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UTILITIES COMMISSION

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Chas. F. McDevitt
Dean J. (Joe) Miller

May 26, 2009

Via Hand Delivery

Jean Jewell, Secretary
Idaho Public Utilities Commission
472 W. Washington St.
Boise, Idaho 83720

Re: Sagebrush Energy LLC
Case No. AVU-E-09-04

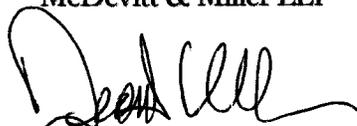
Dear Ms. Jewell:

Enclosed for filing in the above matter, please find the original and seven copies of a Motion for Order Rejecting Request for Stay of Sagebrush Energy LLC.

Kindly return a file stamped copy to me.

Very Truly Yours,

McDevitt & Miller LLP



Dean J. Miller

DJM/hh
Enclosures

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UTILITIES COMMISSION

Attorney for *Sagebrush Energy 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

**MOTION FOR ORDER REJECTING
REQUEST FOR STAY**

COMES NOW Sagebrush Energy LLC (Sagebrush), pursuant to RP 56 and 256,
and moves the Commission for an Order denying the Applicant's request for a stay of
"...any requirement to award RECs to a developer that has tendered or may tender a
PURPA project to Avista until such time as a final order is issued that fully resolves the
issues raised in Avista's Petition..." (Petition, pg. 6), and in support thereof respectfully
shows as follows, to wit:

INTRODUCTION

Sagebrush is an independent renewable energy company that is working across
the Intermountain West to develop wind projects that are sensitive to the concerns of
local communities. Sagebrush is in the process of developing a wind fueled electric

energy generating facility, known as the Norris Hill Project, located in Madison County, Montana. The Norris Hill Project is a Qualifying Facility within the meaning of the Public Utility Regulatory Policies Act (PURPA). Sagebrush has been actively working with Avista on the Norris Hill Project since March 2007 and formally engaged in PURPA contract negotiations with Avista for the execution of a long term purchase power agreement in February 5, 2009.

On May 5, 2009, the Petitioner initiated this proceeding by filing a Petition for Order Determining Ownership of RECS. In essence the Petition asks the Commission to make a declaratory judgment that marketable environmental attributes, or Renewable Energy Credits ("REC"), are the property of the purchasing utility, not of the generator, as is the current state of law. The Petition further requests that the Commission enter a stay of "any requirement to award RECs to a developer that has tendered or may tender a PURPA project to Avista until such time as a final order is issued that fully resolves the issues raised in Avista's Petition".

On two previous occasions the Commission has recognized that under current law, RECs are the property of the generator. In Case No. IPC-E-04-2, *Petition for Declaratory Order Regarding Ownership of Environmental Attributes*, Order No. 29840, the Commission dismissed as non-justifiable Idaho Power Company's request that it be assigned a right of first refusal to acquire RECs from QF projects. The underlying assumption in Case No. IPC-E-04-2, which the Commission accepted, was the RECs are the property of the QF generator. The Commission reiterated its acceptance of this view in case No. IPC-E-04-2. There, Idaho Power Company waived any claim to environmental attributes and sought an assurance that the Commission would pre-

approve for rate making the waiver. The Commission reaffirmed Order No. 29840, and held that while the utility is free to negotiate for the purchase of RECs from QF generators, the purchase price is not a PURPA cost and would be evaluated by ordinary prudence standards. (*Application for Approval of Purchase and Sale Agreement with J. R. Simplot Company*, Order No. 29577).

Thus, the current state of law in Idaho is clear and unambiguous.

ARGUMENT

The Request for Stay Should be Evaluated Under the Law of Preliminary Injunctions

The courts of Idaho, through a long series of judicial decisions and through adoption of procedural rules (IRCP 65e), have developed a well-established body of law that govern requests for preliminary relief prior to a full hearing on the merits. This body of law strikes a balance between recognizing those rare circumstances where preliminary relief is reasonable with the necessity of thorough consideration of the merits of the case.

Although the Petitioner labels its request for interim relief as a request for stay, the requested relief is, in essence, a request for a preliminary injunction because PURPA developers are, in effect, enjoined from obtaining PURPA contracts pending the outcome of the proceeding. Accordingly, the law of preliminary injunctions should apply.

In order to be entitled to a preliminary injunction the applicant must prove two things:

1. That the applicant is entitled to the relief demanded and there is a substantial likelihood the applicant is likely to prevail. If the applicant's claim is not free from doubt, an injunction is improper. *Harris v. Cassia County*, 106 Idaho 513, 681 P.2d 988 (1984).

2. That the applicant will suffer irreparable injury in the absence of an injunction. “A preliminary injunction is granted only in extreme case where the right is very clear and it appears that irreparable injury will flow from its refusal.” *Evans v. District Court*, 47 Idaho 267, 270 275 P. 99 (1929); *Harris, supra*.

