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IDAHO PUBLIC  
UTILITIES COMMISSION

Attorney for Idaho Conservation League

BEFORE THE IDAHO PUBLIC UTILITIES COMMISSION

IN THE MATTER OF THE )  
COMMISSION'S REVIEW OF PURPA QF )  
CONTRACT PROVISIONS INCLUDING )  
THE SURROGATE AVOIDED )  
RESOURCE (SAR) AND INTEGRATED )  
RESOURCE PLANNING (IRP) )  
METHODOLOGIES FOR CALCULATING )  
PUBLISHED AVOIDED COST RATES. )

CASE NO. GNR-E-11-03

LEGAL BRIEF OF THE IDAHO  
CONSERVATION LEAGUE

This case presents the Commission with a host of factual, legal, and policy issues. In this brief, the Idaho Conservation League ("ICL") addresses only two legal issues: (1) the Commission's authority to assign Renewable Energy Credits ("RECs"), and (2) the legal framework under Federal Energy Regulatory Commission ("FERC") licenses and the Clean Water Act governing Idaho Power's operation of four Mid-Snake River dams. Until the technical hearing ICL takes not position on the other legal, factual, or policy issues present in this case.

**I. The Commission does not have the legal authority to resolve REC ownership under Idaho law, unless the owner unequivocally dedicates the REC to public use.**

In 2004, the PUC Staff succulently stated there is "no hook that gives the Commission jurisdiction over 'environmental attributes,' not under PURPA or federal law (including the Energy Policies Act of 1992), and not under Title 61 of the Idaho Code. *Comments of the Commission Staff* at 6 - 7, Case IPC-E-04-02. Since this statement, the Federal Energy Regulatory Commission has consistently confirmed that "PURPA does not address the ownership of RECs and that states have the authority to determine ownership of RECs in the initial instance, as well as how they are transferred from one entity to another." *Morgantown Energy Associates*, 139 FERC ¶ 61,066 at P 46 (April 24, 2012). But a precondition to a state's authority to determine REC ownership is the creation of RECs as a legal commodity. Many states have passed such legislation; Idaho has not.

The Commission is a creature statue with a limited set of powers prescribed in Idaho Code Title 61. In the words of the Idaho Supreme Court: “The Idaho Public Utilities Commission has no authority other than that given to it by the legislature. It exercises a limited jurisdiction and nothing is presumed in favor of its jurisdiction.” *McGuire Estates Water Co., v. Idaho Pub. Utils. Comm’n*, 111 Idaho 341 (1986). These limited powers do not include the authority to create and assign a non-electric property interest. The Commission recently explained, “RECs are inventions of state property law whereby the renewable energy attributes are ‘unbundled’ from the energy itself and sold separately.” *Order 32580 at 4 (citing Wheelabrator Lisbon v. Connecticut Dept. Public Utility Control*, 531 F.3d 183, 186 (2d Cir. 2008)). The Idaho legislature has considered, but ultimately rejected, recognizing RECs as a property right under Idaho law. *Order No. 32580 at 5, 8-9*. And the Commission, along with Idaho’s investor owned utilities, all recognize that “no Idaho law . . . addresses the ownership of RECs.” *Id.* at 9. Until the Idaho legislature recognizes RECs as a legal commodity, the Commission simply does not have the authority to resolve the ownership issue.

Despite a lack of legal authority, the utilities and Staff all urge the Commission to resolve the ownership of RECs. *Clements Direct at 6 – 10; Sterling Direct at 39 – 48; Kalich Rebuttal at 9 – 10; Stokes Rebuttal at 41 - 45*.<sup>1</sup> Mr. Clements and Mr. Sterling misconstrue the law by arguing that environmental attributes, represented by a REC, are a precondition to developers availing themselves of the PURPA purchase mandate. *Clements at 7 – 9; Sterling at 41*. FERC has consistently rejected this argument by stating, “RECs are created by the States. They exist outside the confines of PURPA.” *American Re-Fuel* 105 FERC ¶ 61,004 at P 23 (Oct. 1, 2003); *Morgantown at P 46*. Along the same lines, FERC has explained that Mr. Clements’ and Mr. Sterling’s argument that avoided costs under PURPA compensates developers for the RECs “is inconsistent with PURPA.” *Morgantown at P 47; Clement at 9; Sterling at 41, 46*.<sup>2</sup> More specifically, FERC has explained “the avoided cost that a utility pays a QF does not depend on the type of QF i.e., whether it is a fossil fueled cogeneration facility or a renewable-energy small power production facility.” *American Ref-Fuel at P 22*. And FERC has clearly stated that RECs created by state law are “outside the confines of, and, in addition to the PURPA avoided cost

