Capitol Law Group, PLLC

C. Tom Arkoosh

www.capitollawgroup.com • tarkoosh@capitollawgroup.com

RECEIVED

2012 JUL 20 AM 8:48

IDAHO PUBLIC UTILITIES COMMISSION

July 19, 2012

Idaho Public Utilities Commission
P.O. Box 83720
Boise, Idaho 83720-0074

Re: Our Client: Twin Falls Canal Company and North Side Canal Company
CLG File No. 6417.000

Dear Commissioners:

Enclosed please find an original and nine copies of the Legal Brief.

If you have any questions or comments, please do not hesitate to contact me.

Sincerely,

Capitol Law Group, PLLC

Lori Thomas

Lori Thomas
Paralegal to C. Tom Arkoosh

CTA/lbt
Enclosures

205 North 10th Street, 4th Floor, PO Box 2598, Boise, ID 83701-2598 • Tel: (208) 424.8872 • Fax: (208) 424.8874

C. Thomas Arkoosh, ISB No. 2253
CAPITOL LAW GROUP, PLLC
205 N. 10th St., 4th Floor
P.O. Box 2598
Boise, Idaho 83701-2598
Telephone: (208) 424-8872
Facsimile: (208) 424-8874
e-mail: tarkoosh@capitollawgroup.com

RECEIVED
2012 JUL 20 AM 8:48
IDAHO PUBLIC
UTILITIES COMMISSION

Attorneys for Twin Falls Canal Company, Inc.;
North Side Canal Company, Inc.

BEFORE THE IDAHO PUBLIC UTILITIES COMMISSION

IN THE MATTER OF THE COMMISSION'S REVIEW OF PURPA QF CONTRACT PROVISION INCLUDING THE SUBROGATE AVOIDED RESOURCE (SAR) AND INTEGRATED RESOURCE PLANNING (IRP) METHODOLOGIES FOR CALCULATING PUBLISHED AVOIDED COST RATES.	Case No. GNR-E-11-03 **LEGAL BRIEF**

COME NOW Twin Falls Canal Company and North Side Canal Company[1] and respectfully submit this *Legal Brief* in accord with the Staff's October 21, 2011, *Decision Memo.* These parties adopt by reference the briefing of the Renewable Energy Coalition and those legal positions taken in the testimony of their expert, Donald W. Schoenbeck.

[1] At the filing of this *Legal Brief*, American Falls Reservoir District #2 and Big Wood Canal Company have pending a *Motion to Intervene* in the proceeding seeking involvement without disturbance of the process. This brief will be the *Legal Brief* of American Falls Reservoir District #2 and Big Wood Canal Company if the Commission grants the *Motion to Intervene*.

I.

Liquidated Damages

Issue: Whether power purchase agreements ("PPAs") should require liquidated damage provisions or deposits in an industry with immediately identifiable prices.

Utilities have proposed that all PPAs contain liquidated damage deposit provisions requiring qualified facilities ("QF"), as defined by the Public Utilities Regulatory Policies Act ("PURPA")to deposit with utilities an amount to cover damages incurred in the event of a QF's failure to deliver power. However, these proposed liquidated damage deposit provisions calculate liquidated damage deposits at dollar value per kilowatt of installed capacity when the PPA is executed. Such a damage assessment is an arbitrary reflection of the damages a utility might incur should a QF fail to deliver power according to the PPA and is not an enforceable liquidated damages provision pursuant to Idaho law.

A. The proposed liquidated damages provision is inappropriate because anticipated damages are easily ascertained and the proposed means for computing liquidated damges is not reasonably related to the expected harm.

i. Liquidated damages are appropriate only where actual damages are difficult or impossible to measure and the means for computing liquidated damages is reasonably related to the expected harm.

In general, liquidated damages clauses are upheld where the anticipated harm is very difficult or impossible to measure accurately and the means for computing damages is reasonably related to the expected harm. They should be enforced:

> "in any case where the circumstances are such that accurate determination of the damages would be difficult or impossible, and provided that the liquidated dam-

> ages fixed by the contract bear a reasonable relation to actual damages. But, where the forfeiture or damage fixed by the contract is arbitrary and bears no reasonable relation to the anticipated damage, and is exorbitant and unconscionable, it is regarded as a 'penalty', and the contractual provision therefor is void and unenforceable."

