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BEFORE THE IDAHO PUBLIC UTILITIES COMMISSION

IN THE MATTER OF THE JOINT)
 PETITION OF IDAHO POWER)
 COMPANY, AVISTA CORPORATION,)
 AND PACIFICORP DBA ROCKY)
 MOUNTAIN POWER TO ADDRESS)
 AVOIDED COST ISSUES TO ADJUST)
 THE PUBLISHED AVOIDED COST RATE)
 ELIGIBILITY CAP)

Case No. GNR-E-10-04

JOINT REPLY COMMENTS OF
 IDAHO CONSERVATION
 LEAGUE AND RENEWABLE
 NORTHWEST PROJECT

COMES NOW the Idaho Conservation League and Renewable Northwest Project with the following reply comments:

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This Commission has wide latitude to implement PURPA's policy goals - within statutory bounds and FERC Orders. PURPA, particularly the obligation to purchase at published rates, is intended to assist small developers by reducing transaction costs. To resolve Phase I of this case, Commission should use this wide latitude to address some of the Petitioners immediate concern's while preserving the 10 a MW eligibility cap for all single Qualifying Facilities. To serve PURPA's primary goal -- to promote market access to small power developers -- ICL and RNP recommend:

- Maintain the eligibility for published rates for all Small Qualifying Facilities at 10 aMW.
- Require developers to certify each new project, seeking a published rate contract, is a Single Small Qualifying Facility.
- Consider, amend and adopt criteria to identify the cumulative generation and other facilities used define a Single Small Qualifying Facility

This will allow small-scale PURPA activity to continue, with lesser impacts to utility portfolios, while Phase II of this proceeding, adopting appropriate avoided costs metrics, continues.

The Commission has broad authority to implement PURPA within the boundaries established by Congress and FERC.

The Commission has the authority to adopt a single Qualifying Facility requirement to distinguish between true small generators and larger projects segregated to qualify for published rates. PURPA, and FERC's interpretation thereof, provides broad authority to state commissions. FERC has stated: "Our decision here simply makes clear that the State can pursue its policy choices concerning particular generation technologies consistent with the requirements of PURPA and our regulations, so long as such action does not result in rates above avoided cost." *SoCal Edison*, 70 FERC ¶ 61,215 at 23 (February 23, 1995). The California Public Utilities Commission described PURPA as a "cooperative venture between the federal and state regulators." *Id* at 5.

“Since 1980, the Commission has given the states wide latitude in implementing PURPA.” *Id* at 21; *See American Ref-FUEL Company of Hemstead*, 47 FERC ¶ 61,161 at 61,533 (1989). FERC grants this discretion partly “in recognition of the important role, which Congress intended to give the States under PURPA.” *Id* at 21-22 (citing to *FERC v. Mississippi*, 456 US 742, 750 (1982)).

Relying on this authority, FERC recently explained:

“states are allowed a wide degree of latitude in establishing an implementation plan for section 210 of PURPA, as long as such plans are consistent with our regulations.

Similarly, with regard to review and enforcement of avoided cost determinations under such implementation plans, we have said that our role is generally limited to ensuring that the plans are consistent with section 210 of PURPA....” *Order Granting*

Clarification and Dismissing Rehearing (“CPUC Order”), 133 FERC ¶ 61,509 at 11 (October 21, 2010).

This Commission’s wide latitude to implement PURPA must ensure that all Qualifying Facilities can enter into contracts at rates that do “not exceed the established avoided cost of the purchasing utility.” *CPUC Order*, 133 FERC ¶ 61,509 at 2-3. The Commission may consider the size of qualifying facilities and create multi-tier avoided cost rates. FERC has consistently found that “a multi-tier avoided costs rate structure is consistent with the avoided cost requirements set forth in section 210 of PURPA and in the Commission’s regulation.” *CPUC Order*, 133 FERC ¶ 61,509 at 9,12; *See SoCal Edison*, 70 FERC ¶ 61,215.

Idaho currently has a good multi-tier structure with standard rates for projects up to 10 aMW and IRP based rates for projects up to 80 MW. The utilities are now asking the Commission to effectively eliminate its tiered structure without demonstrating that all smaller QFs have the level of market access that PURPA is intended to facilitate. As described more fully

below, a primary purpose of PURPA is to reduce market barriers for small QFs. The Commission should not eliminate the market access that PURPA published rates are intended to provide to smaller QFs. And as explained by Idaho Power, the key point of this incentive is the utility's obligation to purchase from the QF. *IPC Comments* at 4-5. GNR-E-10-04 (December 22, 2010).