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<sup>1</sup> Mr. Stokes “adopts and supports” Mr. Clements testimony. *Stokes Rebuttal at 45*.

<sup>2</sup> Interestingly Mr. Kalich correctly states “under PURPA it is not appropriate to include the value of RECs in avoided costs.” *Kalisch Rebuttal at 9*. This contradiction between utility witnesses goes to show how untenable their position is – each uses the opposite argument to support the same conclusion.

rate[.]” *California Public Utils. Comm’n*, 133 FERC ¶ 61,059 at P 31 (Oct. 21, 2010); *American Ref-Fuel* at P 23.

Mr. Clements goes on to claim that selling energy unbundled from RECs in somehow defective. *Clements* at 9 - 10.<sup>3</sup> Again, this argument does not conform to the legal landscape. FERC has consistently upheld the rights of states to allow for unbundled REC sales. *American Ref-fuel* at P 23; *W.Sys. Power Pool*, 139 FERC ¶ 61,061 at P 24 (April 20, 2012). And FERC recently distinguished its authority over bundled and unbundled REC transactions exerting “jurisdiction over the wholesale energy portion of the [bundled] transaction as well as the REC portion of the bundled REC transaction under FPA sections 205 and 206.” *W.Sys. Power Pool*, at P 24. The Commission should ignore the arguments of the utilities and staff regarding RECs because they do not conform to applicable law.

While the Commission has no authority to resolve REC ownership, the Idaho Supreme Court does pursuant to its judicial power and appellant jurisdiction. I.D Const. art. V, §§ 2, 9; *Marbury v. Madison*, 5 U.S. 137 (1803). Prior Idaho Supreme Court decisions regarding water rights are a useful analogy for REC ownership because they distinguish the unqualified rights of property owners to private waters against the qualified rights to public waters. In *King v. Chamberlin* the court ruled that a property owner who, through their own efforts, collects rain and snow melt on their property holds such water as private property and is not subject to the dedication to public use of water prescribed in Article 15 of the Idaho Constitution. 118 P. 1099 (Idaho 1911). In *Idaho Public Utils. Comm’n v. Natatorium*, the court applied this rule to a property owner who collected hot water and delivered it to surrounding homes. 211 P. 533, 533 - 534, (Idaho 1922)(*Natatorium*). Finding the property owners developed a private water source; the court overturned the Commission’s exertion of regulatory authority over the owner. “If these waters are private waters, in the absence of an unequivocal intention to and dedication thereof to a public use by the appellant, the appellant would not be a public service corporation, and therefore subject to regulation as a public utility. Such dedication is never presumed.” *Id.* at 534.

Similarly, energy and capacity sold to a public utility is dedicated to public use and subject to the Commission’s jurisdiction. I.C. § 61-129. But the environmental attributes are a distinct property interest arising spontaneously, just like a water seep or rainwater falling on private lands. As the Commission has explained, “RECs are inventions of state property law whereby the

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<sup>3</sup> Selling energy and capacity separately from RECs is an unbundled transaction; selling the three commodities together is a bundled transaction.

renewable energy attributes are ‘unbundled’ from the energy itself and sold separately.” *Order No. 32580* at 4. Absent legislative recognition, the legal status of RECs as property must depend on traditional notions of common law, which in Idaho vest those rights in the owner who expends the time and effort to create the property. *King*, 188 P. at 510 - 511. And the Commission’s jurisdiction over the RECs only applies when the owner makes “an unequivocal intention to and dedication thereof to a public use[.]” *Natatorium*, 211 P. 1009. Because QF developers expend their own time and resources to create an independent property right in RECs, unless they make an unequivocal dedication to the public, QF developers inherently own RECs under Idaho law.

