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IDAHO PUBLIC
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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 REPLY TO AVISTA'S ANSWER TO EXERGY'S MOTION TO DISMISS

COMES NOW, Exergy Development Group of Idaho, LLC ("Exergy"), by and through undersigned counsel, and pursuant to that Notice of Scheduling issued by the Commission on June 2, 2009, files this Reply to Avista's Answer to Exergy's Motion to Dismiss for Lack of Subject Matter Jurisdiction.

I
AVISTA IDENTIFIES NO AUTHORITY GRANTING THE PUC SUBJECT MATTER JURISDICTION

In its opening pleading, Avista cited a FERC decision as the source of this Commission's authority to rule on REC ownership. In response, Exergy's Motion to

Dismiss provided a detailed exposition of the proper relationship between FERC and this Commission, clearly explaining the respective and distinct roles of the two regulatory bodies in implementing PURPA. Exergy correctly pointed out that this Commission's authority in implementing PURPA is limited in scope and does not include adjudicating REC ownership. In its reply, Avista essentially concurs with Exergy's statement of the issue. Avista concedes:

> The sole issue with regard to the Commission's subject matter jurisdiction with regard to issues raised in this proceeding is whether Idaho law authorizes the Commission to determine the ownership of RECs associated with PURPA projects.[1]

Although Avista has at last focused on the threshold question -- what Idaho law grants the Commission jurisdiction over REC ownership – it cites no Idaho law which, in fact, provides for Commission jurisdiction.

Avista mistakenly relies on two sections of the PUC Code in support of its contention that this Commission has jurisdiction to decide ownership of RECs. Avista points to Idaho Code § 61-501 which vests the Commission with "power and jurisdiction to supervise and regulate [public utilities] and to do all things necessary to carry out the spirit and intent of the provisions of this act"[2] and to the following language from Idaho Code § 61-507:

> *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 rate, such public utility shall furnish such commodity or render such

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[1] Avista Answer at p. 6.

[2] *Id.*

> service within the time and upon the conditions provided in such rules.[3]

From the language quoted above, Avista strains, unsuccessfully, to makes its case. Avista argues:

> There can be no doubt that RECs are a commodity of the character furnished or supplied by any public utility. The Commission is expressly empowered by statute to "prescribe rules and regulations for the performance of any service *and [sic] the furnishings of any commodity of the character furnished or supplied by any public utility.* Accordingly the Commission has subject matter jurisdiction to determine in this proceeding the ownership of RECs associated with PURPA projects.[4]

Avista's reading of Section 507 is fatally flawed because Section 507 is a specific grant of authority to the Commission to regulate *public utilities* in their furnishing or supplying of commodities. It does not give the Commission authority to regulate entities other than public utilities. QFs are not public utilities. Thus, the Commission has no authority to regulate QFs. The only way Avista's argument could make any sense would be if RECs were "furnished or supplied" by public utilities – and they are not. QFs – not public utilities – create the RECs at issue in this docket. Moreover, it is the QF that would furnish or supply to the public utility – not the other way around. Avista's contorted reading of the statute provides no authority giving this Commission subject matter jurisdiction.

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[3] I.C. § 61-507 (emphasis provided by Avista)

[4] Avista Answer at p. 7 underscoring provided, *italics* in original. A footnote explaining that Avista's failure to comply, in its opening pleading, with Rule 101 (which requires petitions for declaratory rulings to cite to a controlling rule or statute) was omitted from the above passage. In addition, a footnote citing the Commission to a case in Connecticut was omitted. The Connecticut case is not relevant because the Idaho Commission is applying Idaho law, not Connecticut law. It is also not relevant because the Commission does not need to look to foreign jurisdictions for aid in applying Idaho law as Idaho law is clear on this point.

