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BEFORE THE
IDAHO PUBLIC UTILITIES COMMISSION

IN THE MATTER OF A REVIEW OF THE SURROGATE AVOIDABLE RESOURCE ("SAR") METHODOLOGY FOR CALCULATING PUBLISHED AVOIDED COST RATES	CASE NO. GNR-E-09-03 EXERGY DEVELOPMENT GROUP OF IDAHO'S REPLY COMMENTS

INTRODUCTION

Exergy Development Group of Idaho, LLC ("Exergy"), by and through undersigned counsel, hereby files reply comments regarding the Idaho Public Utilities Commission's generic

electric docket on the Surrogate Avoidable Resource ("SAR") methodology for calculating published avoided cost rates under the Public Utility Regulatory Policies Act of 1978 ("PURPA"). Exergy is an independent developer of PURPA wind energy projects, and would be affected by an alteration of the SAR methodology.

Exergy believes that the current SAR methodology for calculating avoided cost rates for Qualifying Facilities ("QFs") smaller than 10 aMW, which employs a natural gas-fired combined cycle combustion turbine ("CCCT") as the surrogate resource, is adequate as a matter of law and policy. Exergy disagrees with the comments of Idaho Power Company, Avista Corporation, and Rocky Mountain Power (collectively "the utilities"), as well as the Commission Staff, to the extent those parties advocate the Commission should adopt a methodology employing a wind project as the surrogate resource used to compute avoided cost rates for wind QFs. Further, even if the Commission were to employ a wind SAR, Exergy believes the wind SAR methodology advocated by the utilities and Staff would violate not only PURPA, but also the Supremacy Clause of United States Constitution.

BACKGROUND

A. Federal Laws Promoting Renewable Energy Development

1. PURPA

"Congress passed PURPA in 1978 in response to the prevailing energy crisis." *Rosebud Enterprises, Inc. v. Idaho Public Utilities Commission*, 128 Idaho 609, 613 (1996); *see also* Pub.L. No. 95-617 (Nov. 9, 1978). Congress's intent "was to encourage the promotion and development of renewable energy technologies as alternatives to fossil fuels and the construction of new generating facilities by electric utilities." *Rosebud Enterprises, Inc.*, 128 Idaho at 613.

Section 210 of PURPA requires electric utilities to purchase power produced by cogenerators or small power producers that obtain QF status under section 201. 16 U.S.C. § 824a-3(a)(2). Under PURPA section 210(b), however, the rate to be paid for such power is not to exceed the "incremental cost to the utility of alternative electric energy." *Id.* at § 824a-3(b),(d).

Federal Energy Regulatory Commission ("FERC") rules provide QFs with the option of selling power to a utility based on the utility's "avoided costs" at the time of delivery or at the time the qualifying facility's legally enforceable obligation to deliver power is incurred. *See* 18 C.F.R. § 292.304(d). PURPA and related FERC regulations require that the avoided cost rates (1) be just and reasonable to the electric utility's consumers and in the public interest, and (2) not discriminate against qualifying cogenerators or small power producers. 16 U.S.C. § 824a-3(b); 18 C.F.R. § 292.304(a)(1), (2).

2. The Renewable Energy Tax Credits

Congress first enacted the renewable energy production tax credit ("PTC") in § 1914 of the Energy Policy Act of 1992. *See* P.L. 102-486, § 1914 (Oct. 24, 1992); *see also* 26 U.S.C. § 45 (codification of PTC in Internal Revenue Code). The purpose of any tax credit is to encourage the activity for which Congress allows a credit – here, development of renewable energy projects, be it for their environmental, economic development, or energy security benefits. Indeed, the Energy Policy Act of 1992 stated that the purpose of renewable energy incentives was "to promote . . . increases in the production and utilization of energy from renewable energy resources." P.L. 102-486, at § 1201(1).

The initial PTC was a production-based credit for the first 10 years of project operations beginning at 1.5 cents/kWh (adjusted upwards, in future years, for inflation). P.L. 102-486, at §

1914. Congress reduced the PTC in § 1914 for amounts renewable energy developers received in certain grants, tax-exempt bonds, subsidized energy financing, and other credits. *See id.* (enacting 26 U.S.C. § 45(b)(3)). But Congress did not reduce the PTC for any economic advantage that PURPA's avoided cost rates bestowed on renewable energy projects. Although the PTC has lapsed twice since its initial enactment, Congress has re-enacted, extended, or expanded it several times, and thus had many occasions to revisit the effect of the PTC and its interplay with other legislative enactments promoting renewable energy development. *See* P.L. 106-170, § 507 (Dec. 19, 1999); P.L. 107-147, § 603 (March 9, 2002); P.L. 108-311, § 313 (Oct. 4, 2004); P.L. 109-58, § 1301 (August 8, 2005); P.L. 109-432, § 201 (Dec. 20, 2006); P.L. 111-5, § 1101 (Feb. 17, 2009).

