

PETER J. RICAHRDSON (ISB # 3195)
Richardson & O'Leary PLLC
515 North 27th Street
P.O. Box 7218
Boise, Idaho 83707
Telephone: (208) 938-7900
Fax: (208) 938-7904
peter@richardsonandoleary.com

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IDAHO PUBLIC
UTILITIES COMMISSION

Attorneys for Exergy Development Group of Idaho, LLC

BEFORE THE
IDAHO PUBLIC UTILITIES COMMISSION

IN THE MATTER OF A PETITION FILED BY)
AVISTA CORPORATION FOR AN ORDER)
DETERMINING THE OWNERSHIP OF THE)
ENVIRONMENTAL ATTRIBUTES ("RECS"))
ASSOCIATED WITH A QUALIFYING)
FACILITY UPON PURCHASE BY A UTILITY)
OF THE ENERGY PRODUCED BY A)
QUALIFYING FACILITY)

CASE NO. AVU-E-09-04

EXERGY DEVELOPMENT GROUP
OF IDAHO'S MOTION TO DISMISS

COMES NOW, Exergy Development Group of Idaho, LLC ("Exergy"), by and through undersigned counsel, and files this Motion to Dismiss Avista's Petition. This Motion, filed pursuant to Rule 56 of the Idaho Public Utilities Commission's Rules of Procedure, is based on the argument that the Commission lacks subject matter jurisdiction to decide the proper ownership of RECs. It is also based on the argument that Avista's Petition is an impermissible collateral attack on final Commission orders.

1. **LACK OF SUBJECT MATTER JURISDICTION**

BACKGROUND

On May 6, 2009 Avista filed a “Petition for an Order Determining Ownership of RECS and Stay of any Requirement to Award RECS to a PURPA Developer” (“Petition”) with this Commission. In its Petition, Avista makes the following assertion relative to this Commission’s “authority to determine the ownership of environmental attributes associated with a wholesale sale of energy by a QF to a utility under PURPA”:

In response to a petition for declaratory order seeking an interpretation of section 210 of PURPA, the Federal Energy Regulatory Commission (“FERC”) has determined that the ownership of environmental attributes (sometimes referred to as RECs”) is not controlled by PURPA. *American Ref-Fuel Co., et al.*, 105 FERC ¶ 61,004, P. 23 (2003), *order on reh’g*, 107 FERC 61,016, P. 12 (2004). FERC further found 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[.]” *Id.* Accordingly, the IPUC has the authority to determine the ownership of environmental attributes associated with a wholesale sale of energy by a QF to a utility under PURPA.

Petition at P. 2, emphasis provided.

The above statement constitutes the entirety of Avista’s argument that this Commission has jurisdiction to entertain the question of REC ownership in the PURPA QF context. For the reasons set forth below, this argument lacks merit

THE FERC DECISION OFFERS NO LEGAL BASIS FOR AVISTA’S POSITION

FERC stated that its avoided cost rules under PURPA cannot be the basis for transferring ownership of RECs to the utility purchasing the power. Beyond that, FERC left it to the states to decide the ownership of REC issue. FERC stated that “the Commission’s avoided cost regulations did not contemplate the existence of RECs and that the avoided cost rates for

capacity and energy sold under contracts entered into pursuant to PURPA do not convey the RECs, in the absence of an express contractual provision.” FERC further noted, however, that RECs are the creation of the states, and that PURPA does not address the ownership of RECs. Therefore, “while a state may decide that a sale of power at wholesale automatically transfers ownership of the state-created RECs, that requirement must find its authority in state law, not PURPA.”¹ Thus, FERC did not grant authority to the states to determine REC ownership; rather, it simply observed that *if* that authority exists it must be found in state law. Avista has not cited Idaho State law or policy giving this Commission such authority. As FERC pointed out, in the absence of such authority, the REC ownership question is left to the private contracting parties to resolve as they see fit. Therefore, because the only source of the Idaho PUC’s jurisdiction over QFs is implementing PURPA this Commission has no jurisdiction over the REC ownership question.

**THE COMMISSION MUST DISMISS
FOR LACK OF SUBJECT MATTER JURISDICTION**

Avista filed its Petition “pursuant IPUC Rule of Procedure 101.” Rule of Procedure 101 (dealing with Declaratory Orders) requires that the referenced pleading identify the legal authority upon which the petition for declaratory order is based. Rule of Procedure 101.02(c) requires that a petition for declaratory order “indicate the statute, order, rule or other controlling law” upon which the petitioner relies. Avista’s Petition refers only to FERC’s *American Ref-Fuel* ruling. However, in that ruling FERC *disclaimed* any jurisdiction over the question of ownership of RECs. FERC did not -- indeed it can not -- confer jurisdiction on the Idaho Public

¹ FERC Docket NO. EL03-133-000, *Order Granting Petition for Declaratory Ruling*, October 1, 2003. *American Ref-Fuel Co. et al.*, 105 FERC ¶ 61,004 (2003).

