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June 16, 2009

Via Hand Delivery

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

Re: Sagebrush Energy LLC and Idaho Forest Group LLC
Case No. AVU-E-09-04

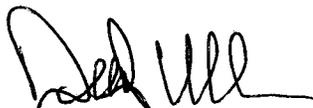
Dear Ms. Jewell:

Enclosed for filing in the above matter, please find an original and seven copies of a Reply to Avista's Answer of Sagebrush Energy LLC and Idaho Forest Group 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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Attorney for Sagebrush Energy LLC and Idaho Forest Group 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

REPLY TO AVISTA ANSWER

COME NOW Sagebrush Energy LLC and Idaho Forest Group LLC (Sagebrush—
IFG) and Reply to the Answer of Avista Corporation (Avista) dated June 9, 2009, as
follows, to wit:

PROCEDURAL BACKGROUND

This proceeding was commenced on May 6, 2009, by the filing of a Petition. As
part of the Petition, Avista requested that the Commission enter an order staying Avista's
obligation to negotiate power purchase agreements with potential Qualifying Facilities
pending the outcome of the proceeding.

JAN 20 2009

On May 26, 2009, Sagebrush Energy filed a Motion for Order Rejecting Request for Stay (Motion). Among other things, Sagebrush argued that the Petition and accompanying testimony did not allege facts sufficient to entitle Avista to a preliminary injunction and that a stay is bad public policy. Idaho Forest Group LLC filed a Concurrence in Motion on June 2, 2009.

On June 2, 2009, the Commission published its Notice of Motion and Notice of Scheduling. Pursuant to the Notice, Avista was to file an Answer on June 9, 2009; other intervenors were to file any desired pleadings by June 15, 2009, and Sagebrush—IFG were to file a Reply to the Answer by noon, June 16, 2009.

This Reply is submitted in accordance with the Commission's Notice and in Reply to Avista's Answer.

ARGUMENT

Current Law In Idaho Regarding REC Ownership Is Clear

A central issue that divides Sagebrush--IFG and Avista is the state of current law in Idaho regarding ownership of environmental attributes (Renewable Energy Credits or Recs) . Sagebrush contends that as a result of orders issued in Case Nos. IPC-E-04-02 (Order No. 29480) and IPC-04-16 (Order No. 29577), current law is clear that RECs are the property of the generator. Avista contends that because orders issued in those cases resulted in a finding of non-justifiability, the law is unclear.

A more detailed review of Case Nos. IPC-E-04-02 and IPC-E-04-16 reveals that Avista misapprehends (or misinterprets) the meaning of Order Nos. 29840 and 29577.

Case No. IPC-E-04-02.

This case was initiated by a Petition of Idaho Power Company dated February 5, 2004. Idaho Power's Petition recognizes that the RECs are the property of QFs and concludes with this recommendation:

“By assigning the value of the Green Tags to the QF developers, additional opportunities may be provided in the State for a broad spectrum of renewable generation without additional cost to the Company's customers. At the same time, by requiring the QF developers from whom Idaho Power purchases electrical energy to grant Idaho Power a right of first refusal to purchase any Green Tags issued to them, Idaho Power can purchase those Tags from the developers when the Company deems it in the interest of the utility and its customers to do so”. (Petition, Pg. 6).

By recommending that the utility be given a right of first refusal to purchase Green Tags for QF developers, Idaho Power recognized that, in the first instance, the Green Tags are the property of the developer and that the Green Tags have an economic value independent of the cost of energy, which the utility should be permitted to purchase for a price.

Staff Comments also recognize QF ownership of RECs:

“Arguably what Idaho Power proposes is an impermissible "taking" of property. The Fifth Amendment of the U.S. Constitution states, "nor shall private property be taken for public use without just compensation." This provision is called the "takings clause." Idaho Power requests a Commission Order granting the utility by regulatory fiat a "right of first refusal." It proposes no compensation to the QF for the right. Electric utility purchases of energy and capacity from PURPA QFs are mandatory. 18 C.F.R. § 292.303(a). The environmental attributes associated with renewable QF projects are currently separate from the capacity and energy sold to Idaho utilities. They are not bundled together as a matter of law. Nor is the cost to purchase environmental attributes included in an Idaho utility's avoided cost. *To the extent those attributes have value and provide additional developer incentive, Staff believes they should remain with the developer. At this time, no argument has been advanced nor authority cited to justify or require placing any regulatory restriction by this Commission on their ownership*”. (Staff Comments Pg. 7, Emphasis Supplied)

Staff's suggestion that the Company's proposal might constitute a taking is, obviously, based on an understanding that RECs are the property of the QF.

