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BEFORE THE IDAHO PUBLIC UTILITIES COMMISSION

WOOD HYDRO, LLC, COMPLAINANT, vs. IDAHO POWER COMPANY, RESPONDENT/CROSS-COMPLAINANT, vs. ENEL GREEN POWER NORTH AMERICA, INC., CROSS-RESPONDENT, vs. CENTRAL RIVERS POWER US, LLC, CROSS-RESPONDENT.	CASE NO. IPC-E-20-28 **CROSS-RESPONDENT ENEL GREEN POWER NORTH AMERICA, INC.'S MOTION TO DISMISS**

In response to the Summons and Cross-Complaint served by the Idaho Public Utilities Commission ("IPUC" or "Commission"), Enel Green Power North America, Inc. ("Enel") hereby files its Motion to Dismiss Idaho Power Company's ("Idaho Power") Cross Complaint pursuant to IDAPA 31.01.01.056.[1] For the reasons explained below, Enel respectfully requests that the Commission issue an order finding it lacks subject matter jurisdiction to require Enel to pay Idaho Power the damages it requests in its Cross Complaint, and that it further lacks jurisdiction to adjudicate the contract dispute at issue in this case. In the alternative, even if the Commission concludes it may have jurisdiction, the Commission should decline to exercise jurisdiction over this contract dispute, which would more properly be adjudicated in court.

I. FACTS

This case involves contractual disputes between Idaho Power and three separately owned and operated hydroelectric qualifying facilities ("QFs") under the Public Utility Regulatory Policies Act of 1978 ("PURPA"), each with its own 35-year Firm Energy Sales Agreement ("FESA") and unique facts related to its dispute. In each case, Idaho Power takes the position that the QF has "permanently" curtailed deliveries of energy in the latter years of its levelized-rate FESA, even though two of the QFs have already recommenced deliveries of energy to Idaho Power and the third has stated it intends to do so soon. Nevertheless, Idaho Power asserts that certain provisions of the FESAs entitle it to substantial liquidated damages as though the QFs each

[1] The Summons directs Enel to "file a written answer *or* written motion in defense of the Cross-Complaint within twenty-one (21) days of the service date of this Summons . . . ." *Summons* at p. 1 (emphasis added); *see also* IDAPA 31.01.01.057.02 (stating an answer to a complaint is due within 21 days "unless . . . a motion to dismiss is made within twenty-one (21) days"). Enel reserves the right to file an answer and affirmative defenses should the Commission deny this Motion to Dismiss.

committed an economic walk-away from its contract, and it asks this Commission to issue it the equivalent of a judgment for damages totaling over seven million dollars.

A. Wood Hydro, LLC ("Mile 28")

Wood Hydro, LLC ("Wood Hydro") initiated this proceeding by filing a formal complaint against Idaho Power on June 25, 2020, regarding its QF referred to as "Mile 28." Wood Hydro's complaint alleges that Idaho Power has wrongly asserted that Wood Hydro permanently curtailed the Mile 28 facility's output and thus owes a large liquidated damages payment to Idaho Power, even though Wood Hydro has already recommenced deliveries of energy. *Wood Hydro Complaint* at pp. 4-5. Wood Hydro's complaint asks the Commission to provide the following relief: (1) a declaration that Wood Hydro has not "permanently curtailed the Annual Net Energy Amount"; (2) a declaration that the "liquidated damages clause in the Agreement is not enforceable"; and (3) a "directive to Idaho Power to refund" withheld payments for delivered energy and to "reimburse Wood for the costs of a letter of credit wrongfully required by Idaho Power to continue to accept deliveries of energy from the Project." *Id.* at p. 6.

In response to Wood Hydro's complaint, Idaho Power's answer and cross complaint asserts that Wood Hydro's curtailment triggers a requirement to pay liquidated damages equal to $1,163,125. *Idaho Power's Answer and Cross Complaint* at ¶¶ 1-4. However, because Wood Hydro recommenced deliveries within a year of such curtailment, Idaho Power "forwent its entitlement" to full payment of $1,163,125 and reduced the amount owing to $116,312. *Id.* at ¶ 15. Through the cross complaint, Idaho Power requests affirmative relief against Wood Hydro, including that the Commission direct Wood Hydro to "pay the amounts assessed by Idaho Power as Lump Sum Repayment amounts due[,]" – i.e., $116,312. *Id.* at pp. 1, 18.