Utilities Commission. In violation of Rule of Procedure 101 Avista did not cite this Commission to a statute, a rule, an order or any other controlling law upon which it relies in bringing its Petition before the Commission, and as explained above, the single ruling referenced by Avista does not provide support for its position.

It is black letter law that the Commission's jurisdiction is statutorily derived and cannot be expanded without legislative action. "The Public Utilities Commission has no inherent power; its powers and jurisdiction derives in its entirety from the enabling statutes, and nothing is presumed in its jurisdiction." *Lemhi Telephone Co. v. Mt. States Tele. & Tele. Co.*, 98 Idaho 692, 696, 571 P. 2d 753 (1977). "The power which the Commission has is that given by the legislature. It has no other. It exercises a limited jurisdiction; nothing is presumed in favor of its jurisdiction. (Citations omitted). The general rule is stated in 42 Am.Jur. 440, § 109, as:

Administrative authorities are tribunals of limited jurisdiction. Their jurisdiction is dependent entirely upon the provisions of the statutes reposing power in them; they cannot confer it upon themselves, although they may determine whether they have it. If the provisions of the statutes are not met and complied with, they have no jurisdiction."

Arrow Transportation Co. v. Idaho Public Utilities Comm'n, 85 Idaho 307, 313-314, 379 P.2d 422 (1963), citing *Malone v. Van Etten*, 67 Idaho 294, 178 P.2d 382, 383; *In the Matter of the Jurisdiction of the Oregon P. U. C.*, 201 Or. 1, 268 P.2d 605; 42 Am. Jur., Pub.Ad.Law., secs. 109, 157; I.C. § 61-808; 49 U.S.C. § 312(a).

The enabling statute for the Commission is clear and unequivocal, and narrowly circumscribes the Commission's jurisdiction:

61-501. INVESTMENT OF AUTHORITY. 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.

I.C. § 61-501 (emphasis supplied). The express scope of the Public Utilities Law is limited to the supervision and regulation of public utilities in Idaho. There is no provision in the Public Utilities Law that requires or permits the Commission to make sweeping policy declarations relating to the private contractual relationship between a QF and Avista. Although the Commission has broad authority under PURPA in setting avoided cost rates and terms and conditions of PURPA contracts, FERC has specifically ruled a state commission's determination of REC ownership must be grounded on authority other than PURPA. Avista has not provided the Commission with a citation to any such authority, and Exergy's research revealed no such authority. Therefore the Commission must dismiss Avista's Petition for lack of subject matter jurisdiction.

2. **THE IPUC HAS LIMITED AUTHORITY UNDER PURPA**

**ALTHOUGH CHARGED WITH IMPLEMENTING
PURPA THE COMMISSION HAS A WELL DEFINED ROLE
THAT DOES NOT INCLUDE SETTING STATE POLICY**

Although given great discretion in interpreting and implementing the Public Utility Code by the Courts, the Idaho Public Utilities Commission has at best limited authority to make law. The Commission's jurisdiction is limited and must be found entirely in its enabling statutes. *Arrow Transportation Company v. Idaho Public Utilities Commission*, 85 Idaho 307, 379 P.2d 422 (1963). The Idaho Supreme Court in *Empire Lumber v. Washington Water Power*, 114 Idaho 191, 755 P.2d 1229 (1988), provides a cogent overview of the authority granted to the Commission under the Public Utility Regulatory Policy Act of 1978.² That Court observed:

² P.L. 95-617, 92 Stat. 3117 (1978)

Section 210 of that Act [PURPA] requires electric utilities to purchase the power produced by co-generators or small power producers which obtain qualifying status under the Act. Pursuant to section 201 of the Act, co-generators or small producers must meet three criteria to become Qualified Facilities (QF). Those criteria encompass size, fuel, and ownership. Upon satisfaction of those criteria, the owner or operator is required to furnish notice to the Federal Energy Regulatory Commission (FERC). FERC promulgated regulations implementing sections 201-210 of PURPA.³

The Court also noted that the State Commission is the proper entity in Idaho to implement PURPA:

The implementation of PURPA as it relates to co-generation and small power producers, and the regulations promulgated by FERC, have been largely left to the regulatory authorities of the individual states. PURPA, section 210(f), provides in part: “Each state regulatory . . . shall implement such FERC rule . . . for each electric utility for which it has ratemaking authority.” [citation omitted] The FERC regulation, 18 C.F.R. § 292.401(a) 1980 further provides: “Such [state] implementation may consist of the issuance of regulations, an undertaking to resolve disputes between qualifying facilities and electric utilities under subpart C arrangements between electric utilities and qualifying cogeneration and small power production facilities under § 210 of (PURPA) or any other action reasonably designed to implement such subpart.”⁴

Relying on the above regulation and its understanding that the Idaho PUC is the agency charged with regulating utilities, the court was able to conclude:

[I]t is clear that the Idaho Public Utilities Commission is granted authority by the Idaho statutes to, and is the appropriate forum to resolve whether a co-generator or small power producer has satisfied the criteria for “qualified facility” status, and to determine whether a regulated utility has an obligation under PURPA to purchase power from an applicant.⁵

³ *Id* at p. 192.