The Supreme Court of Idaho addressed a strikingly similar subject matter jurisdiction issue in the PURPA context in *Idaho Power Company v. Idaho Public Utilities Commission* 102 Idaho 744, 639 P.2d 442 (1981). PURPA not only established avoided cost procedures, it required all public utility commissions to investigate several generic ratemaking issues. Further, PURPA provided for the granting of intervenor funding to consumers who participated in those generic proceedings. Specifically PURPA provides:

> A consumer entitled to fees and costs under paragraph (1) may collect such fees and costs from any electric utility by bringing a civil action in any State court of competent jurisdiction, unless the State regulatory authority...has adopted a reasonable procedure pursuant to which such authority ...(A) determines the amount of such fees and costs...[5]

Apparently inferring that PURPA provided the authority, this Commission adopted rules granting intervenor funding to consumers who participated in its generic PURPA-mandated investigations. The rules were duly promulgated and finalized. At the conclusion of its generic PURPA investigation, this Commission awarded intervenor funding to consumer groups. The utility appealed, challenging the Commission's authority to promulgate rules on intervenor funding absent a state statute empowering it to do so.

Like Avista in the present matter, the Commission relied on Idaho Code § 61-501 for the proposition that it has broad ratemaking powers and Idaho Code § 61-601 granting it broad rulemaking authority. The Court however, rejected the Commission's reasoning that it could grant intervenor funding with an analysis particularly apropos to

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[5] 16 U.S.C. § 2623(a)

the pending issue. The Court emphasized that the Commission's subject matter jurisdiction must be specifically granted to it by the state legislature:

> The ... question... is whether the Commission has authority under state law to adopt intervenor funding rules, and make an award of attorney fees and costs, in connection with PURPA proceedings. The Commission contends that its authority to supervise and regulate utilities pursuant to I.C. § 61-501 and its authority to adopt rules of practice and procedure pursuant to I.C. § 61-601 encompass the authority to promulgate intervenor funding rules. We decline to follow the construction of these statutes as advocated by the Commission in view of the long line of authority in this state holding that (1) the Commission has only that jurisdiction conferred to it by the legislature and (2) attorney fees may be awarded only where specifically provided by statute or contract.
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> . . .
>
> Because the Commission was created by statute, the Commission has no jurisdiction other than that which the legislature has specifically granted to it. [Citations omitted.] The Commission therefore exercises limited jurisdiction, with nothing being presumed in favor of its jurisdiction.

Id. at p. 750.

Thus, in the absence of a statute authorizing the PUC to grant intervenor funding, a state court of competent jurisdiction would have the requisite subject matter jurisdiction. Significantly, the Idaho Supreme Court made clear that it will not tolerate the type of boot strap argument Avista is making in this docket with respect to expanding the Commission's subject matter jurisdiction. The Court instructed:

> A review of Idaho Code Ch. 5, title 61, reveals the complete absence of any section which would empower the Commission to either adopt rules governing compensation for consumer intervenors in proceedings related to PURPA or to actually award any such compensation in the form of attorney fees or costs. It is true that I.C. § 61-501 empowers the Commission 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 the public utilities law, and it is equally true that I.C. § 61-601 empowers the Commission to adopt rules of practice and procedure to so carry out the spirit and intent of the provisions of the public

> utilities law. <u>However, it would be inappropriate to construe those provisions to authorize the Commission to compensate consumer intervenors in the absence of a specific state statute to that effect.</u>

Id. emphasis provided. Thus, just as the Commission had no authority to award intervenor funding in the absence of a state statute, it has no subject matter jurisdiction to award RECs to a public utility.

II
RECS ARE THE SOLE PROPERTY OF THE ENTITY GENERATING RENEWABLE ENERGY

Avista's Answer attempts to create a case and controversy out of whole cloth by asserting there is a question of REC ownership in Idaho. Avista claims that "Ownership of RECs associated with PURPA Qualifying Facilities ... is not settled in Idaho."[6] In support of its assertion Avista argues, "in both Order No. 29780 and Order No. 29577, the Commission declined to address the issue of ownership of RECs, and therefore ... there is no clear and ambiguous [sic] Idaho law that provides that RECs are the property of the generator." In declining to rule the second time, the Commission stated in Order No. 29577 that "the regulatory landscape has not changed" meaning that there is no Idaho law, case, statute, rule or policy casting doubt on REC ownership. The RECs remained the property of the entity that created them. Despite Avista's arguments to the contrary, the Commission's observation in 2004 in Order No. 29577 is as true today as it was then – to wit: the regulatory landscape has still not changed.