Graves v. Cupic, 75 Idaho 451, 456, 272 P.2d 1020, 1023 (1954), see also *Margaret H. Wayne Trust v. Lipsky*, 123 Idaho 253, 258-59, 846 P.2d 904, 909-10 (1993); *Alumet v. Bear Lake Grazing Co.,* 119 Idaho 946, 812 P.2d 253 (1991); *Clampitt v. A.M.R. Corp.,* 109 Idaho 145, 706 P.2d 34 (1985); *McEnroe v. Morgan,* 106 Idaho 326, 678 P.2d 595 (Ct.App.1984); *Nichols v. Knowles,* 87 Idaho 550, 394 P.2d 630 (1964). Further, "If a liquidated damages clause is unenforceable, the non-breaching party is entitled to compensation for its actual damages." *Schroeder v. Partin*, 151 Idaho 471, 476, 259 P.3d 617, 622 (2011), citing *City of Idaho Falls v. Beco Const. Co., Inc.,* 123 Idaho 516, 522, 850 P.2d 165, 171 (1993).

ii. Damages in the case of failure to deliver power can be easily calculated because the price a utility would actually pay to cover the power a QF fails to deliver is readily available in forward power prices.

Utilities propose to continue to require QFs to maintain liquidated damage deposits at a dollar value per kilowatt of installed capacity when a PPA is executed. In doing so, however, they have overlooked the fact that the amount of such damages may easily be determined based on the difference between the contract price and forward power prices. Such a calculation, holding market price in the case of breach against contract price, could not be further from the "difficult or impossible" calculation to which *Graves* refers actual damages can be accurately calculated and ascertained by periodically renewing the liquidated damages deposit to equal the difference between the contract price and forward power prices, which are readily available to the utilities for the purpose of such calculations. This process is set forth in the direct testimony of Donald W.

Schoenbeck. As set forth by *Shroeder*, should this liquidated damages amount, calculated based upon the damages a utility is actually anticipated to incur, be held unenforceable, it will still represent the actual amount of damages a utility will incur, the same amount a QF will actually owe that utility in damages, as closely as those may be calculated prior to being incurred. Since the amount of actual damages is the fallback to which a court would refer if the liquidated damages provision is unenforceable, a provision based on the difference between contract and forward prices is the best and most enforceable protection for both parties to a PPA.

iii. Utilties have failed to show how their proposed liquidated damages rate is reasonably related to the actual anticipated damge.

Furthermore, the utilities have failed, as is required by the *Graves* holding, to establish that this rate accurately reflects the actual damage it would suffer in terms of the price to cover should a QF fail to deliver the energy it contracted to deliver. In essence, the liquidated damages it proposes are arbitrary and bear no relation to the anticipated damage.

II.

<u>Curtailment</u>

Issue: Whether PURPA allows curtailment not provided for in current PPAs or a PPA clause requiring curtailment for economic reasons.

Idaho Power has requested that the Commission impose curtailments on QFs that have a nameplate capacity greater than or equal to 10 MW or more and also have generator output limiting controls when it is experiencing "must run periods," which it proposes be defined as:

> "Those periods when the Company's system load demand in the upcoming hours and days requires that sufficient Base Load Resources will be on-line and available to serve system load."

Idaho Power proposes that "Base Load Resources" be defined as:

> "Company-owned hydroelectric resources, including all run-of-river generators and the Hells Canyon Complex, coal-fired generating resources."

PURPA requires Idaho Power to purchase power from QFs at its avoided cost according to the terms of its PPAs with those QFs. PURPA also dictates when Idaho Power must purchase this power. Specifically, 18 C.F.R. 292.304(f) states:

> "Any electric utility…will not be required to purchase electric energy or capacity during any period during which, due to operational circumstances, purchases from qualifying facilities will result in costs greater than those which the utility would incur if it did not make such purchases, but instead generated an equivalent amount of energy itself."

Idaho Power seeks to modify its existing PPAs with QFs by curtailing its purchases from those QFs where its demand for power is such that it must, in its words, "dispatch higher cost, less efficient resources to serve system load or to make Base Load Resources unavailable for serving the next anticipated load." Idaho Power's proposal would have it unilaterally modify its existing contracts with QFs in violation of longstanding Idaho contract law, would disregard the Federal Energy Regulatory Commission's ("FERC") guidance on its own regulation and would blatantly contradict Idaho Power's own prior definitions of "base load" and "must run."

A. Idaho Power's proposal is contrary to the longstanding principle of contract law prohibiting unilateral modification.

Basic contract law principles clearly deny the ability of one party to alter a contract's terms without the approval of the other.