⁴ *Id.*

⁵ *Id.*

Thus, the Idaho Supreme Court has clearly established that this Commission's jurisdiction relative to QFs as stemming solely from PURPA and FERC's implementing regulations. Just as clearly that this Commission has no authority other than that conferred upon it by Idaho law or through its role as the state agency regulating utilities under PURPA.

In light of the Commission's limited jurisdiction, what then are the FERC's PURPA regulations this Commission is charged with implementing that deal with ownership of Green Tags? Simply put, there are none. In fact FERC has correctly observed that in order for a state regulatory commission to exercise any authority over Green Tag ownership there must be a *state* law bestowing that authority upon the Commission. In the FERC order cited by Avista, the Federal agency made it clear that there is nothing in PURPA or FERC's regulations granting the Commission authority to adjudicate ownership of Green Tags:

RECs are relatively recent creations of the States. Seven States have adopted Renewable Portfolio Standards that use unbundled RECs. What is relevant here is that RECs are created by the States. *They exist outside the confines of PURPA. PURPA thus does not address the ownership of RECs. . . . 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; it is not an issue controlled by PURPA.*⁶

Two significant points merit amplification. First, FERC recognizes that RECs are "created by the states." Idaho, however, has *not* created a Renewable Portfolio Standard that uses unbundled RECs. Second, FERC declared that, since the states create RECs the states may regulate how RECs are traded. Idaho hasn't created RECs; thus there is nothing for the State to regulate. A REC, or Green Tag, is private property owned and created by the QF. It is no different from any other ancillary benefit that might accrue to a QF as a result of building a

⁶ FERC Docket No. EL03-133-000, October 1, 2003 at p. 6. Emphasis provided.

renewable energy resource. For example, the late Mr. Robert Lewandowski's wind project became something of a tourist attraction as it was the first, and arguably, the most visible wind project in the state. Scores of people come by his site asking for tours and wanting to investigate his wind technology. Mr. Lewandowski had an ancillary asset (possible tourist revenue) that accrued to him as a result of his project. Neither Avista nor this Commission has any claim to that ancillary asset. Similarly, many renewable energy projects have some ancillary detriments such as environmental issues or visual pollution. The developer is responsible for the costs of those ancillary detriments in the same way the developer is entitled to ownership of any ancillary assets.

3. **AVISTA'S PETITION IS AN IMPERMISSIBLE COLLATERAL ATTACK**
AS THIS COMMISSION HAS ALREADY SPOKEN ON
THE QUESTION OF REC OWNERSHIP

The question of REC ownership has twice been addressed by this Commission. In Case No. IPC-E-04-2 the Commission was faced with the question of REC ownership. Idaho Power initiated that case "pursuant to IPUC Rule 101"⁷ which is the same rule under which Avista has filed its Petition. This is significant because the Commission ruled in that docket based on the Idaho Declaratory Judgment Act *Idaho Code* 10-1201 *et seq.* and must now do so again in this docket. The Commission concluded:

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 judgments are appropriate regarding the applicability of any statutory provision or any rule or order of this Commission. [citations omitted] A declaratory ruling contemplates the

⁷ Idaho Power Company Petition for Declaratory Order, Feb. 5, 2004 at p. 1.

resolution of prospective problems. The rights sought to be protected by a declaratory judgment may invoke either remedial or preventative 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. [citation omitted] We find that none of the predicates are present in this case . . . 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 portfolio standard.⁸

Avista's Petition is based on the same factual allegations raised in the Idaho Power Docket making it an impermissible collateral attack on a final Commission Order. See I.C. § 61-625 prohibiting collateral attacks on final Commission orders.

Avista contends that circumstances have changed since the Commission made the above findings. Specifically Avista cites the Commission to the following five conditions that have "substantially changed":

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 substantially

All five factors noted above were fully on the record in 2004 when the Commission ruled that no justiciable controversy existed. Avista actually provided formal comments in Docket No. IPC-E-04-2 warning:

[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, then the utility's rate payers should receive the benefits of the increase...⁹

⁸ IPC-E-04-2, Order No. 29480 at p. 16.

⁹ Comments of Avista Corporation Case No. IPC-E-04-2, March 19, 2004 at p. 4.

