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IDAHO PUBLIC
UTILITIES COMMISSION



June 9, 2009

Jean Jewell, Commission Secretary
Idaho Public Utilities Commission
Statehouse Mail
472 W. Washington Street
Boise, ID 83702

Re: Case No. AVU-E-09-04
Avista Corporation's Answer to Motion to Dismiss and Motion for an Order
Rejecting Stay

Dear Ms. Jewell:

Enclosed for filing with the Commission are an original and seven (7) copies of Avista Corporation's Answer to Motion to Dismiss and Motion for an Order Rejecting Stay.

If you have any questions regarding this filing, please contact Patrick Ehrbar at (509) 495-8620.

Sincerely,

A handwritten signature in black ink that reads "Kelly Norwood". The signature is written in a cursive, flowing style.

Kelly Norwood
Vice President, State & Federal Regulation

cc: Service List

CERTIFICATE OF SERVICE

I hereby certify that on this 9th day of June 2009, true and correct copies of the foregoing ANSWER TO MOTION TO DISMISS AND MOTION FOR ORDER REJECTING REQUEST FOR STAY were delivered to the following persons via electronic mail and overnight delivery for the Commission.

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BEFORE THE IDAHO PUBLIC UTILITIES COMMISSION

IN THE MATTER OF A PETITION FILED BY)
AVISTA CORPORATION FOR AN ORDER) CASE NO. AVU-E-09-04
DETERMINING THE OWNERSHIP OF THE)
ENVIRONMENTAL ATTRIBUTES ("RECS"))
ASSOCIATED WITH A QUALIFYING) ANSWER TO MOTION TO DISMISS
FACILITY UPON PURCHASE BY A UTILITY) AND MOTION FOR ORDER
OF THE ENERGY PRODUCED BY A) REJECTING REQUEST FOR STAY
QUALIFYING FACILITY)
_____)

Pursuant to IPUC Rule of Procedure 57, petitioner Avista Corporation ("Avista") hereby submits its answer to the Motion to Dismiss ("Motion to Dismiss") filed by Exergy Development Group of Idaho, LLC ("Exergy") and the Motion for Order Rejecting Request for Stay ("Motion to Reject Stay") filed by Sagebrush Energy LLC ("Sagebrush") on May 26, 2009.¹ As discussed herein, the Commission has subject matter jurisdiction to determine the ownership of environmental attributes (sometimes referred to as RECs) in this proceeding, Avista's Petition for an Order Determining the Ownership of RECs and Stay of Any Requirement to Award RECs

¹ On June 2, 2009, Idaho Forest Group filed a concurrence to Sagebrush's Motion to Reject Stay. On June 3, 2009, Exergy filed a supplemental filing in support of its Motion to Dismiss.

to a PURPA Developer (“Petition”) is not a collateral attack on any final order, and Avista’s request for a stay satisfies the requirements for a preliminary injunction. Accordingly, Avista respectfully requests that the Idaho Public Utilities Commission (“Commission”) deny Exergy’s Motion to Dismiss and Sagebrush’s Motion to Reject Stay and that the Commission grant Avista’s request for an order staying any requirement to award RECs to a PURPA developer that has tendered or may tender a PURPA project to Avista until such time as the issue of ownership of RECs raised in Avista’s Petition is resolved.

BACKGROUND

I. Regulatory Background

The Federal Energy Regulatory Commission (“FERC”) has determined that the ownership of RECs is not controlled by the Public Utility Regulatory Policy Act of 1978 (“PURPA”).² FERC further held that “States, in creating RECs have the power to determine who owns the REC in the initial instance and how they may be sold or traded[.]”³ Finally, FERC held that “a state may decide that a sale of power at wholesale automatically transfers ownership of the state-created RECs, [but] that requirement must find its authority in state law, not PURPA.”⁴

Ownership of RECs associated with PURPA Qualifying Facilities (referred to as “PURPA projects” or “QFs”) is not settled in Idaho.⁵ In 2004, Idaho Power filed a petition with the Commission requesting a declaratory order to determine the ownership of the marketable

² *American Ref-Fuel Co., et al.*, 105 FERC ¶ 61,004, P 23 (2003), *order on reh’g*, 107 FERC ¶ 61,016 (2004).

³ *Id.*

⁴ *Id.* at P 24

⁵ Based on Order Nos. 29480 and 29577, Sagebrush asserts that “the current state of the law in Idaho is clear and unambiguous” because, according to Sagebrush, “[o]n two previous occasions the Commission has recognized that under current law, RECs are the property of the generator.” Sagebrush is incorrect. Sagebrush Motion to Reject Stay at 2-3. As discussed herein, in both Order No. 29780 and Order No. 29577, the Commission declined to address the issue of ownership of RECs and, therefore, contrary to Sagebrush’s assertion there is no clear and ambiguous Idaho law that provides that RECs are the property of the generator.

environmental attributes associated with a PURPA project when Idaho Power entered into a long-term, fixed rate contract to purchase the energy produced by such project.⁶ In Order No. 29480, the Commission found that “the issue presented by Idaho Power in its Petition d[id] not present an actual or justiciable controversy in Idaho and [wa]s not ripe for a declaratory judgment by this Commission.”⁷

After the Commission issued Order No. 29480, Idaho Power filed an application with the Commission in Case No. IPC-E-04-16 requesting approval of a Firm Energy Sales Agreement between Idaho Power and J.R. Simplot Company (“Simplot Agreement”).⁸ In the Simplot Agreement, Idaho Power agreed to waive any claim to ownership of RECs, if the Commission provided Idaho Power reasonable assurance that it would not be penalized in a future revenue requirement proceeding for having agreed to forego any ownership interest or right in such RECs.⁹ Idaho Power argued that by filing the Simplot Agreement it had presented the Commission with a real case or controversy and, therefore, the issue of ownership of RECs that the Commission declined to address in Order No. 29480 was now ripe.¹⁰ In Order No. 29577, the Commission found that the regulatory landscape had not changed and again declined to address the issue of ownership of RECs associated with PURPA Projects.¹¹ In this case, as

⁶ IPUC Case No. IPC-E-04-02.

