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IDAHO PUBLIC UTILITIES COMMISSION

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BEFORE THE IDAHO PUBLIC UTILITIES COMMISSION

IN THE MATTER OF THE)	CASE NO. GNR-E-11-03
COMMISSION'S REVIEW OF PURPA QF)	
CONTRACT PROVISIONS INCLUDING)	EXERGY'S RESPONSE TO IDAHO
THE SURROGATE AVOIDED)	POWER'S MOTION FOR
RESOURCE (SAR) AND INTEGRATED)	TEMPORARY STAY OF ITS
RESOURCE PLANNING (IRP))	OBLIGATION TO ENTER INTO
METHODOLOGIES FOR CALCULATING)	NEW POWER PURCHASE
PUBLISHED AVOIDED COST RATES)	AGREEMENTS WITH QUALIFYING
		FACILITIES

COMES NOW, Exergy Development Group of Idaho, LLC ("Exergy") in response to Idaho Power Company's ("Idaho Power") Motion for Temporary Stay of its Obligation to Enter into New Power Purchase Agreements with Qualifying Facilities ("Motion"); Memorandum in Support of Idaho Power Company's Motion ("Memorandum") and Affidavit of Randy C. Allphin in Support of Idaho Power Company's Motion ("Affidavit") and urges the Idaho Public Utilities Commission ("Commission") to deny Idaho Power's Motion in its entirety and to maintain the schedule currently in place for prosecuting this docket.

**THE IDAHO PUBLIC UTILITIES COMMISSION DOES NOT HAVE THE
AUTHORITY TO ALLOW IDAHO POWER TO OPT OUT OF ITS OBLIGATIONS
UNDER PURPA**

One would expect that Idaho Power would have opened its legal memorandum in support of its extraordinary request to suspend its obligation to purchase QF power with a detailed and cogent exposition of the jurisdictional basis for such an action. Idaho Power, however, does not get to the jurisdictional question until page 17 of its Memorandum. No citation is made to a FERC regulation or federal statute granting the Idaho Commission the authority to impose a moratorium on Idaho Power's PURPA obligations under federal law. That is because no such authority exists.

Idaho Power cites three other states that it asserts have imposed moratoria on PURPA. Of course, PUC decisions from other states do not and cannot repeal PURPA and are not precedent controlling this Commission's actions. Idaho Power cites to a Colorado PUC order imposing a moratorium on new PURPA projects as support for its contention that the Commission has the authority to impose a moratorium.¹ Of course, Colorado PUC decisions are not controlling law in Idaho and the fact that the Colorado Commission engaged in extra jurisdictional acts does not give the Idaho PUC the legal authority to do the same. That decision was apparently not appealed on jurisdictional grounds -- probably because four broad categories of PURPA developers were grandfathered if they merely "had contacted Public Service prior to the filing of this application."² Idaho Power also cites to a California Public Utilities Commission docket (R01-10-024), which likewise does not control Idaho Commission actions. Oregon is the final state Idaho Power refers this Commission. It cites an order only issued two weeks ago which is not final and may yet be subject to a motion for reconsideration and/or appealed from.

The only federal citation is to a FERC enforcement docket initiated by two California utilities seeking protection from being forced to execute contracts that they alleged violated

¹ *Application of the Pub. Serv. Co. of Colo for a Moratorium Regarding Indep. Power Prod. Facilities*, Colo. PUC Dec. No. C87-1690 (Dec. 16, 1987)

² *Id.* at ¶ 37.

PURPA. According to FERC, “we find that the California Commission’s process of determining avoided costs did not comply with PURPA.”³ FERC went on to explain:

Because the California Commission’s procedure was unlawful under PURPA, Edison and San Diego cannot lawfully be compelled to enter into contracts resulting from that procedure. At this juncture, there are no executed contracts. However, in order to avoid parties spending further time and resources in pursuing contracts that would be unlawful under PURPA, we believe it would be appropriate for the California Commission to stay its requirements directing Edison and San Diego to purchase pending the outcome of further administrative procedures in accordance with PURPA.”⁴

Here, unlike in SoCal and Edison, the issue of whether the Idaho PUC’s implementation of PURPA creates rates in excess of avoided costs has not been adjudicated. The IRP methodology has been in place for many years. Indeed, Idaho Power only recently asked the Commission to use that very methodology for wind and solar projects going forward, which this Commission adopted less than nine months ago. Order No. 32262, Case No. GNR-E-11-01. Idaho Power may not like the results of the process it advocated for, but it may not complain about the process or procedure.

The importance of denying Idaho Power’s Motion outright and swiftly is underscored by fact that the other two investor owned utilities are surely going to file ‘me too’ pleadings effectively making Idaho Power’s Motion for a stay a state-wide problem which will broaden the legal and factual issues that will have to be dealt.