B. Enel (Rock Creek #2)

Idaho Power's cross complaint also joined and brought a claim for damages against Enel related to the Rock Creek #2 hydroelectric QF. Idaho Power appears to allege that the Rock Creek #2 QF is "owned" by Enel, and that the Rock Creek #2 permanently curtailed its deliveries. *Id.* at pp. 1, 10-13.[2] Idaho Power alleges, "On June 2, 2020, Idaho Power sent Enel a letter notifying it that Rock Creek #2 had not generated at all during Contract Year 31, and informed Rock Creek #2 of the Lump Sum Repayment amount due under its PURPA contract of $4,059,472." *Id.* at ¶ 16. According to Idaho Power, the $4,059,472 in damages is due under Article 21.3.1 and Appendix D of the FESA, which Idaho Power characterizes as a liquidated damages provision purportedly designed to repay Idaho Power for alleged overpayments for deliveries made in the early years of the contract. *Id.* at ¶¶ 17-18. However, Idaho Power calculates the $4,059,472 liquidated damages for "overpayment" based on the *estimated* Annual Net Firm Energy amount made at the time of contracting in 1987, not based on the lesser amount of Net Firm Energy actually delivered each year since 1987. *Id.* at ¶¶ 18-20.

Despite characterizing Rock Creek #2's curtailment as "permanent" and thus triggering overpayment damages based on a theory of economic walk-away, Idaho Power acknowledges the temporary outage at Rock Creek #2 ended before Idaho Power even filed its cross complaint. *See id.* at ¶ 19. As the letter from Enel attached to Idaho Power's answer and cross complaint explains, "Seller never intended for, nor conveyed to Idaho Power that the shut-down of the Facility was going to be permanent . . . The Facility is now back in service as of June 18, 2020." *Id.* at

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[2] By filing this Motion, Enel Green Power North America, Inc. does not concede that it, as opposed to one of its subsidiaries, is the proper party to this proceeding. Such matters can be resolved if the case proceeds.

Attachment 12.[3] Furthermore, Enel's letter explains that Idaho Power failed to object to the outage of the Rock Creek #2 plant for almost a year before claiming $4,059,472 in damages for the first time in the days before the plant was brought back online, calling into question Idaho Power's good faith and compliance with basic equity principles. *Id.* at Attachment 12.

Idaho Power's cross complaint requests that the Commission direct Enel to "pay the amounts assessed by Idaho Power as Lump Sum Repayment amounts due[.]" *Id.* at p. 18. In other words, Idaho Power asks the Commission to enter the equivalent of a judgment against Enel for $4,059,472 in damages for an alleged breach of contract.

C. Central Rivers Power US, LLC (Lowline #2)

Idaho Power also joins and brings a claim for damages against Central Rivers Power US, LLC ("Central Rivers") related to an outage at the Lowline #2 hydroelectric QF. Idaho Power alleges that "[b]ecause Lowline #2 failed to deliver its Annual Net Energy amount from Section 6.3 during Contract Year 32, and permanently curtailed its annual delivery for that year, the lump sum repayment amount specified for Contract Year 32 from Appendix D is applied to the difference in Net Energy delivered and the Annual Net Energy amount – which in this case is $3,616,983 . . . ." *Id.* at ¶ 26. According to a letter from Central Rivers attached to Idaho Power's answer and cross complaint, the Lowline #2 facility is planned to be placed back online in the near future. *Id.* at Attachment 14. Yet Idaho Power asks the Commission to order Central Rivers to pay Idaho Power $3,616,983 in damages under the purported liquidated damages provision in the FESA. *Id.* at p. 18.

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[3] Idaho Power's pleading does not dispute the quoted facts from Enel's letter, which are incorporated into Idaho Power's pleading by reference. *Id.* at ¶ 21.

In sum, Idaho Power seeks a cumulative damages awards from the Commission against the three QFs of $7,792,767.[4]

II. ARGUMENT

A. The Commission Lacks Subject Matter Jurisdiction Over this Dispute

The Commission possesses no jurisdiction over this contractual dispute for payment of damages. Both the Idaho Supreme Court and this Commission's precedent confirm the lack of jurisdiction over Idaho Power's contractual damages claim.

As an administrative agency, the Commission's jurisdiction is limited. "The Public Utilities Commission has no inherent power; its powers and jurisdiction derive in entirety from the enabling statutes, and nothing is presumed in favor of its jurisdiction." *Lemhi Tel. Co. v. Mountain States Tel. & Tel. Co.*, 98 Idaho 692, 696, 571 P.2d 753, 757 (1977) (internal quotation omitted). "As a general rule, agencies have only such adjudicatory jurisdiction as is conferred on them by statute . . . and they cannot confer jurisdiction upon themselves." 2 Am. Jur. 2d, *Administrative Law* § 282. Just last year, the Idaho Supreme Court confirmed that an agency "has no jurisdiction outside of what the Legislature specifically grants it[,]" and therefore the "Court must void an order by the [agency] that determines issues outside of its statutory jurisdiction." *Idaho Retired Firefighters Ass'n v. Pub. Employee. Ret. Bd.*, 443 P.3d 207, 210 (2019).