Thus, in Case No. IPC-E-04-02, the entire record before the Commission was based on the premise that RECs belonged to the generator.

While the end result of Order No. 29840 is a finding of non-judisicability, the Order accepts the underling recognition by all parties that the generator owns the RECs. Importantly, the Order says:

“While this Commission will not permit the Company in its contracting practice to condition QF contracts on inclusion of such a right-of-first refusal term, neither do we preclude the parties from voluntarily negotiating the sale and purchase of such a green tag should it be perceived to have value. The price of same we find, however, is not a PURPA cost and is not recoverable as such by the Company. Recovery of those expenses will be reviewed as are all other non-PURPA costs. (Order No. 29840, Pgs. 16-17).

This order language, which prohibits inclusion of a right-of first-refusal but permits voluntary sale and purchase, necessarily reflects a Commission acknowledgement that RECs are the property of the QF and that RECs have economic value to the QF which could be monetized by sale of the RECs to the utility.

Case No. IPC-04-16

Case No. IPC-E-04-16 was a routine PURPA contract approval case, with a twist. Following Order No. 29840, Idaho Power perceived that the Commission would not support a requirement that the QF generator turn over RECs to Idaho Power. Accordingly, in the Application Idaho Power waived any claim to environmental

attributes in return for an assurance that the waiver would not later be deemed imprudent.

The Application recites:

“On page 16 of Order No. 29480, the Commission states that it will not permit the Company in its contracting practice to condition QF contracts on inclusion of a right of first refusal for ownership of any Environmental Attributes credited to a QF. From this language, Idaho Power assumes that the Commission would not be supportive of the Company conditioning QF contracts on the QF's agreement to turn over the Environmental Attributes to the Company.

Within Article VIII of the Agreement presented with this Application, Idaho Power waives any claim to ownership of the Environmental Attributes. The Company is willing to agree to waive its ownership claims to encourage the development of additional cogeneration and renewable energy resources in Idaho without the need to increase energy purchase prices. Thus, Idaho Power is not seeking to retain a right of first refusal to purchase the Environmental Attributes but, instead, is clarifying that the Company will not claim any legal ownership interest in the Environmental Attributes associated with this Agreement” (Application, Pgs. 6-7).

Thus, for a second time, Idaho Power recognized in formal pleadings before the Commission that RECs are the property of the generator.

Staff Comments in the case questioned whether the Simplot generation facility produced any marketable RECs, but assuming that it did, Staff reiterated its views expressed in case No. IPC-E-04-02:

“In the event, however, that the Commission determines that the issue of environmental attributes has been squarely presented, Staff incorporates its related comments filed in Case No. PC-E-04-2 as if expressly set forth herein and includes same as an attachment to these comments. In those attached comments, Staff stated its belief that neither PURPA or other federal law (including the Energy Policies Act of 1992) nor Title 61 of the Idaho Code gives the Commission jurisdiction over environmental attributes. Staff recommended that if the Commission determined that it has jurisdiction, that the Commission issue a declaratory order stating that mandatory purchases from QFs under PURPA do not convey ownership of any marketable environmental attributes. *Accordingly, Staff recommended that any environmental attributes remain with the QF*”. (Staff Comments, Pgs. 4 Emphasis Supplied).

Similarly, the Commission re-stated its view that parties could voluntarily contract for the sale and purchase of RECs, necessarily acknowledging ownership by the QF:

“We note, as we did earlier, that the utility and QFs are free to voluntarily contract and negotiate the sale and purchase of such green tags should environmental attributes be perceived by the contracting parties to have value”. (Order No. 29577, Pg. 6).

In sum, Avista supports its claim of legal uncertainty by narrowly focusing on the end result of Order Nos. 29840 and 29577, and by ignoring the record and context of Case Nos. IPC-E-04-02 and IPC-E-04-16. As demonstrated above, when the full record of those cases are examined, the current state of law becomes clear—RECs are the property of the generator.

