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IDAHO PUBLIC  
UTILITIES COMMISSION

July 19, 2012

Ms. Jean Jewell  
Commission Secretary  
Idaho Public Utilities Commission  
472 W. Washington  
Boise, ID 83702

**RE: GNR-E-11-03 – Brief of Avista Corporation**

Dear Ms. Jewell:

Enclosed please find a Brief of Avista Corporation, submitted for filing in the above-referenced docket on behalf of Avista Corporation. Per the Commission's Rules of Procedure, we have enclosed and original and seven (7) copies.

If you have any questions regarding this filing, please contact Michael Andrea at 509.495.2564 or me at 509.495.4584.

Sincerely,

A handwritten signature in black ink, appearing to read "Paul Kimball", written over a horizontal line.

Paul Kimball  
Regulatory Analyst

Enclosures

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have served Avista Corporation's Brief in GNR-E-11-03, by electronic mail to the following:

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July 19, 2012

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IDAHO PUBLIC  
UTILITIES COMMISSION

Attorney for Avista Corporation

BEFORE THE IDAHO PUBLIC UTILITIES COMMISSION

IN THE MATTER OF THE COMMISSION'S )  
REVIEW OF PURPA QF CONTRACT )  
PROVISIONS INCLUDING THE )  
SURROGATE AVOIDED RESOURCES ) CASE NO. GNR-E-11-03  
(SAR) AND INTEGRATED RESOURCE )  
PLANNING (IRP) METHODOLOGIES FOR ) BRIEF OF AVISTA CORPORATION  
CALCULATING AVOIDED COST RATES )  
\_\_\_\_\_ )

**I. Introduction**

On September 1, 2011, the Idaho Public Utilities Commission ("Commission") initiated this proceeding to review power purchase agreements under the Public Utility Regulatory Policies Act of 1978 ("PURPA"), including but not limited to the surrogate avoided cost resource ("SAR") and integrated resource planning ("IRP") methodologies. Order No. 32352 at 1-2. The Commission has certain authority under PURPA and the Federal Energy Regulatory Commission's ("FERC") regulations to implement PURPA, including the authority to set the avoided cost rates.<sup>1</sup>

Under PURPA, utilities are required to purchase qualifying facility ("QF") generation at a rate equal to the utility's avoided cost.<sup>2</sup> "Avoided costs" are the incremental costs to the electric utility of power which, but for the purchase from the QF, such utility would generate itself or

<sup>1</sup> See, e.g., 16 U.S.C. § 824a-3(f)(1); 18 C.F.R. § 292.304.

<sup>2</sup> 18 C.F.R. § 292.304(b)(2).

purchase from another source.<sup>3</sup> The avoided cost rates for all QF purchases must also be just and reasonable to utility customers and in the public interest and cannot discriminate against QFs.<sup>4</sup>

## II. Argument

In its direct testimony in this proceeding, Avista did not take a position on ownership of environmental attributes (“RECs”) generated or associated with QFs. However, Commission Staff and others submitted direct testimony on REC ownership. For example, Commission Staff and PacifiCorp submitted testimony that REC ownership should be decided in favor of the utilities.<sup>5</sup> Other entities took the opposite position.<sup>6</sup> At the time that direct testimony was filed, the issue of REC ownership was pending before the Idaho Legislature and, therefore, Avista did not take a position regarding REC ownership in this proceeding. The Idaho Legislature did not act on the issue and, therefore, the issue of REC ownership remains unresolved in Idaho. To the extent that the Commission seeks to resolve the issue in this proceeding, an underlying issue is whether the Commission has jurisdiction to determine REC ownership. As discussed herein, the Commission does have jurisdiction to determine ownership.

In direct testimony, Commission Staff further suggested that, if the utilities are deemed to own the RECs associated with a QF, the avoided cost rate should be adjusted, presumably through a payment in excess of what the payment would be absent the ownership right.<sup>7</sup> On rebuttal, Avista submitted testimony that adjusting the avoided cost rate to reflect RECs is inappropriate. Specifically, Mr. Kalich stated:

. . . to the extent the Commission chooses to assign RECs to utilities, Avista opposes adjusting (i.e., increasing) avoided cost rates in exchange for obtaining the RECs. It is my understanding that under PURPA it is not appropriate to include the value of RECs in

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<sup>3</sup> 18 C.F.R. § 292.101(b)(6).

<sup>4</sup> 18 C.F.R. § 292.304(a)(1).

<sup>5</sup> Sterling Direct at 40; Clement Direct at 6-10.

<sup>6</sup> Reading Direct at 58-59; Schoenbeck Direct at 26-27.

<sup>7</sup> Sterling Direct at 46-47.

avoided cost rates. Moreover, such an adjustment could create an opportunity for QF developers to arbitrage the REC value to the detriment of utility customers. Further, the market for RECs is very volatile and is not liquid or transparent.<sup>8</sup>

As discussed below, the avoided cost rate cannot be adjusted to reflect the value of RECs if the Commission deems that RECs are owned by the utility.