Through all these years and all these revisions, Congress has never expressed any intent that the PTC not apply to projects that utilize PURPA's avoided cost rates. *See* 26 U.S.C. § 45(b)(3) (2009). Indeed, in the Energy Policy Act of 2005, Congress renewed the PTC in § 1301, and in § 1253 of the same law, terminated PURPA's mandatory purchase and sale requirements for QFs in jurisdictions where FERC finds that new facilities have access to wholesale power markets and transmission services. P.L. 109-58, at §§ 1253, 1301. That Congress left PURPA intact in non-competitive jurisdictions -- such as Idaho -- exhibits intent to allow QF's to use both PURPA's avoided cost rates and the PTC.

Moreover, in the most recent extension of the PTC, Congress not only extended a version of the initial PTC (now at 2.1 cents/kWh) for projects "placed in service" by 2012, but it provided also an alternative that is even more economically advantageous for certain projects. *See* American Recovery and Reinvestment Act ("ARRA") of 2009, P.L. 111-5, §§ 1101, 1102

(Feb. 17, 2009). Specifically, § 1102 of the ARRA provided a right for certain renewable energy developers to exercise a 30% tax credit for investments in projects in lieu of the PTC. *Id.* at § 1102. By providing a tax credit for up-front investments in the project (rather than against production which will occur over several years), this alternative demonstrates Congress's intent to further hasten development of renewable energy projects.

B. The Prior and Current SAR Methodology for QFs smaller than 10 aMW

The current administrative SAR methodology for calculation of published avoided cost rates for QFs smaller than 10 aMW is based on the estimated costs that a utility would incur in constructing a natural gas-fired CCCT plant. Prior to that, the surrogate was a hypothetical base load coal-fired generation plant located in Wyoming. Under the prior and current SAR methodologies, renewable energy developers could properly realize the value of the PTC (or now the investment credit) because the avoided cost rate was not decreased downward for the credit.

C. The Proposed Wind SAR Methodology

The utilities and Staff now propose abandoning the published, natural gas-fired, CCCT SAR methodology, and replacing it with a wind SAR. According to them, the published SAR provides QFs with an avoided cost rate that is higher than rates awarded to wind energy projects acquired through the competitive bidding process. This difference is primarily due to the lack of a discount in the published avoided cost rate for the economic benefits to wind developers from the tax credits and from the value of renewable energy credits ("RECs"), which has increased substantially due to neighboring states' renewable portfolio standards ("RPSs"). The utilities assert that this situation is unfair. Staff, too, asserts that a wind SAR would be a superior alternative, at least for intermittent resource QFs.

DISCUSSION

The Commission in its Notice posed the following questions:

1. Does the present SAR methodology for published avoided cost rates need to be modified or augmented? Yes or no.

2. If answer to Question 1 is no, please provide the basis for your answer.

3. If answer to Question 1 is yes,

   a. Please provide the basis for your answer.

   b. In broad and general terms, how should the methodology be modified or augmented?

Exergy answers question one in the negative, and, even if Exergy could agree to some type of modified SAR methodology, the wind SAR methodologies proposed by the utilities and Staff are unacceptable as a matter of law and policy. In support, Exergy provides the reasoning set forth below, and Exergy hereby also joins in the Comments of Sagebrush Energy.

A. The proposed wind SAR methodology would violate the Supremacy Clause by depriving wind QFs of the federal tax credit.

The Supremacy Clause gives Congress the power to preempt state law. *Crosby v. National Foreign Trade Council*, 530 U.S. 363, 372 (2000). Even absent express preemption, Congress preempts state law (1) when "Congress intends federal law to occupy the field," or (2) when there is "any conflict with a federal statute." *Id.* (internal quotation omitted). Preemption occurs "where under the circumstances of [a] particular case, the challenged state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Id.* at 372-73 (internal quotation and alteration omitted). The courts make this determination by examining "the federal statute as a whole and identifying its purpose and

intended effects." *Id.* at 373.

The federal courts have held that federal tax provisions preempt state laws or actions that effectively nullify the tax provision at issue. *See, e.g., Russell v. United States*, 551 F.3d 1174, 1180 (10th Cir. 2008) (holding federal tax lien law preempted Colorado law allowing for extinguishment of third party's rights); *Bosarge v. United States Dept. of Educ.*, 5 F.3d 1414, 1419 (11th Cir. 1993) (holding federal tax refund intercept statute preempted Alabama law exempting certain personal property from "process for the collection of debts").

Here, the federal tax credit for renewable energy projects preempts adoption of the proposed wind SAR because the proposed SAR would deprive QFs of the value of the tax credit. By reducing the avoided cost paid to QFs by the amount of the federal tax credit, the proposed SAR methodology offsets the tax credit's value to QFs. This is in direct contradiction of the stated purpose of both PURPA and the federal tax credit – to promote development of renewable resources. PURPA's avoided cost rate and the federal production (or investment) tax credit work in conjunction in Idaho, and Congress has never expressed intent to reduce the federal tax credit by any economic benefit PURPA provides. In 2005, Congress reexamined both provisions, and passed a single piece of legislation that left both the avoided cost rate methodology and the PTC available to QFs in Idaho. *See* P.L. 109-58, at §§ 1253, 1301. The Commission, therefore, has no authority to adopt a wind SAR methodology that decreases the avoided cost rate by the amount of the federal tax credits because federal law preempts such state action.

