

DECISION MEMORANDUM

**TO: COMMISSIONER KEMPTON
COMMISSIONER SMITH
COMMISSIONER REDFORD
COMMISSION SECRETARY
COMMISSION STAFF
LEGAL**

**FROM: SCOTT WOODBURY
DEPUTY ATTORNEY GENERAL**

DATE: MAY 21, 2009

**SUBJECT: CASE NO. AVU-E-09-04 (Avista)
PETITION FOR DECLARATORY ORDER – OWNERSHIP OF RECs
ASSOCIATED WITH QF PURPA CONTRACTS
PETITION FOR STAY – OF ANY REQUIREMENT TO AWARD RECs
TO QF REQUESTING A PURPA CONTRACT**

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).

Avista in its Petition and in the testimony of Clint Kalich, Manager of Resource Planning and Power Supply Analyses in Avista’s Energy Resources Department, sets forth its argument for a Commission Order declaring that the ownership of environmental attributes associated with PURPA projects are to be assigned to the utilities that purchased the energy from such projects. Avista does not believe that an evidentiary hearing is necessary to consider the issues presented in its Petition and requests that the matter be processed under Modified

Procedure, i.e., by written submission rather than by hearing. Reference Commission Rules of Procedure, IDAPA 31.01.01.201-204.

BACKGROUND

In support of its Petition, Avista recites that in a petition for declaratory order seeking an interpretation of Section 210 of PURPA, the Federal Energy Regulatory Commission (FERC) determined that the ownership of environmental attributes (sometimes referred to as RECs) is not controlled by PURPA. *American Ref-Fuel Co., et al.*, 105 FERC ¶ 61,004, p. 23 (2003), *Order on Reh'g*, 107 FERC 61,016, p. 12 (2004). FERC further held that “States, in creating RECs, have the power to determine who owns the REC in the initial instance, and how they may be sold or traded.” *Id.* Accordingly, Avista states, the Idaho Public Utilities Commission has the authority to determine the ownership of environmental attributes associated with a wholesale sale of energy by a QF to a utility under PURPA.

In 2004, Avista recites that Idaho Power Company filed a petition for declaratory order from the IPUC “determining ownership of the marketable environmental attributes associated with a PURPA Qualifying Facility when the [utility] enters into a long-term, fixed rate contract for the purchase of the energy produced by that QF.” Case No. IPC-E-04-02, Order No. 29480. Idaho Power recommended that the Commission determine that the qualifying developers of new renewable resources receive full ownership rights in any green tags issued to them conditioned upon the requirement that the QF developers who qualify for green tags and from whom Idaho Power purchases energy grant the utility a “right of first refusal” to purchase those tags.

As reflected in the Commission’s Order No. 29480:

All commenters recommend for different reasons that the ultimate relief requested by Idaho Power, i.e., that the Company be provided a “right of first refusal” to purchase the environmental attributes or green tags associated with required QF purchases, be denied. PacifiCorp and Avista maintain that the environmental attributes or green tags associated with renewable resources are the property of the purchasing utility. The Bonneville Environmental Foundation, Northwest Energy Coalition and Advocates for the West recommend that the Commission confirm that QF developers own the environmental attributes associated with their projects, free from rights of first refusal. Exergy Corporation, Bob Lewandowski and Mark Schroeder and Commission Staff contend that the Commission has no jurisdiction or authority stemming from either PURPA, FERC implementing regulations or Idaho state law to grant the requested relief.

