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IDAHO PUBLIC
UTILITIES COMMISSION

Attorneys for Exergy Development Group of Idaho LLC

BEFORE THE
IDAHO PUBLIC UTILITIES COMMISSION

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

COMES NOW, Exergy Development Group of Idaho LLC ("Exergy") by and through its attorneys of record, Peter J. Richardson and Gregory M. Adams, pursuant to that request for comments to Staff's "Strawman Proposal" of May 27, 2010, and hereby lodges its Comments.¹

I

The IPUC may not implement different PURPA rates for different resource types, unless narrowly tailored only to address different supply characteristics.

FERC's regulations do not allow for different avoided costs to different QF resource types, unless those different rates are based on the different supply characteristics of the QF

¹ Exergy filed extensive *Reply Comments* in this docket several months ago, wherein it addressed several elements of the proposed wind SAR, including treatment of the renewable energy tax credits, REC ownership, capacity factors and transmission costs, and the proposed moratorium on wind QF projects pending resolution of this docket. Exergy stands by all comments raised at that time, and renews those comments in response to Staff's Strawman proposal.

resources. *See American Ref-Fuel Co., et al.*, 105 FERC ¶ 61,004, ¶¶ 21-22 (2003), *order aff'd on reh'g*, 107 FERC ¶ 61,016, ¶¶ 14-15 (2004) (citing the factors listed in 18 C.F.R. § 292.304(e) as the sole basis to calculate avoided costs). With regard to calculating standard or published avoided cost rates, FERC regulations allow for different published rates available to QFs of differing generation technology only “on the basis of the *supply characteristics* of the different technologies.” 18 C.F.R. 292.304(c)(3)(ii) (emphasis added). *See also* FERC Order no. 68, 45 Fed. Reg. 12214, 12224 (Feb. 25, 1980) (promulgating this regulation and noting as an example, “[i]f it can be shown that system peak occurs when there is bright sun and no wind, rates for purchase could provide a higher capacity payment for photovoltaic cells than for wind energy conversion systems”). A modern-day example may include a narrowly tailored reduction in avoided cost rates available to intermittent resources after a showing that the utility incurs different costs stemming from the *supply characteristics* of a particular intermittent resource.

This Commission has already adjusted wind QF rates to account for their unique supply characteristics. In case No. IPC-E-07-03, the Commission considered the appropriate amount of adjustment to the avoided cost rates paid to wind QFs in order to integrate such resources into the utilities' systems. In that docket, the Commission imposed a wind integration charge upon wind QFs and also implemented a mechanical availability guarantee on wind QFs. The Commission revisited the integration charge issue just this year in Order No. 31021, wherein it increased PacifiCorp's wind integration charge to wind QFs taking the published avoided cost rates from \$5.10/MWh to \$6.50/MWh.

Here, the IPUC Staff Strawman proposes to implement different rates for wind developers based on the all-in costs of developing that particular resource being different than the costs to develop a natural gas CCCT power plant -- a matter wholly separate from any supply

characteristics. The reason IPUC Staff's Wind SAR produces a different rate is because the hypothetical utility built wind resource has different costs to construct and associated tax benefits than the hypothetical gas CCCT resource. FERC regulations do not allow for differential treatment on that basis when calculating published rates.

Staff's Strawman Proposal ironically turns 18 C.F.R. § 292.304(c)(3)(ii) on its head by penalizing wind QFs with a wind integration charge, but ignoring the fact that when a utility builds its own wind resource it incurs the very same charges to integrate the wind.² If wind were indeed the avoided resource of choice and a wind SAR were implemented, the utility built model must pay the same wind integration charge the utilities are otherwise charging wind QFs. Consequently, the avoided cost would *increase* by the cost to integrate wind. Thus, for non-intermittent QFs taking this wind SAR rate, the avoided cost rate would be increased because the utility is avoiding the cost of integrating wind from its hypothetically avoided wind resource. For wind QFs, even if the utility could charge an integration charge to the QF, that amount would be cancelled out by the increased avoided cost rate in the wind SAR to account for integration costs the utility would incur developing its own wind resource. If wind integration is a real cost utilities incur, it must increase the avoided costs in the wind SAR model; if it is not a real cost, the utilities may not charge wind developers for it outside of the model. Staff's Strawman Proposal's failure to properly account for this supply characteristic demonstrates that the motives of this wind SAR exercise drift far afield from FERC regulations.