Avista has not demonstrated it is likely to prevail on the merits

The support the Applicant offers for its request for a stay comes through the pre-filed direct testimony of Mr. Clint Kalich, Manager of Resource Planning & Power Supply Analysis. The only argument offered by Mr. Kalich is that unless the RECs associated with any wind QF project purchased by the Applicant are transferred to the Applicant, the payments made by the Applicant for the energy will “substantially exceed the cost of building and operating a wind plant.” This argument may be relevant in the context of a discussion or review of avoided costs but does not have any bearing on the question of ownership of RECs. The current avoided costs were established by the Commission in Case No GNR-E-09-01 and its Order No 30744. The current avoided cost rates did not include any “costs” associated with RECs. The real argument being made by Mr. Kalich is that the recently approved avoided cost rate “is simply too high” and the Applicant just does not want to pay it.

After review of the work papers accompanying Mr. Kalich’s testimony Sagebrush believes Mr. Kalich’s testimony is not transparent and appears to be deeply flawed. At a minimum, fully vetting Mr. Kalich’s analysis would require a long discovery period, but as presented, Mr. Kalich’s testimony and supporting workpapers do not reflect the real development and operational conditions for a small wind QF.

Avista's primary claim for disparity is that the Northwest Power and Conservation Council's ("NWPC") estimates for wind generation project development, construction and operation result in an avoided cost of \$64 per MWh when levelized over 20 years." (p. 6)

Sagebrush has been actively engaged in NWPC planning activities and finds no basis for the levelized costs projected by Mr. Kalich in policies, working drafts, drafts, or other materials published by NWPC. In fact, in one NWPC staff analysis the calculated twenty-year levelized cost for base-case wind power development for the Pacific Northwest is \$100.03¹. This analysis rates suggests, in contrast to Mr. Kalich's opinion, that current avoided cost rates in Idaho may be too low, and it points to deep flaws in Mr. Kalich's economic analysis that would need to be fully examined through the hearing process. Avista's claim, in the context of these disparities in economic modeling, is not free from doubt.

In addition to the inadequate factual record to support the requested relief, as discussed above, there are other problems with the Avista Petition. They include:

The Petition is an impermissible collateral attack on Order No.30744. At the end of the day, Avista is trying to use the REC ownership issue as a vehicle to convince the Commission that the avoided cost rates established in Order No. 30744 are in some sense "too high" and that Order No. 30744 was, in consequence, wrongly decided. Mr. Kalich's testimony is frank it Avista's admission that it is attacking Order No. 30744. In response to the question of "Why is Avista making this filing?", he replies: "the [avoided cost] rate is simply too high"(p. 4).

¹ See Jeff King's Workbook "MicroFin 14.2.6 042109", Reporting year real dollars 2009, commercial operation 2010, Busbar cost for 100 MW wind project with 32% capacity factor.

Idaho Code 6-625 provides, “All orders and decisions of the commission which have become final and conclusive shall not be attached collaterally.” The Idaho Supreme Court has explained:

“The legislature has afforded the orders of the Commission a degree of finality similar to that possessed by judgments made by a court of law (citing I.C. 6-625). Final orders of the Commission should ordinarily be challenged either by petition to the Commission for rehearing or by appeal to this Court as provided by I.C. §§ 61-626 and -627; Id. Const. Art. 5, § 9. A different rule would lead to endless consideration of matters previously presented.” *Utah Idaho Sugar Co. v. Intermountain Gas Co.* 100 Idaho 368, 597 P.2d (1979).

The Avista Petition leads to what the Supreme Court has said is impermissible—the endless consideration of matters previously presented. Avista could have chosen the proper avenue to challenge Order No. 30744, by seeking reconsideration and then appealing. It did not.

The jurisdiction of the Commission to decide the ownership of RECs is in question. Sagebrush is informed that another intervenor, Exergy Development Group of Idaho, LLC, intends to file a Motion to Dismiss contending that the Commission does not have subject matter jurisdiction to decide the question of REC ownership. The Commission should not grant temporary relief until it has satisfied itself that it has jurisdiction to decide the underlying dispute.

There are numerous policy and legal considerations weighing against Avista’s requested relief. Avista’s right to relief is far from clear in light of numerous policy and legal arguments which Sagebrush intends to advance, after the Commission establishes a procedural schedule for Comments or Testimony. They include:

- The FERC Order (105 FERC 61,004) affirms that, in the absence of specific language in the contract, PURPA does not require the QFs to transfer RECs to the purchasing utilities.