As the Idaho Supreme Court has explained, the public utilities law "establishes a comprehensive scheme for the regulation of investor-owned public utilities by the Idaho Public Utilities Commission." *Alpert v. Boise Water Corp.*, 118 Idaho 136, 140, 795 P.2d 298, 302 (1990) (citing Idaho Code, title 61, ch. 5). Yet that authority primarily regards the regulation of public

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[4] $116,312 + $4,059,472 + $3,616,983 = $7,792,767.

utilities and their relationship with their own customers in provision of regulated utility services. *See id.* (holding that Commission lacked jurisdiction to determine the validity of the franchise contracts between utilities and cities). In *Alpert,* the Court has summarized that the Commission's statutory jurisdiction includes the power to investigate and fix rates and regulations, I.C. § 61-503; to determine the reasonableness of rates, I.C. § 61-502; to investigate proposed interstate rates, I.C. § 61-506; to determine rules and regulations affecting the performance of public utilities, I.C. § 61-507; to order improvements to utility facilities, I.C. § 61-508; to investigate accidents occurring on public utility property arising from its maintenance or operation, I.C. § 61-517; to determine standards and practices for the measurement of quantity, quality or other conditions pertaining to the supply of a public utility product or service, I.C. § 61-520; to ascertain the value of public utility property, I.C. § 61-523; and to issue certificates of convenience and necessity, I.C. § 61-526. *Id.*, 118 Idaho at 140.

However, QFs are not public utilities and are not subject to such rate regulation and oversight by the Commission. Instead, when selling power a utility, QFs are third-party suppliers of energy to the utility. Indeed, PURPA and the Federal Energy Regulatory Commission's ("FERC") rules exempt QFs from utility-type rate regulation by state utility commissions. 16 U.S.C. § 824a-3(e)(1); 18 C.F.R. § 292.602(c)(1); *see also Crossroads Cogeneration Corp. v. Orange & Rockland Utils.*, 159 F.3d 129, 139 (3d Cir. 1998) ("although a PURPA-governed agreement is unenforceable prior to approval by the relevant state agency, the rights of the parties,

once their agreement receives such approval, are to be determined by applying normal principles of contract interpretation.").[5]

Thus, the question is whether the Commission possesses jurisdiction to adjudicate a contract dispute between a regulated utility and a QF acting as a supplier of energy at wholesale to the utility. In Idaho, the starting premise is that contract interpretation and enforcement is generally a matter for the courts. As the Idaho Supreme Court has explained:

> 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.

Lemhi Tel. Co., 98 Idaho at 696. Thus, in *Lemhi*, the Court "set aside" the order of the Commission construing and enforcing a contract with a utility. *Id.* at 698; *see also Bunker Hill Co. v. Wash. Water Power Co.*, 101 Idaho 493, 494, 616 P.2d 272, 273 (1980) (setting aside another order and explaining, "While one of the parties is a public utility, and while the general area of power supply may be one in which the Commission is presumed to have expertise, nevertheless, the matter remains a contractual dispute involving the legal interpretation of a contract which historically lies within the jurisdiction of the courts.").

The Idaho Supreme Court has traditionally held that the Commission lacks jurisdiction to interpret and enforce contracts between utilities and QFs. *See Idaho Power Co. v. Cogeneration,*

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[5] *See also See also Independent Energy Producers Association, Inc. v. California Public Utilities Commission*, 36 F.3d 848, 858 (9th Cir. 1994) (state utility commission had no authority "unilaterally to modify the terms of the standard offer contract"); *Oregon Trail Electric Consumers Cooperative, Inc. v. Co-Gen Company*, 168 Or. App. 466, 482, 7 P.3d 594 (2000) ("[c]ourts uniformly have held that state regulators cannot intervene in the public interest and modify the prices fixed by a cogeneration contract because PURPA does not provide for such authority . . . , and to imply that authority would undermine the long-term cogeneration contracts that Congress sought to encourage.").

