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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)	CASE NO. GNR-E-11-03
THE SURROGATE AVOIDED)	
RESOURCE (SAR) AND INTEGRATED)	PETITION FOR
RESOURCE PLANNING (IRP))	RECONSIDERATION
METHODOLOGIES FOR CALULATING)	
PUBLISHED AVOIDED COST RATES.)	

The Idaho Conservation League (ICL) requests the Commission reconsider the portion of Order No. 32697 resolving the ownership and allocation of Renewable Energy Credits (REC) pursuant to I.C. § 61-626 and IDAPA 31.01.01.331 - 333. As explained below, this portion of the Order lacks legal and factual justification and is an abuse of discretion. ICL requests the Commission grant this petition and establish a briefing schedule to resolve this issue.

The Commission overstepped its authority by exerting jurisdiction over RECs that Qualifying Facilities (QFs) have not voluntarily dedicated to public use. While ICL agrees the Commission has broad authority to deal with existing and future rates, this is "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). Order No. 32697 oversteps the Commission's jurisdiction by presuming, without any analysis or authority, that all RECs are dedicated to public use. ICL urges the Commission to reconsider this overstep of authority.

The Commission has repeatedly affirmed that RECs are a creation of state property law. Order No. 32697 at 45, (citing Order No. 32580). Despite this recognition, Order No. 32697 fails

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to grapple with Idaho's laws governing private property rights. This case requires analyzing two specific legal questions before the Commission has the authority to allocate REC ownership. First, since RECs are a property interest arising spontaneously, the Commission must determine, pursuant to the fundamental concepts of private property, who owns the REC in the first instance. As ICL cited in its legal brief, the Idaho Supreme Court in *King v. Chamberlin* ruled that a person 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). This case remains good law. Likewise, RECs are an asset created through the efforts of QF developers and the Commission may not presume they are dedicated to public use. Order No. 32697 does not grapple with this fundamental aspect of private property rights, and instead presumes both the utility and QF have an equal claim to the REC. The record or the Commission's analysis does not support this presumption.

Second, the Commission's jurisdiction only extends over assets where the owner makes an unequivocal dedication to public use. *Idaho Public Utils. Comm'n v. Natatorium*, 211 P. 533, 533 - 534, (Idaho 1922). All of the case law cited in the Order addressed situations where the owner dedicated the asset to public use. But the facts of this case are different. A critical foundation of the Commission's logic in Order No. 32697 is that "the disposition of RECs in now a term that is found in most, if not all, PURPA contracts." *Order No. 32967* at 44. But the Commission fails to acknowledge that the QFs who do include RECs in these contracts are making an unequivocal dedication of this property to public use. Of course, once this dedication is made, the Commission is free to exercise jurisdiction over these terms in PURPA contracts. This voluntary dedication confers jurisdiction—not solely the existence of the REC. By not respecting this legal distinction, the Commission exceeded its authority in exerting subject matter jurisdiction.

Regarding the merits of the Commission's allocation of REC ownership, Order No. 32697 lacks legal justification and is not supported by substantial, competent evidence. The Order attempts to explain that "but for the must purchase provision of PURPA, RECs would not exist or be created for a PURPA project." *Order No. 32697* at 45 – 46. But this assertion contradicts the Commission's other legal conclusions. For instance the Commission recognizes that "RECs did not exist and were not contemplated when PURPA was enacted in 1978." *Id* at 37. Moreover, the Commission concludes, "indeed PURPA and REC programs were created for different reasons." *Id*. The Commission also admits that RECs do exist in non-PURPA renewable projects. *Id* at 46 n. 9. But despite explaining the applicable law, the Commission fails to justify why, in the context of Order No. 32697, RECs exist only because of PURPA. By inconsistently applying the legal standards and arbitrarily applying the facts, the Commission abused its discretion. *Bingham v. Montane Resource Associates*, 133 Idaho 420 (1999).

The Commission also fails to explain why conceptualizing a REC as an intangible asset has any legal significance for allocating ownership. *Order No. 32697* at 45 – 46. Although intangible assets may exist in relation to physical assets, it does not necessarily follow that each asset cannot be separately traded. In fact, this notion of separately trading physical and intangible property rights underlies the entire field of intellectual property law. An author is free to sell a physical book to one buyer and sell the story, the intangible asset, to a movie producer. Whether a REC is an intangible characteristic of the QF facility or the energy it produces, the mere fact of its intangibility does not decide the proper allocation of ownership. Instead, like intellectual property, allocating ownership of RECs requires grappling with fundamental principles of property law. By not undertaking this effort, Order No. 32697 lacks legal justification for the allocation of REC ownership and thus the Commission acted outside its legal authority.

The disparate allocation of RECs under the SAR and IRP methodology is also fundamentally flawed. ICL agrees with the premise that because the SAR methodology contemplates avoiding a gas-fired resource, then SAR based contracts do not transfer RECs. *Order No. 32697* at 46. This same reasoning should apply to the IRP methodology. However, the Commission here reaches an unsupported conclusion. While the IRP methodology may consider that utilities have renewable resources in their current generation stack, this consideration only extends to the operational characteristics of the system as a whole. These operational considerations inform the load and resource balance and identify future needs that QF purchases could avoid. And, for Idaho Power, the 2011 IRP preferred portfolio over the next ten years consist primarily of a gas plant and a transmission line, neither of which produce RECs. *Idaho Power 2011 IRP* at 7, table 1-1.¹ Further, while the IRP rates may reflect the generation characteristics of the resources—the energy and capacity they may deliver—RECs capture something completely different, the environmental attributes of the resource. And at least in Idaho and for Idaho ratepayers, utilities are not required to acquire RECs, rather utilities choose to do so. There simply is no logical basis to conclude that pricing the energy and capacity of a QF somehow causes utilities to avoid procuring REC generating resources.

For all the reasons stated above, allocating half of the RECs produced by a QF to a utility lacks substantial, compete evidence and is an abuse of discretion. ICL urges the Commission to grant this petition and establish a briefing schedule to reconsider this aspect of Order No. 32697.

Respectfully submitted this 8th day of January 2013,


Benjamin J. Otto
Idaho Conservation League

¹ ICL hereby requests the Commission take official notice of Idaho Power's 2011 IRP pursuant to IDAPA 31.01.01.263.

CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of January 2013 I delivered true and correct copies of the foregoing PETITION FOR RECONSIDERATION to the following persons via the method of service noted:

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