> "As with all modifications, the terms of a contract cannot be altered by one party without the other party's approval."

Watkins Co., LLC v. Storms, 152 Idaho 531, 272 P.3d 503, 508 (2012), reh'g denied (Apr. 5, 2012), citing *Ore–Ida Potato Prod., Inc. v. Larsen,* 83 Idaho 290, 293, 362 P.2d 384, 387 (1961). Furthermore, the "minds of the parties must meet as to any proposed modification." *Ore-Ida*, 382 P.2d at 387. In essence here, Idaho Power is seeking to curtail its purchases from QFs because it feels it can get a better deal. However, the avoided costs bargained for in existing PPAs, calculated using sophisticated simulation models such as AURORA, take into account times of light load for which Idaho Power now seeks curtailment and factor those times into the prices set for QF power. Therefore, Idaho Power is already compensated for the times of light load it describes, and QFs have been developed in reliance upon these rates. Changing the contract so that Idaho Power can curtail for purely economic reasons not only hurts the QFs who have bargained for the avoided cost rates set in their contracts, directly contradicts clear Idaho law on the matter.

B. Idaho Power's suggestion that 304(f) allows curtailment directly contradicts FERC's guidance and rulings on that regulation.

Idaho Power suggests that Section 304(f) of PURPA purports to allow it to curtail its contracts with QFs, the established rates in which take into account the variance in the value of the power purchase as the utility's operating costs change over time. In essence, the purchase price over the term of the PPA represents the average value of the power purchase taking into account these fluctuations. Indeed, FERC's regulatory guidance holds the same to be true:

> "The Commission does not intend that this paragraph [Section 304(f)] override contractual or other legally enforceable obligations incurred by the electric utility to purchase from a qualifying facility. In such arrangements, the established rate is based on the recognition that the value of the purchase will vary with the changes in the utility's operating costs. These variations ordinarily are taken into account, and the resulting rate represents the average value of the purchase over the duration of the obligation."

F.E.R.C. Order No. 69, 45 Fed. Reg. 12214, 12228 (Feb. 19, 1980). That order affirms the intention of the rule, and thereby interprets FERC's intended prohibition against exactly what Idaho Power proposes. While, in its testimony, Idaho Power contorts the meaning of FERC's recent Docket Nos. ER05-1065-011 and OA07-32-008, this decision actually reinforces the purpose of Order No. 69. In fact, that ruling cites to Order No. 69 and reinforces its principles for exactly the reasons set forth above.

> "55. In Order No. 69, which implemented section 304(f), the Commission stated that that section was intended to deal with a certain condition which can occur during light loading periods, in which a utility operating only base load units would be forced to cut back output from the units in order to accommodate the unscheduled QF energy purchases. The Commission stated that such base load units might not be able to later increase their output levels rapidly when the system demand later increased, resulting in the utility needing to rely upon less efficient, higher cost units. Section 304(f), when read in conjunction with the relevant explanation in Order No. 69, applies only to such low loading scenarios, and cannot be relied upon to curtail purchases of unscheduled QF energy for general economic reasons.
>
> 56. Many avoided cost rates are calculated on an average or composite basis, and already reflect the variations in the value of the purchase in the lower overall rate. In such circumstances, the utility is already compensated, through the lower rate it generally pays for unscheduled QF energy, for any periods during which it purchases unscheduled QF energy even though that energy's value is lower than the true avoided cost. On the other hand, for avoided cost rates that are determined in real-time, such avoided costs adjust to reflect the low (or zero or negative) value of the unscheduled QF energy, allowing the QF to make its own curtailment decisions. In neither case is the utility authorized to curtail the QF purchase unilaterally."

Entergy Servs., Inc., 137 FERC ¶61, 199 at PP 55-56 (2011). Idaho Power not only misconstrues this ruling, but applies it to reinforce just the opposite principles.

C. Idaho Power's definitions of "base load" and "must run" contradict the purpose that drove development of some of its resources.

Idaho Power's proposal sets forth incorrect definitions of "base load" and "must run" as those terms relate to its generating resources. Specifically, Idaho Power has included in the resources it takes into account in calculating base load those which it has online to support variable production from QFs, many of which it has agreed to purchase power from under an existing PPA.