The Commission can retain market access for smaller projects and promote PURPA's goals by adopting clear rules to limit published rate availability to true community scale projects. Such rules are within the Commission's broad authority to implement PURPA.

PURPA is Intended to Assist Small Power Producers, and FERC Has Continued To Protect Market Access for Smaller Projects.

PURPA was enacted when there "was very little non-utility generation" and "because utilities refused to purchase from non-utility producers." *SoCal Edison*, 70 FERC ¶ 61,215 at 61,676; *FERC Order No. 671* at 48, 114 FERC 61,102, (February 2, 2006); *See also FERC v. Mississippi*, 456 U.S. at 750. One of the primary reasons Congress enacted PURPA was because "there was no market for electric energy produced by non-utility generators." *Id* at 20-21; *Id* at 48. Since then, times have changed. Today there is a robust market for some independent power producers in some areas. Even so, there remains an important distinction between the market access available to large and small PURPA projects.

FERC has consistent preferred small Qualifying Facilities in establishing exemptions and interconnection standards under PURPA. Faced with relatively robust markets in the East and California, in 2006 Congress enacted, and FERC implemented, new exemptions from utility purchase obligations under PURPA for QFs with open access to real-time wholesale markets. Importantly, even in those highly developed markets, FERC retained the purchase obligation for small QFs because all parties agreed "that small size could affect a QF's ability to access markets."

FERC Order No. 688 at 47, RM06-10-000, *New PURPA Section 210(m) Regulations Applicable to Small Power Production and Cogeneration Facilities*, (October 20, 2006).¹

When challenged, FERC explained that it retained the small QF presumption to “distinguish between small and large facilities to reflect the ability of particular QFs to access markets.” *FERC Order No. 688-A* at 55-56, 119 FERC ¶ 61,305 (June 22, 2007). The small QF presumption “serves a fundamentally different purpose. The Commission is distinguishing between small and large facilities to reflect the ability of particular QFs to access markets.” *Id* at 55-56. In setting this eligibility cap level FERC stated they “believe that it is reasonable to conclude that some, perhaps most, small QFs at or below the 20 MW² level can be distinguished from larger QFs by the type of delivery facilities to which they typically interconnect.” *Id* at 54. This is the same threshold for other PURPA exemptions and “the interconnection rules . . . which recognize that small generators, i.e., 20 MW or below, should be subject to different standards than large generators.” *FERC Order No. 688* at 48-49; *FERC Order No. 2006*, (May 12, 2005).

FERC created a separate standard generator interconnection procedure for small QFs because they “believe the higher threshold will remove barriers to the development of a greater number of Small Generating Facilities and promote the development of innovative small generation technologies.” *FERC Order No. 2006* at 26. Creating special procedures for small generators would “(1) limit opportunities for transmitting utilities to favor their own generation, [and] (2) remove unfair impediments to market entry for small generators by reducing interconnection costs and time . . .” *Id* at 8.

¹ FERC continued: “In addition to a presumption in favor of small QFs, the rule also recognizes that some QFs, irrespective of size, may not have the ability to sell in certain markets because of operational characteristics or other constraints.” *Id* at 2. With the small QF presumption, where market access suffers, “QF development will continue to be stimulated as it is today through the mandatory purchase obligation.” *Id* at 5. “To rebut this presumption a utility the filing electric utility will be required in its application to demonstrate, with regard to each small QF that it, in fact, has nondiscriminatory access to the market.” *Id* at 46 – 47.

² Meaning 20 MW net capacity, or gross capacity minus auxiliary power, as identified on FERC Form 556. *FERC Order No. 688* at ¶ 72 n. 41.

To fulfill PURPA, FERC treats smaller generators differently, as should this Commission.

The Parties to This Case Recognize that PURPA is Intended to Promote Small Generation and that the Primary Problem is Not Small Power Producers.

The three utilities in this case describe the level and timing of recent PURPA QF requests as well as their pursuit of renewable generation through the RFP process. *See Avista* at 5 – 6, GNR-E-10-04 (December 22, 2010); *IPC* at 7, *RMP* at 5, 10-11 GNR-E-10-04 (December 22, 2010). But this mature and open market is not available for all QFs. While today's market for QFs is more robust than the 1970's, small developers still face market access barriers – chief among them negotiating power purchase agreements.

In this present case, Staff recognizes the fundamental purpose of PURPA is to encourage small QFs who are unlikely to have realistic market access. “One of the primary justifications for limiting eligibility for published rates to 10 aMW has been to recognize that developers of small QFs are less likely to be large, well-financed organizations, capable of sophisticated contract negotiations. *By making published rates available for small projects, rate negotiations can be eliminated and contracting costs can be minimized.*” *Staff* at 4 (emphasis added).

