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BEFORE THE IDAHO PUBLIC UTILITIES COMMISSION

WOOD HYDRO, LLC,

Complainant,

v.

IDAHO POWER COMPANY,

Respondent/Cross-Complainant,

v.

WOOD HYDRO, LLC,

Cross-Respondent,

ENEL GREEN POWER NORTH AMERICA, INC.

Cross-Respondent,

v.

CENTRAL RIVERS POWER US, LLC

Cross-Respondent.

Case No. IPC-E-20-28

CENTRAL RIVERS POWER US, LLC'S MOTION TO DISMISS

Central Rivers Power US, LLC[1] ("Lowline #2"), by and through its counsel of record, Givens Pursley LLP, files this Motion to Dismiss. Lowline #2 respectfully requests that the

[1] Although Central Rivers Power, LLC is named in the Cross-Complaint, the facility at issue is owned and operated by Lowline Rapids, LLC ("Lowline #2"). By filing this Motion, neither Central Rivers Power nor Lowline

Idaho Public Utilities Commission (the "Commission") issue an order dismissing Idaho Power Company's ("Idaho Power" or "Company") Cross-Complaint against Central Rivers for lack of jurisdiction. Alternatively, Lowline #2 respectfully submits that even if the Commission has jurisdiction, it should decline to exercise jurisdiction because the dispute is more properly adjudicated in district court.

INTRODUCTION

A. Facts and procedural history

This case involves a dispute over the liquidated damages clause in the Firm Energy Sales Agreement ("FESA") between Lowline #2 and Idaho Power.[2] Lowline #2 owns and operates the Lowline #2 facility, which is a Qualifying Facility ("QF") under the Public Utility Regulatory Policies Act of 1978, 16 U.S.C. § 2601 *et seq.* Lowline #2 became a party to this case when Idaho Power filed a Cross-Complaint against Central Rivers and Enel Green Power North America, Inc. ("Enel") in response to a formal complaint filed against Idaho Power by Wood Hydro, LLC ("Wood Hydro").

In the Cross-Complaint, Idaho Power alleges that all three QFs "have an old version of a 35-year, levelized rate, mandatory purchase, PURPA QF contract with Idaho Power." Cross-Complaint at ¶1. According to Idaho Power, under the FESA "the project must deliver up to its Annual Net Energy amount from Section 6.3 [of the FESA] or be subject to a schedule of Lump Sum Refund Payment (Section 21.2 [entitled "Liquidated Damages"]; Appendix D)." *Id.* at ¶22.

Idaho Power alleges that Lowline #2 did not provide energy during June 2019-April 2020, and therefore "[t]here was a permanent curtailment of the project's Annual Net Energy

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#2 concede that Central Rivers Power is the proper party to this proceeding. Such matters can be resolved if the case proceeds.

[2] Specifically, paragraph 21.2 of the FESA, entitled "Liquidated Damages." The FESA, which is attached to Idaho Power's Cross-Complaint as Attachment 3, is described in more detail below.

deliveries for Contract Year 32." *Id.* at ¶25. As a result, Idaho Power claims that Lowline #2 owes over $3.6 million to Idaho Power under the FESA's liquidated damages clause. *Id.* at ¶26.

The Cross-Complaint seeks, among other things, that "the Commission direct . . . Central River[s] Power to pay the amounts assessed by Idaho Power as Lump Sum Repayment Amounts." *Id.* p. 18, ¶4. In other words, Idaho Power seeks from the Commission an order compelling Lowline #2 to pay $3,616,983 to Idaho Power.

B. Lowline #2's FESA

Although Idaho Power treats all three QFs and all three FESAs as the same, this case involves three separate QFs and three separate FESAs. Lowline #2 focuses on its own FESA here.

Lowline #2's predecessor entered into the FESA on September 12, 1986. The FESA was approved by the Commission on November 1, 1986. Under the FESA, Idaho Power is required to purchase Net Energy from the Lowline #2 Facility at a contractually defined price. *See* FESA ¶6.1 (purchase obligation)[3], ¶7.1 (purchase price).[4] "Net Energy" is defined as,

> The electric energy produced by the Facility, less Station Use and less Losses, expressed in kilowatt hours ("kwh"), delivered to Idaho [Power] at the Point of Delivery.

FESA ¶1.10.