The Commission made the following findings:

We find that the issue presented by Idaho Power in its Petition does not present an actual or justiciable controversy in Idaho and is not ripe for a declaratory judgment by this Commission. Declaratory rulings are appropriate regarding the applicability of any statutory provision or of any rule or order of this Commission. See IDAPA 31.01.01.101; Uniform Declaratory Judgment Act *Idaho Code* § 10-1201 *et seq.* A declaratory ruling contemplates the resolution of prospective problems. The rights sought to be protected by a declaratory judgment may invoke either remedial or preventive relief; it may relate to a right that is only yet in dispute or a status undisturbed but threatened or endangered; but in either event it must involve actual and existing facts. Idaho Code Supreme Court in *Harris v. Cassia County*, 106 Idaho 513, 516-517, 618 P.2d 988 (1984). We find that none of the predicates are present in this case. In making this finding, the Commission notes that FERC on April 15, 2004 (Docket EL03-133-001, 107 FERC ¶ 61,016) denied rehearing of its earlier October 1, 2003 Order (105 FERC ¶ 61 004). We note also that the State of Idaho has not created a green tag program, has not established a trading market for green tags, nor does it require a renewable resource portfolio standard.

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.

The Commission in Order No. 29480 denied Idaho Power's Petition for a Declaratory Order and any all other relief requested by the commenting parties as may be related to the "environmental attributes" associated with QF renewable energy.

Avista contends that since the Commission's Order in Case No. IPC-E-04-02, circumstances have substantially changed. Specifically:

1. PURPA rates have increased substantially.

The current avoided cost rates in the State of Idaho that Avista is required to pay for energy generated by PURPA wind projects is \$84.30/MWh (i.e., the 2010 levelized rate is \$90.64/MWh which is reduced by 7% for wind integration).

2. Interest in PURPA contracts has increased.

Avista is currently negotiating new PURPA contracts for five proposed projects.

3. States have adopted renewable portfolio standards.

The State of Washington has adopted renewable portfolio standards (RPS) that require utilities, including Avista, to meet certain targets by 2012, 2016, and 2020. See RCW 19.285.010 *et seq.* Utilities can meet such targets by acquiring equivalent renewable energy credits. RCW 19.285.040.

4. A robust market for RECs has emerged.

Avista is currently marketing RECs from its Spokane River projects, its Kettle Falls biomass project, and its contracted interest in the Stateline Wind Farm to other states that already have requirements. Kalich, p. 15.

5. The value of RECs has increased dramatically.

Recent market activity indicates that \$15/MWh is a reasonable forward price for RECs. Kalich, p. 5.

Avista contends that the rates Avista customers are required to pay for energy from wind QF resources are substantially higher than the avoided costs associated with a similar project that is developed, owned and operated by Avista or the contract price that Avista would expect to pay for renewable energy acquired through a competitive process. The Northwest Power and Conservation Council estimates for wind generation project development, construction and operation result in an avoided cost of \$64/MWh when levelized over 20 years. Transferring the environmental attributes associated with a QF to the utility purchasing the energy produced by that QF, Avista states, would reduce this disparity. Commission action is now necessary, Avista contends, to ensure that “the rates for [purchases of electric energy] from QFs [are] just and reasonable to the ratepayers of the utility, in the public interest, and [do] not discriminate against cogenerators or small power producers [and do] not exceed the incremental cost to the electric utility of alternative electric energy. . . .” Reference 18 C.F.R. § 292.101(b)(6) Definition – Avoided Costs and 292.304(a)(1)(i)(ii) Rates for Purchases.

COMMISSION DECISION

Avista requests a Commission Order declaring that the ownership of environmental attributes associated with PURPA projects is to be assigned to the utilities that purchase the energy from such projects. IDAPA 31.01.01.101. Pending issuance of a declaratory order, Avista requests a stay of any requirement to award RECs to PURPA developers. IDAPA 31.01.01.053.01.

Avista recommends that its Petitions be processed under Modified Procedure. IDAPA 31.01.01.201-204. Staff notes that Petitions for Intervention have been filed by Idaho Power, PacifiCorp, Idaho Forest Group, Sagebrush Energy, Exergy Development Group of Idaho and Sorenson Engineering. Staff recommends that a Notice of Petitions for Declaratory Order and Stay be issued, that an intervention deadline be established, and that a deadline be established for initial written comments regarding the Petitions filed by Avista. How does the Commission wish to process the Company's Petitions?



Scott Woodbury
Deputy Attorney General

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