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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 SUPPLEMENTAL FILING IN SUPPORT OF MOTION TO DISMISS
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COMES NOW, Exergy Development Group of Idaho, LLC ("Exergy"), by and through undersigned counsel, and files this Supplemental Filing in Support Motion to Dismiss Avista's Petition. This Supplemental Filing is made for the purpose of bringing to the Commission's attention filings made by this Commission's Staff in prior dockets in which the ownership of RECs was at issue.

Attached hereto are the Commission Staff's Comments in Docket Nos. IPC-E-04-02 (Attachment 1) and IPC-E-04-06 (Attachment 2). In both dockets the Staff argued that the Commission should not rule in favor of Idaho Power with regard to ownership of RECs. As Staff's comments helped shape the Commission's ruling in those dockets,

EXERGY DEVELOPMENT GROUP
OF IDAHO, LLC
SUPPLEMENT FILING IN SUPPORT
OF MOTION TO DISMISS

Exergy believes it would be useful to the Commission in this docket to review Staff's position on this issue.

In Docket No. IPC-E-04-02 the Commission Staff made the following recommendations, and conclusions:

In short there appears to Staff to be no hook that gives the Commission jurisdiction over "environmental attributes," not under PURPA or federal law (including the Energy Policies Act of 1992), and not under Title 61 of the Idaho Code.¹

Arguably what Idaho Power proposes is an impermissible "taking" of property. The Fifth Amendment of the U.S. Constitution states, "nor shall private property be taken for public use without just compensation." This provision is called the "takings clause." Idaho Power requests a Commission Order granting the utility by regulatory fiat a "right of first refusal." It proposes no compensation for that right.²

Staff recommends that the Company's Petition for Declaratory Order be denied. Alternatively, should the Commission determine that it has jurisdiction, Staff recommends that the Commission issue a declaratory order stating that mandatory purchases from QFs under PURPA do not convey ownership of any marketable environmental attributes. Accordingly, any environmental attributes ... remain with the QF.³

In Docket No. IPC-E-04-16 the Commission Staff made the following Comments:

In the event, however, that the Commission determines that the issue of environmental attributes has been squarely presented, Staff incorporates its related comments filed in Case NO. IPC-E-04-02 as if expressly set forth herein and includes as an attachment to these comments. In those attached comments, Staff stated its belief that neither PURPA or other federal law (including the Energy Policies Act of 1992) nor Title 61 of the Idaho Code gives the Commission jurisdiction over environmental attributes. Staff recommended that if the Commission determined that it has jurisdiction, that the Commission issue a declaratory order stating that mandatory purchases from QFs under PURPA do

¹ Comments of the Commission Staff Docket No. IPC-E-04-02 at pp. 6 – 7,

² *Id* at p. 7.

³ *Id.* at p. 8.

not convey ownership of any marketable environmental attributes. Accordingly, Staff recommended that any environmental attributes remain with the QF.⁴

Exergy does not know whether Staff plans to file formal comments in this docket. Staff did file comments in Idaho Power's docket in which the utility sought to retire or bank its RECs in which docket Staff opposed the Company's proposal. On reconsideration of that docket Staff did not file comments or take a formal position, furthermore Staff did not participate in oral argument in that docket. Therefore, given the chance that Staff may not actively participate in this docket, it will be instructive for the Commission to understand how the PUC's Staff has viewed the REC ownership issue in past proceedings.

DATED this 3rd day of June, 2009.

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

⁴ Comments of the Commission Staff Docket No. IPC-E-04-16 at p. 4.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 3rd day of June 2009, I caused a true and correct copy of the EXERGY'S SUPPLEMENTAL FILING IN SUPPORT OF 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:

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Attorney for the Commission Staff

BEFORE THE IDAHO PUBLIC UTILITIES COMMISSION

IN THE MATTER OF A PETITION FILED BY)
IDAHO POWER COMPANY FOR AN ORDER) **CASE NO. IPC-E-04-2**
DETERMINING OWNERSHIP OF THE)
ENVIRONMENTAL ATTRIBUTES)
ASSOCIATED WITH A QUALIFYING)
FACILITY UPON PURCHASE BY A UTILITY) **COMMENTS OF THE**
OF THE ENERGY PRODUCED BY A) **COMMISSION STAFF**
QUALIFYING FACILITY.)
)

COMES NOW the Staff of the Idaho Public Utilities Commission, by and through its attorney of record, Scott Woodbury, Deputy Attorney General, and in response to the Notice of Petition for Declaratory Ruling, Notice of Modified Procedure and Notice of Comment/Protest Deadline issued on February 20, 2004, submits the following comments.