The FESA sets forth an estimate of the Net Energy that the QF believed it could provide to Idaho Power on an annual basis, defined as "Annual Net Energy." FESA ¶6.2 ("Based on long-term historical water flow records and average long-term energy estimates based thereon, Seller *estimates* that it can deliver Net Energy in the following amounts: . . . ." (emphasis

[3] Paragraph 6.1 provides, "Except when either party's performance is prevented by events of force majeure (Article XVI) or otherwise excused as provided herein, Idaho [Power] *shall purchase all of the Net Energy and Surplus Energy delivered by Seller to the Point of Delivery.*" (Emphasis added).

[4] Paragraphs 7.1 and 7.2 set forth the prices for Net Energy and Surplus Energy.

added)); FESA ¶1.1 ("Annual Net Energy" – The amount of Net Energy Seller *estimates* it will deliver to Idaho [Power] at the Point of Delivery during each Contract Year." (emphasis added)).

Consistent with the FESA's terms, when approving the FESA the Commission recognized that the annual net energy amount was an estimate: "The *estimated* annual average energy production [under the FESA] is 15,755,610 kilowatt hours." Case No. U-1006-281, Order No. 20823 at 1 (emphasis added).

Paragraph 21.2 is the liquidated damages clause at issue here. That paragraph provides, in full and with key terms in italics,

> 21.2 Liquidated damages. The parties agree that the amount of the payment which Idaho [Power] is to make to Seller is based on the agreed value to Idaho [Power] of Seller's performance of *its obligation to provide Net Energy* as set out in Article VI for the full term of the Agreement. The parties further agree that if Idaho [Power] does not receive such full performance (1) Idaho [Power] shall be deemed damaged by reason thereof, (2) it would be impractical or extremely difficult to fix the actual damages to Idaho [Power] resulting therefrom, (3) the payments as provided below are in the nature of adjustments in Net Energy prices *and liquidated damages* and not a penalty, and are a reasonable attempt by the parties to estimate a fair compensation to Idaho [Power] for the reasonable losses that would result from such total or partial default.
>
> > 21.2.2 Failure to Deliver for Term of Agreement – If, at any time prior to the end of the term of the Agreement, Seller *permanently curtails in whole or in part its deliveries of the Annual Net Energy* amount Seller shall pay to Idaho [Power], as Idaho [Power's] sole and exclusive remedy for damages arising out of this permanent curtailment of Net Energy deliveries, the appropriate lump sum repayment amount specified in Appendix D, multiplied by the difference in megawatt-hours between the annual Net Energy amount specified in paragraph 6.3 and the reduced Annual Net Energy amount. This payment amount will bear interest from sixty (60) days after Idaho [Power] receives notice of Seller's *permanent reduction of the annual Net Energy amount*, until paid, at a rate equal to the average of the prime interest rates of the Idaho First National Bank in effect during each month of that period. For purposes of this paragraph, reduced deliveries of Net Energy due to below-

> normal water conditions (paragraph 6.4) shall not be considered a permanent curtailment.
>
> FESA ¶21.2 (emphasis added).

Unlike the other FESAs at issue in this case, the Lowline #2 FESA does not contain a dispute resolution clause. Paragraph 7.3 provides that the "rates, terms and conditions contained in th[e] Agreement" will be construed in accordance with several cited cases, Section 210 of PURPA, and 18 CFR § 292.303-308.[5]

In addition, unlike the Wood Hydro FESA, Lowline #2's FESA does not contain a "Refund of Lump Sum Repayment" clause, which allows for a refund of up to 90% of the Lump Sum Repayment amount if the Wood Hydro QF returned to generation within one year's time after an outage. Cross-Complaint, Attachment 1, ¶21.7.

Finally, some of the key contractual terms at issue in this case are different in the three FESAs. For example, the term "Net Energy" is defined differently, and the language of the liquidated damages clause in each FESA is different.[6]

ARGUMENT

A. As a general rule—applicable here—the Commission does not have jurisdiction over construction and enforcement of contract rights.

Both the Commission and the courts recognize that, as a general matter, jurisdiction over contractual disputes lies with the courts and not with the Commission:

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[5] The cited cases are: *Afton Energy, Inc. v. Idaho Power Co.*, 107 Idaho 781, 693 P.2d 427 (1984) *(Afton I/III)* and *Idaho Power Co. v. Idaho Public Utilities Comm'n*, 107 Idaho 1122, 695 P.2d 1261 (1985). Both cases primarily addressed the issue of whether rates in a PURPA contract could be adjusted by the Commission, consistent with federal law, pursuant to the fair, just, and reasonable standard. Neither case relates to the Commission's jurisdiction over contractual disputes.

