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UTILITIES COMMISSION

**DONOVAN E. WALKER**  
Corporate Counsel

June 15, 2009

**VIA HAND DELIVERY**

Jean D. Jewell, Secretary  
Idaho Public Utilities Commission  
472 West Washington Street  
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Boise, Idaho 83720-0074

Re: Case No. AVU-E-09-04

*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  
QUALIFIED FACILITY*

Dear Ms. Jewell:

Enclosed for filing please find an original and seven (7) copies of Idaho Power Company's Brief Re: Motion to Dismiss/Motion to Deny Stay in the above matter.

Very truly yours,

A handwritten signature in black ink, appearing to read "Donovan E. Walker", written over a horizontal line.

Donovan E. Walker

DEW:csb  
Enclosures

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BEFORE THE IDAHO PUBLIC UTILITIES COMMISSION

IN THE MATTER OF THE PETITION OF )  
AVISTA CORPORATION FOR AN ORDER ) CASE NO. AVU-E-09-04  
DETERMINING THE OWNERSHIP OF THE )  
ENVIRONMENTAL ATTRIBUTES ("RECS") ) IDAHO POWER COMPANY'S  
ASSOCIATED WITH A QUALIFYING ) BRIEF RE: MOTION TO  
FACILITY UPON PURCHASE BY A ) DISMISS/MOTION TO DENY STAY  
UTILITY OF THE ENERGY PRODUCED BY )  
A QUALIFYING FACILITY )  
\_\_\_\_\_ )

**I. INTRODUCTION**

Pursuant to the Idaho Public Utilities Commission's Notice of Scheduling dated June 2, 2009, in Case No. AVU-E-09-04, Idaho Power Company ("Idaho Power" or "Company") respectfully submits the following Legal Brief and Comments.

**II. BACKGROUND**

On May 6, 2009, Avista Corporation ("Avista") filed a Petition with the Idaho Public Utilities Commission ("Commission") for an order determining the ownership of the marketable environmental attributes (renewable energy credits or "RECs")

associated with wholesale sales of energy by a qualifying facility under the Public Utility Regulatory Policies Act of 1978 ("PURPA") to a utility within the State of Idaho. Avista also petitioned the Commission for a stay of the requirement to award RECs to any PURPA developer that has tendered or may tender a PURPA project pending a decision by the Commission on Avista's Petition. Avista's Petition, p. 1.

On May 26, 2009, Exergy Development Group of Idaho LLC ("Exergy") filed a Motion to Dismiss Avista's Petition. Exergy contends that the Commission lacks subject matter jurisdiction and that Avista's Petition is an impermissible collateral attack on prior orders of the Commission. Exergy Motion to Dismiss, p. 2, 3, 8. Also in May 26, 2009, Sagebrush Energy LLC ("Sagebrush") filed a Motion for Order denying Avista's Petition for Stay. Sagebrush contends that Avista's request for stay should be evaluated under the Idaho Rules of Civil Procedure, I.R.C.P. 65(e), relating to preliminary injunctions.

On June 2, 2009, the Commission issued a Notice of Scheduling setting forth a June 9, 2009, deadline for Avista to file Answers to the Motions of Exergy and Sagebrush, a June 15, 2009, deadline for other intervening parties to file comments, exhibits, and legal briefs on the Motions of Exergy and Sagebrush, and a June 16, 2009, deadline for Exergy and Sagebrush to file a reply to Avista's Answers. The Notice of Scheduling also set an oral argument for the issues raised by Exergy in its Motion to Dismiss and by Sagebrush in its Motion to Deny the Stay for June 17, 2009, at 1:00 p.m.

Several parties have petitioned for, and been granted, intervenor status in this proceeding. Idaho Power was granted intervention in this matter on May 27, 2009, by Order No. 30813.

### III. DISCUSSION

#### A. The Commission has Subject-Matter Jurisdiction to Hear This Case.

The Idaho Public Utilities Commission has very broad authority 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.” *Idaho Code* § 61-501. This includes the power to investigate and fix the rates and regulations of any public utility, *Idaho Code* § 61-503, as well as to prescribe rules and regulations for the performance of any service or the furnishing of any commodity of the character furnished or supplied by any public utility. *Idaho Code* § 61-507.

Additionally, the Commission has recognized and accepted jurisdiction and authority pursuant to the Public Utility Regulatory Policies Act of 1978, “PURPA,” and the implementing regulations of the Federal Energy Regulatory Commission (“FERC”) to set avoided costs, to order electric utilities to enter into fixed term obligations for the purchase of energy from qualified facilities (“QF”), and to implement FERC rules. 16 U.S.C. § 824a-3; Order No. 29480 p. 17; Order No. 29577 p. 6.