On February 5, 2004, Idaho Power Company (Idaho Power; Company) filed a Petition with the Idaho Public Utilities Commission (Commission) requesting an Order determining ownership of the marketable "environmental attributes"¹ associated with a PURPA qualifying facility (QF) when Idaho Power enters into a long-term, fixed rate contract to purchase the energy produced by that QF. Reference IDAPA 31.01.01.101.

¹ Idaho Power does not define "environmental attributes." A good definition is included in a white paper prepared by the Energy Trust of Oregon Inc. __ Green Tag Ownership and Disposition (September 17, 2003). See attached "Appendix A."

COMMENTS OF THE
COMMISSION STAFF

Background

In June 2003, the Federal Energy Regulatory Commission (FERC) received a Petition for Declaratory Order from PURPA QFs seeking FERC interpretation of its avoided cost rules under PURPA. Specifically, Petitioners sought an Order declaring that avoided cost contracts entered into pursuant to PURPA, absent express provisions to the contrary, do not inherently convey to the purchasing utility any renewable energy credits (RECs) or similar tradable certificates. It was the contention of Petitioners that the power purchase price that the utility pays under such a contract compensates a QF only for the energy and capacity produced by that facility and not for any environmental attributes associated with the facility. Reference FERC Docket EL03-133-000.

In an Order issued on October 1, 2003 (105 FERC ¶ 61,004), FERC granted the Petitioners request for a declaratory order, to the extent that the petition asked the Commission to declare that 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 expressed contractual provision. FERC's Order made the following specific findings:

19. Section 210(a) of PURPA requires the Commission to prescribe rules imposing on electric utilities the obligation to offer to purchase electric energy from QFs. Under Section 210(b) of PURPA, such purchases must be at rates that are: (1) just and reasonable to electric consumers and in the public interest; (2) not discriminatory against QFs; and (3) not in excess of the incremental cost to the electric utility of alternative electric energy. Section 210(d) of PURPA, in turn, defines "incremental costs of alternative electric energy" as "the cost to the electric utility of the electric energy of which, but for the purchases from [the QF], such utility would generate or purchase from another source."
20. The Commission implemented the purchase obligations set forth in PURPA in Section 292.303 of its regulations, 18 CFR § 292.303(a) (2003), which provides:

Each electric utility shall purchase in accordance with Section 292.304, any energy and capacity which is made available from a qualifying facility. . . .

Section 292.304, in turn, requires that rates for purchases shall: (1) be just and reasonable to the electric customer of the electric utility and in the public interest; and (2) not discriminate against qualifying cogeneration

and small power production facilities. 18 CFR § 292.304(a)(1) (2003). The regulation further provides that nothing in the regulation requires any electric utility to pay more than the avoided costs for purchases. 18 CFR § 292.304(a)(2) (2003). "Avoided costs" is defined as the "incremental costs to an electric utility of electric energy or capacity or both which, but for the purchase from the qualifying facility or qualifying facilities, such utility would generate itself or purchase from another source." 18 CFR § 292.101(b)(6) (2003).

21. Section 292.304 sets forth what factors are to be considered in determining avoided costs. See 18 CFR § 292.304(e) (2003). The factors to be considered include:
 - (1) The utility's system cost data;
 - (2) The availability of capacity or energy from a QF during the system daily and season peak periods;
 - (3) The relationship between the availability of energy or capacity from the QF to the ability of the electric utility to avoid costs; and
 - (4) The costs or savings resulting from variations in line losses from those that would have existed in the absence of purchases from the QF.
22. Significantly, what factor is not mentioned in the Commission's regulations is the environmental attributes of the QF selling to the utility. This is because avoided costs were intended to put the utility into the same position when purchasing QF capacity and energy as if the utility generated the energy itself or purchased the energy from another source. In this regard, the avoided costs that a utility pays a QF does not depend on the type of QF, i.e., whether it is a fossil-fuel-cogeneration facility or a renewable-energy small power production facility. The avoided costs rates, in short, are not intended to compensate the QF for more than capacity and energy.
23. As noted above, RECs are relative recent creations of the states. Seven states have adopted renewable portfolio standards that use unbundled RECs. What is relevant here is that the RECs are created by the states. They exist outside the confines of PURPA. PURPA thus does not address the ownership of RECs. The contracts for sales of QF capacity and energy, entered into pursuant to PURPA, likewise do not control the ownership of the RECs (absent an express provision in the contract). States, in creating RECs, have the power to determine who owns the REC in the initial instance, and how they may be sold and traded; it is not an issue controlled by PURPA.