⁷ Order No. 29480 at 16. The Commission did note that Idaho Power could negotiate the sale and purchase of RECs, but the cost of such RECs could not be recovered as PURPA costs. *Id.* at 16-17. Nevertheless, the Commission declined to directly address the issue of ownership of RECs raised by Idaho Power’s petition. *See id.*

⁸ Order No. 29577 at 1.

⁹ *Id.* at 2-3. The fact that Idaho Power agreed to waive any right to RECs in the Simplot Agreement and that Idaho Power sought assurances from the Commission that it would not be later penalized for doing so demonstrates that, contrary to Sagebrush’s assertion (*see supra* note 5), Order No. 29480 did not clearly and unambiguously recognize that RECs belong to the generator—if it had, Idaho Power would have had no right to the RECs to waive and there would have been no reason for Idaho Power to seek assurances from the Commission that it would not be penalized for waiving such rights.

¹⁰ *Id.* at 3.

¹¹ *Id.* at 5-6.

discussed below, Avista has five inquiries or requests for PURPA contracts.¹² As discussed below, that fact as well as substantial changed circumstances since 2004 when this issue was last presented to the Commission, gives rise to a justiciable controversy.

II. Current Proceeding

On May 5, 2009, Avista initiated the above-captioned proceeding by filing its Petition requesting an order declaring that the ownership of RECs associated with PURPA projects will be assigned to the utilities that purchase energy from such projects. Avista's Petition demonstrates that, assuming RECs do not transfer to Avista when it purchases the energy from PURPA projects, Avista's ratepayers will substantially overpay for energy from wind QFs.¹³ Moreover, Avista's Petition states that allowing PURPA developers to retain and market separately the RECs associated with their projects may negatively impact Avista's ability to acquire cost effective renewable resources in a competitive acquisition process.¹⁴ Given that the issue of ownership of RECs is not yet settled in the State of Idaho and the potential for substantial harm, and given the five pending requests or inquiries from developers for PURPA contracts, Avista also requests in its Petition that the Commission issue an order staying any requirement to award RECs to PURPA developers until a final order resolving the issues raised in Avista's Petition is issued. Avista requests expedited treatment of its request for a stay.

¹² Specifically, Avista has received the following requests or inquiries for PURPA contracts: (1) Sagebrush has requested a PURPA contract for a proposed PURPA project located in Montana for which it desires to sell the output to Avista in Idaho; (2) IFG Energy I, LLC has requested a PURPA contract for a proposed PURPA project located near Grangeville, Idaho; (3) IFG Energy II, LLC has requested a PURPA contract for a proposed PURPA project near Chilco, Idaho; (4) IFG Energy III, LLC has requested a PURPA contract for a proposed PURPA project near Laclede, Idaho; and (5) Fodge Pulp, Inc. has inquired about a PURPA contract for a proposed PURPA project near Bonners Ferry, Idaho. Sagebrush is an intervener in this proceeding. Avista understands that IFG Energy I, IFG Energy II, and IFG Energy III are affiliated with Idaho Forest Group, which is also an intervener in this proceeding.

¹³ *E.g.*, Petition at 4-5 (stating that "Avista's customers will overpay by approximately \$310 million over the expected 20-year lives" of the contracts associated with five proposed PURPA projects, if the RECs associated with such projects are not transferred to Avista when it purchases the energy from such projects); Kalich Direct at 14 (same).

¹⁴ Petition at 5; Kalich Direct at 24.

On May 26, 2009, Exergy filed its Motion to Dismiss. In its Motion to Dismiss, Exergy argues that Avista's Petition should be dismissed because the Commission lacks subject matter jurisdiction. Exergy further argues that Avista's Petition should be dismissed because Avista's Petition is a collateral attack on Order Nos. 29480 and 29577.

On May 26, 2009, Sagebrush filed its Motion to Reject Stay, in which it requests that the Commission reject Avista's request for a stay. Sagebrush asserts that Avista's request for a stay should be evaluated under the law of preliminary injunctions and rejected because, in Sagebrush's view: (1) Avista has not demonstrated that it is likely to prevail on the merits; and (2) Avista has not shown irreparable injury. Sagebrush also argues that the Commission should reject Avista's request for a stay on public policy grounds.

As discussed below, Exergy's and Sagebrush's arguments are without merit.

Accordingly, Avista requests that the Commission deny both Exergy's Motion to Dismiss and Sagebrush's Motion to Reject Stay and issue an order granting Avista's request for a stay of any requirement to award RECs to a PURPA developer until the issues raised in Avista's Petition are resolved.