It is conceded that because the Commission is not a court, it is not as rigidly bound by the doctrine of *stare decisis* and is not required to decide all future cases as it has in the past. However, a departure from prior decisions or practices must be based on reasoned decision making and circumstances which require such departures. “If, however, the IPUC decides a case in a manner contrary to prior IPUC rulings the Court will consider whether the IPUC has adequately explained the departure from prior rulings so that a reviewing court can determine that the decisions are not arbitrary and capricious”. *Rosebud Enterprises v. IPUC*, 128 Idaho 609, 917 P.2d 766 (1996).

For the reasons stated in Sagebrush’s Motion to Reject Stay, and discussed further herein, Sagebrush--IFG respectfully suggests it is too early in the proceeding for the Commission to conclude it will more likely than not depart from prior holdings and the reasons for such departure. Accordingly, Avista’s Application is not free from doubt and it cannot be said there is a substantial likelihood Avista will prevail. In such a

circumstance injunctive relief in the form of a stay is improper. *Harris v. Cassia County*, 196 Idaho 513, 681 P.2d 988(1984).

Avista's Answer Contains An Irreconcilable Inconsistency

In its Answer, Avista first addresses the question of whether it is likely to prevail on the merits. Avista observes, correctly, that under federal law PURPA rates may not exceed the utility's incremental cost of alternative energy and then argues, "...that, absent a Commission order assigning the RECs associated with PURPA projects to the utilities that purchase the energy from such projects, the cost of energy from a PURPA wind project will substantially exceed the incremental cost to the utility of alternative electric energy." (Answer, Pg. 14). In this passage, Avista is clearly asserting that RECs are included in PURPA costs and that they are too high.

Later, Avista's Answer turns to Sagebrush's contention that the Avista Petition is a collateral attack on Order No. 30744. In its Motion to Reject Stay, Sagebrush argues that Avista's Petition is a not too thinly disguised attack on Order No 30744, which established the current avoided cost rates. (Motion, Pg. 5-6). Ignoring what it wrote two pages before, Avista now argues, "Avista's Petition does not take any position regarding whether the current avoided cost rates, which apply generally to all PURPA projects, are appropriate." Here, Avista is arguing that REC costs are not part of PURPA costs. (Answer, Pg. 16).

Regardless of how it ultimately attempts to resolve this inconsistency, Avista is in a dilemma. If it ultimately decides that RECs are part of PURPA costs, it must admit that its Petition is a collateral attack on Order No. 30744; if it ultimately decides RECs are not PURPA costs, Commission jurisdiction is doubtful for the reasons set out in Exergy's

Motion to Dismiss and its likelihood of prevailing is in doubt for the reasons pointed out in Sagebrush's Motion.

**There Are Additional Reasons To Believe Avista's Likelihood
Of Success Is In Doubt**

In its Motion, Sagebrush highlighted a series of legal and policy issues for the purpose of demonstrating that Avista's entitlement to the requested relief is far from clear and in consequence preliminary injunctive relief is improper. (Motion, Pg. 6-7).

Avista, in its Answer, is critical of Sagebrush, arguing that this "laundry list" is conclusory and without explanation. (Answer, Pg. 17).

Avista misses the point. As Sagebrush explained in its Motion, the arguments were listed, "...not with the expectations 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..." (Motion, Pg. 8).

Sagebrush—IFG request that the Commission consider the listed arguments only for the purpose for which they were offered: to gauge whether Avista's Petition is free from doubt.

Decisions From Other Jurisdictions Are Not Instructive

In its Answer, Avista provides citations to decisions in other state jurisdictions holding that RECs are transferred to the utility with the sale of electricity.

There are, however, an almost equal number of decisions from other jurisdictions holding the opposite—that RECs are the property of the generator. (*See, Who Owns Renewable Energy Certificates: An Exploration of Policy Options and Practice*, Lawrence Berkeley National Laboratory, April 2006).

These differing results appear to be explained by state-specific considerations such as whether a renewable portfolio standard has been adopted, whether legislative intent can be derived from other sources or whether the issue arises in the context of existing or new purchase power agreements.