[6] The defined term in the Lowline #2 FESA is "Net Energy." In both Wood Hydro's and Enel's FESAs, the defined term is "Net *Firm* Energy." Cross-Complaint, Attachment 1, ¶1.11; Attachment 2, ¶1.10 (emphasis added). The former is defined as "electric energy produced by the Facility, . . . delivered to Idaho [Power] at the Point of Delivery." *Id.* at Attachment 3, ¶1.10. The latter is defined in both FESAs as "electric energy produced by the Facility, . . . which Seller *commits* to deliver to Idaho (Power) at the Point of Delivery on a *long-term average basis* for the full term of the Agreement." *Id.* at Attachment 1, ¶1.11; Attachment 2, ¶1.10 (emphasis added). The liquidated damages clauses vary from FESA to FESA and are too lengthy to set forth in this motion.

> Generally, construction and enforcement of contract rights is a matter which lies in the jurisdiction of the courts and not the Public Utilities Commission. This is true notwithstanding that the parties are public utilities or that the subject matter of the contract coincides generally with the expertise of the commission. *If the matter is a contractual dispute, it should be heard by the courts.*

Idaho PUC Order No. 32780 (April 2013) (quoting *Lemhi Tel. Co. v. Mountain States Tel. & Tel. Co.*, 98 Idaho 692, 696, 571 P.2d 753, 757 (1977) (emphasis added)).

As with most legal rules, there are exceptions, discussed below. But this case falls within the general rule. Idaho Power's Cross-Complaint seeks enforcement of the FESA. Indeed, the Cross-Complaint specifically seeks an order requiring Lowline #2 to pay contractual damages in excess of $3.6 million. Lowline #2 disputes, among other things, Idaho Power's interpretation of the FESA, the enforceability of the liquidated damages clause, and Idaho Power's compliance with the FESA's notice provisions.[7] Adjudication of these issues falls squarely within the general prohibition on the Commission resolving contractual disputes. This matter is a contractual dispute; "it should be heard by the courts." *Id.*

B. The "consent" exception does not apply to the Lowline #2 FESA.

The Idaho Supreme Court has recognized exceptions to the general rule, primarily that "the Commission has authority to interpret contracts where the parties have agreed to permit the Commission to do so." *Idaho Power Co. v. New Energy Two, LLC*, 156 Idaho 462, 463. However, the "consent" exception does not apply if the contract at issue does not reflect the parties' consent to allow the Commission to adjudicate disputes. *Afton Energy, Inc. v. Idaho Power Co.*, 111 Idaho 925, 729 P.2d 400 (1986) (*Afton IV*) ("[T]he contract between Afton and

[7] FESA ¶21.1. Pursuant to the Commission's rules, Lowline #2 is not required to file an answer since it has filed this motion. IDAPA 31.01.01.057.02 (noting that answers to complaints must be filed within twenty-one days "unless . . . a motion to dismiss is made within twenty-one (21) days"). Lowline #2's reference to potential arguments does not waive any argument or defense or otherwise limit its ability to advance arguments and defenses as the case proceeds.

Idaho Power does not fall within any of the exceptions. Idaho Power and Afton have not agreed to allow the Commission to interpret the contract.").

The "consent" exception does not apply to this case. First and foremost, Lowline #2's FESA does not contain a dispute resolution clause.[8] Instead, the FESA merely provides that the FESA is a special contract that shall be construed in accordance with certain caselaw, PURPA, and PURPA regulations. FESA ¶7.3. As in *Afton IV*, in this case Lowline #2 has not "agreed to allow the Commission" to resolve disputes related to the FESA. *Afton IV*, 111 Idaho at 929 (1986).

Second, even if the Commission concludes that the "consent" exception applies and that it has jurisdiction to interpret the Lowline #2 FESA, it still lacks jurisdiction to award damages. As the Commission explained, "The Commission, mindful of its statutory underpinnings, has never assumed the jurisdiction or authority to assess or determine damages nor would it in this case attempt to do so." Idaho PUC Order No. 22453 (April 1989). Stated another way, in another context:

> The Commission is not authorized to award "damages" to customers under the Public Utilities Laws. Idaho Code § 61-702 provides that any person injured by the conduct of a public utility may file "an action to recover such loss, damage or injury . . . in any court of competent jurisdiction . . . ." Consequently, persons injured by public utilities have recourse through Idaho courts.