ARGUMENT

I. Exergy's Motion to Dismiss Should be Denied

A. The Commission has Jurisdiction to Determine the Ownership of RECs Associated with PURPA Projects

The Commission has subject matter jurisdiction to determine the ownership of RECs in this proceeding. FERC has expressly disclaimed such jurisdiction and has held that states "have the power to determine who owns the REC in the initial instance, and how they may be sold or traded."¹⁵ Moreover, FERC has expressly stated that states have the authority to "decide that a

¹⁵ *American Ref-Fuel Co., et al.*, 105 FERC at P 23.

sale of power at wholesale automatically transfers ownership of the state-created RECs, [but] that requirement must find its authority in state law, not PURPA.”¹⁶ Under Idaho law, the Commission has subject matter jurisdiction to determine ownership of RECs associated with PURPA projects.

Exergy cites at length the Idaho Supreme Court’s opinion in *Empire Lumber v. Washington Water Power*,¹⁷ for the proposition that “the Commission’s jurisdiction relative to QFs [stems] solely from PURPA and FERC’s implementing regulations.”¹⁸ Exergy’s citations to *Empire Lumber* and any discussion of PURPA or FERC’s rules regarding the implementation of PURPA are irrelevant. As FERC expressly stated, ownership of RECs is governed by state law, not PURPA.¹⁹ The sole issue with regard to the Commission’s subject matter jurisdiction with regard to the issues raised in this proceeding is whether Idaho law authorizes the Commission to determine the ownership of RECs associated with PURPA projects.

The Commission’s enabling statutes authorize the Commission to determine the ownership of RECs associated with PURPA projects. The Commission has the authority to issue declaratory orders clarifying or constructing orders, rules, and statutes.²⁰ The Idaho Code provides:

The public utilities commission is hereby vested with power and jurisdiction to supervise and regulate every public utility in the state and to do all things necessary to carry out the spirit and intent of the provisions of this act.²¹

¹⁶ *Id.* at P 24

¹⁷ 114 Idaho 191, 755 P.2d 1229 (1998).

¹⁸ Exergy Motion to Dismiss at 5-7.

¹⁹ *American Ref-Fuel Co., et al.*, 105 FERC at PP 23, 24.

²⁰ See IPUC Rules of Procedure 53, 101.

²¹ I.C. § 61-501.

The Idaho Code further provides:

*The commission shall prescribe rules and regulations for the performance of any service or the furnishings of any commodity of the character furnished or supplied by any public utility, and, on proper demand and tender of rates, such public utility shall furnish such commodity or render such service within the time and upon the conditions provided in such rules.*²²

There can be no doubt that RECs are a commodity of the character furnished or supplied by any public utility.²³ The Commission is expressly empowered by statute to “prescribe rules and regulations for the performance of any service *and the furnishings of any commodity of the character furnished or supplied by any public utility.*”²⁴ Accordingly the Commission has subject matter jurisdiction to determine in this proceeding the ownership of RECs associated with PURPA projects.²⁵

Other jurisdictions that have addressed the issue of ownership of RECs have determined that their state public utility commissions have subject matter jurisdiction over this issue.²⁶ For

²² I.C. § 61-507 (emphasis added).

²³ *Wheelabrator Lisbon, Inc. v. Connecticut Dep’t of Pub. Util. Control*, 531 F.3d 183, 186 (2d Cir. 2008) (affirming decision of Connecticut Department of Public Utility Control requiring transfer of RECs to electric utility under electricity purchase agreements and noting that “[t]he energy conveyed in the [PURPA] Agreement possesses certain renewable energy attributes that, since the signing of the Agreement, have become independently tradeable commodities known as ‘renewable energy credits’ (‘RECs’).”); *In re the Ownership of Renewable Energy Certificates (“RECs”)*, 389 N.J.Super. 481, 484, 913 A.2d 825, 826 (2007) (affirming Board of Public Utilities’ decision that renewable energy certificates issued on pre-existing contracts for the sale of electricity to public electric utility belonged to utility rather than the producer and stating that RECs are a commodity).

²⁴ I.C. § 61-507 (emphasis added).

²⁵ To the extent that Exergy asserts that Avista’s Petition is deficient under IPUC Rule of Procedure 101 because it does not expressly cite to I.C. §§ 61-501, 61-507, that deficiency provides no basis for granting Exergy’s Motion to Dismiss. Unless prohibited by statute, the Commission may permit deviation from its Rules of Procedure when it finds compliance with them is impracticable, unnecessary or not in the public interest. IPUC Rule of Procedure 13. Moreover, IPUC Rule of Procedure 66 provides that “[t]he Commission may allow any pleading to be amended or corrected or any omission to be supplied. Pleadings will be liberally construed, and defects that do not affect substantial rights of the parties will be disregarded.” Avista’s failure to cite sections 61-501 and 61-507 of the Idaho Code does not affect a substantial right of any party and, therefore, should be disregarded. To the extent necessary, Avista requests that the Commission allow Avista to amend its Petition to include any necessary citations to the Idaho Code.

²⁶ The public utility commissions of several states have, in various contexts, made determinations regarding the ownership of RECs, including the public utility commissions of the states of Connecticut, Nevada, New Jersey, North Dakota, Oregon, Pennsylvania, Utah, and Colorado.

example, in *In re The Riley Energy Corp.*,²⁷ the Connecticut Light and Power Company (“CL&P”) requested that the Connecticut Department of Public Utility Control (“DPUC”) issue a declaratory ruling regarding the ownership of RECs under a pre-existing power purchase agreement entered under PURPA. The power purchase agreement did not contemplate ownership of RECs, but provided for the sale of the entire net electric output of the facility. The DPUC found that under the power purchase agreement the RECs transferred to the utility as part of the electrical output purchased by the utility. In reaching its conclusion, the DPUC found that it had subject matter jurisdiction. The Connecticut Supreme Court affirmed the DPUC’s decision.²⁸ Notably, the court found that the issue of whether the DPUC had jurisdiction to determine the ownership of RECs was not an issue of pure contractual intent, but “more a question of legislative intent and public policy than a question of the intent of the parties.”²⁹ Thus, the court found that the DPUC had subject matter jurisdiction under its general enabling statutes.³⁰

Finally, it is worth noting that both Exergy and Sagebrush argue in their motions that the Commission has already addressed the issue of RECs in its prior orders.³¹ Such arguments necessarily concede that the Commission has subject matter jurisdiction over the issue in this

²⁷ 2004 WL 3160409 (Conn. DPUC 2004).