While these resources are designed and maintained in order to increase output quickly in order to meet peak demand, Idaho Power now claims that these resources should be in production, or, in other words, are "must run" resources, before it must purchase power from QFs under its existing PPAs. Its basis for curtailment, which is that these resources are incapable of meeting peak demand, is simply not true, as these resources are designed for just such a function on just such an occasion. Not only is Idaho Power's proposed unilateral modification contrary to Idaho law and FERC's regulation, guidance and further ruling thereon, but also does not serve its own underlying purpose into the future.[2]

III.

<u>REC Ownership</u>

Issue: Whether the PUC can, or should, award Renewable Energy Credits ("RECs") from a QF to a utility gratis. The mandatory purchase provisions of the PURPA require electric utilities to purchase power produced by cogenerators or small power producers that obtain status as a QF. 16 U.S.C. § 824a-3(a)(2). PURPA instructs the FERC to promulgate implementing regulations, and directs the state public utilities commissions to implement FERC's regulations. 16 U.S.C. § 824a-3(a)(2),(f). The price PURPA section 210(b) requires the utilities to pay to QFs in exchange for a QF's electrical output is called the 'avoided cost rate,' which is "the cost to the electric utility of the electric energy which, but for the purchase from such cogenerator or small power producer, such utility would generate or purchase from another source." 16 U.S.C. § 824a-3(d).

Subsequent to the enactment of PURPA and FERC's regulations, several states have enacted renewable energy portfolio standards ("RPSs"), and mandatory and voluntary markets for

[2] The reader must notice some irony in the utilities' movement from requesting contract language contemplating continuing the PUC's jurisdiction to change future rates in a fixed rate PPA as being "in the public interest," which the Idaho Supreme Court rejected as utility like regulation in *Afton Energy v. Idaho Power Co.*, 107 Idaho 781 (1984), to now requesting the PUC exercise jurisdiction to order payment of no rate. In 28 years, matters have moved from bad to worse.

tradable RECs have emerged to create a commodity separate from electricity and capacity produced by QFs. *See American Ref-Fuel Co.,* 105 FERC ¶ 61,004 (2003) In *American Ref-Fuel Co.,* FERC found that "the avoided cost that a utility pays a QF does not depend on the type of QF, i.e., whether it is a fossil-fuel-cogeneration facility or renewable-energy small power production facility." *Id.* at ¶ 22. FERC stated, "[t]he avoided cost rates, in short, are not intended to compensate the QF for more than capacity and energy." *Id.* Further, it declared "that contracts for the sale of QF capacity and energy entered into pursuant to PURPA do not convey RECs to the purchasing utility (absent an express provision in [the relevant] contract)" or a rule or state law to the contrary. *Id.* at ¶ 24. FERC clarified, however, that "[A] state may 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." (emphasis added). *Id*

FERC subsequently denied rehearing stating:

> "As those seeking rehearing recognize, only renewable energy small power production facilities have renewable attributes, yet the energy from a cogeneration facility is priced the same as the energy from a small power production facility." *American Ref-Fuel Co.,* 107 FERC ¶ 61,016, ¶ 15 (2004). "If avoided cost rates are not intended to compensate a QF for more than capacity and energy, it follows that other attributes associated with the facilities are separate from, *and may be sold separately from,* the capacity and energy."

(emphasis added). *Id.* at ¶ 16. Additionally, FERC reasoned that cogeneration QFs are entitled to sell the thermal output from their projects as part of a separate transaction from sale of the electricity and capacity to the utility, and thus "If the thermal output of a cogeneration QF is separately saleable, the renewable attributes of a small power production QF are similarly separate." *Id.* at ¶ 16 n. 9; appeal dismissed sub. nom., Xcel Energy Services Inc. v. FERC, 407 F.3d 1242 (D.C. Cir. 2005).

More recently, FERC ruled that a state utility commission has the authority to require a utility to pay a separate, higher avoided cost rate stream for QFs providing the utility with environmental attributes that will help the utility avoid real costs of environmental compliance. Cal. Pub. Util. Commn., 133 FERC ¶ 61,059 (2010) (order granting clarification and dismissing rehearing), rehearing denied, 134 FERC ¶ 61,044 (2011). Even more recently, FERC again re-emphasized its prior rulings by rejecting an attempt by an Idaho utility, Avista, to obtain ownership of environmental attributes without additional compensation. *See Idaho Wind Partners 1, LLC,* 136 FERC ¶ 61,174 (Sept. 15, 2011) (order dismissing rehearing). There, Avista requested FERC rule that the QF retains the RECs in a PURPA contract only if it is expressly allowed under state law or under the terms of a PURPA contract. *Id.* at ¶ 7 FERC dismissed Avista's request on the ground that Avista filed it after the applicable deadline. *Id.* at ¶ 9. But FERC stated:

> "We also reiterate our holding in *American Ref-Fuel,* specifically, that under PURPA the sale and trading of RECs are for the state to determine, and that this is not an issue that PURPA controls." *Id.* at ¶ 10.

