

BEFORE THE IDAHO PUBLIC UTILITIES COMMISSION

IN THE MATTER OF THE PETITION FILED)	
BY AVISTA CORPORATION FOR AN)	CASE NO. AVU-E-09-04
ORDER DETERMINING THE OWNERSHIP)	
OF THE ENVIRONMENTAL ATTRIBUTES)	
(RECS) ASSOCIATED WITH A [PURPA])	
QUALIFYING FACILITY UPON PURCHASE)	ORDER NO. 30921
BY A UTILITY OF THE ENERGY)	
PRODUCED BY A QUALIFYING FACILITY)	

BACKGROUND

On May 6, 2009, Avista Corporation (Avista) filed a Petition with the Idaho Public Utilities Commission (Commission; IPUC) for a declaratory order determining the ownership of the marketable environmental attributes (renewable energy credits or RECs) associated with wholesale sales of energy by a qualifying facility (QF) under the Public Utility Regulatory Policies Act of 1978 (PURPA) to a utility within the State of Idaho. IDAPA 31.01.01.101 (Petition for Declaratory Order).

Avista also petitions the Commission for a stay of “any requirement to award RECs to any PURPA developer” that has tendered or may tender a PURPA project to Avista pending issuance by the Commission of the requested declaratory order. IDAPA 31.01.01.053.01 (Stay of Existing Orders or Rules).

On May 26, 2009, Exergy Development Group of Idaho LLC (Exergy) filed a Motion to Dismiss Avista’s Petition for Declaratory Order. Exergy contends that the Commission lacks subject matter jurisdiction to decide the proper ownership of renewable energy credits or RECs. Exergy contends further that Avista’s Petition is an impermissible collateral attack on the Commission’s final Order No. 29480 in Idaho Power Company Case No. IPC-E-04-02 (wherein the Commission denied Idaho Power’s Petition for a Declaratory Order determining ownership of RECs).

On 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 (i.e., a request for preliminary relief prior to a full hearing on the merits) should be evaluated under the law of preliminary injunctions (IRCP 65e). To be entitled to a preliminary injunction, Sagebrush

contends, Avista must prove two things: (1) that Avista is entitled to the relief demanded and there is a substantial likelihood that the Company is likely to prevail; and (2) that Avista will suffer irreparable injury in the absence of an injunction. Sagebrush contends that Avista fails on both counts.

On June 17, 2009, oral arguments were held in Case No. AVU-E-09-04 on the issues raised by Exergy in its Motion to Dismiss and Sagebrush in its Motion for Order Denying Petition for Stay.

WITHDRAWAL OF PETITION

On July 28, 2009, Avista filed a Notice of Withdrawal of Petition pursuant to Commission Rule of Procedure 68. The Commission not ordering otherwise, the Notice was effective 14 days after filing (August 11, 2009).

PETITION FOR INTERVENOR FUNDING – SAGEBRUSH

On August 3, 2009, Sagebrush Energy LLC filed a Petition for Intervenor Funding requesting \$6,799.35 (comprised of \$5,665 attorney fees (25.75 hours at \$220 per hour), \$1,053.15 for Sagebrush travel expense and \$81.72 for office expense). Sagebrush contends that costs incurred by it constitute a significant financial hardship because the company is a small renewable energy development firm. The filing of Avista's Petition created specific delays and complications with PURPA contract negotiations and appears to have closed out opportunities for Sagebrush to purchase deeply discounted turbines and added unanticipated unbudgeted costs to Sagebrush operations. These hardships have affected investors' willingness to finance the deal between Avista and Sagebrush. The only costs Sagebrush seeks to recover are direct expenses associated with Sagebrush travel and direct legal fees associated with Avista's Petition.

Sagebrush contends that an otherwise meritorious request for intervenor funding should not fail because the utility withdrew its Petition before a written Order could be issued. For precedent of an award of intervenor funding to a PURPA QF the Commission's attention is cited to Order No. 29147, Case No. GNR-E-02-1.

PETITION FOR INTERVENOR FUNDING – EXERGY

On August 3, 2009, Exergy filed a Motion to Condition Withdrawal on reimbursement of parties' expenses or in the alternative a Petition for Intervenor Funding. The amount requested by Exergy is \$12,456 (consisting of \$12,255 in attorney fees (\$200 per hour)

and \$201.60 in office expense). Exergy contends that it is apparent from the filings in the case that Avista was 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 time and effort on behalf of the intervenors, Exergy contends, should not be condoned by this Commission. Costs Exergy expended, it states, were in good faith reliance on the Company's initial pleading in this docket.

COMMISSION FINDINGS

On July 28, 2009, Avista filed a Rule 68 Notice of Withdrawal of Petition in Case No. AVU-E-09-04. The Company's Petition was a request for a Commission determination regarding ownership of Renewable Energy Credits. Without Commission action the Notice was effective August 11, 2009.

Two Petitions for Intervenor Funding have been filed: (1) Sagebrush -- \$6,799.35 and (2) Exergy -- \$12,456.

Intervenor funding is available pursuant to *Idaho Code* § 61-617A and Commission Rules of Procedure 161-165. Section 61-617A(1) declares that it is "the policy of [Idaho] to encourage participation at all stages of all proceedings before this commission so that all affected customers receive full and fair representation in those proceedings." The statutory cap for intervenor funding that can be awarded in any one case is \$40,000. *Idaho Code* § 61-617A(2). Accordingly, the Commission may order any regulated utility with intrastate annual revenues exceeding \$3.5 million to pay all or a portion of the costs of one or more parties for legal fees, witness fees and reproduction costs not to exceed a total for all intervening parties combined of \$40,000.