## II. The Federal Power Act and Clean Water Act allow flexibility in Idaho Power’s run of river projects on the Mid-Snake River.

Although she admits not being qualified to address the issue, Idaho Power witness Tessia Park claims Idaho Power’s Mid-Snake River hydroelectric projects are must run resources pursuant to FERC licenses and Clean Water Act constraints. *Park Rebuttal* at 9 - 11; *Park Direct* at 20. By modeling these resources as “must-run” Idaho Power artificially reduces the ability and increases the costs to integrate PURPA projects. The legal framework provides more flexibility than Ms. Park allows. The Commission should reject Idaho Power’s artificial modeling constraint based on an inaccurate application of the legal framework.

The Federal Power Act empowers FERC to regulate the construction and operation of hydroelectric facilities through the issuance and conditioning of licenses. 16 U.S.C §797(e). Before issuing a license, FERC must provide a state the opportunity to certify the terms and conditions of construction and operations will comply with state water quality standards - known as a 401 certification. 33 U.S.C §1341(d); *PUD No. 1 of Jefferson County v. Washington Department of Environmental Quality*, 511 U.S. 700, 707 - 708 (1994); *S.D. Warren Co. v. Maine Board of Environmental Protection*, 547 U.S. 370, 374-375 (2006). A state can waive the 401 certification affirmatively, or by not responding with the statutory time frame. 33 U.S.C. §1341(a)(1). But even if a state waives the 401 certification, FERC has an obligation to impose license terms and conditions that balance power generation with protecting fish and wildlife habitat as well as water quality generally. 16 U.S.C. §803(a). Through this approach, FERC balances the operation of the hydroelectric project with the protection of other public benefits including aesthetics, water quality, and fish habitat.

Pursuant to this legal framework, FERC issued licenses for Idaho Power's hydroelectric dams that include operating terms and conditions that will protect water quality. *See generally Hayes Direct.* The terms and conditions cover two characteristics, the amount of flow and the rate of change, or "ramping rate" in the by-passed reach. *Id.* Because the purpose of these terms is to comply with the Clean Water Act, any fair consideration of whether Idaho Power can legally vary from them must be based on the potential impact to water quality and habitat. While altering the operations of the dams may be technically challenging, as described by Ms. Park, nothing in the Federal Power Act, the Clean Water Act, or the FERC licenses prevents Idaho Power from reducing generation and increasing spill within the applicable ramping rates. Any claim by Idaho power they are legally prohibited from changing operations within these parameters misstates the applicable law and should be rejected.

### Conclusion

The Commission has a long record of carefully applying the applicable legal standards to the facts and policy decision before them. For the two issues addressed in this brief the legal standards are clear. First, absent legislative recognition, the Commission simply does not have the legal authority to resolve REC ownership. However, the Idaho Supreme Court does, and the analogous case law holds the legal status of RECs as property must depend on traditional notions of common law, which, in Idaho, vest those rights in the owner who expends the time and effort to create the property. Second, at least for the four largest Mid-Snake River dams, nothing in the Federal Power Act, the Clean Water Act, or the FERC licenses prevents Idaho Power from reducing generation and increasing spill within the applicable ramping rates. Accordingly, the Commission should:

- (1) Reject the utilities and staff suggestion to allocate RECs to the utilities;
- (2) Reject Idaho Power's artificial modeling constraint that deems the Milner, Twin Falls, Bliss, and Lower Salmon projects must-run resources.

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



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## CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of July, 2012 I delivered true and correct copies of the foregoing LEGAL BRIEF to the following persons via the method of service noted:

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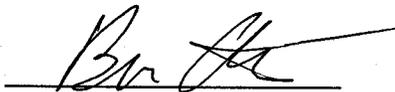
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