Here, Avista has petitioned the Commission for a determination regarding the ownership of RECs in the sale of energy from a QF to a purchasing utility. As the parties have pointed out, FERC addressed this issue in 2003. 105 FERC P 61004, Docket No. EL03-133-000 (2003). In that case the petitioners, certified QFs, sought a declaratory order from FERC that avoided cost contracts entered into pursuant to PURPA did not inherently convey to the purchasing utility any renewable energy credits or similar tradeable certificates (RECs), absent express provision to the contrary. *Id.*, at 61005. The FERC granted the QFs request, and ordered 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)." *Id.*, at 61007. FERC reasoned that RECs, being created by the States, "exist outside the confines of PURPA" and thus PURPA did not address the ownership of RECs. *Id.* "And 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)." *Id.* FERC qualified the language of its declaratory order stating, "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." *Id.*

Certainly FERC has stated plainly that nothing in PURPA controls the decision about who, the QF or the purchasing utility, owns the RECs associated with the sale of energy from a QF to a purchasing utility. FERC also stated that, because RECs exist outside of PURPA, that the parties' contract could provide for the ownership of RECs and, absent that, it was ultimately up to the States to determine ownership.

The Commission has had variations of this issue presented to it twice before, in Case No. IPC-E-04-02 and Case No. IPC-E-04-16. 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 Order No. 29577, respectively.

Clearly, this Commission is the body that has subject-matter jurisdiction to make the determinations contemplated by Avista's Petition. This Commission has jurisdiction over the purchasing utilities in this State. This Commission has jurisdiction to set

avoided costs, to order electric utilities to enter into fixed term obligations for the purchase of energy from QFs, and to implement FERC rules. FERC has declined to act, stating that the determination is not governed by PURPA, and is a matter left to the States. Here, in the absence of federal preemption or action, the State is free to act. 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 the public utilities of this state, and what they must pay for it. *Idaho Code* §§ 61-501, 61-507. The Commission must, as it has done on at least two prior occasions, determine that it does in fact have subject-matter jurisdiction to hear this case.

**B. The Petition is Not an Impermissible Collateral Attack on a Prior Commission Order.**

“All orders and decisions of the commission which have become final and conclusive shall not be attacked collaterally.” *Idaho Code* § 61-625. Generally speaking, a collateral attack is an attempt to impeach the validity, or deny the force and effect of a prior order or decision in a subsequent proceeding that is not instituted in an attempt to amend, correct, reform, vacate, or enjoin the prior decision. See, 47 Am.Jur.2d Judgments § 468; Black’s Law Dictionary, 5<sup>th</sup> ed., p. 237. Res judicata is a closely related doctrine, and a type of collateral attack. *Id.* Although “collateral attack” is not itself explicitly defined very well by Idaho case law, res judicata and its sub-part collateral estoppel are very well defined.

Res judicata is comprised of claim preclusion (true res judicata) and issue preclusion (collateral estoppel). Res judicata, or claim preclusion, bars a subsequent action between the same parties upon the same claim or upon claims relating to the same cause of action . . . . The doctrine of collateral estoppels exists to prevent the relitigation of an issue previously

determined when (1) the party against whom the earlier decision was asserted has a full and fair opportunity to litigate the issue decided in the earlier case; (2) the issue decided in the prior litigation was identical to the issue presented in the present action; (3) the issue sought to be precluded was actually decided in the prior litigation; (4) there was a final judgment on the merits in the prior litigation; and (5) the party against whom the issue is asserted was a party or in privity with a party to the litigation.

*Stoddard v. Hagadone Corp.*, \_\_ Idaho \_\_, 207 P.3d 162, 166-67 (2009)(citations and internal quotations omitted).

Here, Exergy claims that Avista's petition is an impermissible collateral attack simply because the "Commission has already spoken on the question of REC ownership" and "Avista's Petition is based on the same factual allegations raised in the Idaho Power Docket . . . ." Exergy Motion to Dismiss, p. 8-9. First of all, 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. This is lacking here, and the claim of an impermissible collateral attack simply does not follow. Likewise, res judicata, or claim preclusion, as well as collateral estoppel, or issue preclusion, clearly do not apply. The parties to the cases are different, it is not the same claim, and it does not arise from the same cause of action. Additionally, the issues presented are not identical, the relief requested is different, and most importantly the issue *was not decided* in the prior action. The claim that Avista's petition is an impermissible collateral attack simply fails from the very nature and wording of the Commission's prior orders, neither of which actually decided the issue.

