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IDAHO PUBLIC UTILITIES COMMISSION

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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 IDAHO
POWER'S BRIEF AND
PACIFICORP'S COMMENTS ON
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 Idaho Power Company's ("Idaho Power") Brief on Exergy's Motion to Dismiss for Lack of Subject Matter Jurisdiction.

I
**IDAHO POWER ALSO IDENTIFIES NO AUTHORITY
GRANTING THE PUC SUBJECT MATTER JURISDICTION**

At the center of Idaho Power's argument that the Commission has subject matter jurisdiction is the assertion that:

This Commission has the jurisdiction and authority to determine whether the law and the public policy of the state of Idaho are applicable in a determination effecting the provision of power to customers of public utilities of this state, and what they must pay for it. Idaho Code §§ 61-501, 61-507¹

Thus, Idaho Power relies on the same two sections relied upon by Avista in its Answer. Exergy has addressed the inapplicability of these sections in its Reply to Avista, and incorporates its Reply by reference as if fully set forth herein. Like Avista, Idaho Power ignores the fact that Idaho Code § 61-501 grants the Commission broad authority to do all things necessary to regulate public utilities not QFs. Like Avista, Idaho Power also misreads Idaho Code § 61-507 to infer that it grants the Commission authority to regulate the provision of utility-like service by QFs as well as by public utilities. It does not. Idaho Power does not address the one Idaho Supreme Court case² that settles the question of subject matter jurisdiction in the PURPA context. In *Idaho Power Company v. Idaho Public Utilities Commission*, the Supreme Court unambiguously held that jurisdiction only vests in the Commission pursuant to clear legislative mandate.

¹ Idaho Power Brief at p. 5.

² *Idaho Power Company v. Idaho Public Utilities Commission* 102 Idaho 744, 639 P.2d 442 (1981).

Idaho Power wrongly asserts that this Commission has previously accepted subject matter jurisdiction over RECs in the QF context:

The Commission has had variations of this issue presented to it twice before ... In neither of these cases did the Commission find that it lacked subject matter jurisdiction to hear the matter, and in fact the Commission issued final orders in both proceedings: Order No. 29480 and No. 29577, respectively.³

This assertion is, at best, misleading. In neither case did the Commission reach the question of subject matter jurisdiction. Exergy pointed out, in its Supplemental Filing, that the Commission Staff raised the issue of subject matter jurisdiction in opposing Idaho Power's motion for a declaratory ruling on REC ownership. However the Commission ruled in both cases on the basis of a lack of a justiciable controversy. Hence, the question of subject matter jurisdiction was not litigated in either of the two dockets. For Idaho Power to state that the Commission issued "final orders in both proceedings" suggests that both proceedings were fully litigated. That is simply not true. As a principal party in both proceedings, Idaho Power knows better than to contend otherwise.

II. AFFIRMATIVE STATE POLICY ARGUES AGAINST SUBJECT MATTER JURISDICTION OVER RECS

Idaho Power asserts that "In the absence of federal preemption or action, the State is free to act." While the State is, indeed, free to act, the fact is that the State has not, in fact, acted. Idaho Power points to no statute, policy, ruling or regulation granting the Commission jurisdiction over what is essentially a private property right unrelated to providing utility service.

Indeed, the closest pronouncement of state policy on RECs deals with whether or not Idaho endorses, as a matter of state policy, the implementation of a renewable

³ Idaho Power Brief at p. 4.

portfolio standard (RPS). The Idaho legislature expressed a distinct aversion to the concept of a RPS in the following policy statement from the 2007 State Energy Plan:

While the Committee endorses renewable resources in general because of the many benefits they provide, it declines to adopt specific targets or standards out of concern that setting arbitrary targets could conflict with the goals of maintaining Idaho's low-cost energy supply and ensuring access to affordable energy for all Idahoans. The Committee is also concerned that adopting firm targets may not provide sufficient flexibility for Idaho energy providers, given the rapid development of new energy technologies.⁴

If Idaho had legislation requiring utilities to obtain a certain percentage of their energy supplies from renewable sources, then the State might have a modicum of interest in REC ownership in the QF context. However, the State has no such policy and, indeed, has specifically disavowed such a policy.

III

IDAHO POWER MISCHARACTERIZES EXERGY'S COLLATERAL ATTACK ARGUMENT

Idaho Power misconstrues Exergy's argument that Avista's Application is an impermissible collateral attack on final Commission Orders. Idaho Power claims:

It is very clear in both of the Commission's previous orders that the Commission went to great length to state that it was **not** deciding the issue of REC ownership in those cases. This is a fundamental principle in any collateral attack claim – that there actually is a previous judgment, or decision to collaterally attack.⁵

The two orders in question dismissed requests by Idaho Power to declare the ownership rights to RECs in a PURPA QF contract context. In both orders the Commission declined to hear the question, observing that there was no justiciable controversy. The determination that there is no justiciable controversy is the final order being impermissibly collaterally attacked. Moreover, Idaho Power's argument that there

⁴ 2007 Idaho Energy Plan, Idaho Legislative Council Interim Committee on Energy at § 3.5.2.

⁵ *Id.* at p. 6, emphasis in original.

was no “previous judgment, or decision” is inconsistent with it earlier argument that “In neither of these cases did the Commission find that it lacked subject matter jurisdiction to hear the matter, and in fact issued final orders in both proceedings.”⁶ There were, indeed, final orders in those proceedings – final orders that are being collaterally challenged by Avista.

IV PACIFICORP WRONGLY ASSERTS, ABSENT COMMISSION JURISDICTION, THAT NO FORUM EXISTS FOR ADJUDICATING REC DISPUTES

While adding nothing new to the legal arguments already before the Commission, PacifiCorp does make one incorrect assertion that should be addressed. PacifiCorp wrongly observes that, “were the Commission to find that it does not have jurisdiction over RECs would be to hold that there is no venue in the State of Idaho for determining such ownership.”⁷ This is simply untrue. PacifiCorp leaves the Commission with the misleading implication that if it does not assert jurisdiction, parties with disputes over ownership of RECs will be left with no forum for redress. That is fundamentally incorrect as the Idaho Constitution provides that “The district court shall have original jurisdiction in all cases, both at law and in equity, and such appellate jurisdiction as may be conferred by law.”⁸ Thus, contrary to PacifiCorp’s assertion, there is a forum readily available to parties who have disputes over REC ownership - the district courts.

V. CONCLUSION

Idaho Power’s Brief and PacifiCorp’s Comments merely endorse Avista’s arguments. For the reasons set forth in Exergy’s Motion, Reply to Avista’s Response,

⁶ *Id.* at p. 4.

⁷ PacifiCorp’s Comments at pp. 3 – 4.

⁸ *Id.* Const. Art. V, § 20.

and Supplemental Comments in Support, and for the reasons set forth above, Idaho Power's and PacifiCorp's arguments, like Avista's must fail. There is simply no authority in support of the contention that the Commission has subject matter jurisdiction over RECs owned by QFs.

By 
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 16th day of June, 2009, a true and correct copy of the within and foregoing **EXERGY DEVELOPMENT GROUP OF IDAHO'S REPLY TO IDAHO POWER'S BRIEF AND PACIFICORP'S COMMENTS ON EXERGY'S MOTION TO DISMISS** was served in the manner shown to:

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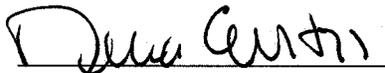
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