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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
CONDITION WITHDRAWAL ON
REIMBURSEMENT OF PARTIES'
EXPENSES AND ALTERNATIVELY
APPLICATION FOR INTERVENOR
FUNDING

COMES NOW, Exergy Development Group of Idaho, LLC ("Exergy"), by and through undersigned counsel, and files this Motion to Condition Withdrawal on Reimbursement of Parties' Expenses or in the alternative Application for Intervenor Funding.

CONDITION ON WITHDRAWAL

Avista initiated this docket for a declaratory ruling on which party (a QF developer or the purchasing utility) owns the environmental attributes in the PURPA context.

Avista hereby respectfully requests that the IPUC grant Avista's Petition to Determine Ownership of RECs and issue an order declaring that the Ownership of environmental attributes associated with PURPA projects will be assigned to the utilities that purchase the energy from such projects.

Exergy took Avista at its word, and accordingly filed a Motion to Dismiss based on this Commission's lack of subject matter jurisdiction. The issue was vigorously litigated and fully briefed by the parties cumulating in oral argument before the full Commission. The sole issues briefed and argued were whether the Commission has jurisdiction over RECs ownership and whether it would be wise to stay any requirement to award RECs to PURPA developers pending the outcome of the docket.

On July 28, 2009, after oral argument and prior to the issuance of an order from the Commission, Avista filed a Notice of Withdrawal of its Petition. It is apparent, based on Avista's Notice of Withdrawal, that its Petition was, in fact, a collateral attack on the Commission's final order setting avoided cost rates and was not a good faith effort to determine ownership of RECs. According to the Notice of Withdrawal:

Rather than resolving the issue of ownership of RECs raised in its Petition in order to address the current disparity between the avoided cost rate in the State of Idaho and the cost associated with Avista developing and operating its own wind energy project, Avista believes it may be more appropriate to develop a wind surrogate avoided cost resource ("Wind SAR") to address such disparity. [Notice to Withdraw p. 2, emphasis provided]

Avista did argue that it thought the avoided cost rates were too high as a *rational* for this Commission to rule in its favor on the underlying issue of the case: REC ownership. It was, however, adamant that it was not collaterally attacking the Commission's avoided cost rate setting orders. For example, in its Answer to Motion to Dismiss, Avista made it clear that it was not challenging the avoided cost rates:

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 an operating an equivalent resource. [Answer to Motion to Dismiss p. 16]

In its Notice of Withdrawal Avista makes its true intentions clear:

Avista is informed that the Commission is opening a generic docket to revisit the methodology for published avoided cost rates. In that generic docket Avista intends to present a proposal for a Wind SAR. ... Avista believes that the development of a Wind SAR may reduce the disparity between the avoided cost rates that Avista is required to pay for energy produced by a wind PURPA project and the cost of developing and operating a similar resource. Accordingly, Avista respectfully submits this Notice of Withdrawal of its Petition. [Notice of Withdrawal pp 2 – 3]

From the above, it is clear that Avista was, in fact, launching an attack on the avoided cost rates through the ruse of seeking a declaratory order regarding ownership of RECs generated by PURPA projects. Such abuse of the Commission's offices and waste of the time and effort on behalf of the intervenors should not be condoned by this Commission. For that reason Exergy urges this Commission to issue an order conditioning withdrawal upon Avista's satisfaction of the costs Exergy expended in good faith reliance on Avista's initial pleading in this docket.

ALTERNATIVE APPLICATION FOR INTERVENOR FUNDING

Pursuant to Rule 161 – 165 Exergy hereby Petitions the Commission for intervenor funding in the amount of \$12,456.60 based on the following:

Rule 161 (01) Itemized List of Expenses: The itemized list of expenses is attached as Exhibit A.

Rule 161(02) Statement of Proposed Findings: Exergy's proposed finding is that this Commission lacks jurisdiction over REC ownership and that Avista's Petition constitutes a collateral attack on the Commission's avoided cost rate setting orders.

Rule 161(3) Statement Showing Costs: The costs Exergy proposes to recover are reasonable in amount and are not out of the ordinary for litigating a vigorously contested, complex legal question.

Rule 161(4) Explanation of Cost Statement: Exergy is solely owned by Mr., James Carkulis who funds development operations from a variety of sources, none of which anticipated or budgeted for litigating a complex issue that is so clearly not within the Commission's jurisdiction. Nevertheless they were forced to do so because of the critically important issue of REC ownership.