Further, PURPA prohibits discriminating against qualifying small power producers. 16 U.S.C. § 824a-3(b). By depriving wind QFs under 10 aMW of the renewable energy tax credit available to larger wind projects in the competitive bidding process, the Commission would

discriminate against qualifying small producers in violation of PURPA.

B. The proposed wind SAR methodology would violate PURPA by depriving wind energy developers of RECs.

As Exergy asserted in IPUC Case No. AVU-E-09-04, the Commission lacks jurisdiction to determine ownership of RECs. In addition to the arguments set forth in that docket by Exergy and Sagebrush, Exergy further asserts that RECs have no re-sale value to utilities that operate in jurisdictions with RPSs. The utility would not resell the RECs if it developed its own wind resource because those RECs would go towards meeting the utilities' targeted RPS. The published natural gas-fired, CCCT SAR methodology does not increase the avoided cost rate by the cost of obtaining RECs on the open market for those utilities who must do so to meet an RPS. So the utilities may not now decrease the avoided cost rate by the amount for which they could theoretically sell RECs if they developed and owned them. In sum, RECs came into existence long after PURPA was enacted, and are simply separate from, and outside of, the avoided cost inquiry. *See American Ref-Fuel Co., et al.*, 105 FERC ¶ 61,004, p. 23 (2003), *order on reh'g*, 107 FERC 61,016, ¶ 12 (2004) (holding that avoided cost rules under PURPA cannot be the basis for transferring ownership of RECs to the utility purchasing the power).

C. Rocky Mountain Power's proposed wind SAR methodology would violate PURPA by including an unrealistically high capacity factor without accounting for costs of transmission from Wyoming to population centers in Idaho.

Rocky Mountain Power proposes to utilize a capacity factor of 38 %, which is typical for a wind farm in Wyoming. *Comments of Rocky Mountain Power*, at p. 6. But this is significantly higher than capacity factors at wind projects near Idaho population centers, and would therefore render the avoided cost of the surrogate wind project significantly lower than that of a similar

project in Idaho. When the surrogate resource was a Wyoming coal-fired power plant, the avoided cost methodology included an upward adjustment to account for the cost of transmission of the electricity produced in Wyoming to the population centers of Idaho. A Wyoming wind SAR must also take into account higher transmission costs.

E. Exergy opposes any moratorium or grandfathering requirements with the effect of a moratorium.

1. Proposed moratorium

Exergy opposes a moratorium on new wind QFs pending resolution of this issue. The Commission lacks jurisdiction to suspend operation of PURPA because PURPA compels states to administer the federally determined avoided cost rate methodology. *See FERC v. Mississippi*, 456 U.S. 742, 751 (1982). The Commission simply does not have the legal authority to suspend PURPA for any resource. Doing so would subject the Commission to enforcement action by FERC. *See id.*; 16 U.S.C. § 824a-3(h).

2. Grandfather requirements

Exergy further opposes any grandfathering requirements that would have the effect of a moratorium. To achieve grandfathered status, the utilities advocate for requiring QFs to post a "liquidated damages amount that would be retained by the utility," just in case the QF fails to diligently proceed through the interconnection process, perform on the power purchase agreement, and achieve the scheduled commercial operation date. *See Idaho Power and Avista's Initial Joint Comments*, at p. 8; *see also Rocky Mountain Power's Comments*, at pp. 9-10.

The Commission has no authority to provide remedies for a breach of a QF contract. *See Idaho Power Co. v. Cogeneration Inc.*, 129 Idaho 46, 49 (1996) (collecting cases and holding that the "district court is the appropriate forum for utility contract disputes," not the

Commission). And requiring QFs to involuntarily post a bond for liquidated damages prior to occurrence of any breach would violate the QFs' due process rights. The utilities must proceed with a court action to obtain contract damages, just like any other commercial entity.

Furthermore, the high bonding requirements proposed in the utilities' comments are financially prohibitive to QFs wishing to enter the market. Thus, even if the Commission can modify PURPA contracts in the public interest, imposing these prohibitive requirements on QFs would have the effect of a moratorium and would not be in the public interest. As discussed above, a moratorium would exceed the Commission's authority, and it would stymie development of small, renewable projects in Idaho, in direct contradiction of the purposes of PURPA and the federal tax credit.

CONCLUSION

Exergy respectfully requests that the Commission leave unchanged the published SAR methodology. Alternatively, a wind SAR methodology may not decrease the avoided cost rate by the value of the federal renewable energy production or investment tax credits, or by the value of RECs. Additionally, if the methodology employs the capacity factor of a Wyoming wind farm, it must employ also the transmission costs of a Wyoming wind farm. Finally, the Commission should not impose a moratorium on new wind QFs and should not impose grandfathering requirements with the practical effect of moratorium.

Respectfully submitted:

Richardson and O'Leary PLLC

Gregory M. Adams

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 29th day of September, 2009, a true and correct copy of the within and foregoing **EXERGY DEVELOPMENT GROUP OF IDAHO'S REPLY COMMENTS** was served in the manner shown to:

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