Idaho PUC Order No. 33524 (May 2016) (emphasis in original). Just as the Commission is not a forum of "competent jurisdiction" to award damages to customers of a public utility, it is not a forum of "competent jurisdiction" to award liquidated damages to Idaho Power.

[8] The dispute resolution clause in *Idaho Power Co. v. New Energy Two, LLC* stated: "All disputes related to or arising under this Agreement, including, but not limited to, the interpretation of the terms and conditions of this Agreement, will be submitted to the Commission for resolution." 156 Idaho 462, 464, 328 P.3d 442, 444 (2014).

To be clear, Idaho Power has requested that the Commission award liquidated damages. Idaho Power uses the phrase "lump sum repayment," but it is a request for damages all the same. The very provision on which Idaho Power's damages claim relies (§ 21.2.1 of the Lowline #2 FESA) is labeled "Liquidated Damages." The provision itself, as quoted by Idaho Power in its Cross-Complaint, states that it is "Idaho Power's sole and exclusive remedy for *damages* . . . ." Cross-Complaint at ¶24 (emphasis added). While Idaho Power may prefer the phrase "lump sum repayment," the very terms of the Lowline #2 FESA indicate that it is truly seeking liquidated damages.

Third, the "consent" exception does not apply because the parties cannot contractually extend the Commission's jurisdiction to encompass an award of damages. Administrative authorities, like the Commission, "are tribunals of limited jurisdiction and their jurisdiction is dependent entirely upon the statutes reposing power in them and they cannot confer it upon themselves . . . ." *Idaho Power Co. v. Idaho Pub. Utils. Comm'n*, 102 Idaho 744, 750, 639 P.2d 442, 448 (1981). "[J]urisdiction may not be conferred on the Commission by contractual stipulation." Idaho PUC Order No. 21361 (July 1987); Idaho PUC Order No. 25354 (January 1994). In short, the Commission's jurisdiction is limited to the boundaries set by Idaho's enabling statutes. No statute authorizes the Commission to award damages, liquidated or otherwise. Accordingly, even if Lowline #2 consented to the Commission's jurisdiction over contractual disputes—and it has not—that consent would not confer jurisdiction over this case.

Fourth and finally, applying the "consent" exception to this case would cause the exception to swallow the rule. In its current state, the "consent" exception permits the Commission to exercise jurisdiction where the parties have explicitly consented to the Commission's jurisdiction over contractual disputes. Lowline #2's FESA does not contain any language of consent. To bring the Lowline #2 FESA within the bounds of the "consent"

exception, the Commission would have to make some finding that Lowline #2 implicitly consented to jurisdiction, or establish some other, new basis for finding an exception. This would expand the exception so broadly that it swallows the rule.

C. Even if the Commission would have concurrent jurisdiction over this case, it should defer jurisdiction over this contract dispute to the courts.

As discussed above, Lowline #2 respectfully submits that the Commission does not have jurisdiction over this case. However, even if the Commission does have concurrent jurisdiction, it should not exercise it here. As the Commission has stated,

> Mindful of our duty, we recognize that in some instances Commission power, authority and jurisdiction is coincident or concurrent with that of Idaho courts, specifically in the area of contracts. Determining when to exercise our jurisdiction is often predicated on an attitude of self-restraint and a determination of the most appropriate forum.

Idaho PUC Order No. 25918 (March 1995).

This Commission has expertise in rate-setting, regulating the terms of service of utilities, and implementing PURPA and its regulations. Courts have expertise in interpreting contracts, determining whether liquidated damages clauses are enforceable, and awarding damages. This matter falls within the core competency of a court, not of the Commission.

First, this dispute is first and foremost a dispute over liquidated damages, that will likely include 1) whether the liquidated damages clause was triggered—*i.e.*, whether Lowline #2 has engaged in a "permanent" curtailment; 2) whether the liquidated damages clause is enforceable;[9] 3) whether Idaho Power has complied with the notice requirements and other conditions precedent to collecting liquidated damages; 4) the amount of damages; and 5) other potential

[9] Liquidated damages are not enforceable in many circumstances, even when the contract states that clause is enforceable. *See, e.g.*, *Schroeder v. Partin*, 151 Idaho 471, 476, 259 P.3d 617, 622 (2011) (quoting *Graves v. Cupic*, 75 Idaho 451, 456, 272, P.2d 1020, 1023 (1954)) ("[W]here the forfeiture or damage fixed by the contract is arbitrary and bears no reasonable relation to the anticipated damage, and is exorbitant and unconscionable, it is regarded as a 'penalty', and the contractual provision therefor is void and unenforceable.")

common-law defenses. None of these issues are the types of matters in which the Commission has special expertise.