² The Comments of Rocky Mountain Power circulated in this docket today even assert that charge should be \$11.69/MWh -- almost double the charge approved by the Commission only a few months ago in Order No. 31021.

II

Baseload Natural Gas Plants are the Resource of Choice for all Three Investor Owned Utilities Operating in Idaho and Hence are the True Measure of Their Avoided Costs

The utility's avoided costs do not change based solely on the QF technology being used.³ For the Staff's Strawman proposal to be legitimate as a measure of the avoided cost rate, wind would have to be the next resource relied on by the utility in its resource stack. That is decidedly not the case. Natural gas fired combined cycle combustion turbines are currently the next resource of choice for all three IOUs operating in Idaho. Even a cursory review of the IOUs' integrated resource plans shows that wind is a minor and distant player. Natural gas plants are central to the ability of Idaho's utilities to meet future growth.

To suggest that wind is the legitimate avoided resource ignores reality. For example, as recently as September of last year, this Commission approved a natural gas fired resource with an estimated levelized cost of \$126 per MWh for Idaho Power. *See In the Matter of Idaho Power Company's Application for a CPCN for the Langley Gulch Power Plant*, Order No. 30892, p. 6 (September 1, 2009); *see also Comments of the Commission Staff*, Case No. IPC-E-09-34, p. 9 (May 3, 2010) (stating Langley Gulch's levelized cost is \$111.13/MWh, which is substantially higher than the levelized price generated by the SAR methodology for a CCCT plant like Langley Gulch). Indeed, in that case the Commission rejected all alternatives to the construction of a new baseload natural gas fired power plant to meet Idaho Power's near term load:

Staff contends that a new baseload generation plant is justified based on the information and analyses in the Company's 2006 IRP and 2008 IRP update, the Company's load resource balance under various water and load conditions, and transmission constraints

³ As noted in the preceding section, QF technology is only relevant to the avoided cost rate for its impact on the supply characteristics of the technology. *See* 18 C.F.R. § 292.304(c)(3)(ii).

that limit the Company's ability to import power during critical times of the year. Sterling, Tr. p. 1031; Exh. 101-105.

Staff in its analysis considered the availability to the Company of other resource alternatives, e.g., non-Company owned generation, conservation, demand response programs and transmission upgrades. Staff concluded that while such alternatives may be truly viable, they cannot be relied on exclusively and should be pursued in conjunction with and not instead of Langley Gulch. Sterling, Tr.p. 1021.

In its 2006 IRP planning process the Company, Staff states, considered upgrades to hydro, gas-fired thermal generation options (SCCT and CCCT), clean coal options (IGCC), super-critical pulverized coal, nuclear, geothermal and a wide variety of DSM options. Sterling Tr.p. 1041.

Id. at p. 13.

In light of this Commission's thorough examination of all resource options in the Langley Gulch docket, which took place after this case was initiated, and its conclusion that a baseload natural gas fired plant is the resource of choice for meeting near term load -- any discussion of changing the SAR from a baseload natural gas fired plant should be dismissed as irrelevant.

III

This Case is no Longer Relevant

One of the primary reasons the Commission opened this docket is the perception that the natural gas SAR produces an avoided cost rate that is too high when compared to the cost of constructing a wind generating facility. As the Commission stated in its Notice of Review of Avoided Cost Methodology:

Based on recent filings at the Commission by Idaho's electric utilities, we are concerned that a disparity exists between Idaho's published avoided cost rate established using a natural gas-fired surrogate resource and the cost to a utility of developing and operating its own wind generation project.

Order No. 30873, p. 3. The Commission's belief was not true at the time and has become even less compelling subsequently for two reasons.

First, the Commission made its finding in August of 2009. Subsequent to making that finding, the Commission issued an order lowering the published avoided cost rates calculated using the current gas CCCT SAR by approximately thirteen percent, to approximately \$80/MWh. This new published rate eliminates the perceived “disparity” between the avoided cost rate derived from a gas SAR and a utility developed wind project and should alleviate the Commission’s concern.