**C. The Court's Preliminary Injunction Rules Do Not Apply to the Commission and a Temporary Stay is Appropriate.**

The Idaho Rules of Civil Procedure cited by Sagebrush Energy LLC ("Sagebrush") apply only to "courts" and not to the Commission. *McNeal v. Idaho Public Utilities Commission*, 142 Idaho 685, 132 P.2d 442, 447 (2006)(claim for application of the Rules of Civil Procedure in the Commission is without merit). "The Idaho Rules of Civil Procedure apply to the courts, of which the Commission is not." *Id.* Idaho law directs the Commission to promulgate rules of practice and procedure. *Idaho Code* § 61-601. The Commission has adopted Rules of Procedure pursuant to its authority. IDAPA 31.01.01.000. The Idaho Rules of Civil Procedure apply only to the courts. I.R.C.P. 1(a). The Commission is not a court of law. *Natatorium Company v. Erb*, 34 Idaho 209, 200 P. 348 (1921). Therefore, the Idaho Rules of Civil Procedure regarding preliminary injunctions do not apply to proceedings before the Commission, and Sagebrush's argument to the contrary is without merit. *See, McNeal, supra.*

Even assuming *arguendo* that the law of preliminary injunctions were applicable, Avista has satisfied the requirements of a preliminary injunction as set forth in its Answer. Idaho Rule of Civil Procedure 65 states in pertinent part as follows:

(e) Grounds for Preliminary Injunction.

A preliminary injunction may be granted in the following cases:

(1) When it appears by the complaint that the plaintiff is entitled to the relief demanded, and such relief, or any part thereof, consists in restraining the commission or continuance of the acts complained of, either for a limited period or perpetually.

(2) When it appears by the complaint or affidavit that the commission or continuance of some act during the litigation would produce waste, or great or irreparable injury to the plaintiff.

(3) When it appears during the litigation that the defendant is doing, or threatens, or is about to do, or is procuring or suffering to be done, some act in violation of the plaintiff's rights, respecting the subject of the action, and tending to render the judgment ineffectual.

(4) When it appears, by affidavit, that the defendant during the pendency of the action, threatens, or is about to remove, or to dispose of the defendant's property with intent to defraud the plaintiff, an injunction order may be granted to restrain the removal or disposition.

(5) A preliminary injunction may also be granted on the motion of the defendant upon filing a counterclaim, praying for affirmative relief upon any of the grounds mentioned above in this section, subject to the same rules and provisions provided for the issuance of injunctions on behalf of the plaintiff.

I.R.C.P. 65(e)(ground (e)(6) is not applicable in this case).

Sagebrush implies that you must have more than one of the above stated grounds for a preliminary injunction to issue, when in fact the five stated grounds are not cumulative. Satisfaction of any one of the five listed grounds will allow the court to exercise its discretion to issue a preliminary injunction. Avista addresses how its Petition meets the grounds stated in I.R.C.P. 65(e)(1) and 65(e)(2). Additionally, in the present matter I.R.C.P. 65(e)(3) is also applicable. Without a stay, the proffering and approval of contracts during the interim, respecting the subject of the action, could tend to render the judgment of the Commission ineffectual, at least with regard to those contracts signed and approved during the pendency of the case. Consequently, Avista's Petition satisfies at least three of the five stated grounds upon which a *court* could issue a preliminary injunction. Although the Civil Rules of Procedure clearly do not apply and bind the Commission, even if they did this case meets those requirements.

A temporary stay, during the pendency of this action, is appropriate, and would maintain the status quo until a Commission decision is issued. Additionally, there is some value in having consistency in this determination across all the effected utilities in the State.

**D. The Judgment of the Commission Must Not be Retroactive.**

Given the Commission's order in Idaho Power's first case, Case No. IPC-E-04-02, the Company, in the second Idaho Power case, Case No. IPC-E-04-16, sought assurance that it would not be penalized in a future revenue requirement proceeding by inclusion of a contract provision in PURPA contracts whereby the Company agreed to forego any ownership interest in the environmental attributes or RECs. In response, the Commission reiterated its prior ruling, declining to address the issue of ownership. However, the Commission also approved the contract in that case with J.R. Simplot Company that was submitted for approval and included the above mentioned provision regarding the RECs. Since that time, Idaho Power has executed and submitted approximately 15 PURPA contracts, containing this same clause with regard to the RECs, all of which have been approved by the Commission.

Idaho law recognizes a general prohibition on retroactive ratemaking. In *Utah Power & Light vs. Idaho Public Utilities Commission*, 107 Idaho 47, 685 P.2d 276 (1984), the Court stated:

I.C. § 61-502 provides that:

Whenever the commission . . . shall find that the rates . . . are unjust, unreasonable, discriminatory or preferential, . . . or that such rates . . . are insufficient, the commission shall determine the just, reasonable or sufficient rates . . . *to be thereafter observed* . . . . (Emphasis added.)