- In the same Order, FERC declared that in awarding REC ownership to utilities, the state must find this requirement in state law, not in PURPA.
- FERC further affirmed that avoided costs are not intended to compensate the QF for more than energy and capacity.
- It is clear that avoided cost payments do not compensate for RECs because renewable QFs are paid the same avoided costs as fossil-fueled cogeneration QFs are paid. Therefore avoided cost payments by utilities compensate only for energy and capacity, and not for the environmental benefits.
- In Idaho calculations of avoided cost are currently based on costs associated with gas fuel-fired plant that do not have associated RECs. Thus avoided cost compensation does not include any recognition of the economic value of the RECs. States that have granted the ownership of RECs to utilities have done so through legislative action. The Idaho Legislature has not enacted any Renewable Portfolio Standard, or other law that assigns the ownership of RECs.
- Even with avoided cost payments for energy and capacity, QFs still bear the risk or unanticipated facility operational expenses required due to changes in environmental laws, and the risk for any claims, liabilities or damages arising from the design, construction and operation of the QF. REC ownership benefits should follow facility ownership risks.
- Requiring QFs to transfer RECs with energy without additional compensation is a taking from QFs and a windfall to utilities.
- Payment for RECs may be critical to a project's economic feasibility. The sale of the RECs separate from power is intended to compensate the owner of the renewable facility and promise further investment in renewable resources. Because the risks of development and operation of a renewable facility are borne by the QF owner, the rewards associated with RECs should also accrue to QF.
- Regulatory assignment of RECs to the utilities without just compensation would constitute an unconstitutional taking of private property in violation of the Fifth and Fourteenth Amendments to the US Constitution, and would obligate the state to compensate the QFs for the value of the RECs

- If a utility were to be granted ownership of RECs, it should also be responsible for the environmental attributes and liabilities of non-renewable power plants from which it purchases but does not own—contingencies that are not recognized on the utility's books. Utilities should not be able to pick and choose which attributes it would like to own among all purchased energy for which it contracts.

Utilities and ratepayers receive the benefits of renewable energy even without the RECs: increased fuel diversity, a local and secure fuel supply, increased efficiency of energy production, and a fixed price not subject to the vagaries of world commodity markets. RECs will not provide these benefits to utilities and their customers.

The foregoing arguments are listed, not with the expectation that the Commission would decide their merits in the context of this motion, but to demonstrate the existence of numerous credible arguments against Avista's request for relief which the Commission will have to address when it reaches the merits. Avista's claim for relief is not free from doubt and injunctive relief is not proper. *Harris, supra*.

Avista has not shown irreparable injury

In neither its Petition nor the supporting testimony does Avista allege any injury to itself. It does not allege that adherence to Order No. 30744 would cause it to experience financial distress, bankruptcy, insolvency or the like.

Rather, Avista asserts that its customers will be burdened with costs that are somehow too high. (Kalich Direct Testimony, pg. 9). Avista's professed concern for its ratepayers is touching, maybe even heartwarming, but not convincing. As discussed above the existence of any so-called overpayment by rate payers is founded on an assumption that Order No. 30744 was wrongly decided. If Avista was so concerned about its rate payers it could have followed the proper course of action of seeking reconsideration and appeal. It did neither and, in consequence, its claim of concern for rate payers rings hollow.

A Stay of Current Obligations is Bad Public Policy

The intent of PURPA was to “encourage cogeneration and small power production” of qualifying facilities. The entry of Order No. 30744 on March 17, 2009 establishing new avoided cost rates ended a long period of regulatory uncertainty regarding PURPA implementation. Since at least 2005 a *de facto* moratorium, triggered by Idaho Power Company’s *Petition of Idaho Power Company for an Order Temporarily Suspending Idaho Power’s PURPA Obligation*, Case No. IPC-E-05-22, impeded the development of renewable resources in Idaho. Order No. 30744, ended that long period of uncertainty.

Now, less than sixty days after years of uncertainty has ended, Avista seeks to inject new uncertainty by again staying the PURPA obligation to purchase.

Above all else, industries subject to regulation require certainty and predictability in regulatory policy. Regulation that takes sudden lurches in one direction then another impedes the ability to make financial commitments and otherwise make long lead time decisions that are associated with constructing electric generation facilities.

And, experience has shown that once a stay goes into effect, it tends to stay in effect. For example, in Case No. IPC-E-05-22, the moratorium was originally projected to last nine months. It ended up lasting almost four years.

As discussed above, Avista has not demonstrated the existence of irreparable injury that would warrant a stay of its obligation to enter into PURPA contracts under current law. In consequence, the Commission should continue the course it set in Order No. 30744, and not precipitously lurch in the opposite direction.

Conclusion

Based on the reasons and authorities cited herein, Sagebrush respectfully requests that the Commission enter its order denying Petitioner's request for a stay and further providing that Avista is required to negotiate with PURPA project developers based on the premise that RECs are the property of the generator and that Avista is required to enter into purchase power agreements based on that premise during the pendency hereof.

DATED this 26 day of May, 2009.

SAGEBRUSH ENERGY LLC

By: 

Dean J. Miller

Attorney for *Sagebrush Energy LLC*

CERTIFICATE OF SERVICE

I hereby certify that on the 20th day of May, 2009, I caused to be served, via the method(s) indicated below, true and correct copies of the foregoing document, upon:

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BY: Heather Houde, legal asst.
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