Both Idaho Power and Avista acknowledge that current avoided cost rates may not be perfect, but the process has been “accepted and/or tolerated in order to accommodate small QF developers because historically (1) small QF developers generally had fewer resources to dedicate to complex contract negotiations and (2) the financial impact to the utility's customers for a relatively low volume of small QF projects was likewise small.” *IPC* at 9, 19-20; *Avista* at 2-3, 8-9. *RMP* asks this Commission to, in part, “acknowledge the rationale for standard rates is to minimize transaction costs for small projects.” *RMP* at 8.

All parties to this case appear to agree that PURPA is intended to incentivize small QFs. Idaho Power explains the incentive is not the published rate, rather the utilities' obligation to

purchase. *IPC* at 4 – 5. Moreover, the three utilities also explain that many of their asserted problems result from large wind projects that have been structured to qualify for published rates. *See IPC* at 9, 13 – 14, 23; *RMP* at 10 – 12; *Avista* at 4 - 5. According to Staff:

“Because wind projects have been, by far, collectively the largest and most plentiful projects in recent years, they represent the greatest immediate concern for the utilities. Consequently, Staff recommends that if the Commission grant the Petition to lower the eligibility cap, it apply its decision only to wind projects.” *Staff* at 7.

To meet the clear purpose of PURPA - to protect smaller generators – while addressing the primary problems leading to this docket, the Commission should maintain access to published rates for individual 10 aMW QFs. Going forward, the Commission should adopt criteria to identify single QFs – like those proposed below - with the goal of limiting incentives to larger projects, which have artificially divided themselves in an effort to capitalize on the PURPA rates.

The Commission Should Adopt Some Criteria To Identify Single QF Projects

The current one-mile separation rule is ineffective at limiting the practice of dividing large, sophisticated projects with a greater degree of market access into smaller projects to take advantage of higher published avoided cost rates. *See Avista* at 5; *IPC* at 22; *RMP* at 10 - 12. With this in mind, the Commission’s statement made when the utilities previously opposed the current eligibility cap remains relevant – “if the rates are no longer fair and accurate, the appropriate response is to adjust the rates, not to limit the size of the QFs eligible for the rates.” *Order No.* 29069 at 7, GNR-E-02-01 (July 2, 2002). However, pending Phase II - addressing the appropriate avoided cost model - the Commission may address the separate matter of establishing which QFs are eligible for these rates.

The Commission has wide latitude to enact criteria to prevent project segregation. When

FERC affirmed the presumption that small QFs face market access barriers they stated:

“The Commission will not allow for gaming of this 20 MW rebuttable presumption. . . . *In any such proceeding, we will consider all relevant factors, including, but not limited to, ownership, proximity of facilities, and whether facilities share a point of interconnection. For purposes of evaluating proximity of facilities with regard to alleged gaming of this rebuttable presumption, we will not be bound by the one-mile standard set forth in 18 C.F.R. § 292.204(a)(2).*” FERC Order No. 688 at 49.

FERC has demonstrated that multiple factors, beyond just the one-mile rule, are appropriate to determine the true size of a QF.

To implement PURPA in Idaho, and incentivize small producers while protecting ratepayers, the Commission should adopt rules ensuring that published rates are not available to larger QF or utility-scale development.³ A primary goal for these criteria should be to exclude from eligibility projects that, based on ownership and operational control, are really quite large, projects that are developed at the same time, in the same area, by the same developer, that share the same operation and control facilities, and that are owned by the same or similar interests.. Meanwhile the criteria should allow projects that, while proposed by the same developer, are in fact truly separate facilities. This distinction maintains PURPA’s public policy goals of incentivizing small-scale alternative energy while protecting ratepayers.

Previously, Idaho Power offered, and this Commission declined, adopting a five mile buffer rule to limit project segregation in IPC-07-04. *IPC* at 21 – 22. The Staff agreed in principle with this notion but in 2007 questioned its potential effectiveness. *Staff* at 10. Today Staff is concerned about “large wind projects, specifically those that *choose to reconfigure*

³ Projects up to 80 MW may be Qualifying Facilities. For example the Rockland Wind Project.

themselves into multiple legal entities in order to qualify for published avoided costs rates.” Id at 9. One concern is this practice may “essentially render the Commission’s 10aMW eligibility cap meaningless.” Id at 9-10. And after reviewing the situation in Oregon, Staff is “surprised” their five mile rule seems to be “preventing disaggregation” and is “willing to further explore similar options . . .” Id.