²⁸ *Wheelabrator Lisbon, Inc. v. Dep’t of Pub. Util. Control*, 283 Conn. 672, 931 A.2d 159 (2007). The producers also sought relief from the DPUC’s decision in federal court. *Wheelabrator Lisbon, Inc. v. Dep’t of Pub. Util. Control*, 526 F.Supp.2d 295 (D. Conn. 2006), *aff’d*, 531 F.3d 183 (2d Cir. 2008). The federal court addressed, among other things, whether the DPUC’s decision was preempted by PURPA and whether assigning ownership of RECs to the utility was a taking under the United States Constitution. The federal district court held, among other things, that the DPUC’s decision was not preempted by PURPA and that assigning the RECs to the utility was not a taking. *Wheelabrator Lisbon, Inc.*, 526 F.Supp.2d at 305-07. The United States Court of Appeals for the Second Circuit affirmed the judgment of the district court. *Wheelabrator Lisbon, Inc. v. Dep’t of Pub. Util. Control*, 531 F.3d 183 (2d Cir. 2008).

²⁹ *Wheelabrator Lisbon, Inc.*, 283 Conn. at 687, 931 A.2d at 169-70.

³⁰ *Id.* at 689, 931 A.2d at 171. Specifically, the court found that the DPUC had authority, and therefore subject matter jurisdiction, to determine ownership of RECs in this case based on C.G.S.A. §§4-176 and 16-9, which authorize any person to petition the DPUC, or the DPUC to initiate on its own motion, to initiate a proceeding for a declaratory ruling and authorizes the DPUC to rescind, reverse or amend its prior decisions. *Id.*

³¹ Exergy Motion to Dismiss at 8; Sagebrush Motion to Reject Stay at 2-3.

proceeding. To be sure, if the Commission does not have subject matter jurisdiction to determine that RECs are assigned to the utilities that purchase energy from QFs the Commission similarly has no jurisdiction to determine that QFs retain such RECs.³² It necessarily follows from this reasoning that, absent legislative action, there is no forum for determining the ownership of RECs in Idaho. This is clearly incorrect. Arguments that the Commission lacks jurisdiction in this proceeding are without merit and should be summarily rejected.

B. Avista's Petition is Not a Collateral Attack of Commission Order Nos. 29480 or 29577

Exergy next argues that Avista's Petition is an impermissible collateral attack of Commission Order Nos. 29480 and 29577. Exergy's argument appears to be based on two related incorrect premises—i.e., (i) that the Commission has already spoken on the issue of ownership of RECs in Order Nos. 29480 and 29577³³ and (ii) Avista's petition is based on the same factual allegations raised in Idaho Power's petition for a declaratory order in Case No. IPC-E-04-2. Each of these premises is demonstrably incorrect.

With regard to Exergy's first incorrect premise—that the Commission has already spoken on the issue of REC ownership—the Commission did not address the issue of ownership of RECs in Order No. 29480 or Order No. 29577. Rather, the Commission expressly declined to rule on the issue of the ownership of RECs associated with PURPA projects on grounds that, at the time those orders were issued, the issue was not yet ripe for a declaratory judgment.

Specifically, in Order No. 29480, the Commission held:

We find that the issue presented by Idaho Power in its Petition does not present an actual or justiciable controversy in Idaho and is not ripe for a declaratory judgment by this Commission. Declaratory rulings are appropriate regarding the applicability of any

³² See, e.g., Sagebrush Motion to Reject Stay at 2.

³³ To the extent that Exergy argues that Avista's Petition is an impermissible collateral attack because the Commission has already spoken on the question of RECs, Exergy's Motion to Dismiss necessarily concedes that the Commission has subject matter to determine the ownership of RECs. See Exergy Motion to Dismiss at 8.

statutory provision or of any rule or order of this Commission. See IDAP A 31.01.01.10 1; Uniform Declaratory Judgment Act Idaho Code 10- 1201 et seq. A declaratory ruling contemplates the resolution of prospective problems. The rights sought to be protected by a declaratory judgment may invoke either remedial or preventive relief; it may relate to a right that is only yet in dispute or a status undisturbed but threatened or endangered; but in either event it must involve actual and existing facts. *Idaho Code Supreme Court in Harris v. Cassia County*, 106 Idaho 513, 516-517, 618 P.2d 988 (1984). We find that none of the predicates are present in this case. In making this finding, the Commission notes that FERC on April 15, 2004 (Docket EL03-133-001 107 FERC ¶ 61,016) denied rehearing of its earlier October 1, 2003 Order (105 FERC ¶ 61 004). We note also that the State of Idaho has not created a green tag program, has not established a trading market for green tags, nor does it require a renewable resource portfolio standard.

