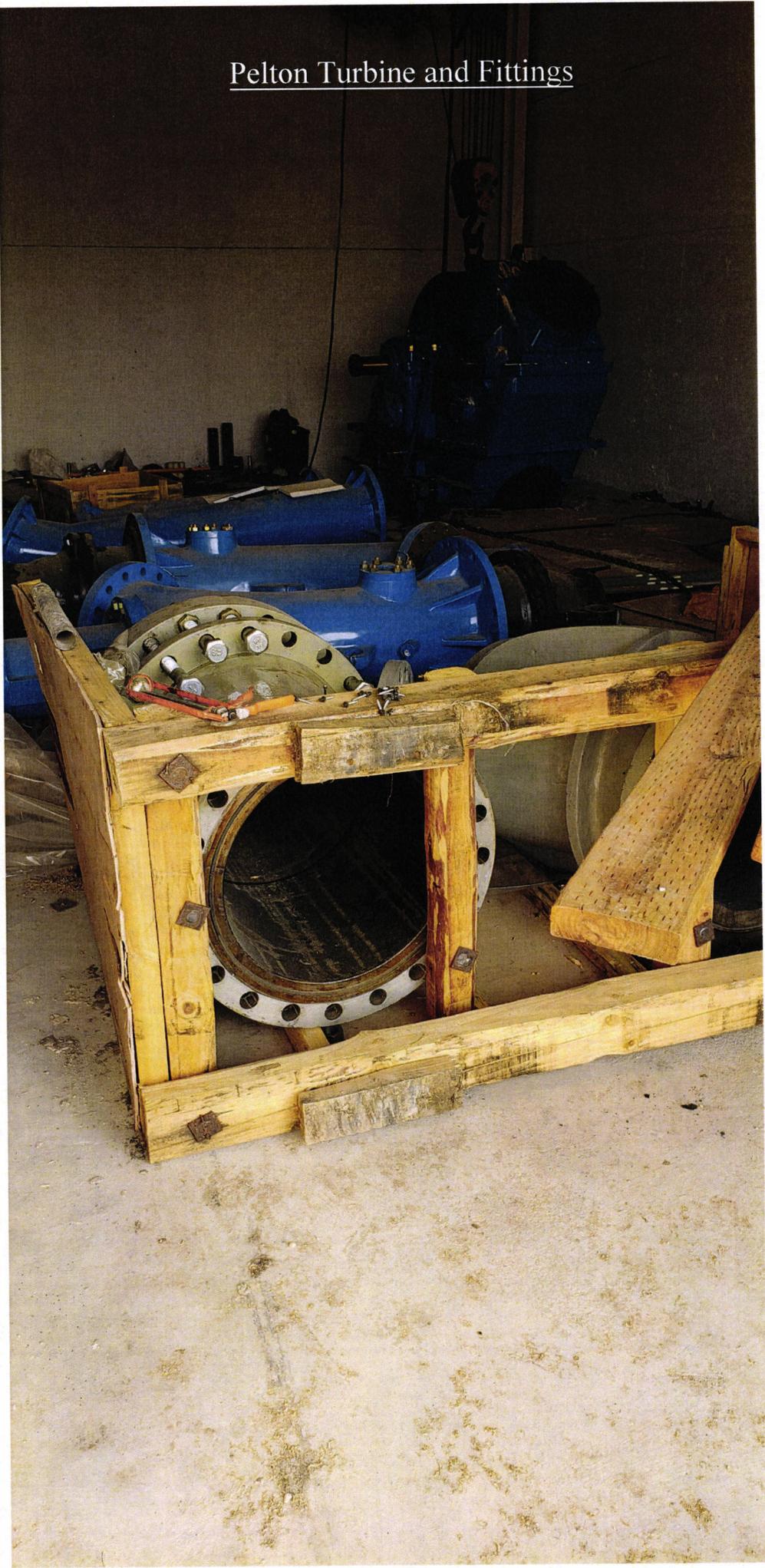
Generator



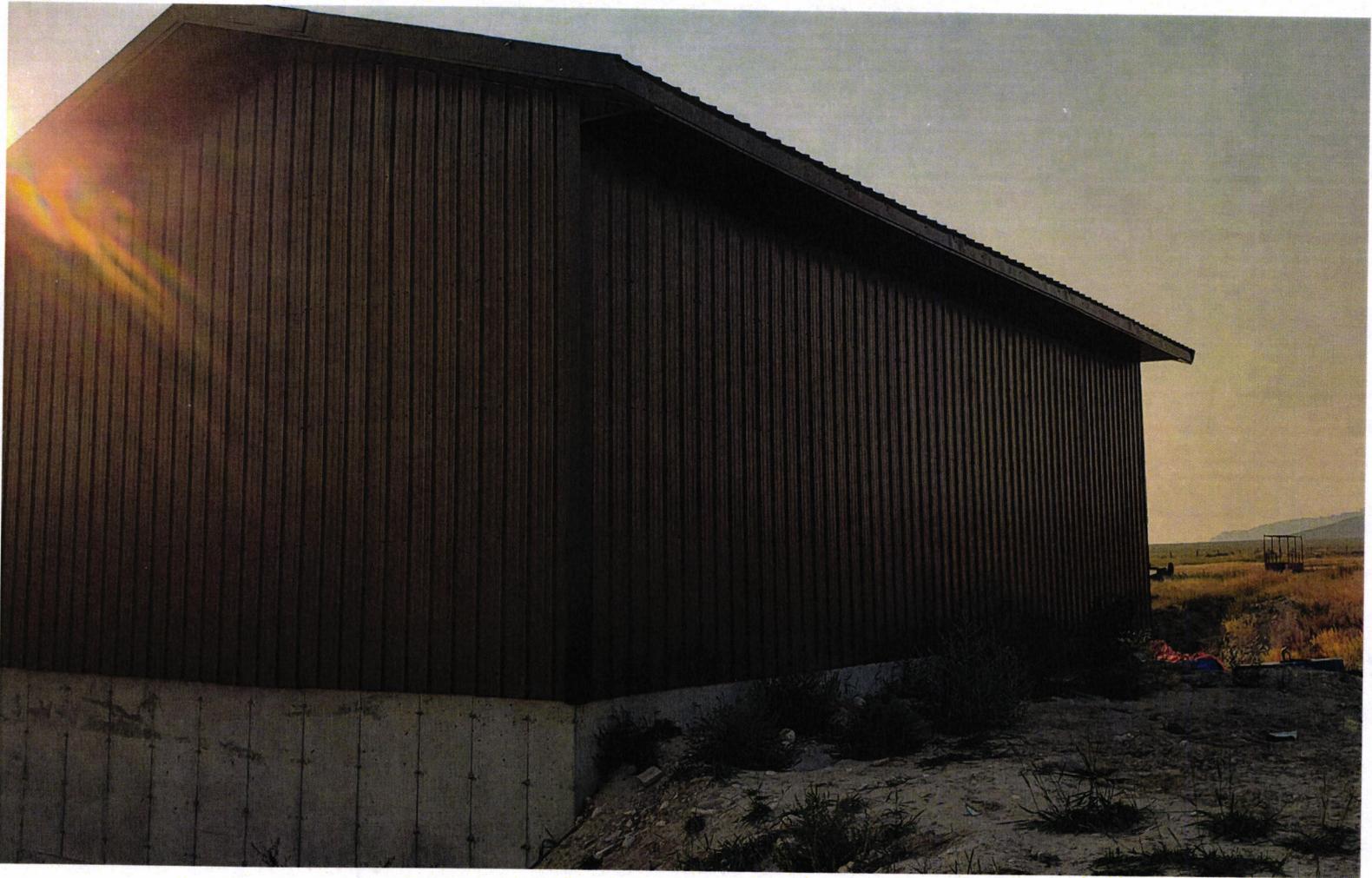
Large Valve



Pelton Turbine and Fittings



Powerhouse



Tail Race/Powerhouse



Private Power Line