Idaho Power argues that reducing the eligibility cap for all projects is “a somewhat different and better approach” than restricting common ownership. *IPC* at 23. While different, it is unlikely to be better for the small power producers since the utilities want all QFs to use the IRP-based methodology. *Id* at 24. Staff has identified four concerns for requiring small developers to use the IRP method. *Staff* at 8. QFs could be suspicious because the model is proprietary, and complicated. Running the model for each project would be complicated. Different results for different projects could lead to claims of discrimination. And, “requiring small projects to negotiate contracts would defeat a longstanding objective of the Commission to minimize negotiation costs and complexity for small projects.” *Id*. To address the inherent market barrier of the IRP based method for small developers, the Commission should retain the eligibility cap for true small power producers.

Attachment 1 is a Discussion Draft outlining a possible Single Qualifying Facility Rule this Commission could adopt. The proposed criteria attempt to identify true small power producers while avoiding the geographic distance requirement that Staff questions. *Staff* at page 10. The proposed criteria focus on the inherent operational or physical characteristics that can distinguish between a large sophisticated developer and a small power producer. The common ownership factor looks to prevent larger entities from creating smaller legal subdivisions to hold projects. The coordinated interconnection, control and operations factor looks towards whether the aggregated projects are in fact one energy delivery project. The interconnection factor looks towards one of

the primary impacts to system reliability - disaggregated projects using a single interconnection. The one-year timing factor looks to developers who design projects to meet the 10aMW limit but really intend to develop larger projects. Combined, these factors provide a more precise identification of larger projects while remaining administratively feasible.

To administer and enforce the single QF requirement the discussion draft relies on contract language and discussion between the utility and the QF, with the Commission resolving disputes. Linking compliance with the single QF requirement to a contract default incentivizes project investors to self regulate with minimal regulatory involvement.

The single QF requirement proposed for discussion could accomplish PURPA's objective - protecting market access for small QFs. It would prevent large-scale system additions during Phase II of this proceeding, without stifling development of small PURPA projects during what is likely to be a lengthy process. We encourage the Commission to consider this proposal.

ICL and RNP submit this reply not as official parties, rather as public comments. We stand ready to answer questions or assist the Commission in any manner.

Respectfully submitted this 19th day of January 2011,



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/s/ Megan Decker
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Senior Staff Counsel
Renewable Northwest Project

**Attachment 1: Discussion Draft January 19, 2011
Single Qualifying Facility Requirement**

A single Qualifying Facility (QF) is eligible to receive published rates for delivery up to 10 average MW monthly.

Single QF Criteria

In setting rates and approving contracts, the Commission will consider the following criteria in determining whether a project with multiple generation sources qualifies as a single Qualifying Facility. Whether each generation source within the applicable QF:

- (i) uses the same motive force as the QF;
- (ii) is owned or controlled by the same person(s) or affiliated person(s);
- (iii) is placed in service within 12 months of the QF's in-service date; and
- (iv) shares common interconnection or control, communications, and operation facilities.

Eligibility for Published Rates

Multiple Facilities that satisfy all of (i)-(iv), above, and deliver more than 10 a MW per month shall be aggregated for purposes of calculating eligibility for a Single Small Qualifying Facility published rates.

Definitions

As used above, the term "person(s)" means one or more natural persons or legal entities. "Affiliated person(s)" means a natural person or persons or legal entity or entities sharing common ownership, management or acting jointly or in concert with or exercising influence over the policies or actions of another person or entity. "Affiliated person(s)" does not include passive investors whose sole ownership benefit is using production tax credits, green tag values, or depreciation, or a combination of these.

QF Responsibilities

Upon request, the QF will verify to the utility the ownership, management and financial structure of the QF in reasonably sufficient detail to allow the utility to make an initial determination of compliance with the ownership requirement. Any dispute concerning a QF's entitlement to published rates shall be presented to the Commission for resolution.

In each contract for payment of published rates, the seller shall:

- (i) warrant the project satisfies the single Qualifying Facility requirement;
- (ii) warrant and represent that the seller will not make any changes in its ownership, control or management during the term of the contract that would cause it not to be in compliance with the single Qualifying Facility requirement;
- (iii) agree to provide buyer with documentation of compliance with the separate ownership requirement upon buyer's request, made no more frequently than every 3 years, subject to the buyer maintaining the confidentiality of the documentation provided; and
- (iv) acknowledge that, upon a Commission finding that the Single Qualifying Facility requirement is no longer met, the seller will be in default under the contract.

CERTIFICATE OF SERVICE

I hereby certify that on this 19th day of January, 2011 true and correct copies of the foregoing REPLY COMMENTS OF IDAHO CONSERVATION LEAGUE AND RENEWABLE NORTHWEST PROJECT were delivered to the following persons via the method of service noted:

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