While this Commission will not permit the Company in its contracting practice to condition QF contracts on inclusion of such a right-of- first refusal term, neither do we preclude the parties from voluntarily negotiating the sale and purchase of such a green tag should it be perceived to have value. The price of same we find, however, is not a PURPA cost and is not recoverable as such by the Company. Recovery of those expenses will be reviewed as are all other non-PURPA costs.³⁴

Because the Commission found that Idaho Power's petition did not present an actual or justiciable controversy that was ripe for a declaratory judgment, the Commission declined to grant Idaho Power's petition.³⁵

The Commission similarly declined to address the issue of REC ownership in Order No. 29577. Specifically, the Commission stated:

The Commission has reviewed its prior Order No. 29480 language in Case No. IPC-04-2 regarding environmental attributes. The regulatory landscape has not changed. The state of Idaho has still not created a green tag program, has not established a trading market for green tags, nor does it require a renewable resource portfolio standard. We note, as we did earlier, that the utility and QFs are free to voluntarily contract and negotiate the sale and purchase of such green tags should environmental attributes be perceived by the contracting parties to have value. The price of same we find, however, is not a PURPA cost and is not recoverable as such by the Company. Recovery of those expenses will be reviewed as are all other non-PURPA costs.³⁶

³⁴ Order No. 29480 at 16.

³⁵ *Id.* at 17.

³⁶ Order No. 29577 at 5-6. The Commission's statements in Order Nos. 29480 and 29577 that Idaho Power could not recover the cost of RECs as a PURPA cost is consistent with FERC's precedent that makes clear that RECs are not governed by PURPA. See *American Ref-Fuel Co., et al.*, 105 FERC at PP 23, 24. The Commission's statements regarding how the cost of RECs may be recovered does not indicate that the Commission addressed the issue of ownership of RECs; rather, the Commission expressly declined to address that issue.

Because the Commission did not rule on the issue of ownership of RECs in Order Nos. 29480 and 29577, Avista's Petition cannot be a collateral attack of those orders.

Second, Avista's Petition is not based on the same factual allegations raised in Idaho Power's petition for a declaratory order in Case No. IPC-E-04-2. Rather, Avista asserts in its Petition that circumstances have substantially changed. Avista cites five specific changes in the regulatory landscape since the Commission issued Order No. 29480: (1) PURPA rates have increased substantially; (2) interest in PURPA contracts has increased; (3) states have adopted renewable portfolio standards ("RPS"); (4) a robust market for RECs has emerged; and (5) the value of RECs has increased dramatically.³⁷ The changed circumstances cited in Avista's Petition occurred after the Commission issued Order No. 29480 and, therefore, were not (and could not possibly have been) present in Idaho Power's petition in Case No. IPC-E-04-2.³⁸

Exergy appears to read Order Nos. 29480 and 29577 to require the specific circumstances listed in those orders to occur—i.e., that the State of Idaho create a RPS or other green tag program or established a trading program for RECs—before the issue of REC ownership will be ripe in Idaho.³⁹ Such a reading is too narrow in that it fails to recognize the multitude of other potential changes that may give rise to an actual justiciable controversy regarding the ownership of RECs. With regard to whether the issue presented by Avista's Petition is ripe, the fact that

³⁷ Petition at 2-3.

³⁸ Exergy cites Avista's prior comments in Case No. IPC-E-04-2 to support its assertion that the five changed circumstances that Avista cites in its Petition were in the record in 2004. Specifically, Exergy quotes the following from Avista's prior comments:

[O]ne may speculate that the value of RECs may increase significantly concurrent with societal concerns about global warming. If there is a significant and unexpected increase in the wholesale market value of RECs than the utility's rate payers should receive the benefits of the increase. . .

Exergy Motion to Dismiss at 9 (quoting Comments of Avista Corporation Case No. IPC-E-04-2, March 19, 2004 at p.4) (internal footnote omitted). Exergy reliance on Avista's prior comments misses the point. In IPC-E-04-2 Avista noted the potential that in the future the market value of RECs would increase substantially. Avista's petition in this case does not cite potential future circumstances; rather, Avista cites actual present conditions that present a justiciable controversy. In this regard, Exergy's reliance on Avista's prior comments in IPC-E-04-2 is misplaced.

³⁹ See Exergy Motion to Dismiss at 10.

State of Idaho has not created a RPS or other green tag program or established a trading program for RECs is not determinative—RECs are generated by projects that are located in the State of Idaho and by projects that sell their output within the State of Idaho and there is a market for such RECs. There is clearly an actual justiciable controversy regarding the ownership of RECs, notwithstanding the fact that Idaho has not created a RPS or other green tag program or established a trading program for RECs.

Avista has demonstrated substantial changed circumstances that give rise to an actual justiciable controversy in this case. Specifically, most states, including the neighboring states of Washington, Oregon, and Montana have now developed RPS requirements. In fact, according to the Renewable Energy Policy Project, all but 16 states now have renewable portfolio standards.⁴⁰ Because more states have adopted RPS requirements, a robust market for RECs, including RECs generated by PURPA projects located in Idaho, has emerged.⁴¹ The value of RECs has also increased dramatically. In 2004, RECs were valued at approximately \$2 per MWh. Today REC values can be \$15 per MWh or more.⁴² These facts, combined with substantially higher avoided cost rates in Idaho—currently \$94.64 (or \$84.30 for wind projects after subtracting the current wind integration charge) as compared with \$53.56 in 2004—and the related increase in interest in PURPA projects demonstrated by the fact that Avista currently has five pending requests or inquiries for PURPA contracts,⁴³ give rise to an actual controversy regarding the ownership of RECs.⁴⁴ As a result, the issue of ownership of RECs is now ripe.