**A. The Commission has Jurisdiction to Determine the Ownership of RECs Associated with PURPA Projects**

A threshold issue with regard to any determination by the Commission regarding ownership of RECs is whether the Commission has subject matter jurisdiction to determine the ownership of RECs associated with PURPA projects. Clearly, the Commission has subject matter jurisdiction to determine the ownership of RECs in this proceeding.

FERC has expressly disclaimed such jurisdiction and has held that states “have the power to determine who owns the REC in the initial instance, and how they may be sold or traded.”<sup>9</sup> Moreover, FERC has expressly stated that states have the authority to “decide that a sale of power at wholesale automatically transfers ownership of the state-created RECs, [but] that requirement must find its authority in state law, not PURPA.”<sup>10</sup>

The Commission’s enabling statutes authorize the Commission to determine the ownership of RECs associated with PURPA projects. The Commission has the authority to issue declaratory orders clarifying or constructing orders, rules, and statutes.<sup>11</sup> The Idaho Code provides:

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<sup>8</sup> Kalich Rebuttal at 9-10.

<sup>9</sup> *American Ref-Fuel Co., et al.*, 105 FERC ¶ 61,004, P 23 (2003), *reh’g denied*, 107 FERC ¶ 61,016 (2004), *appeal dismissed sub nom., Xcel energy Serv. Inc.*, 407 F.3d 1242 (D.C. Cir. 2005) (“*American Ref-Fuel Co.*”); *see also Morgantown Energy Associates*, 139 FERC ¶ 61,006, P 46 (2012) (“*Morgantown*”) (reaffirming that states have authority to determine ownership of RECs in the initial instance).

<sup>10</sup> *American Ref-Fuel Co.* at P 24; *see also Morgantown* at P 46.

<sup>11</sup> *See* IPUC Rules of Procedure 53, 101.

The public utilities commission is hereby vested with power and jurisdiction to supervise and regulate every public utility in the state and to do all things necessary to carry out the spirit and intent of the provisions of this act.<sup>12</sup>

The Idaho Code further provides:

*The commission shall prescribe rules and regulations for the performance of any service or the furnishings of any commodity of the character furnished or supplied by any public utility, and, on proper demand and tender of rates, such public utility shall furnish such commodity or render such service within the time and upon the conditions provided in such rules.*<sup>13</sup>

RECs are a commodity of the character furnished or supplied by any public utility.<sup>14</sup> The Commission is expressly empowered by statute to “prescribe rules and regulations for the performance of any service *and the furnishings of any commodity of the character furnished or supplied by any public utility.*”<sup>15</sup> Accordingly the Commission has subject matter jurisdiction to determine in this proceeding the ownership of RECs associated with PURPA projects.

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<sup>12</sup> I.C. § 61-501.

<sup>13</sup> I.C. § 61-507 (emphasis added).

<sup>14</sup> *Wheelabrator Lisbon, Inc. v. Connecticut Dep't of Pub. Util. Control*, 531 F.3d 183, 186 (2d Cir. 2008) (affirming decision of Connecticut Department of Public Utility Control requiring transfer of RECs to electric utility under electricity purchase agreements and noting that “[t]he energy conveyed in the [PURPA] Agreement possesses certain renewable energy attributes that, since the signing of the Agreement, have become independently tradeable commodities known as ‘renewable energy credits’ (‘RECs’).”); *In re the Ownership of Renewable Energy Certificates (“RECs”)*, 389 N.J.Super. 481, 484, 913 A.2d 825, 826 (2007) (affirming Board of Public Utilities’ decision that renewable energy certificates issued on pre-existing contracts for the sale of electricity to public electric utility belonged to utility rather than the producer and stating that RECs are a commodity).

<sup>15</sup> I.C. § 61-507 (emphasis added). Avista further notes that the Commission has jurisdiction over QFs and that such jurisdiction is sufficient to determine ownership of RECs. See I.C. § 61-129 (defining “public utility” to include every “electrical corporation” and “where the service is performed or the commodity delivered to any corporation or corporations, or any person or persons, who in turn, either directly or indirectly or mediately or immediately, performs the services or delivers such commodity to or for the public or some portion thereof[.]”); I.C. § 61-191 (defining “electric corporation” to include, with certain exceptions not relevant here, to include “every corporation or person, their lessees, trustees, receivers or trustees appointed by any court whatsoever, owning, controlling, operating or managing any electric plant for compensation within this state. . . .”); I.C. § 61-118 (defining “electric plant” to include “all real estate, fixtures and personal property owned, controlled, operated or managed in connection with or to facilitate the production, generation, transmission, delivery or furnishing of electricity for light, heat or power, and all conduits, ducts or other devices, materials, apparatus or property for containing, holding or carrying conductors used or to be used for the transmission of electricity for light, heat or power.”). To be sure, federal law prohibits states from regulating QFs in the same manner as other public utilities. See 16 U.S.C. § 824a-3; 18 C.F.R. § 292.602(c). However, federal law does not prohibit all regulation of QFs by states. See 18 C.F.R. § 292.602(c)(2); *Independent Power Producers of New York, Inc.*, 80 FERC ¶ 61,125 (1997), *order on reh’g and clarification*, 80 FERC ¶ 61,360 (1997) (finding that state commission’s requirement that QFs comply with certain monitoring requirements was legitimate exercise of state’s authority). States have the authority to determine ownership of RECs generated by or associated with QFs in the first instance, see *American Ref-Fuel*