24. We thus grant Petitioners' Petition for Declaratory Order, to the extent that they ask the Commission to declare that contracts for the sale of QF capacity and energy entered into pursuant to PURPA do not convey RECs to the purchasing utility (absent an express provision in a contract to the contrary). 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.

Petition for Declaratory Ruling

Regional organizations, Idaho Power contends, exist to facilitate green energy transactions from resources that have been certified as green energy compliant by those organizations e.g., Bonneville Environmental Foundation (BEF). These entities issue tradable "green tags" to certified renewable energy producers. Green tags are also known as green certificates, renewable energy credits (RECs) and tradable renewable certificates (TRCs). A green tag represents the environmental and other non-power attributes associated with 1 megawatt hour (MWh) of electricity generated from a renewable resource. Some of the QFs from whom Idaho Power anticipates making purchases in the future, the Company contends, have indicated an intention to obtain marketable green tags as a result of entering into contracts with Idaho Power. Green tags avoid the need to package the electricity with its environmental attributes. The tags provide a way in which to "unbundle" the environmental attributes from the electricity and permit the sale of the environmental attributes of renewable generation separately from the electricity generated. In effect, the Company states that green tags are a currency that can be traded to individuals and entities wishing to support "green" energy. Example: Idaho Power Schedule 62_Green Energy Purchase Program (Case No. IPC-E-00-18, Order No. 28655).

Referencing the foregoing FERC Order, Idaho Power states that FERC suggested that individual states may decide ownership of the green tags. As a result, the Company seeks guidance from the Commission as to ownership of potentially marketable certificates in Idaho.

Idaho Power contends that in Idaho, a utility and its customers confer additional value on QFs by virtue of the long-term, levelized, fixed rate contracts that the utility enters into with the QFs. That value, it asserts, is in addition to the avoided costs paid to the QFs for the energy produced. Vesting the utility with some ownership interest in the green tags, it states, would remunerate the utility for the additional value conferred to the QFs. The QF position, the

Company represents, is that QF ownership of the green tags provides the incentive they need to invest in the production of energy from a renewable resource. They assert that the sale of the green tags associated with the generation of green power compensates the QF with the facility's environmental attributes and rewards the additional risks associated with the investment in and the design and operation of a renewable energy resource plant.

In this Petition, Idaho Power Company requests a declaratory order from the Commission clarifying ownership of these green tags. The "respective arguments" of the Company and QFs are presented in the Company's Petition.

Despite Idaho Power's interest in owning the green tags, the Company acknowledges that retention of those tags by the QF developers may encourage the development of additional green energy resources in Idaho without the need to increase energy purchase prices. Given the heightened public interest in the development of new renewable resources, Idaho Power respectfully recommends that the Commission determine that the developers of such generation facilities receive full ownership rights in any green tags issued to them conditioned upon the requirement that the QF developers who qualify for green tags and from whom Idaho Power purchases energy grant the Company a "right of first refusal" to purchase those tags.

Staff Analysis

Idaho Power has requested a Commission Order determining ownership of the marketable "environmental attributes" associated with the sale of renewable energy from a PURPA qualifying facility to Idaho Power. The Company acquiesces to the ownership of environmental attributes being confirmed as belonging to the developer but requests a "right of first refusal" should the developer choose to sell. In Idaho the environmental attributes of renewable power are generally referred to as "green tags." Reference Idaho Power Schedule 62, Green Energy Purchase Program (Case No. IPC-E-00-18, Order No. 28655). The Company's Green Energy Program is a voluntary program for customers. Idaho Power was not required by the State or any regulatory authority to offer the Program.

Staff contends that the initial question before the Commission is one of jurisdiction. Does the Commission have the statutory authority and jurisdiction to determine who owns the "environmental attributes" associated with a QF project that requests a PURPA contract and proposes to sell capacity and energy to a regulated utility? If PURPA and FERC rules do not address and do not require a QF developer to sell "environmental attributes," to the purchasing

utility can the Commission in its implementation of PURPA restrict their sale to other parties? If the Commission has the authority under PURPA, should it restrict their sale? Can the Commission require as a PURPA contract condition that a QF grant a purchasing utility a "right of first refusal" to purchase the "Green Tags" associated with the QF facility?