FERC, therefore, rejected Avista's attempt to secure a ruling that, absent a state law or contract provision to the contrary, the utility is the default owner of environmental attributes in a PURPA contract.

This case involves, in part, a dispute over the ownership of RECs and why forcing QF's to sell the RECs bundled with MWh of energy and capacity would violate Section 210(e) of PURPA and constitute a taking under the Takings Clause of the U.S. and Idaho Constitutions.

There are two critical reasons why the RECs should stay with the developer. First, the purposed IRP pricing method is based upon the incremental cost of a host of resources, the vast majority of which are carbon emitters being either gas- or coal-fired resources. None of the utilities in this case are proposing to determine avoided costs based on the full cost of surrogate renewable resources with RECs. As such, consistency and equity requires any renewable energy credits that are not being paid for should stay with the QF. Second, FERC has been very clear that avoided cost rates are not intended to compensate the QF for more than capacity and energy. In FERC Docket NO. EL03-122 FERC stated the following with regard to renewable energy credits or similar tradeable certificates:

> "23. What is relevant here is that the RECs are created by the States. They exist outside the confines of PURPA. PURPA thus does not address the ownership of RECs. And the contracts for sales of QF capacity and energy, entered into pursuant to PURPA, likewise do not control the ownerships of RECs (absent an express provision in the contract). States, in creating RECs, have the power to determine who owns the REC in the initial instance, and how they may be sold or traded; it is not an issue controlled by PURPA.
>
> 24. We thus grant Petitioner' petition for a declaratory order, to the extent that they ask the Commission to declare that contracts for the sale of QF capacity and energy entered pursuant to PURPA do not convey RECs to the purchasing utility (absent an express provision in a contact to the contrary). While a state may decide that a sale of power at wholesale automatically transfers ownership of the state-created RECs, that requirement must find its authority in state law, not PURPA. (*see EL03-122*, Order issued October 1, 2003, paragraphs 23 and 24)."

As Idaho does not have a state renewable portfolio standard and FERC has stated that PURPA pricing does not include a value for RECs, this Commission should clearly state that the published standard prices do not compensate the seller for any RECs and that the rights to the RECs remain with the QFs.

A. **Idaho Power will not compensate QF's for more than energy and capacity in the IRP Methodology contract, and no Idaho law transfers the RECs to Idaho Power without payment. Thus, QF's own the RECs under existing law.**

1. **Idaho QF contracts only compensate QFs for energy and capacity.**

The Commission calculates the published avoided cost rates using a methodology "based on the estimated costs that a utility would incur in constructing a natural gas-fired combine cycle combustion turbine ('CCCT') power plant." Idaho PUC, Order No. 30873, at p. 3. The Commission publishes a "non-fueled" rate stream calculated with a forward gas price forecast for QFs not using fossil fuels. Idaho PUC Order No. 28945, at p. 7. This avoided cost rate stream is available to QFs regardless of whether they qualify for any particular state's RPS, and is available even to old co-generation or hydropower facilities unable to qualify to create RECs. *See* Idaho PUC Order No. 28945, at p. 7.

The proposed IRP Methodology compares the present value of the revenue requirements of the base case with one that includes the utility's system including the QF to estimate the value of both capacity and energy delivered by the QF. Direct Testimony of Rick Sterling, IPC-E-95-09, Exhibit 101, p.8. The IRP Methodology itself values all of the utility's resources and therefore does not provide a value for the avoided cost of acquiring a renewable-specific resource, or otherwise include any adderfor the value of the RECs a QF may convey. *Id.*

Thus, the IRP Methodology, like the SAR methodology for published rates, compensates QFs for the estimated value of the energy and capacity alone, not for the avoided costs a utility may otherwise incur in acquiring any non-energy environmental attributes such as RECs. Indeed, the Idaho Public Utilities Commission ("Commission") vigilantly ensuresthat the avoided cost rates do not exceed the cost of energy and capacity alone. Idaho PUC Order No. 31057, at pp. 6-7 (stating, "It is well established that a utility cannot be required to pay more for QF power than its avoided cost," and therefore a "delay in changing avoided cost rates...ultimately means that ratepayers are saddled with rates that are too high and therefore unreasonable"); *see also* Idaho PUC Order No. 31092, at p. 11.