Inc. ("*Cogeneration I*"), 129 Idaho 46, 49, 921 P.2d 746, 749 (1996). In *Cogeneration, I*, the Commission asserted jurisdiction over a dispute regarding whether a force majeure event excused a QF of a requirement to submit a performance assurance under its FESA with Idaho Power. *See id.* In its own orders, the Commission acknowledged that its jurisdiction over contract disputes is limited in general and further that the Commission's "regulatory authority over QFs . . . is limited by PURPA and the implementing FERC regulations," which protect QFs against utility-type regulation. *Idaho Power Co. v. Cogeneration, Inc.*, IPUC Case No. IPC-E-94-24, Order No. 25918, 1995 Ida. PUC LEXIS 31, *9-11 (March 1, 1995). Yet the Commission stated it found that "the public interest" of the case required it to "assert and exercise what [it found] to be concurrent jurisdiction" with the courts. *Id.* The Commission thus denied the QF's motion to dismiss the case and subsequently issued an order stating that the QF must pay the performance assurance. *Id.*; *see also Idaho Power Co. v. Cogeneration, Inc.*, IPUC Case No. IPC-E-94-24, Order No. 25971, 1995 Ida. PUC LEXIS 47 (April 1, 1995) (order on merits after a hearing).

After the district court relied on the Commission's order as binding in resolving the dispute, the Idaho Supreme Court reversed on the ground that the Commission lacked jurisdiction to issue an order enforcing the contract. *Cogeneration I*, 129 Idaho at 49. The Supreme Court explained: "While there is no dispute concerning IPUC's authority to approve PURPA contracts, the subsequent interpretation and enforcement of contracts does not generally fall within its powers." *Id.* The Supreme Court cited *Afton Energy, Inc. v. Idaho Power Co.,* 111 Idaho 925, 928, 729 P.2d 400, 403 (1986) (*Afton IV*), for the general rule that the "district court rather than IPUC the appropriate forum for contract disputes between utilities and QFs." *Cogeneration I*, 129 Idaho at 49. "Accordingly, IPUC's attempted enforcement of the agreement is of no consequence." *Id.*

Thus, the efforts and proceedings before the Commission were fruitless, and the parties were subsequently left to litigate the matter on the merits in trial court. *See Idaho Power Co. v. Cogeneration, Inc.* ("*Cogeneration II*"), 134 Idaho 738, 742, 9 P.3d 1204, 1208 (2000) (appeal after remand for trial).

In *Afton IV*, the Court explained that in a jurisdictional challenge, "[i]t is important to note what relief Idaho Power is asking for." 111 Idaho at 928. In this case, the relief Idaho Power requests is three contractual damages awards that total $7,792,767. Indeed, in the case of Rock Creek #2, the damages amount claimed by Idaho Power far exceeds a reasonable expectation of likely payments to the QF under the remainder of its FESA. *See Declaration of Randald Bartlett In Support of Motion to Dismiss* at ¶ 8.[6] A high estimate of remaining payments for energy likely to be delivered under the Rock Creek #2 FESA is only $1,780,205.60, whereas Idaho Power asks the Commission to order Enel to pay Idaho Power $4,059,472. *Id.* Thus, it is impossible to characterize Idaho Power's claim as anything other than a claim for damages, and the dispute presented by Idaho Power involves far more than a mere interpretation of contract rights that could be remedied with declaratory or injunctive relief alone.

Notably, the pleadings identify no statutory provision providing the Commission with jurisdiction to adjudicate contractual damages claims, let alone to award an enforceable judgment for such damages to Idaho Power against a QF. Indeed, the utility statutes establish that even

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[6] Although the court rules do not strictly govern proceedings before the Commission, a motion to dismiss on jurisdictional grounds that implicates factual matters can rely on evidence outside the pleadings without converting the motion to a motion for summary judgment. I.R.C.P. 12(b)(1); *Owsley v. Idaho Indus. Comm'n*, 141 Idaho 129, 133 n.1, 106 P.3d 455, 459 n.1 (2005) (citing *Osborn v. United States*, 918 F.2d 724, 729 n.6 (8th Cir. 1990)). Accordingly, the Commission may consider the factual matters in the Declaration of Randald Bartlett In Support of Motion to Dismiss without converting this motion to a motion for summary judgment.

where a regulated utility violates laws administered by the Commission, any damages are available in the district courts, *not* the Commission. Idaho Code provides:

> In case any public utility shall do, cause to be done or permit to be done, any act, matter or thing prohibited, forbidden or declared to be unlawful, or shall omit to do any act, matter or thing required to be done, either by the constitution, any law of this state, or any order or decision of the commission, according to the terms of this act, such public utility shall be liable to the persons or corporations affected thereby for all loss, damages or injury caused thereby or resulting therefrom. *An action to recover such loss, damage or injury may be brought in any court of competent jurisdiction by any corporation or person.*

I.C. § 61-702 (emphasis added). No provision provides for recovery of such damages before the Commission.