The Commission has subject matter to jurisdiction to determine the ownership of RECs associated with PURPA projects. The Commission has previously declined to address the issue

⁴⁰ Kalich Direct at 13.

⁴¹ *Id.*

⁴² *Id.*

⁴³ *See supra* note 12.

⁴⁴ Petition at 2-3; Kalich Direct at 3, 13-14.

of ownership of RECs in Order Nos. 29482 and 29577 on the grounds that, at the time those orders were issued, the issue was not ripe. Avista's Petition is not a collateral attack of those orders. Rather, Avista's Petition demonstrates changed circumstances such that an actual justiciable controversy regarding the ownership of RECs is now present. Accordingly, Exergy's Motion to Dismiss should be denied.

II. Sagebrush's Motion to Reject Stay Should be Denied

Sagebrush advances two arguments in support of its motion to reject Avista's request for a stay. First, Sagebrush asserts that Avista's request for stay should be evaluated under the law of preliminary injunctions. Second, Sagebrush asserts that Avista's request for stay should be rejected on public policy grounds. Sagebrush's arguments are without merit.

Assuming *arguendo* that the law of preliminary injunctions applies, Avista has satisfied the requirements for a preliminary injunction and, therefore, its request for stay should be granted. Moreover, rather than providing a basis for rejecting Avista's request for stay, public policy considerations strongly favor Avista's request for stay.

A. Avista Has Satisfied the Requirements for a Stay

Idaho Rule of Civil Procedure ("IRCP") 65e sets forth the grounds for preliminary injunctions. IRCP 65e states, in relevant part, that a preliminary injunction may be granted in either of the following cases:

(1) When it appears by the complaint that the plaintiff is entitled to the relief demanded, and such relief, or any part thereof, consists in restraining the commission or continuance of the acts complained of, either for a limited period or perpetually.

(2) When it appears by the complaint or affidavit that the commission or continuance of some act during the litigation would produce waste, or great or irreparable injury to the plaintiff.⁴⁵

⁴⁵ IRCP 65e(1), e(2). IRCP 65e(3)-(6) are not applicable.

As discussed below, Avista's Petition demonstrates that it is entitled to the relief requested and, therefore, a stay is properly issued under IRCP 65e(1). Even assuming that the Commission concludes that Avista's Petition somehow does not demonstrate that Avista is entitled to the relief requested, Avista has demonstrated in its Petition that failure to grant the stay will result in an irreparable injury and, therefore, a stay is properly issued under IRCP 65e(2).

1. Avista's Request for Stay Satisfies IRCP 65e(1)

Under IRCP 65e(1), a preliminary injunction is appropriate if there is a substantial likelihood that the proponent of the preliminary injunction will prevail.⁴⁶ As discussed below, Avista's Petition satisfies the requirements for a preliminary injunction under IRCP 65e(1).

Sagebrush argues that Avista has not demonstrated that it is likely to prevail on the merits.⁴⁷ Avista's Petition clearly demonstrates that: (1) FERC left the issue of ownership of RECs to the states; (2) that the IPUC has not yet issued an order determining the ownership of RECs; (3) that FERC precedent requires the rates for purchases of electric energy from QFs to be just and reasonable to the ratepayers of the utility, in the public interest, and not exceed the incremental cost to the electric utility of alternative electric energy; (4) that, absent a Commission order assigning the RECs associated with PURPA projects to the utilities that purchase the energy from such project, the cost of energy from a PURPA wind project will substantially exceed the incremental cost to the utility of alternative electric energy; and (5) allowing PURPA projects to retain and market separately the environmental attributes associated with such projects will likely negatively impact Avista's ability to acquire cost-effective renewable resources in a competitive acquisition process.⁴⁸ Avista's Petition is supported by Mr. Kalich's direct testimony. Avista's Petition demonstrates a substantial likelihood that it will

⁴⁶ *Harris v. Cassia County*, 106 Idaho 513, 518, 681 P2d 988, 993 (1984).

⁴⁷ Sagebrush Motion to Reject Stay at 4-8.

⁴⁸ Petition at 2-5.

prevail in the above-captioned proceeding. Moreover, Sagebrush provides no persuasive argument that Avista will not prevail in this proceeding.

a) Mr. Kalich's Direct Testimony is Not Flawed

Sagebrush argues that Avista has not demonstrated that it is likely to prevail on the merits because Sagebrush believes that Mr. Kalich's direct testimony is flawed. Specifically, Sagebrush takes issue with Mr. Kalich's testimony that Northwest Power and Conservation Council ("NWPC") estimates for wind generation project development construction and operation result in an avoided cost of \$64 per MWh when levelized over 20 years.⁴⁹ Sagebrush notes that "one NWPC staff analysis the [sic] calculated twenty-year levelized cost for base-case wind power development for the Pacific Northwest is [sic] \$100.03."⁵⁰

In his testimony, Mr. Kalich explained the derivation of the \$64 per MWh levelized avoided cost. Specifically, Mr. Kalich testified that the \$64 per MWh levelized avoided cost reflected the impact of federal tax subsidies.⁵¹ The \$100.03 that Sagebrush points to as evidence that Mr. Kalich's calculations are flawed appears to not account for certain tax incentives and, therefore, is misleading.

b) Avista's Petition is Not a Collateral Attack on the Avoided Cost Rates

Sagebrush also argues that Avista's Petition is an impermissible collateral attack on Order No. 30744.⁵² Sagebrush is incorrect. In Order No. 30744, the Commission established the current avoided cost rates. Avista is not challenging the avoided cost rates in its Petition.