Rule 162 of the Commission's Rules of Procedure provides the form and content requirements for a Petition for Intervenor Funding. The petition must contain: (1) an itemized list of expenses broken down into categories; (2) a statement of the intervenor's proposed finding or recommendation; (3) a statement showing that the costs the intervenor wishes to recover are reasonable; (4) a statement explaining why the costs constitute a significant financial hardship for the intervenor; (5) a statement showing how the intervenor's proposed finding or recommendation differed materially from the testimony and exhibits of the Commission Staff; (6) a statement showing how the intervenor's recommendation or position addressed issues of concern to the general body of utility users or customers; and (7) a statement showing the class

of customer on whose behalf the intervenor appeared. The Petitions for Intervenor Funding in this case were timely filed and comport with the procedural and technical requirements of the Commission's rules.

Idaho Code § 61-617A includes a statement of policy to encourage participation by intervenors at all stages of all proceedings before the Commission. The Commission determines an award for intervenor funding based on the following considerations:

- (a) A finding that the participation of the intervenor has materially contributed to the decision rendered by the Commission; and
- (b) A finding that the costs of intervention are reasonable in amount and would be a significant financial hardship for the intervenor; and
- (c) The recommendation made by the intervenor differed materially from the testimony and exhibits of the Commission Staff; and
- (d) The testimony and participation of the intervenor addressed issues of concern to the general body of users or consumers.

Idaho Code § 61-617A.

In considering the reasonableness of the Petitions for Intervenor Funding filed by Exergy and Sagebrush, the Commission pursuant to *Idaho Code* § 61-617A is required to consider whether the payment of the amount requested by intervenors would constitute a "significant financial hardship." Addressing the issue of hardship, the Petitioners for Intervenor Funding make the following statements:

Exergy

"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. . . ."

Sagebrush

"The costs described . . . constitute a significant financial hardship for Sagebrush because the company is a small renewable energy development firm that carefully allocates limited investor funds to specific tasks."

Most awards to intervenors by this Commission have historically been to non-profit organizations, rarely to for-profit corporations. In this case, the positions advanced by the intervenors were clearly to serve their economic interests and those of other QFs. While the

Commission appreciates the participation of both Exergy and Sagebrush in this case, we do not find that an award of funding is required to encourage their participation. The end result, withdrawal of the Petition by Avista, we find was in line with the relief requested by intervenors – Motion to Dismiss and Motion to Deny Stay.

While the Commission has a certain amount of discretion in making awards of intervenor funding, we find a critical element for any award to be that of financial hardship. Both petitioners are PURPA QFs. Both are for-profit corporate entities. Pursuant to FERC rules this Commission is constrained from inquiring into the finances of QFs. 18 C.F.R. § 292.602(c)(ii). We find the respective offers of proof regarding hardship by Exergy and Sagebrush in this case to be insufficient. This Commission, however, will not inquire further; nor will we entertain any additional voluntary offer of proof. Given the nature of the proceedings in this case and on the facts presented, we find that the Petitioners are not qualified recipients of intervenor funding. Accordingly, we find it reasonable to deny the Petitions for Intervenor Funding.

CONCLUSIONS OF LAW

The Idaho Public Utilities Commission has jurisdiction over Avista Corporation dba Avista Utilities, an electric utility, pursuant to the authority and power granted under Title 61 of the Idaho Code and the Public Utility Regulatory Policies Act of 1978 (PURPA). The Commission has authority under 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 and to implement FERC rules.

ORDER

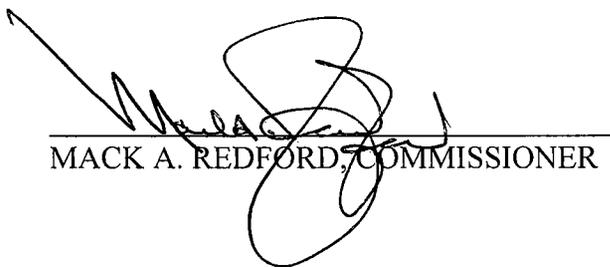
In consideration of the foregoing and for reasons set forth above IT IS HEREBY ORDERED and the Commission hereby denies the Petitions for Intervenor Funding filed by Exergy Development Group of Idaho LLC and Sagebrush Energy LLC in Case No. AVU-E-09-04.

THIS IS A FINAL ORDER. Any person interested in this Order may petition for reconsideration within twenty-one (21) days of the service date of this Order. Within seven (7) days after any person has petitioned for reconsideration, any other person may cross-petition for reconsideration. See *Idaho Code* § 61-626.

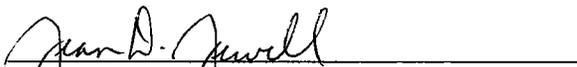
DONE by Order of the Idaho Public Utilities Commission at Boise, Idaho this 8th
day of October 2009.


JIM D. KEMPTON, PRESIDENT


MARSHA H. SMITH, COMMISSIONER


MACK A. REDFORD, COMMISSIONER

ATTEST:


Jean D. Jewell
Commission Secretary

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