In its second attempt at creating a case and controversy out of whole cloth Avista asserts:

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[6] Avista Answer at p. 2.

> 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 waving such rights.[7]

However, the Commission's use of the phrase "the regulatory landscape has not changed" is unambiguous. Without some action on the part of the State to confer jurisdiction on the Commission to adjudicate REC issues, the Commission has no such authority.

Perhaps most puzzling is Avista's argument that because five QFs have inquired or requested contracts from the Company, the Commission has somehow obtained jurisdiction over REC ownership issues. According to Avista, the five alleged QF inquiries, along with "substantial changed circumstances since 2004", gives rise to a justiciable controversy.[8] Avista suggests that inquiries from five QFs indicate some sort of change in the regulatory climate. The inference is unwarranted; indeed nothing could be further from the truth. To put Avista's assertion into perspective, in 2004 Idaho Power *executed* at least five QF contracts (including the Simplot contract at issue in Order No. 29577). As the Commission and Avista are well aware, the number of inquiries far exceeds the number of executed contracts. So, for Avista to argue that its having received five inquires and/or contract requests is exceptional or out of the ordinary is simply not accurate.[9] Moreover, even if the number of requests were out of

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[7] *Id.* at fn 9.

[8] *Id* at pp 3 – 4.

[9] In 2005 Idaho Power *executed* an additional ten QF contracts. Certainly many of the developers of those projects were making inquiries of Idaho Power in 2004.

the ordinary, this would not suffice to confer subject matter jurisdiction regarding REC ownership on the Commission in the absence of a statute.

III
AVISTA'S CLAIM THAT RATEPAYERS WILL OVERPAY FOR QF PURCHASES IS SELF DEFEATING AND REQUIRES DISMISSAL ON THE GROUNDS OF COLLATERAL ATTACK

Demonstrating a profound misunderstanding of PURPA and this Commission's role in setting avoided cost rates, Avista makes the following remarkable assertion:

> 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.[10]

This assertion is remarkable because it reflects a fundamental misunderstanding of long established law. Pursuant to PURPA, this Commission sets avoided cost rates and it is prohibited from setting those rates any higher than the utility's actual avoided costs. Avista claims that "when it purchases the energy from PURPA projects, Avista's ratepayers will substantially overpay for energy from wind QFs." If it is true that purchases from QFs result in "overpayments" then Avista's avoided cost rates are set too high in violation of PURPA. If the avoided cost rate setting order is not being challenged, then that order's rates are, also by definition, accurate and result in no overpayment. The Company can't have it both ways. Either the rates are accurate and do not result in an overpayment or they result in an overpayment because they are set too high. Because its argument is based on the assertion that overpayments result from QF purchases at the current avoided cost rates – it is a collateral attack on the order that set those rates.

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[10] Avista Answer at p. 4.

Avista claims that if it does not take title to the RECs, its ratepayers will lose substantial amounts of money over the life of the QF contracts. The relationship between that assertion and whether this Commission has subject matter jurisdiction over REC ownership is not established in the Company's answer. Exergy does not deny that RECs have value in the marketplace. They had value in the marketplace in 2004 as well. That fact has not changed. Avista's assertion that the value of a REC has increased may or may not be true. But even if it is true, the *value* of a REC is irrelevant to the question of whether the Commission has subject matter jurisdiction *over* the REC's ownership.