The Commission's precedent unequivocally establishes that the Commission has no jurisdiction to adjudicate damages claims. In a PURPA dispute, 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." *A.W. Brown Co. v. Idaho Power Co.*, IPUC Case No. IPC-E-88-9, Order No. 22453, 1989 Ida. PUC LEXIS 77, *5 (April 1, 1989) (emphasis added). In another case, the Commission approved of Idaho Power's settlement agreement to prevent the need to litigate claims of overpayment liability damages in levelized-rate FESAs similar to the claims at issue here. *In re Application of Idaho Power Co. Regarding its Proposed Cancellation of Two Firm Energy Sales Agreements*, IPUC Case No. IPC-E-98-10, Order No. 27861, 1999 Ida. PUC LEXIS 1, *11-13 (Jan. 1, 1999). The Commission expressly acknowledge that absent the settlement such damages claims must be litigated in court, stating: "We find that the facts in this case are in dispute and we recognize that contract disputes generally fall within the jurisdiction of the District Court, not this Commission." *Id.*; *see also id.* at **7-8 (noting "Staff also agrees with Idaho Power that the expense associated with pursuing the

matter *in court*, and the small likelihood of being able to collect on any judgment, makes settlement a preferred alternative" (emphasis added)). Thus, in virtually the same circumstances as presented here, the Commission acknowledged that jurisdiction to assess or determine damages for alleged overpayment liability belongs in the courts, not the Commission.

This Commission has consistently recognized the limitations of its statutory jurisdiction over damages claims. "Although the Commission is often described as a quasi-judicial agency, the Commission is not a court." *Eric Conrad v. Intermountain Gas Co.*, IPUC Case No. INT-G-16-01, Order No. 33524, 2016 Ida. PUC LEXIS 55, *15-16 (May 17, 2016). "The Commission is not authorized to award 'damages' to customers under the Public Utilities Laws[,]" and instead, "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*. . . .'" *Id.* (quoting I.C. § 61-702) (emphasis in order); *accord Pamela and Scott Bowers v. Idaho Power Co.*, IPUC Case No. IPC-E-07-14, Order No. 30615, 2008 Ida. PUC LEXIS 117, *16 (Aug. 7, 2008) (stating, the "Commission is not empowered to award damages for losses or injuries. *Idaho Code* § 61-702."). "The Commission's regulatory responsibility is to ensure that rates and services offered by regulated utilities are just and reasonable and that utilities are in compliance with Orders and regulations issued by this Commission." *In re Investigation into the Pay Telephone Practices of GTE Northwest, Inc.*, IPUC Case No. GTE-T-89-4, Order No., 22554, 1989 Ida. PUC LEXIS 109, *2-3 (May 1, 1989). But the Commission "is generally without jurisdiction to resolve issues of contractual obligations" and "has no authority to award damages based upon allegations of unfair business practices." *Id.*

Similarly, in addition to lacking jurisdiction to award damages, the Idaho Supreme Court has also held that the Commission lacks jurisdiction to forbid a utility from pursuing collection of

amounts owed to it. *See In re Complaints of Strand*, 111 Idaho 341, 342-43, 723 P.2d 885, 886-87 (1986) (holding that decision to pursue collections is committed to utility management's discretion). The lack of jurisdiction to direct Idaho Power to pursue (or forego pursuit of) such damages further confirms the Commission's lack of jurisdiction over the subject matter of this dispute, where Idaho Power appears to seek such direction from the Commission. *See Idaho Power's Answer and Cross Complaint*, at p. 18, ¶ 5.

Moreover, in addition to a lack of jurisdiction to award damages, the Commission lacks jurisdiction to adjudicate the numerous common law affirmative defenses that are implicated by Idaho Power's answer and cross complaint. As noted above, Idaho Power's cross complaint demonstrates that Idaho Power delayed for almost a year in asserting its objections regarding Rock Creek #2's outage, despite having been promptly informed of the outage. Idaho Power's decision to sit on its alleged rights for months and then claim millions of dollars in damages implicates several common law affirmative defenses that will have to be resolved, including laches, estoppel, waiver, failure to mitigate damages, and lack good faith and fair dealing, among others. Similarly, the excessive nature of the damages alleged under the purported liquidated damages clause will require adjudication of whether such provision – if even intended to be a liquidated damages clause in the first place – is actually an unenforceable penalty provision under Idaho contract law. As the Commission itself has repeatedly held, there is no basis for the Commission's adjudication of the complex factual and legal issues that arise in such contractual matters.