It is well settled that the Idaho Commission is a creature of statute and derives its general authority vis-à-vis electric utilities from Title 61, Idaho Code. Under State Law, the Commission has authority over retail electric service. Wholesale power transactions are regulated by the Federal Energy Regulatory Commission (FERC). The Federal Power Act defines "sale at wholesale" as any sale to any person for resale. 16 U.S.C. § 824(d). Therefore, all QF sales to an electric utility are wholesale transactions. Under federal authority, i.e., PURPA and the implementing regulations of FERC, the Idaho Commission has the authority to set avoided costs, to order electric utilities to enter into fixed term obligations for the wholesale purchase of energy from qualifying facilities and to implement FERC rules regarding such purchases. PURPA Sections 210, 210(a), 210(f); 16 U.S.C. §§ 824a-3, 824a-3(a)(f); accord: *Afton Energy, Inc. v. Idaho Power Company*, 107 Idaho 781 (1984). FERC in the Order cited by Idaho Power in its Petition (105 FERC ¶ 61, 004) states that the contract sale of QF capacity and energy entered into pursuant to PURPA does not convey renewable energy credits (RECs) to the purchasing utility (absent an express provision in the contract to the contrary). FERC notes that RECs are relatively recent creations of the States and suggested that "States, in creating RECs, have the power to determine who owns the REC in the initial instance, and how they may be sold and traded." "It is not," FERC states, "an issue controlled by PURPA." Staff notes that Idaho is not a State that has established a renewable energy portfolio standard for electric utilities. Nor is it a State that has by legislation created green certificates, green tags, renewable energy credits (RECs) or tradable renewable certificates (TRCs) or established a market for same. Nor also is Idaho presently a state that has provided tax incentives or credits for the development of renewable energy.² In short, there appears to Staff to be no hook that gives the Commission

² Staff notes the following bills introduced in the 2004 Idaho legislative session:

- Idaho HB 760 – Income tax credit (capital investment)/alternative energy;
- Idaho HB 761 – Income tax credit (generation)/alternative energy;
- Idaho HB 827 – Alternative energy/sales tax exemption (equipment/supplies).

jurisdiction over “environmental attributes,” not under PURPA or federal law (including the Energy Policies Act of 1992), and not under Title 61 of the Idaho Code.

The avoided cost rate methodology in Idaho does not include an adder for “environmental attributes” associated with QF renewable energy. Environmental attributes are not an identified factor affecting rates for purchases. 18 C.F.R. § 292.304. Under PURPA, the avoided cost is the utility’s avoided cost. It is the incremental costs to an electric utility of electric energy or capacity or both which, but for the purchase from the qualifying facility the utility would generate itself or purchase from another source. 18 C.F.R. § 292.101(b)(6). In the context of PURPA wholesale transactions, FERC has barred state commissions from establishing different wholesale prices for otherwise qualified cogeneration or small power production facilities. 18 C.F.R. § 292.304(a)(ii). Accordingly, contracts for renewable resources cannot be at a higher price than for non-renewable resources, nor can the requirements of contract be different. Discrimination either directly or indirectly is not permitted.

Arguably what Idaho Power proposes is an impermissible “taking” of property. The Fifth Amendment of the U.S. Constitution states, “nor shall private property be taken for public use without just compensation.” This provision is called the “takings clause.” Idaho Power requests a Commission Order granting the utility by regulatory fiat a “right of first refusal.” It proposes no compensation to the QF for the right. Electric utility purchases of energy and capacity from PURPA QFs are mandatory. 18 C.F.R. § 292.303(a). The environmental attributes associated with renewable QF projects are currently separate from the capacity and energy sold to Idaho utilities. They are not bundled together as a matter of law. Nor is the cost to purchase environmental attributes included in an Idaho utility’s avoided cost. To the extent those attributes have value and provide additional developer incentive, Staff believes they should remain with the developer. At this time, no argument has been advanced nor authority cited to justify or require placing any regulatory restriction by this Commission on their ownership.