There is no question, therefore, that neither Idaho avoided cost model considers the costs of building or procuring a renewable-specific resource, and neither model explicitly or implicitly includes compensation to the QF for RECs or any other valuable environmental attributes.

2. **Because QFs are not compensated for environmental attributes and no law conveys them to Idaho utilities free of additional charge, QFs retain legal title to their projects' environmental attributes.**

The Commission itself twice addressed ownership of environmental attributes shortly after FERC's *American Ref-Fuel, Co.* orders. First, Idaho Power petitioned the Commission for an order declaring that QFs generating green tags must grant Idaho Power "a 'right of first refusal' to purchase those tags." Idaho PUC Order No. 29480, at p. 5. The other two investor-owned utilities in Idaho, PacifiCorp and Avista, both intervened and requested that the Commission determine the utilities own the environmental attributes associated with QF generation. *Id.* at pp. 5-8. The Idaho PUC found that Idaho Power's petition did "not present an actual or justiciable controversy in Idaho and [was] not ripe for a declaratory judgment…." *Id.* at p. 16. The Commission noted the *American Ref-Fuel, Co.* orders and noted that the State of Idaho does not have a green tag program or an RPS, stating:

> :While *this Commission will not permit [Idaho Power] in its contracting practice to condition QF contracts on inclusion of such a right-of-first refusal term,* neither do we preclude the parties from voluntarily negotiating the sale and purchase of such a green tag should it be perceived to have value. The price of same we find, however, is not a PURPA cost and is not recoverable as such by the Company." *Id.* at pp. 16-17.

(emphasis added). Shortly thereafter, Idaho Power filed for approval of a PURPA contract containing the published rates for a non-fueled co-generation project, wherein Idaho Power expressly waived any claim to ownership of environmental attributes. Idaho Power requested the Commission provide it with assurance that it would not be penalized in a future ratemaking proceeding for waiving ownership of the environmental attributes. Idaho PUC Order No. 29577, at pp. 2-3. The Commission stated, "The State of Idaho still has not created a green tag program, has not established a trading market for green tags, nor does it require a renewable portfolio standard." *Id.* at pp.5-6. It again stated that the QF and the utility were free to separately negotiate for the sale of environmental attributes, but that the costs associated with the sale could not be recovered by the utility as a PURPA cost. The Commission ruled,

> "as qualified above, the Commission finds it reasonable to approve the submitted Agreement and further finds it reasonable to allow payments made under the Agreement as prudently incurred expenses for ratemaking purposes." *Id.* at p.6.

Thus, the Commission found it reasonable for the utilities to waive ownership of environmental attributes because Idaho law did not convey them to the utility.

No Idaho law currently vests ownership of environmental attributes to a utility in an Idaho QF contract. Thus, under any reasonable interpretation of the current QF rate mechanisms and existing Idaho Commission orders implementing PURPA, Idaho QFs are the default owners the environmental attributes. There is no question that RECs exist and have value, yet the rate provided to QFs under both of the Idaho Commission's approved methodologies includes no express or implicit compensation for the value of RECs. . *IRCO OR REC Application,* at 6 (noting Idaho Power had sold $3.1 million worth of RECs from projects conveying it RECs). The rate in renewable QF contracts is the same rate that would be included in a contract for a fossil-fueled congeneration QF too old to produce RECs. Just as an Idaho cogeneration QF retains and may separately sell the thermal output from its QF, a renewable QF retains and may separately sell the environmental attributes. *American Ref-Fuel Co.,* 107 FERC ¶ 61,016, ¶ 16 n. 9.

The Commission has ruled it "will not permit [Idaho Power] in its contracting practice to condition QF contracts on inclusion of such a right-of-first refusal term [regarding RECs]."

Idaho PUC Order No. 29480, p. 16. This ruling can be read as nothing other than an implicit rejection of the request by PacifiCorp and Avista in that case for a determination that they own the environmental attributes. The circumstances are no different today, and the rule remains that Idaho QFs being paid the SAR or IRP Methodology rates own and may separately convey their environmental attributes and RECs for compensation in addition to the estimated value of the electric energy and capacity in the Idaho avoided cost rates.