In sum, therefore, the Commission should dismiss the case for lack of subject matter jurisdiction.

B. The FESA Does Not Confer Jurisdiction on the Commission

The FESA for Rock Creek #2 contains a clause stating disputes will be submitted to the Commission, but such a provision cannot confer jurisdiction on the Commission because no statutory basis for jurisdiction exists. Specifically, in the Rock Creek #2 FESA, Section 21.1 provides: "Disputes – 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." *Idaho Power's Answer and Cross Complaint*, at Attachment 2, § 21.2. As explained below, this provision does not support jurisdiction over the contractual damages dispute at issue.

It is a basic tenet of administrative law that the parties cannot confer jurisdiction upon an administrative agency by consent. "An administrative agency cannot enlarge its own jurisdiction, nor can jurisdiction be conferred upon the agency by parties before it; thus, deviations from an agency's statutorily established sphere of action cannot be upheld based upon an agreement, contract, or consent of the parties." 2 Am. Jur. 2d *Administrative Law* § 283 (2004). In short, "[n]o action of the parties can confer subject-matter jurisdiction on an administrative tribunal." *Id.*; *accord Idaho Power Co. v. Idaho Pub. Utils. Comm'n*, 102 Idaho 744, 750, 639 P.2d 442, 448 (1981) (holding that "'administrative authorities 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,'") (quoting *Wash. Water Power Co. v. Kootenai Envtl. All.*, 99 Idaho 875, 879, 591 P.2d 122, 126 (1979) (emphasis in *Idaho Power Co.*)); *see also H & V Engineers, Inc. v. Idaho State Bd. Of Prof'l Eng'rs & Land Surveyors*, 113 Idaho 646, 648, 747 P.2d 55, 57

(1987) (holding that "parties cannot confer jurisdiction upon the court by stipulation, agreement, or estoppel").

The Commission itself acknowledged this rule of law in the order approving the FESA at issue for Rock Creek #2. In approving the Rock Creek #2 FESA, the Commission stated:

> The Commission reminds the parties that jurisdiction may not be conferred on the Commission by contractual stipulation. The authority and jurisdiction of the Commission is restricted to that expressly and by necessary implication conferred upon it by enabling statutes. (reference: Agreement P 21.1 Disputes.)

In Re Application of Idaho Power Co. for an Order Approving a Firm Energy Sales Agreement with Bonneville Pac., Corp., IPUC Case No. U-1006-297, Order No. 21361, 1987 Ida. PUC LEXIS 151, *2 (July 1, 1987).[7] In other words, just because the parties might agree to submit the dispute to the Commission for resolution, as Idaho Power has done here, the Commission appropriately recognized that it generally will have no jurisdiction over such disputes and will decline to resolve the dispute if such jurisdiction is lacking. Additionally, the Rock Creek #2 FESA also states it is not final until approved by the Commission, and therefore the Commission's own order and qualifications during such approval must be interpreted with the FESA. *Idaho Power's Answer and Cross Complaint*, at Attachment 2, § 23.

Thus, by signing the FESA, no party waived any future objections to the Commission's jurisdiction over any particular dispute. In accordance with the Commission's own order

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[7] Notably, the Commission's order approving the FESA for Wood Hydro's Mile 28 QF contains the same disclaimer as to the effect of the dispute resolution clause in Mile 28's FESA. *In Re the Approval of a Firm Energy Sales Agreement Between Idaho Power Co. and Contractor's Power Group, Inc.*, IPUC Case No. IPC-E-93-25, Order No. 25354, 1994 Ida. PUC LEXIS 6, *2 (Jan. 1, 1994). The FESA for the third QF in this case, Lowline #2, does not appear to contain such a dispute resolution clause. *Idaho Power's Answer and Cross Complaint* at Attachment No. 3.

approving the Rock Creek #2 FESA, the dispute resolution clause adds nothing to the jurisdictional analysis in this case, which instead turns solely on the Commission's enabling statutes.

Furthermore, the Idaho Supreme Court declined to find jurisdiction under the same type of dispute resolution provision in the FESA in *Cogeneration I.* As Justice Silak noted in her concurrence in that case, the FESA contained the same type of dispute resolution provision as those at issue in this proceeding. *Cogeneration I*, 129 Idaho at 50 (Silak, J., concurring). Yet the Court nevertheless held the Commission improperly exercised jurisdiction over the contract dispute. *Cogeneration I*, 129 Idaho at 49.