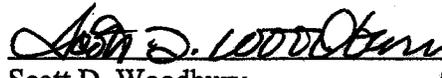
By way of aside, it is unclear from the Company’s Application why Idaho Power would purchase the tags of a QF that it has contracted with. The purchase of tags is not mandated by any state, federal or regulatory requirement. The Company should not be permitted to use such tags to satisfy its Tariff Schedule 62 obligations. Customers participating in Schedule 62 are paying a premium to promote the development of renewable energy. The purchase of QF green tags by Idaho Power does not promote the development of any additional

renewables by the Company. The purchase of QF renewables is already mandatory. The purchase price of green tags only increases the cost to the Company of QF energy.

RECOMMENDATIONS

Staff recommends that the Company's Petition for Declaratory Order be denied. Alternatively, should the Commission determine that it has jurisdiction, Staff recommends that the Commission issue a declaratory order stating that mandatory purchases from QFs under PURPA do not convey ownership of any marketable environmental attributes. Accordingly, any environmental attributes associated remain with the QF. Staff further recommends that the Commission deny the Company's proposal to require that QF developers from whom Idaho Power purchases energy grant Idaho Power a "right of first refusal" to purchase the environmental attributes associated with the QF facility.

RESPECTFULLY submitted this 19th day of March 2004.



Scott D. Woodbury
Deputy Attorney General

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APPENDIX A

Energy Trust Green Tag Definition

"Environmental Attributes" means any and all credits, benefits, emissions reductions, offsets, and allowances, howsoever entitled, resulting from the avoidance of the emission of any gas, chemical, or other substance to the air, soil, or water attributable to the Specified Resource, which are deemed of value by a Green Tag purchaser. Environmental Attributes include but are not limited to: (1) any avoided emissions of pollutants to the air, soil, or water such as (subject to the foregoing) sulfur oxides (SO_x), nitrogen oxides (NO_x), carbon monoxide (CO), and other pollutants; (2) any avoided emissions of carbon dioxide (CO₂), methane (CH₄), and other greenhouse gases (GHGs) that have been determined by the United Nations Intergovernmental Panel on Climate Change to contribute to the actual or potential threat of altering the Earth's climate by trapping heat in the atmosphere; and (3) the Green Tag Reporting Rights to these avoided emissions. Subject to the foregoing, Environmental Attributes do not include any energy, capacity, reliability, or other power attributes from the Specified Resource nor production tax credits or certain other financial incentives existing now or in the future associated with the construction or operation of the Specified Resource.

"Green Tag" means the Environmental Attributes associated with the power generated from the Specified Resource, together with the Green Tag Reporting Rights associated thereto. One Green Tag represents the Environmental Attributes made available by the generation of 1 MWh from the Specified Resource.

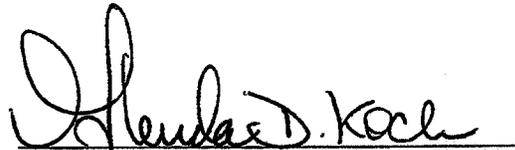
"Green Tag Reporting Right(s)" means the right of a Green Tag purchaser to report ownership of Green Tags in compliance with federal or state Law, if applicable, and to a federal or state agency, or other parties at the Green Tag purchaser's discretion, and include those accruing under Section 1605(b) of the Energy Policy Act of 1992, or under any present or future domestic, international, or foreign emissions trading program.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY THAT I HAVE THIS 19TH DAY OF MARCH 2004, SERVED THE FOREGOING COMMENTS OF THE COMMISSION STAFF, IN CASE NO. IPC-E-04-02, BY MAILING A COPY THEREOF, POSTAGE PREPAID, TO THE FOLLOWING:

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BEFORE THE IDAHO PUBLIC UTILITIES COMMISSION

**IN THE MATTER OF THE APPLICATION OF)
IDAHO POWER COMPANY FOR APPROVAL) CASE NO. IPC-E-04-16
OF AN AGREEMENT FOR SALE AND)
PURCHASE OF ELECTRIC ENERGY)
BETWEEN IDAHO POWER COMPANY AND) COMMENTS OF THE
THE J.R. SIMPLOT COMPANY.) COMMISSION STAFF
_____)**

COMES NOW the Staff of the Idaho Public Utilities Commission, by and through its Attorney of record, Scott Woodbury, Deputy Attorney General, and in response to the Notice of Application, Notice of Modified Procedure and Notice of Comment/Protest Deadline issued on July 22, 2004 submits the following comments.

BACKGROUND

On June 25, 2004, Idaho Power Company (Idaho Power; Company) filed an Application with the Idaho Public Utilities Commission (Commission) requesting approval of a Firm Energy Sales Agreement between Idaho Power and J.R. Simplot Company (Simplot) dated June 18, 2004 (Agreement).