An illustration of the diversity of state approaches in this area is found in the 2007 Idaho Energy Plan. As is well known, Idaho has not adopted anything in the nature of a renewable portfolio standard. The Idaho Legislature has taken the next, and unusual, step of affirmatively declaring that a standard should not be adopted. The IEP 2007 states:

“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.”(IEP 2007, Pg. 44).

Because decisions from other jurisdictions are dependent on state-specific circumstances, laws and policies, care should be taken before concluding that other state decisions are persuasive in Idaho.

Avista Is Not Subject To Immediate Irreparable Injury

The second prong of the test for eligibility for preliminary injunctive relief is whether the Applicant is threatened with immediate irreparable injury. In its Motion to Reject Stay, Sagebrush observes that Avista has not alleged any potential injury to itself in the nature financial calamity or the like.

In its Answer, Avista appears to concede this, but points to alleged overpayment of avoided cost rates as harming ratepayers. To support this argument, Avista points to the fact that it has received five requests for or inquires about PURPA contracts. (Answer, Pgs. 4, 18-19).

However, of the five requests/inquiries, only one is a wind QF—Sagebrush's proposed Project. The IFG and Fodge Pulp projects are all biomass cogeneration projects.

Avista's entire case is built on an argument that because of internal financial aspect of wind projects, current rates for wind projects are too high. (*See* Testimony of Clint Kalich). Avista offers no evidence or argument that PURPA rates for other renewable energy sources are too high.

Thus, Avista is currently faced with acquiring only 10 aMW of a resource it claims is too expensive, compared to a system total capacity of 1,787 MW. (*See* Testimony of Richard Storro, Case No. AVU-E-09-01, Pg. 3). This cannot be said to constitute irreparable injury either to Avista or its ratepayers.

Public Policy Considerations Tilt In Favor Of Sagebrush—IFG

In its Motion, Sagebrush argues that in addition to the fact that the Petition fails to establish grounds for a preliminary injunction as a matter of law, a stay would be bad public policy. Sagebrush argues that by the entry of Order No. 30744 the Commission created the potential for the revival of the PURPA scale renewable energy industry in Idaho, after a long period of dormancy. Further, denying the requested stay would advance the goal of consistency in regulation.

Both of these considerations have legislative support. The 2007 Idaho Energy Plan identifies renewable energy as the preferred resource, second only after conservation and efficiency. (IEP 2007, Pg. 48). And, the Plan urges consistency in implementation:

“The PUC has historically been among the leaders in encouraging customer-owned and local renewable generation through its implementation authority under PURPA. The Committee endorses this direction and urges the PUC to continue to administer its authorities in a way that encourages the development of local generation opportunities.” (IEP 2007, Pg. 55).

In its Answer, Avista does not directly dispute these points, but raises the concern of risk of ratepayer overpayment for PURPA resources. While, in the abstract, protecting ratepayers from overpayment is a legitimate Commission objective, on the facts of this case, it should not override the policy goals identified above.

First, the factual predicate for concern about overpayment is not clearly established. Avista’s argument is based solely on the testimony of Mr. Kalich, which testimony has not yet been subjected to discovery and resulting in-depth analysis. As Sagebrush notes in its Motion some of Mr. Kalich’s assumptions and methods appear debatable, at best. (Motion, Pgs. 4-5).

Further, as observed in the discussion of irreparable injury, *supra*, Avista is faced with acquiring only 10 aMW of the resource it claims is too expensive.

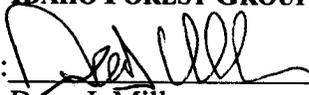
In this circumstance, the balance of policy considerations tips in favor of renewable energy development and consistency in regulatory implementation.

CONCLUSION

Based on the reasons and authorities cited herein Sagebrush—IFG respectfully request that the Motion to Reject Request for Stay be granted in its entirety.

DATED this 14 day of June, 2009.

SAGEBRUSH ENERGY LLC
IDAHO FOREST GROUP LLC

By: 

Dean J. Miller

*Attorney for Sagebrush Energy LLC and
Idaho Forest Group LLC*

CERTIFICATE OF SERVICE

I hereby certify that on the 10th day of June, 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 Houle
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