⁴⁹ Sagebrush Motion to Reject Stay at 5 (citing Kalich Direct at 6).

⁵⁰ *Id.* at 5 (footnote omitted) (citing Jeff King's Workbook "MicroFin 14.2.6 042109", Reporting year real dollars 2009, commercial operation 2010, Busbar cost for 100 MW wind project with 32% capacity factor).

⁵¹ Kalich Direct at 6-7.

⁵² Sagebrush Motion to Reject Stay at 5-6.

Sagebrush points to Mr. Kalich's statement in his testimony that the current avoided cost rate of \$90.64 per MWh is "simply too high" as evidence that Avista is attempting to collaterally attack Order No. 30744. Sagebrush takes Mr. Kalich's statement out of context.

Avista's Petition does not take any position regarding whether the current avoided cost rates, which apply generally to all PURPA projects, are appropriate. Rather, it is Avista's position that, with regard to those PURPA projects that also generate RECs, at the current avoided cost rates awarding the RECs to the PURPA project instead of the utilities that purchase the energy creates a substantial discrepancy between the cost of a PURPA resource and the cost associated with the utility building and operating an equivalent resource. Mr. Kalich's testimony is clear in this regard. For example, Mr. Kalich testifies that:

The purpose of my testimony is to support Avista's request that the Commission declare that the environmental attributes (hereinafter referred to as "Renewable Energy Credits" or "RECs") associated with PURPA projects be granted to the utilities that purchase the energy. In my testimony I explain that current PURPA rates in the State of Idaho (assuming that the utility does not obtain ownership of the RECs when it purchases the energy generated by a wind Qualified Facility) substantially exceed the cost of building and operating a wind plant. This disparity equates to approximately \$60 million in excess costs over a 20-year PURPA contract term for a single 10 aMW project.⁵³

Mr. Kalich further testifies:

Avista therefore requests that the Commission recognize this significant discrepancy between the actual cost of developing a renewable resource and the published PURPA rate, and declare that ownership of all RECs associated with PURPA projects be transferred to the utility purchasing the energy from such projects.⁵⁴

Sagebrush is incorrect that Avista's Petition is a collateral attack on Order No. 30744.

Avista is not arguing in this proceeding that Order No. 30744 was wrongly decided nor is Avista seeking to revise the current avoided cost rates. Rather, Avista seeks a determination regarding the ownership of RECs associated with PURPA projects.

⁵³ Kalich Direct at 2-3 (footnote omitted).

⁵⁴ *Id.* at 4.

c) The Commission has Subject Matter Jurisdiction to Determine Ownership of RECs in this Proceeding

Sagebrush next argues that the likelihood of Avista prevailing in this proceeding is in question based on Exergy's argument in its Motion to Dismiss that the Commission does not have subject matter jurisdiction to decide the question of REC ownership.⁵⁵ As explained in response to Exergy's Motion to Dismiss above, the Commission has subject matter jurisdiction to determine the ownership of RECs in this proceeding.

d) Sagebrush's Laundry List of Purported Policy and Legal Considerations Provide No Basis for Rejecting Avista's Request for Stay

In its Motion to Reject Stay, Sagebrush provides a laundry list of purported policy and legal considerations in an effort to raise doubt about the merits of Avista's Petition.⁵⁶ The laundry list contains conclusory statements without any support or explanation. The items in Sagebrush's laundry list or purported policy and legal considerations provide no basis for rejecting Avista's request for a stay.

Several of the items listed by Sagebrush are similar to arguments raised by Sagebrush and Exergy that are discussed above. For example, the first five items appear to be related to whether the Commission has subject matter jurisdiction to determine the ownership of RECs.⁵⁷ As discussed in detail above, the Commission has subject matter jurisdiction in this proceeding. Other items in Sagebrush's list raise issues that have already been rejected in other forums. Specifically, Sagebrush includes two bullets that suggest that assigning ownership of RECs to

⁵⁵ Sagebrush also asserts in its Motion to Reject Stay that "[on] two previous occasions the Commission has recognized that under current law, RECs are the property of the generator" and based on those two prior Commission orders "the current state of law in Idaho [regarding the ownership of RECs associated with PURPA projects] is clear and unambiguous." Sagebrush Motion to Reject Stay at 2-3. Accordingly, Sagebrush's own Motion to Reject Stay, like Exergy's Motion to Dismiss appears to concede that that the Commission has subject matter jurisdiction to decide the question of REC ownership. *See supra* note 33.

⁵⁶ Sagebrush Motion to Reject Stay at 6-7.

⁵⁷ *Id.*

the utilities would constitute a taking in violation of the Fifth and Fourteenth Amendments to the United States Constitution. A similar taking argument was considered, and rejected in *Wheelabrator Lisbon, Inc. v. Connecticut Dep't of Pub. Util. Control*.⁵⁸

At most, Sagebrush's arguments demonstrate that the issue of REC ownership raised in Avista's Petition is ripe and that a hearing may be appropriate. However, Avista's Petition demonstrates a substantial likelihood that it will prevail in the above-captioned proceeding. Sagebrush provides no persuasive argument that Avista will not prevail in this proceeding. Accordingly, Avista requests that the Commission issue an order granting Avista's request for a stay in this proceeding.

2. Avista's Request for Stay Satisfies IRCP 65e(2)

Assuming that the Commission concludes that Avista has not satisfied IRCP 65e(1), Avista has demonstrated that allowing PURPA projects to retain RECs will cause irreparable injury. Accordingly, the Commission should grant Avista's request for stay under IRCP 65e(2).