Simplot currently owns, operates and maintains a 15.9 MW cogeneration facility (project) at its industrial site near Pocatello, Idaho. The project is a qualified cogeneration

facility under the applicable provisions of the Public Utility Regulatory Policies Act of 1978 (PURPA).

As reflected in the Company's Application, the Simplot project is currently interconnected to Idaho Power and is selling energy to Idaho Power as a Qualifying Facility (QF) in accordance with a Firm Energy Sales Agreement dated January 24, 1991 (Order No. 23552) and as subsequently amended on November 30, 1993 (Order No. 25353) and February 23, 2001 (Order No. 28730), and by two letter Agreements signed by the parties that extended the term of the 1991 Agreement to February 29, 2004.

On March 5, 2004, Idaho Power filed an Application with the Commission requesting approval of a Firm Energy Sales Agreement between Idaho Power and Simplot dated February 19, 2004. Reference Case No. IPC-E-04-7. Subsequent to initial Notice of Application and Modified Procedure, and following the filing of Staff and Reply Comments, Idaho Power requested that its Application be withdrawn. Reference Commission Order No. 29503, May 27, 2004.

Under the terms of the newly submitted Agreement, Simplot has elected to contract with Idaho Power for a one-year term. The Agreement contains non-levelized published avoided cost rates established by the Commission for energy deliveries less than 10 MW (Order No. 29391) for a contract year March 1, 2004 through February 28, 2005. The Agreement will "evergreen" or automatically renew from year-to-year unless terminated. Agreement § 5.3. Idaho Power will pay the published, less than 10 MW non-levelized non-fueled energy price in accordance with the Commission Order in effect as of March 1st of each contract year.

The submitted Agreement, the Company states, is similar in many respects to recent QF contracts between Idaho Power and Tiber Montana LLC (IPC-E-03-1), and United Materials of Great Falls, Inc. (IPC-E-04-1).

Agreement § 24 provides that the Agreement will not become effective until the Commission has approved without change all the Agreement terms and conditions and declared that all payments to Simplot that Idaho Power makes for purchases of energy will be allowed as prudently incurred expenses for ratemaking purposes. Should the Commission approve the Agreement, Idaho Power intends to consider the effective date of the Simplot Agreement to be March 1, 2004.

ANALYSIS

This contract includes several provisions that make it unique from some prior Idaho Power contracts. Staff will discuss each of these unique provisions, but will not discuss those provisions that are common to QF contracts that have been previously approved by the Commission.

10 MW Size Limit

The Company in this Agreement defines energy delivered to Idaho Power exceeding 10,000 kW in a single hour as "Inadvertent Energy." Agreement § 1.9. As reflected in the Agreement, Simplot does not intend to generate and deliver Inadvertent Energy. If Simplot accidentally generates and delivers Inadvertent Energy, Idaho Power will not purchase or pay for Inadvertent Energy. This contract provision effectively limits Simplot to a capacity of less than 10 MW; the current threshold for determining availability for published avoided cost rates. Staff supports this contract provision.

Seasonalization of Rates

As an incentive for Simplot to deliver energy to the Company during times when it is of greater value to Idaho Power, the Company has refined the seasonalization of rates to coincide to the months in which Idaho Power has identified actual energy needs and periods of higher demands. Reference Agreement § 6.2. The months chosen to represent each season are the same as those in the recently approved Renewable Energy of Idaho contract (IPC-E-04-5). Staff believes that the refinement of months within each season as reflected in this contract is appropriate.

Waiver of Environmental Attributes

As reflected in Agreement § 8.1, Idaho Power states that it waives any claim to ownership of Environmental Attributes. Environmental Attributes include, but are not limited to green tags, green certificates, renewable energy credits (RECs) and tradable renewable certificates (TRCs) directly associated with the production of energy from the Simplot project. Noting the Commission's language regarding Environmental Attributes in Case No. IPC-E-04-2, Order No. 29480, Idaho Power states that it is willing to waive any legal rights to the 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 in the Environmental Attributes. By filing this Agreement, including the language in Article 8, 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.