Despite Avista's prediction of higher REC values and assertion that the rate payers ought to receive the value of those RECs, this Commission properly ruled that there is simply no controversy over REC ownership. It reaffirmed that finding later that same year in a case involving approval of a QF agreement with the J. R. Simplot Company.

In Case No. IPC-E-04-16 the Idaho Power Company asked the Commission to rule on the ownership of the RECs in the context of its application for ratemaking approval of the costs associated with a QF purchase agreement between it and the J. R. Simplot Company. The Commission observed that:

Idaho Power states that it is willing to waive any legal rights to Environmental Attributes, if the Commission is willing to provide the Company with reasonable assurance that the Company will not be penalized in a future revenue requirement proceeding for having agreed to forego any ownership interest or right the Environmental Attributes. By filing this Agreement, Idaho Power states that it is presenting the Commission with a real case or controversy and, therefore, the lack of ripeness identified by the Commission in the declaratory judgment action is not present in this case.¹⁰

The Commission again refused to rule on the question of REC ownership for the same reasons it relied on in Order No. 29480. The Commission declared that:

The Commission has reviewed its prior Order No. 29480 language in Case No. IPC-E-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 portfolio standard.¹¹

Significantly the determining factor in the Commission's second refusal to rule on the ownership of RECs was that "the regulatory landscape has not changed." As of today, that fact is still true.

The regulatory landscape in Idaho has not changed since Order Nos. 29480 and 29577 were

¹⁰ Order No. 29577, Case No. IPC-E-04-2, at pp. 2 – 3.

¹¹ *Id.* at pp 5 – 7, emphasis provided.

issued. Idaho has still not created a green tag program, it has still not established a market for green tags and it still does not require a renewable portfolio standard.

WHEREFORE, Respondent respectfully prays that the Commission dismiss Avista's for lack of subject matter jurisdiction and as an impermissible collateral attack on final Commission Orders. Respondent stands ready for oral argument on its Motion if the Commission so desires.

DATED this 26th day of May, 2009.

By 
Peter Richardson
RICHARDSON & O'LEARY PLLC
Attorneys for Exergy Development
Group of Idaho, LLC

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 26th day of May 2009, I caused a true and correct copy of the MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION TO THE IDAHO PUBLIC UTILITIES COMMISSION to be served by the method indicated below, and addressed to the following:

Jean Jewell
Secretary
Idaho Public Utilities Commission
472 W Washington Street
Boise ID 83702

U.S. Mail, Postage Prepaid
 Hand Delivered
 Overnight Mail
 Facsimile
 Electronic Mail

Sagebrush Energy LLC
Dean J. Miller
McDevitt & Miller LLP
PO Box 2564
Boise, Idaho 83701-2564
joe@mcdevitt-miller.com

U.S. Mail, Postage Prepaid
 Hand Delivered
 Overnight Mail
 Facsimile
 Electronic Mail

Sagebrush Energy LLC
Benjamin Ellis
20 Willow Street
Jackson, WY 83001
Ben.ellis@sagebrushenergy.net

U.S. Mail, Postage Prepaid
 Hand Delivered
 Overnight Mail
 Facsimile
 Electronic Mail

Idaho Forest Group LLC
Dean J. Miller
McDevitt & Miller LLP
PO Box 2564
Boise, Idaho 83701-2564

U.S. Mail, Postage Prepaid
 Hand Delivered
 Overnight Mail
 Facsimile
 Electronic Mail

Idaho Forest Group LLC
Scott Atkinson, President
171 Highway 95 N
Grangeville, ID 83530
scotta@idahoforestgroup.com

U.S. Mail, Postage Prepaid
 Hand Delivered
 Overnight Mail
 Facsimile
 Electronic Mail

Idaho Power Company
Donovan E. Walker
Barton L. Kline
PO Box 70
Boise, Idaho 83707
dwalker@idahopower.com
bkline@idahopower.com

U.S. Mail, Postage Prepaid
 Hand Delivered
 Overnight Mail
 Facsimile
 Electronic Mail

Idaho Power Company
Greg W. Said
Randy C. Allphin
PO Box 70
Boise, Idaho 83707
rsaid@idahopower.com
rallphin@idahopower.com

U.S. Mail, Postage Prepaid
 Hand Delivered
 Overnight Mail
 Facsimile
 Electronic Mail

Rocky Mountain Power
Daniel E. Solander
Senior Counsel
201 S. Main St., Suite 2300
Salt Lake City, UT 84111

U.S. Mail, Postage Prepaid
 Hand Delivered
 Overnight Mail
 Facsimile
 Electronic Mail

Sorenson Engineering, Inc.
5203 South 11th East
Idaho Falls, Idaho 83404
ted@tsorenson.net

U.S. Mail, Postage Prepaid
 Hand Delivered
 Overnight Mail
 Facsimile
 Electronic Mail

Signed *Nina Curtis*
Nina Curtis
by Peter Redmond