Avista's Petition states:

Avista is currently negotiating new PURPA contracts for five proposed projects. If each of these contracts are executed at the present rates, and the RECs associated with such projects are not transferred to Avista with the sale of energy, Avista's customers will overpay by approximately \$310 million over the expected 20-year lives of these contracts. Allowing PURPA developers to retain and market separately the environmental attributes associated with their projects may also negatively impact Avista's ability to acquire cost-effective renewable resources in a competitive acquisition process, as explained by Mr. Kalich. As a result, a stay of any requirement to award RECs to a developer that has tendered or that may tender a PURPA project to Avista until such time as a final order is issued that fully resolves the issues raised in Avista's Petition to Determine Ownership of RECs is necessary to protect Avista's customers from substantial overpayment for PURPA resources. Avista respectfully requests that the IPUC grant expedited treatment of Avista's request for a stay given the existing interest expressed by PURPA developers in tendering projects to Avista.⁵⁹

⁵⁸ 526 F.Supp.2d at 307, *aff'd*, *Wheelabrator Lisbon, Inc.*, 531 F.3d at 183-90.

⁵⁹ Petition at 5 (internal footnote omitted).

Sagebrush does not deny that if PURPA Projects are allowed to retain the REC Avista's ratepayers will be harmed by overpaying under PURPA contracts or that allowing PURPA projects to retain the RECs will negatively impact Avista's ability to acquire cost-effective renewable resources in a competitive acquisition process.⁶⁰ Rather, Sagebrush again appears to argue that Avista is attempting to collaterally attack Order No. 30744 by stating that "the existence of any so-called overpayment by rate payers is founded on an assumption that Order No. 30744 was wrongly decided."⁶¹ As discussed above, Avista's Petition is not a collateral attack of Order No. 30744. Avista seeks an order declaring that the ownership of RECs associated with PURPA projects will be assigned to the utilities that purchase the energy from such projects; Avista is not challenging the avoided cost rates set in Order No. 30744.⁶²

Avista's Petition demonstrates that allowing PURPA projects to retain RECs will cause irreparable injury. Accordingly, Avista requests that the Commission issue an order granting Avista's request for a stay in this proceeding.

III. A STAY IS IN THE PUBLIC INTEREST

Sagebrush argues that granting Avista's request for a stay would be bad public policy.⁶³ Although not entirely clear, Sagebrush appears to be asserting that granting Avista's requested stay will impede the development of renewable resources. Again, as discussed above, Mr. Kalich directly addressed this issue in his testimony. Specifically, Mr. Kalich testified that "under current [Idaho] PURPA rates, PURPA developers are compensated at a rate more than

⁶⁰ To the extent that Sagebrush argues that Avista's failed to allege any injury to itself, as opposed to injury to its ratepayers, that argument is without merit. As an initial matter the harm to Avista's ratepayers is sufficient. Moreover, Avista also asserted direct harm to itself—i.e., a negative impact to its ability to acquire cost-effective renewable resources in a competitive acquisition process if PURPA projects can retain and separately market RECs. Petition at 6.

⁶¹ Sagebrush Motion to Reject Stay at 8.

⁶² Petition at 5-6.

⁶³ Sagebrush Motion to Reject Stay at 9.

sufficient to enable their success in constructing new renewable energy projects and earning a sufficient return on their investments.”⁶⁴

Contrary to Sagebrush’s assertion, Avista’s requested stay is in the public interest. The risk of overpayment for PURPA resources is clear and present. Absent the requested stay, Avista will be required to enter into long-term contracts with developers of PURPA wind projects that may not be subject to the outcome of this proceeding. Accordingly, there is a potential that Avista will be required to pay the current PURPA rate of \$90.64 per MWh for a term of up to 20 years and may also not be able to obtain any ownership of the RECs associated with such projects. As a result, for wind resources the cost to Avista and its ratepayers of each such PURPA resource will be 72 percent higher than the cost associated with building an equivalent renewable resource.⁶⁵ Over a 20-year contract term, the overpayment for each 10 aMW PURPA project could exceed \$62 million (\$30 million on a present-value basis).⁶⁶ Avista is currently negotiating contracts for five proposed PURPA projects. If each of these contracts is executed, the overpayment for these resources will be approximately \$310 million over the expected 20-year lives of these contracts.

In addition to the potential for substantial overpayment for PURPA projects by Avista’s ratepayers, there is also a very real concern that allowing PURPA projects to retain RECs will adversely impact Avista’s ability to acquire cost effective renewable resources in a competitive acquisition process.⁶⁷ Avista’s requested stay is in the public interest.

⁶⁴ Kalich Direct at 16.

⁶⁵ *Id.* at 4-5.

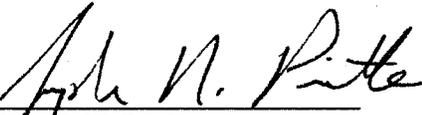
⁶⁶ *Id.* at 8-9.

⁶⁷ Petition at 5; Kalich Direct at 24.

CONCLUSION

For the reasons stated herein, Avista respectfully requests that the Commission deny Exergy's Motion to Dismiss and Sagebrush's Motion to Reject Stay. Avista further requests that the Commission grant Avista's request for a stay and enter an order staying any requirement to award RECs to PURPA developers until a final order resolving the issues raised in Avista's Petition is issued.

Respectfully submitted this 9 day of June 2009.



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