Despite representations of the Company to the contrary, Staff believes that this case does not present the question of ownership of Environmental Attributes. Simplot's cogeneration project has been generating since 1991. While its power sales Agreement is new, Simplot's cogeneration project and whatever environmental impacts it may have, either positive or negative, are not new. Thus, Staff contends that no one would be willing to pay now for "green tags" or other environmental attributes for which they have been enjoying the benefits for nearly 15 years. Because Simplot's cogeneration project would continue to generate regardless of whether there are environmental attributes associated with the project, Staff believes that the project's environmental attributes would have little or no marketable value. Furthermore, Staff questions whether the energy from the Simplot project could be certified as "green" under any certifying organization's criteria, and whether the project even possesses any environmental attributes with value as green tags, green certificates, RECs or TRCs.

In the event, however, that the Commission determines that the issue of environmental attributes has been squarely presented, Staff incorporates its related comments filed in Case No. IPC-E-04-2 as if expressly set forth herein and includes same as an attachment to these comments. In those attached comments, Staff stated its belief that neither PURPA or other federal law (including the Energy Policies Act of 1992) nor Title 61 of the Idaho Code gives the Commission jurisdiction over environmental attributes. Staff recommended that if the Commission determined that it has jurisdiction, that the Commission issue a declaratory order stating that mandatory purchases from QFs under PURPA do not convey ownership of any marketable environmental attributes. Accordingly, Staff recommended that any environmental attributes remain with the QF.

"Evergreen" Provision

The Agreement will "evergreen" or automatically renew from year-to-year unless terminated. Agreement § 5.1. Because the Agreement contains an avoided cost rate that is based on a one-year contract length, Staff has no objection to the "evergreen" provisions in the

proposed contract. The one-year term also obviates the need for the "de-regulation" termination option that Idaho Power has sought to include in other pending QF contracts and that is one of the issues in Case No. IPC-E-04-08/10 currently before the Commission.

Energy Purchases Subsequent to Contract Expiration on December 31, 2003

Idaho Power requests Commission approval of energy purchased from Simplot in January and February 2004 pursuant to letter agreements dated December 22, 2003 and January 30, 2004. The letters reflect that the expiration of the Commission approved agreement (January 24, 1991) and associated amendments (Nov. 30, 1993; Feb. 23, 2001) was December 31, 2003. The Company recites in the extension letters that the parties were engaged in diligent contract negotiation for a new QF firm purchase power agreement and by letter agreements the parties were extending the expiration date of the Commission approved agreement to February 29, 2004. The extension agreements were submitted under the signature of Randy Allphin, Contract Administrator for Idaho Power. For purchases made subsequent to the letter agreements, Idaho Power states that it intends to consider the effective date of the Agreement to be March 1, 2004, and requests that the Commission declare all payments it makes to Simplot for purchases of energy will be allowed as prudently incurred expenses for ratemaking purposes.

Staff contends that extension of the expiring PURPA contract was a significant change or modification that required Commission approval. No Commission approval of the extension agreement was requested. As part of its unified regulatory scheme in implementing PURPA, the Commission has long required that signed power purchase contracts be presented to it for review, approval and lock-in of avoided cost rates. The parties cannot by letter agreement deprive the Commission of its ratemaking authority under PURPA and *Idaho Code* § 61-502 and 61-503 or relieve the utility of its obligations under *Idaho Code* § 61-307. Similarly, the parties should not seek retroactive approval of a new contract with an effective date more than five months past.

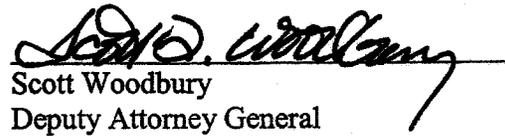
Although the Company neither sought nor obtained Commission approval of the contract extension periods, Staff recommends that the purchases of energy in January and February 2004 be treated for ratemaking purposes as a purchase mandated under PURPA because the rates paid by Idaho Power during the months of January and February 2004 were less than the current published avoided cost rates for those same months. Staff also reluctantly recommends that the

Commission approve the Agreement's March 1, 2004 effective date. In making this recommendation, Staff acknowledges that under the Company's PCA mechanism, PURPA costs are recovered at 100% and non-PURPA costs are subject to a 90/10 sharing. Staff recommends that Commission encourage the Company to manage its PURPA contract portfolio and expiring contracts in a more vigilant and responsible manner.

RECOMMENDATIONS

Staff recommends approval of the Agreement as submitted.

Respectively submitted this 13th day of August 2004.


Scott Woodbury
Deputy Attorney General

Technical Staff: Rick Sterling

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