IDAHO LAW DOES NOT AUTHORIZE A STAY

Idaho Power notes that Idaho Code § 61-623 gives the Commission the authority to suspend rates up to six months while it investigates proposed rate changes. Memorandum at 20. It also points to the Federal Power Act (“FPA”) which permits FERC to suspend rates for up to five months while it investigates proposed rate changes. *Id.* Of course this assertion is meaningless in the PURPA context, because the Idaho Code and FPA sections cited only allow the Commissions to suspend proposed changes in the rates charged by utilities to ratepayers. In addition, Idaho Code § 61-623 only applies to rate *increases*. Here, of course, Idaho Power is

³ *Southern California Edison Company, San Diego Gas & Electric Company*, Docket Nos. EL95-16-000 and EL95-19-000, respectively. 70 FERC ¶61,215 at p. 26, emphasis provided (1995).

⁴ *Id.* at pp 26 – 27.

seeking a rate *decrease* and not a rate increase. These laws simply do not apply to the rates paid by utilities to QF developers pursuant to PURPA. Indeed, taking the utility's argument to its absurd conclusion, if all rates are suspended pending a rate change, then it would seem reasonable that retail ratepayers would be exempt from paying any rates pending the resolution of a rate case by a utility.

THE SKY IS NOT FALLING

Idaho Power's doomsday predictions are overblown and not supported by what few facts there are in this case. The only evidence to date in this docket is the unexamined direct testimony of the utilities and the short Affidavit by Mr. Allphin in which he lists several PURPA projects that "have moved beyond just a phone call and onto more serious inquiries within the last six months." A "serious" inquiry as opposed to "just a phone call" is a weak standard upon which to base a far reaching decision that will, in all likelihood destroy the economic viability of each and every project on Mr. Allphin's list. This is especially true in light of the soon-to-be expired federal tax credits. Certainly, it is not Idaho Power's goal to prevent PURPA projects from being encouraged to be developed as is required of this Commission under federal law. Finally it is well known in the development industry that the mortality rate associated with "projects" is extremely high. Certainly not even Mr. Allphin seriously believes that all of the listed projects will, in fact, be developed.

The listed projects would, if all were built, add about 500 MW of new capacity on Idaho Power's system. Why this is a bad thing is never explained, except for identifying the expense to ratepayers over the lives of these projects and an assertion that if Idaho Power gets its way, the new avoided cost rates will reduce that amount. While somewhat interesting, the bare numbers have no context and cannot support a moratorium against PURPA. The utilities have made their filings and their assertions in this docket but those filing and assertions have not yet been

challenged or placed under the scrutiny of a contested hearing. In short, only one side of the storey has been told. There are factors that suggest the IRP methodology under states the avoided cost rates which will surely be presented to the Commission for its consideration. Due process obviously requires affording both sides the opportunity to present their case prior to curtailing one side's rights – "Trial of an issue of fact necessitates opportunity to present evidence and not by only one side to the controversy." *Lawrence Warehouse Co. v. Rudio Lumber Co.* 89 Idaho 389, 396, 405 P.2d 634 (1965), internal quotation omitted.

The addition of 500 MW of new PURPA projects is less 'disturbing' in light of Idaho Power's recent application to place the 300 MW Langley Gulch gas plant in rates. If successful, that single plant will increase retail rates by seven percent. In addition, ratepayers pay for that plant regardless of its actual usage. Quite the opposite is true for PURPA projects, which do not get paid if they do not produce. Perhaps these new QF projects will be sufficient such that the Langley Gulch plant will prove to be unnecessary. At a minimum, the uncertainty and cost of the natural gas supply for this new plant will be obviated by the addition of these new QF projects. Idaho Power's failure to consider PURPA potential in its Integrated Resource Plan may result in its construction of unneeded plant such as Langley Gulch.

INTERIM 'RELIEF' IS FICTIONAL

Idaho Power proposes four interim "relief" options should the Commission not grant a stay or moratorium beginning on page 25 of its Memorandum. None of the interim relief options are valid as they all effectively create the stay Idaho Power seeks in the first place.

Making the rates contained in power purchase agreement subject to this Commission's final determination in this case would cause such uncertainty in the markets such the developers would not be able to move forward on their projects. Using Idaho Power's proposed rates for interim contracts is likewise unacceptable because those rates will surely not be the final rate.

The low rate coupled with the uncertainty of what the final rate may be will effectively freeze the market. Limiting contracts to one year would make it impossible to finance and build such a project. Finally, forcing all QF projects to use Schedule 86 is effectively a backhanded moratorium because PURPA explicit allows the QF to enter into a fixed term obligation and not just an as available sale, which is essentially what Schedule 86 is. 18 C.F.R. ¶ 292.304(d)(2)(ii).

IDAHO POWER'S MOTION SHOULD BE DENIED

For all of the forgoing reasons, Idaho Power's Motion should be denied

DATED this 14th day of March, 2012.

RICHARDSON & O'LEARY PLLC

By: 
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 14th day of March, 2012, a true and correct copy of the within and foregoing RESPONSE TO IDAHO POWER'S MOTION FOR A STAY was served as shown to:

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