Other jurisdictions that have addressed the issue of ownership of RECs have determined that their state public utility commissions have subject matter jurisdiction over this issue.<sup>16</sup> For example, in *In re The Riley Energy Corp.*,<sup>17</sup> the Connecticut Light and Power Company (“CL&P”) requested that the Connecticut Department of Public Utility Control (“DPUC”) issue a declaratory ruling regarding the ownership of RECs under a pre-existing power purchase agreement entered under PURPA. The power purchase agreement did not contemplate ownership of RECs, but provided for the sale of the entire net electric output of the facility. The DPUC found that under the power purchase agreement the RECs transferred to the utility as part of the electrical output purchased by the utility. In reaching its conclusion, the DPUC found that it had subject matter jurisdiction. The Connecticut Supreme Court affirmed the DPUC’s decision.<sup>18</sup> Notably, the court found that the issue of whether the DPUC had jurisdiction to determine the ownership of RECs was not an issue of pure contractual intent, but “more a question of legislative intent and public policy than a question of the intent of the parties.”<sup>19</sup> Thus, the court found that the DPUC had subject matter jurisdiction under its general enabling statutes.<sup>20</sup>

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Co. at PP 23-24, and have jurisdiction over QFs for purposes of making such determination, *see* I.C. §§ 61-501, 61-129, 61-191, 61-118.

<sup>16</sup> The public utility commissions of several states have, in various contexts, made determinations regarding the ownership of RECs, including the public utility commissions of the states of Connecticut, Nevada, New Jersey, North Dakota, Oregon, Pennsylvania, Utah, and Colorado.

<sup>17</sup> 2004 WL 3160409 (Conn. DPUC 2004).

<sup>18</sup> *Wheelabrator Lisbon, Inc. v. Dep’t of Pub. Util. Control*, 283 Conn. 672, 931 A.2d 159 (2007). The producers also sought relief from the DPUC’s decision in federal court. *Wheelabrator Lisbon, Inc. v. Dep’t of Pub. Util. Control*, 526 F.Supp.2d 295 (D. Conn. 2006), *aff’d*, 531 F.3d 183 (2d Cir. 2008). The federal court addressed, among other things, whether the DPUC’s decision was preempted by PURPA and whether assigning ownership of RECs to the utility was a taking under the United States Constitution. The federal district court held, among other things, that the DPUC’s decision was not preempted by PURPA and that assigning the RECs to the utility was not a taking. *Wheelabrator Lisbon, Inc.*, 526 F.Supp.2d at 305-07. The United States Court of Appeals for the Second Circuit affirmed the judgment of the district court. *Wheelabrator Lisbon, Inc. v. Dep’t of Pub. Util. Control*, 531 F.3d 183 (2d Cir. 2008).

<sup>19</sup> *Wheelabrator Lisbon, Inc.*, 283 Conn. at 687, 931 A.2d at 169-70.

<sup>20</sup> *Id.* at 689, 931 A.2d at 171. Specifically, the court found that the DPUC had authority, and therefore subject matter jurisdiction, to determine ownership of RECs in this case based on C.G.S.A. §§4-176 and 16-9, which

The Commission has jurisdiction to determine ownership of RECs generated by or associated with QFs.

**B. Avoided Cost Rates Cannot Be Adjusted to Compensate for RECs.**

Utilities are only required to pay QFs the avoided cost of generating power itself or of purchasing from another source.<sup>21</sup> FERC recently held that a state public utility commission's order that found that avoided-cost rates under PURPA also compensate for REC's is inconsistent with PURPA.<sup>22</sup> The Commission may determine that a sale of power from a QF automatically transfers ownership of RECs to the utility.<sup>23</sup> The avoided cost rate, however, cannot be adjusted to compensate for the REC.<sup>24</sup>

**III. Conclusion**

The Commission has jurisdiction to determine ownership of RECs generated by or associated with QFs. The Commission may determine that such RECs transfer automatically to the utilities with the sale of power; however, the avoided cost rate cannot be adjusted to compensate for such RECs.

Respectfully submitted this 20<sup>th</sup> day of July 2012.

**AVISTA CORPORATION**



Michael G. Andrea  
Senior Counsel  
Attorney for Avista Corporation

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authorize any person to petition the DPUC, or the DPUC to initiate on its own motion, to initiate a proceeding for a declaratory ruling and authorizes the DPUC to rescind, reverse or amend its prior decisions. *Id.*

<sup>21</sup> *Morgantown* at P 47.

<sup>22</sup> *Morgantown* at P 47.

<sup>23</sup> See *Morgantown* at PP 46-47; *American Ref-Fuel Co.* at PP 23-24.

<sup>24</sup> See *Morgantown* at P 47.