Rule 161(5) Statement of Difference: Since Staff did not participate in this case; this requirement appears to be moot.

Rule 161(6) Statement of Recommendation: Exergy's position in this case benefited the general body of ratepayers because if Avista were successful it would have eroded a significant element of the benefit of PURPA to QFs in Idaho. Thus it would have been a disincentive to QF development, contrary to Federal law.

Rule 161(7) Statement Showing Class of Customer: Exergy's arguments in this docket benefited all ratepayers in furtherance of the goals of PURPA.

WHEREFORE, Respondent respectfully prays that the Commission condition Avista's withdrawal on the requirement that it reimburse Exergy for its costs of participation or in the alternative grant Exergy's Application for intervenor funding.

DATED this 3rd day of August, 2009.

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

EXHIBIT A

ITEMIZED STATEMENT OF COSTS

Professional Services Rendered May & June, 2009

Richardson & O'Leary, PLLC

<u>Date</u>	<u>Activity</u>	<u>Time</u>	<u>Charge</u>
May 1, 2009	Telephone conference with Mr. Woodbury regarding schedule	0.4	\$ 80.00
May 8, 2009	Review Petition for Declaratory Order filed by Avista on Green Tags. Telephone conference with Mr. Sorenson regarding the same.	2.4	\$480.00
May 20, 2009	Begin drafting Motion to Dismiss. Work with Mr. Miller to coordinate filing.	3.8	\$760.00
May 21, 2009	Continue drafting Motion to Dismiss and legal brief in support of same.	5.8	\$1,160.00
May 22, 2009	Continue working on Motion to Dismiss.	4.5	\$900.00
May 23, 2009	Finalize draft Motion to Dismiss and forward to Mr. Carkulis and Mr. Miller for their comments.	5.5	\$1,100.00
May 26, 2009	Finalize and file Motion to Dismiss.	2.9	\$580.00
June 2, 2009	Meet with Mr. Woodbury regarding supplemental comments. Draft the same.	2.5	\$500.00
June 4, 2009	Telephone conference with Mr. Woodbury regarding status of Motion to Dismiss. Telephone conference with Mr. Ellis regarding his motion on Avista's Petition to Stay.	.4	\$ 80.00
June 5, 2009	Telephone conference with Mr. Woodbury regarding oral argument and our supplemental filing.	.7	\$140.00
June 8, 2009	Meet with Mr. Woodbury regarding filing.	1.2	\$240.00
June 9, 2009	Review Avista's answer. Begin legal research on legal issues raised therein.	2.5	\$500.00
June 10, 2009	Research and begin drafting reply to Avista's answer.	4.5	\$900.00
June 11, 2009	Continue working on Brief.	3.8	\$760.00
June 12, 2009	Continue drafting Reply.	4.5	\$900.00

June 13, 2009	Continue drafting Reply.	3.5	\$700.00
June 14, 2009	Review edits by Mr. Carkulis & co-counsel. Finalize Reply.	3.8	\$760.00
June 15, 2009	Edit Exergy Brief in Reply to IPCO's brief and PacifiCorp's comments.	1	\$175.00
June 16, 2009	Finalize & file response to IPCO, PAC & Avista. Meet with Mr. Woodbury to prepare for tomorrow's oral arguments.	3.2	\$640.00
June 17, 2009	Prepare oral argument statement. Meet with Mr. Miller to coordinate oral argument. Attend & participate in oral arguments.	4.5	\$900.00

Total Attorney's Fees: \$12,255.00

Reimbursable Expenses

May 21, 2009	228 pgs @ .15 ea.	\$ 34.20
May 26, 2009	252 pgs @ .15 ea.	37.80
June 3, 2009	450 pgs @ .15 ea	67.50
June 15, 2009	252 pgs @ .15 ea.	37.80
June 16, 2009	162 pgs @ .15 ea.	<u>24.30</u>
Total Reimbursable Expenses		\$201.60

Total Costs	\$ 201.60
Total Attorney's Fees	<u>12,655.00</u>
Total Statement of Costs	\$12,456.60

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 3rd day of August, 2009, a true and correct copy of the within and foregoing **EXERGY DEVELOPMENT GROUP OF IDAHO'S MOTION TO CONDITION WITHDRAWAL ON REIMBURSEMENT OF PARTIES' EXPENSES AND ALTERNATIVELY APPLICATION FOR INTERVENOR FUNDING** was served in the manner shown to:

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Commission Secretary
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