This section provides only prospective relief. It does not give the PUC authority to prescribe surcharges or reductions to otherwise reasonable rates in order to make up past revenue shortfalls due to confiscatory rates.

*Id.*, 107 Idaho at 52 (emphasis in original).

The prohibition against retroactive ratemaking has been endorsed in numerous Commission orders. The most recent examples include: Order No. 25880, Case No. IPC-E-94-5 (1995); Order No. 30157, Case No. IPC-E-06-06 (2006); and Order No. 28097, Case No. WWP-E-98-11 (1999). In each of those cases, the Commission denied utility requests to recover expenses incurred in a prior period on the grounds that to do so without a preceding deferral order would violate the legal prohibition on retroactive ratemaking.

The argument put forth by Avista that it can obtain non-PURPA wind projects independently, that include the RECs going to the utility, for a price that is much less than the avoided cost rate for PURPA wind contracts is verified by Idaho Power's experience with its Elkhorn wind project. The Power Purchase Agreement ("PPA") for the Elkhorn wind project provides for the RECs to transfer to Idaho Power, and the price paid in the PPA for the energy is less than what the avoided cost PURPA rate was at the time the PPA was executed. Additionally, Idaho Power has recently issued a Request for Proposals ("RFP") to acquire 150 MW of wind generation. The bids received as part of that RFP process are expected to be less than the currently approved avoided cost rates also, and is yet to be seen whether they will include RECs or not.

As stated in its Petition to Intervene, Idaho Power currently has approximately 12 draft PURPA power purchase contracts in the negotiation stage, and with the recent

modification raising the avoid cost rates in Idaho, the Company expects interest in signing PURPA contracts and the number of projects offered to the Company to increase. Idaho Power continues, in this case, to seek assurance from the Commission that the Company will not be penalized in a revenue requirement proceeding for the course of action taken with regard to its contract provision in PURPA agreements to forego any interest in the associated RECs. Considering that the Company currently does not have a mandatory renewable portfolio standard with which it must comply, and given the Commission's recent Order No. 30818 requiring the sale of its 2007 and 2008 RECs, negotiating for additional RECs and speculating on their resale would not be economical and would expose the Company and its ratepayers to a potential unnecessary risk.

#### IV. CONCLUSION

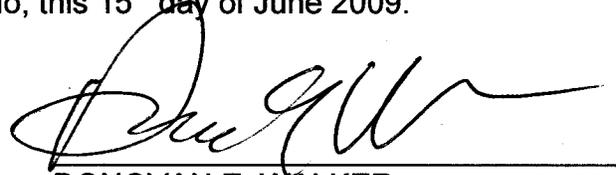
The Commission has the jurisdiction and authority to hear and decide this matter. The issues involved are important legal and public policy considerations that are soundly within the Commission's authority to decide. The Motion to Dismiss should be denied.

Avista's Petition is not an impermissible collateral attack on a prior order or judgment of the Commission. The parties to the cases are different, it is not the same claim, and it does not arise from the same cause of action. Additionally, the issues presented are not identical, the requested relief is different, and most importantly the issue ***was not decided*** in the prior action. The claim that Avista's petition is an impermissible collateral attack simply fails from the very nature and wording of the Commission's prior orders, neither of which actually decided the issue.

A stay during the pendency of this proceeding is appropriate. Avista has demonstrated the possibility of great or irreparable injury. Additionally, the proffering and approval of contracts during the interim, respecting the subject of the present action, could render the judgment of the Commission ineffectual, at least with regard to those contracts signed and approved during the pendency of the case. The Commission is capable of making a determination on this matter in a timely fashion, so as to lessen the effects of a temporary stay.

Lastly, Idaho Power continues, in this case, to reaffirm that the Company will not be penalized in a revenue requirement proceeding for the course of action taken with regard to its contract provision in its approved PURPA agreements to forego any interest in the associated RECs. Any determination by the Commission in this matter must be applied prospectively. Should the Commission decide this matter in such a way as to be in conflict with Idaho Power's present course of action with regard to RECs in PURPA contracts the Company respectfully requests guidance from the Commission on the prudent direction it should take.

Respectfully submitted at Boise, Idaho, this 15<sup>th</sup> day of June 2009.

A handwritten signature in black ink, appearing to read 'Donovan E. Walker', written over a horizontal line.

DONOVAN E. WALKER  
Attorney for Idaho Power Company

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 15<sup>th</sup> day of June 2009 I served a true and correct copy of IDAHO POWER COMPANY'S BRIEF RE: MOTION TO DISMISS/MOTION TO DENY STAY upon the following named parties by the method indicated below, and addressed to the following:

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