Second, ironically, Staff’s Strawman proposal develops wind SAR rates that are higher than the gas CCCT SAR rates in the Commission’s recent Order No. 31025. If Staff’s Strawman is to be believed, (and but for certain tweaking that can be done, it appears to be a reasonably accurate cost estimate) the Commission’s concern about a cost disparity between the gas SAR and a wind project is completely unfounded. Certainly the current “disparity” is not such that the system for setting avoided cost rates that has been in place for well over a decade must now be thrown out. Exergy does not believe the current disparity between the SAR based on gas and the cost of developing a wind project is such that the current system needs to be thrown out.

V

The Strawman Proposal Overreaches the Commission’s Authority as to Allocation of RECs

Given that the wind SAR in Staff’s Strawman Proposal produces a rate higher than that in the rate schedule in the Commission’s Order No. 31025 for the gas CCCT SAR, the primary financial benefit to the utilities of Staff’s Strawman wind SAR would be utility ownership of the Renewable Energy Credits (“RECS”). The Commission, however, has no jurisdictional authority to determine ownership of RECs.

Multiple Idaho Supreme Court opinions have established that the IPUC’s authority is limited to those powers expressly granted to it by statute. *See Application of Boise Water Corp.*

to Revise and Increase Rates Charged for Water Service, 128 Idaho 534, 538, 916 P.2d 1259, 1263 (1996); *Alpert v. Boise Water Corp.*, 118 Idaho 136, 140, 795 P.2d 298, 302 (1990); *Matter of Strand*, 111 Idaho 341, 342, 723 P.2d 885, 886 (1986); *Idaho Power Co. v. Idaho Pub. Util. Commn.*, 102 Idaho 744, 750, 639 P.2d 442, 448 (1981); *Water Power Co. v. Kootenai Alliance*, 99 Idaho 875, 882, 591 P.2d 122, 129 (1979); *United States v. Utah Power and Light Co.*, 98 Idaho 665, 667, 570 P.2d 1353, 1355 (1977); *Lemhi Telephone Co. v. Mountain States Tel. & Tel. Co.*, 98 Idaho 692, 696, 571 P.2d 753, 753 (1977).

Nothing in the Idaho Code grants the IPUC the power to determine ownership of RECs. The Idaho Supreme Court has held that the IPUC has authority to implement PURPA's avoided cost provisions. See *Afton Energy, Inc. v. Idaho Power Co.*, 107 Idaho 781, 784, 693 P.2d 427, 430 (1984). In *Afton*, the Court examined the provisions of the Idaho Code granting the IPUC authority to regulate public utilities and utility rates. *Id.* None of those Idaho Code sections mention PURPA, and indeed even today, no Idaho Code sections grant the IPUC authority to implement PURPA. The IPUC's authority to implement PURPA derives therefore from federal law as explained in the *Afton* majority opinion.

The *Afton* majority opinion did not rely upon the Idaho Code sections as the basis for the IPUC's authority to order Idaho Power to enter into a long-term, fixed rate PURPA contract. Rather, the Court held "the federal government is permitting the Commission to further certain federal policies through the performance of those functions the Commission is authorized to perform under Idaho statutes." *Id.* The Court further held "PURPA was intended to confer upon state regulatory commissions responsibilities not conferred under state law." *Id.* at 784, 693 P.2d at 431; see also *Afton Energy, Inc. v. Idaho Power Co.*, 107 Idaho 781, 790, 693 P.2d 427, 436 (1984) (Bakes, J., specially concurring and dissenting in part) (setting forth separate a

opinion in dissent, disagreeing with the majority position that federal law can confer such jurisdiction on the IPUC). Thus, absent federal law (PURPA), the IPUC would have no authority to order electric utilities in Idaho to enter into long-term, fixed-rate power purchase agreements with developers because Idaho Code alone does not confer that authority on the Commission. The Idaho Supreme Court determined that PURPA gives the IPUC that power.