Second, the rules of procedure, rules of evidence, and manner of proceeding in Idaho courts are geared towards disputes of this nature. The Commission's are not. For example, Idaho courts will apply the parol evidence rule to determine whether extrinsic evidence should be used to interpret the phrase "permanent." *See, e.g., AED, Inc. v. KDC Invests., LLC*, 155 Idaho 159, 165, 307 P.3d 176, 182 (2013) ("The parol evidence rule bars the use of extrinsic evidence when a court interprets a written contract."). The admissibility of extrinsic evidence and the related parol evidence rule are "among the law's muddiest waters." *Williston on Contracts*, § 33:5. (4th ed.). In fact, "the parol evidence rule is billed as the most litigated doctrine in contract law." Juanda Lowder Daniel, *K.I.S.S. the Parol Evidence Rule Goodbye: Simplifying the Concept of Protecting the Parties' Written Agreement*, 57 Syracuse L. Rev. 227, 228 (2007).

Idaho Power's contractual argument is largely based on extrinsic evidence. Lowline #2's arguments are likely to be largely based on the plain language of the FESA—that *permanent* curtailment means, well, a curtailment that is *permanent* as opposed to *annual*. Thus, in this case the Commission will have to determine whether the parol evidence rule applies or instead whether extrinsic evidence is admissible. It is not clear whether the Commission adheres to the parol evidence rule. *See* IDAPA 31.01.01.261 ("The presiding officer at hearing is not bound by the Idaho Rules of Evidence.").[10] Judicial rules of evidence, and judicial interpretation of caselaw interpreting and applying the parol evidence rule, are better suited to undertake this task.

In addition, the role of Commission Staff is not particularly clear in this instance. Lowline #2 recognizes and respects Commission Staff's expertise, education, and experience in

[10] Lowline #2's research did not reveal any Commission decisions discussing the parol evidence rule.

accounting, ratemaking, and other utility-related issues. However, Lowline #2 respectfully submits that a judge's staff of law clerks is better suited to analyze Idaho caselaw regarding the parol evidence rule, contractual interpretation, whether the liquidated damages clause is enforceable, and other issues that will be addressed in this case.

Moreover, the Idaho court's rules of procedure are clear here: there will be a complaint, answer, discovery, and likely dispositive motions with oral argument on the relevant legal points. A jury trial will be held if there are disputed issues of fact, with the prevailing party being entitled to attorney fees. The Commission's rules, by contrast, call for either a technical hearing, in which the parties will present pre-filed testimony, or modified procedure, which is an on-the-record proceeding. There is no opportunity for a jury trial. There is an opportunity for discovery, but common judicial discovery procedures such as depositions, motions to compel, motions for protective orders, and similar mechanisms are rare or nonexistent. While the Commission's processes are well-suited to resolve technical issues related to utility regulation, they are not tailored to resolve multi-million-dollar contractual disputes that hinge on primarily legal issues.

Finally, in district court the prevailing party will be entitled to an award of attorney fees. I.C. § 12-120(3) ("In any civil action . . . in any commercial transaction . . . the prevailing party shall be allowed a reasonable attorney's fee . . . ."). Lowline #2 is not aware of any analogous provision in the Commission's enabling statutes or rules.

In short, as a matter of substance and of procedure, the judicial process is set up to accommodate and resolve contractual disputes such as these. The Commission's processes are not. Lowline #2 respectfully submits that the Commission should defer to the courts and refrain from exercising jurisdiction over this dispute.

CONCLUSION

Idaho Power's Cross-Complaint seeks adjudication of a contractual dispute and an award of over 3.6 million dollars against Lowline #2. Lowline #2's FESA does not contain a clause consenting to the Commission's jurisdiction over contractual disputes. Even if it did, such a clause cannot confer jurisdiction on the Commission where it did not exist before. And even if the Commission could exercise jurisdiction, this dispute should be adjudicated in district court, which has procedures, staff, and expertise that are specifically designed to resolve disputes such as these. For these reasons, Lowline #2 respectfully submits that this proceeding should be dismissed.

Dated: September 17, 2020

Respectfully submitted,

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CERTIFICATE OF DELIVERY

I certify that on September 17, 2020, a true and correct copy of the foregoing was served upon all parties of record in this proceeding via electronic mail as indicated below:

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