In sum, the FESA's dispute resolution clause does not establish the Commission's jurisdiction to resolve this case.

C. The Decision in *Idaho Power Co. v. New Energy Two* Is Inapposite and Does Not Apply Here

Although Idaho Power may argue otherwise, the Idaho Supreme Court's decision affirming the Commission's assertion of jurisdiction in *Idaho Power Co. v. New Energy Two, LLC*, 156 Idaho 462, 328 P.3d 442 (2014), does not support a finding of jurisdiction over the damages claim at issue here. The finding of jurisdiction over a QF contract dispute in that case is distinguishable.

In *New Energy Two*, a dispute between Idaho Power and two dairy digester QFs arose related to the interconnection process and the force majeure provisions of the FESAs. *See In re Complaint and Petition of Idaho Power Co. for a Declaratory Order Regarding Firm Energy Sales Agreement and Generator Interconnection Agreement with New Energy Two, LLC et. al*, IPUC Case Nos. IPC-E-12-25, IPC-E-12-26, Order No. 32755, at 2-4 (March 5, 2013). At the time of the complaint at the Commission in *New Energy Two*, the QFs had still not even obtained interconnection agreements, and thus the dispute arose from the interconnection process itself,

which is unquestionably a matter within the Commission's PURPA regulatory purview. *Id.* at 2-5; 18 C.F.R. § 292.303(c), § 292.306. In contrast here, the contractual disputes are limited to contractual damages for alleged breaches under the FESAs and have nothing to do with the Commission's authority to regulate the interconnection process.

Additionally, the QF's claim of force majeure in *New Energy Two* was based on the impact caused by other ongoing PURPA proceedings before the Commission. Order No. 32755 at 2-5. The Commission ultimately concluded: "Because New Energy's force majeure allegation arises from Commission proceedings, we find that the Commission is well-suited to review these allegations." *Id.* at 12. In contrast here, there is no ongoing proceeding before the Commission that overlaps with the facts in dispute.

On appeal in *New Energy Two*, the Idaho Supreme Court affirmed the Commission's exercise of jurisdiction under the facts and arguments presented, relying primarily on the dispute resolution clause in Section 19.1 of the FESAs, which similar to the clause here stated that all disputes would be submitted to the Commission. *See New Energy Two*, 156 Idaho at 465. However, the Court explained: "New Energy does not even address section 19.1 in its briefing, nor does it dispute that the language of the provision would include determining whether the claimed force majeure was within the scope of the force majeure clause in the agreements." *Id.* at 464. Given that New Energy presented no argument or authority on the point on appeal, the Court logically held "the Commission did not err in holding that the interpretation of the agreements was within the scope of section 19.1." *Id.*[8] That very limited decision hardly stands for the proposition

[8] Although not stated in the *New Energy Two* decision, it is well established that a party waives an argument on appeal if it fails to present argument and authority in support of its position. *Bach v. Bagley*, 148 Idaho 784, 790, 229 P.3d 1146, 1152 (2010) (citing Idaho App. R. 35(a)(6)).

that such dispute resolution clauses will always be found to confer jurisdiction on the Commission over every contractual dispute, let alone to award damages. In any event, Enel specifically disputes the applicability of the dispute resolution clause in this case with both argument and authority.

Although the Supreme Court's *New Energy Two* decision also quoted the Commission's alternative determination that it had statutory jurisdiction in that case, the discussion of statutory jurisdiction was dicta and ancillary to reliance on the dispute resolution clause. *New Energy Two, LLC*, 156 Idaho at 465. Even if not dicta, the discussion of statutory jurisdiction held, at most, that the Commission has jurisdiction "to determine whether a regulated utility has an obligation under PURPA to purchase power from an applicant." *Id.* (quoting *Empire Lumber Co. v. Washington Water Power Co.*, 114 Idaho 191, 192, 755 P.2d 1229, 1230 (1987) (emphasis removed)). Because that was the "central issue" in *New Energy Two* – where the two proposed QFs had not yet even achieved commercial operation or even completed the interconnection process overseen by the Commission – the Court analogized to *Empire Lumber*, which regarded a dispute over whether a QF developer had "perfected its entitlement" to a contract to sell power. *Empire Lumber*, 114 Idaho at 193. However, that analogy does not fit here where the dispute regards interpretation and enforcement of FESAs arising from a damages claim occurring *decades* after the QFs began operating under their contracts.