But unlike the authority to order utilities to enter into contracts containing the avoided cost rates, the avoided cost provisions of PURPA provide no independent basis of authority to determine ownership of RECs. *See American Ref-Fuel Co., et al.*, 105 FERC ¶ 61,004 (2003), *order aff'd on reh'g*, 107 FERC ¶ 61,016 (2004). “While a state may decide that a sale of power at wholesale automatically transfers ownership of the state-created RECs, that requirement must find its authority in state law, not PURPA.” *American Ref-Fuel Co., et al.*, 105 FERC ¶ 61,004, at ¶ 3. “The avoided cost rates, in short, are not intended to compensate the QF for more than capacity and energy.” *Id.* at ¶ 22. FERC even clarified on reconsideration by stating, “All we intended . . . was to indicate that a PURPA contract did not inherently convey any RECs, and correspondingly that, assuming State law did not provide to the contrary, the QF by contract could separately convey the RECs.” *American Ref-Fuel Co., et al.*, 107 FERC 61,016, ¶ 6 n.1 (2004) (denying rehearing).

Nowhere does any provision of Idaho State Law provide that a PURPA QF or any other independent power developer conveys RECs with the electrons when it sells electric capacity or energy to an electric utility. Thus, neither Idaho law nor PURPA provide the IPUC with the authority to create an avoided cost rate mechanism for wind developers (or any QFs for that matter) that conveys the QF's RECs. The IPUC simply lacks the jurisdiction and authority to determine the ownership of RECs; that is a matter that can be addressed only by the Idaho

Legislature.

Whether or not the Commission has jurisdiction over the ownership of RECs has been briefed in Exergy's Reply Comments in this docket. The Utilities filed joint a joint Sur-Reply, and hence this issue is ripe for Commission resolution. Exergy stands ready to present oral argument or additional briefing on this issue should the Commission so desire. Nevertheless, as with the tax question, the answer to this issue is critical to resolution of a wind SAR rate. Indeed, the answer to this issue may well cause some parties to reevaluate their support of a wind SAR.

IV

**It is premature to Discuss
Staff's Strawman Until the Commission
Resolves the Question of the Proper Role Tax
Credits Play in Calculation of the SAR Rate**

The parties to this docket disagree on the question of whether the Commission has the legal authority to reduce the avoided cost calculation by the amount of federal tax credit that developers of wind projects are entitled to. The discount to the avoided cost rate caused by taking the tax credit into consideration in the SAR is significant. Whether or not the Commission is preempted from taking the value of a QF's federal tax credit away by reducing the avoided cost rate it would otherwise be entitled to has been briefed in Exergy's Reply Comments in this docket. In response, the Utilities filed a joint Sur-Reply, and hence this issue is ripe for Commission resolution. Exergy stands ready to present oral argument or additional briefing on this issue should the Commission so desire. Nevertheless, the answer to this issue is critical to resolution of a wind SAR rate. Indeed, the answer to this issue may well cause some parties to reevaluate their support of a wind SAR.

VI

Summary

While Exergy appreciates Staff's efforts to develop a Strawman proposal for wind projects, this effort is premature until the fundamental questions regarding the treatment of federal tax credits and the ability of the Commission to determine REC ownership are resolved. In addition, the very concept of a wind SAR violates fundamental principles of PURPA by: (1) ignoring the pivotal role natural gas plants play in the resource planning of all three investor-owned utilities subject to the Commission's jurisdiction, and (2) setting the different published avoided cost rates for different QF technologies based on the costs of developing the QF resource rather than on the supply characteristics of the QF technology.

Respectfully submitted this 18th day of June 2010.

RICHARDSON & O'LEARY PLLC

By 
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of Idaho

CERTIFICATE OF SERVICE

I hereby certify that I have on this 18th day of June, 2010, served a copy of the foregoing Comments of Exergy Development Group of Idaho on all parties of record in GNR-E-09-03 as set forth below. The original and seven (7) copies were filed with the Commission.

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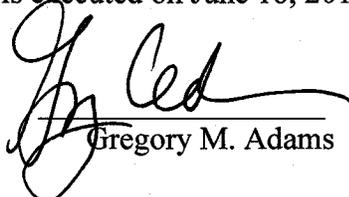
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This Certificate of Service is executed on June 18, 2010, at Boise, Idaho


Gregory M. Adams