IV
WHAT OTHER STATES ARE DOING IS IRRELEVANT

Avista notes that other states that have addressed the issue of the ownership of RECs have determined that their state public utility commissions have subject matter jurisdiction over the issue. Specifically, Avista cites the Commission to two cases decided in Connecticut, both of which have their genesis in the same Connecticut Department of Public Utility Control proceeding. Both Connecticut cases recite the facts surrounding the Connecticut Commission's decision that it had subject matter jurisdiction over the question of REC ownership. However, neither Connecticut case provides authority in support of Avista's assertion that this Commission has similar subject matter jurisdiction in Idaho.

In *Wheelbrator Lisbon, Inc. v. Department of Pub. Util. Control* 283 Conn. 672, 931 A.2d 159 (2007), the Connecticut Supreme Court upheld the DPUC's finding

that it had subject matter jurisdiction over the RECs in the QF context. Although Avista stated that the Court was implementing PURPA in setting the avoided cost rates in that state, a closer examination of the Connecticut regulatory scheme reveals that it was actually implementing a state PURPA-like law giving statutory preference to renewable energy QFs. That statutory preference allowed renewable energy QFs to obtain preferential treatment both as to rates and the contracting process. The Connecticut Court observed:

> [T]he department indicated that "contracts should achieve payments of 100 [percent] of utility avoided costs over the term of the power purchase agreement" and that "[c]ontracts for [qualified facilities] using renewable fuels should receive more favorable terms than for [qualified facilities] using fossil fuels...

Id. at 678, emphasis provided.

Therefore, Connecticut law allows a QF using renewable fuel to petition the Connecticut Commission for an order recognizing its status as a 'renewable fuel QF' thus triggering more favorable treatment of the QF in the contracting process with the utility. As the Connecticut Court noted:

> In 1991, the plaintiff, pursuant to General Statutes §§ 4-176 and 16-243a, submitted to the department a petition for declaratory ruling that its facility was a resource recovery project and was therefore exempt under § 16-243a-7(a)(4) of the regulations from the bidding requirements for obtaining a long-term purchase contract with the utility.

Id. at 679.

Hence Connecticut's enactment of its own version of PURPA (General Statutes § 16-243a), providing for special treatment for renewable QFs, supported the conclusion in favor of Commission jurisdiction:

> Accordingly, as with other terms of the 1991 agreement, the meaning of the agreement's pricing provisions, including whether they were intended to transfer ownership of the renewable energy component of the electricity to the utility, is more a question of legislative intent and public policy than a question of the intent of the parties.

Id. at 687, underscoring provided.

In light of the above, the case on which Avista relies does not support, but rather undermines its argument that the Idaho Commission has subject matter jurisdiction over REC ownership. Ownership of RECs in the Connecticut case rested on a "question of legislative intent". In Idaho, there is no counterpart to the Connecticut statute and, thus no legislative intent.

When the meaning of a statute is in doubt, reference to legislation in other states and jurisdictions that pertain to the same subject may be a helpful source of interpretive guidance. However, extrinsic aides to statutory construction – such as sister state interpretations of similar sister state statutes – are usefully considered only when one is attempting to construe an Idaho statute. Here, Avista suggests that the Connecticut Court's interpretation of its statute merits consideration in the *absence* of a similar Idaho statute. Because there is no Idaho counterpart to the referenced Connecticut statute, there is no Idaho "legislative intent" to construe. It takes little imagination to think of the mischief that would ensue were the Commission to accept Avista's invitation to apply interpretations of other states' statutes to Idaho when no like statute is on the books.

V.
CONCLUSION

Nothing in Avista's Answer supports its contention that this Commission has subject matter jurisdiction. Thus, Exergy renews its Motion to Dismiss for the reasons stated above and those set forth in its Motion and Supplemental Filing.

By _____
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Group of Idaho, LLC

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 15th day of June, 2009, a true and correct copy of the within and foregoing **REPLY TO AVISTA'S ANSWER TO EXERGY'S MOTION TO DISMISS** was served in the manner shown to:

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