Simply put, the *New Energy Two* decision's limited reliance on the dispute resolution clause in that case – which was apparently uncontested on appeal – does not apply here. Nothing in *New Energy Two* holds that the Commission has jurisdiction over a purely contractual dispute regarding the legality of liquidated damages or applicability of contractual and equitable affirmative defenses, much less any authority to issue the equivalent of a judgment requiring QFs

to pay a regulated utility over seven million dollars in damages. The *New Energy Two* decision is therefore inapposite to the circumstances here.

D. In the Alternative, if the Commission Determines It Could Exercise Jurisdiction, the Commission Should Defer Any Exercise of Jurisdiction

Finally, in the alternative, Enel respectfully requests that the Commission decline to exercise whatever jurisdiction it concludes it might have over this dispute.

The Commission has recognized the need to exercise restraint even where it might arguably have some jurisdiction over a contractual dispute. In *Cogeneration I*, the Commission explained: "Determining when to exercise our jurisdiction is often predicated on an attitude of self-restraint and a determination of the most appropriate forum." *Cogeneration, Inc.*, Order No. 25918, 1995 Ida. PUC LEXIS 31, *9. In another QF dispute where the claim was premised "on the basis of either estoppel or some other contractual or quasi-contractual remedy," the Commission determined "the decision will involve ruling on contractual law which is ordinarily a matter of judicial determination." *Faulkner Land and Livestock Co., Inc. v. Idaho Power Co.*, IPUC Case No. U-1006-274, Order No. 20362, 1986 Ida. PUC LEXIS 63, *15-16 (April 1, 1986). The Commission confirmed, "A long line of cases suggests to the Public Utilities Commission that when there is, at best, concurrent jurisdiction in the Public Utilities Commission of a matter that is normally handled in the courts, the fact that it is tangentially related to public utility commission law does not give us primary jurisdiction; that jurisdiction should still lie in the courts." *Id.*

Similarly, in the Commission's proceeding to develop the security provisions for levelized payment liability which are at issue in this very case, the Commission confirmed that contract disputes should be resolved in the courts. *See In Re Investigation on the Commission's Own Motion of Reasonable Terms for Security in Agreements Between Idaho Power Co. and*

Cogenerators and Small Power Producers, IPUC Case No. U-1006-292, Order No. 21800, 1988 Ida PUC LEXIS 6 (March 1, 1988). On rehearing, PacifiCorp asked the Commission to clarify: "[w]ho will decide disputes regarding the escrow funds" used for security purposes. *Id.* at *4. The Commission responded, "Contract disputes and interpretation in the event of alleged default or breach are normally appropriate for judicial determination, *not Commission determination*." *Id.* (emphasis added).

Moreover, the Commission's assertion of jurisdiction over any part of this dispute would almost certainly lead to piecemeal litigation because the courts would have to resolve aspects of the case beyond whatever concurrent jurisdiction the Commission might have. The Idaho Supreme Court has "emphasized the desirability of avoiding piecemeal litigation," which does "a disservice to the litigants and the trial courts of this state." *Losser v. Bradstreet*, 145 Idaho 670, 674-75, 183 P.3d 758, 762-63 (2008). As the Commission's own prior orders demonstrate, there is no question the Commission lacks jurisdiction to adjudicate the equitable defenses that will arise in this proceeding or to assess or award damages, and therefore the Commission's assertion of jurisdiction over some aspects of this case would almost certainly result in the added expense and burden of piecemeal litigation.

Accordingly, even if the Commission may determine it might have jurisdiction over some aspect of this dispute, it should defer taking up the matter because the factual and legal issues in dispute would be best resolved in a judicial forum. There is no question the courts have jurisdiction to adjudicate the entire dispute in the case of a claims of liquidated damages for levelized-rate overpayment. *See Idaho Power Co. v. Glenns Ferry Cogeneration Partners, LTD*, U.S. District Court No. 1:11-cv-00565-CWD, Doc. 1, ¶ 4 (Nov. 15, 2011) (Idaho Power's complaint for breach

of contract and damages for levelized-rate overpayment against a QF, which asserts the district court has jurisdiction). As the Commission has repeatedly held, matters of this type should be deferred for resolution in the courts.

IV. CONCLUSION

For the reasons set forth above, the Commission should dismiss this case for lack of jurisdiction, or in the alternative, decline to exercise jurisdiction it may determine it has over the dispute.

DATED this 17th day of September 2020.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 17th day of September 2020, I delivered true and correct copies of the foregoing Motion to Dismiss and Declaration in Support of Motion to Dismiss to the following parties via electronic mail:

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