3. QF's RECs and their going concern business value are compensable property rights.

The meaning of "property", as used in the Takings Clause, is a "federal question", but it will normally obtain its content by reference to local law. *U.S. v. Causby*, 328 U.S. 256 (1946). The Takings Clause protects private property, rather than creating it; thus, to determine whether a particular property interest is protected, the court looks to existing rules or understandings that stem from an independent source such as state law. *Givens v. Alabama Dept of Corrections,* 381 F.3d 1064, cert denied 545 U.S. 1104 (2004). In determining what property rights exist, and therefore are subject to taking under the Fifth Amendment, federal courts look to local state law. *Richmond Elks Hall Ass'n v. Richmond Redevelopment Agency,* 561 F.2d 1327 (1977).

In analyzing whether a claimant possesses a property interest, courts describe the term "property" as referring to "the group of rights inherent in the citizen's relation to the physical things, as the right to possess, use and dispose of it." *United States v. General Motors Corp.,* 323 U.S. 373, 377-378 (1945); *see also Lingle v. Chevron U.S.A. Inc.,* 544 U.S. 528, 539 (2005); *Loretto v. Teleprompter Manhattan CATV Corp.,* 458 U.S. 419, 435 (1982). Property interests "are about as diverse as the human mind can conceive", *Florida Rock Industries v. United States,* 18 F.3d 1560, 1572 n. 32 (Fed.Cir.1994) and the Takings Clause "is addressed to every sort of interest the citizen may possess." *General Motors,* 323 U.S. at 378; *see also Lucas v. South Carolina Coastal Council,* 505 U.S. 1003, 1019 (1992) (real property); *Monsanto Co.,* 467 U.S. 1, 19 n.16 (1977) (contract rights); *Roth v. Pritikin,* 710 F.2d 934, 939 (2d Cir.1983) (copyright); *Leesona Corp. v. United States,* 599 F.2d 958, 964 (Fed. Cir. 1979).

Transferrable property created by government programs is compensable property under the Takings Clause. *See e.g. Redevelopment Authority of Philadelphia v. Lieberman,* 336 A.2d 249, 257-59 (Pa.1975) (collecting cases and awarding compensation for lost value of liquor license associated with condemnation of liquor store premises); *see also Members of the Peanut Quota Holders Ass'n v. United States,* 421 F. 3d 1323, 1332 (Fed. Cir. 2005) (finding property right existed in government issued peanut quotas and stating the "right to transfer is a traditional hallmark of property."). QFs' interest in the transferrable environmental attributes of QFs is a compensable property interest. As the Commission and Idaho Power have acknowledged in prior orders and filings, RECs are indeed valuable and transferrable.

A. The Commission's requirement of inclusion of Idaho Power's proposed environmental attributes clause would constitute a taking of QF's property without just compensation in violation of the Takings Clauses of the Idaho and U.S. Constitutions.

The Fifth Amendment of the U.S. Constitution and the Article 1 Section 14 of the Idaho Constitution each provide that private property shall not be taken for public use without just compensation. U.S. Const. amend. V, cl. 4; Idaho Const. art. 1 § 14. The purpose of the takings clause is to prohibit the "Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States,* 364 U.S. 40, 49 (1960). Courts first examine whether the claimant possesses a property interest that is protected by the Fifth Amendment. *Ruckelshaus v. Monsanto Co.,* 467 U.S. 986, 1003-04 (1984). If such an interest is established, courts then examine whether the government's action amounts to a compensable taking of that interest. *Id.* at 1005-06. When such a taking occurs, an aggrieved individual may file a claim for "inverse condemnation," which is a shorthand description of the manner in which a property owner recovers just compensation for a taking of his property when condemnation proceedings have not been instituted. *United States v. Clarke,* 445 U.S. 253, 257 (1980).

1. **Commission approval of Idaho Power's environmental attributes clause would constitute a taking.**

Where the government requires an owner to suffer a permanent physical invasion of the property, however minor, it must provide just compensation. *See Loretto,* 458 U.S. at 435 (state law requiring landlords to permit cable companies to install cable facilities in apparent buildings effected a taking). A second categorical rule applies to regulations that completely deprive an owner of all economically beneficial use of her property. *Lucas,* 505 U.S., at 1019; Boise Tower Associates, LLC v. Hogland, 147 Idaho 774, 773, 215 P.3d 494,503 (2009); Coeur d'Alene Garbage Service, 114 Idaho at 591, 759 P.2d at 881 (collecting Idaho cases and applying Idaho Constitution to find taking of garbage collection business by City action curtailing its business). Since what the owner had was transferable value, "the question is, What has the owner lost? Not, What has the taker gained?" *Kimball Laundry Co.,* 338 U.S. at 12-13 (finding compensable taking when government took temporary possession of a laundry); *Yancey v. United States,* 915 F.2d 1534, 1541-42 (Fed. Cir. 1990) (finding a compensable tang where "the Yanceys had no choice but to sell their birds for substantially less than their value"). In *Armstrong*, the Court found a compensable taking of the claimants' liens on uncompleted boat hulls seized by the Government pursuant to a contract. *Armstrong,* 364 U.S. at 48-49.

> "Since this acquisition was for public use, however accomplished, whether with an intent and purpose of extinguishing the liens or not, the Government's action did destroy them and in the circumstances of this case did thereby take the property value of those liens within the meaning of the Fifth Amendment." *Id.* "And it matters not whether (the property was) taken over by the government or destroyed, since, as has been said, destruction is tantamount to taking." *General Motors*, 323 U.S. at 384.

Idaho Power's purpose for the clause is to protect its ratepayers from a future change in the law that may require it to obtain its own RECs, not that Idaho Power intends to pay for the RECs.

To authorize such the clause under this reasoning would be a classic case of requiring an individual or entity (QF's) to forfeit their property (valuable environmental attributes and going concern value of its QF business) for public benefit (reduced regulatory risk for Idaho Power's customers) without any compensation. The Commission would therefore be subject to an inverse condemnation proceeding whereby a court would order it to compensate QFs for (1) the value of environmental attributes impaired by Idaho Power's contract clause, and (2) the going concern value of QF's business impaired by taking of the environmental attributes.

CONCLUSION

Because utilities' proposed liquidated damages provision fails to meet the test of reasonable relation to actual damages and because its potential damages are not difficult to calculate, their proposed liquidated damages provision should be denied. Further, the utilities' desire for curtailment is contradictory to contract principles, FERC guidance and rulings, and contrary to its own prior intention, so should be denied. The Commission's authorization of Idaho Power's proposed contract language regardingenvironmental attributes would violate Section 210(e) of PURPA, and the Takings Clauses of the U.S. and Idaho Constitutions. Twin Falls Canal Company and North Side Canal Company therefore requests that the Commission issue a declaratory judgment that the QFs are the rightful owners of RECs and are entitled to determine whether to sell them or not.

DATED this 19th day of July, 2012.

CAPITOL LAW GROUP, PLLC

By______________________

C. Thomas Arkoosh, Of the Firm
Attorneys for Twin Falls Canal Company, Inc. and
North Side Canal Company, Inc.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 19th day of July, 2012, I served a true and correct copy of the foregoing upon each of the following individuals by causing the same to be delivered by the method and to the addresses indicated below:

Jean Jewell, Commission Secretary Idaho Public Utilities Commission 427 W. Washington St. Boise, Idaho 83702	____ U.S. Mail, postage prepaid ____ Hand-Delivered ____ Overnight Mail ____ Facsimile _X__ Via E-Mail jean.jewell@puc.idaho.gov
Daniel Solander Rocky Mountain Power 201 S. Main St., Ste. 300 Salt Lake City, UT 84111	____ U.S. Mail, postage prepaid ____ Hand-Delivered ____ Overnight Mail ____ Facsimile _X__ Via E-Mail daniel.solander@pacificorp.com
Ronald L. Williams Williams Bradbury PC 1015 W. Hays St. Boise, Idaho 83702	____ U.S. Mail, postage prepaid ____ Hand-Delivered ____ Overnight Mail ____ Facsimile _X__ Via E-Mail ron@williamsbradbury.com
Robert A. Paul Grand View Solar II 15690 Vista circle Desert Hot Springs, CA 92241	____ U.S. Mail, postage prepaid ____ Hand-Delivered ____ Overnight Mail ____ Facsimile _X__ Via E-Mail robertapaul08@gmail.com
R. Greg Ferney Mimura Law Offices, PLLC 2176 E. Franklin Rd., Ste. 120 Meridian, Idaho 83642	____ U.S. Mail, postage prepaid ____ Hand-Delivered ____ Overnight Mail ____ Facsimile _X__ Via E-Mail greg@mimuralaw.com
Bill Piske, Manager Interconnect Solar Development, LLC 1303 E. Carter Boise, Idaho 83706	____ U.S. Mail, postage prepaid ____ Hand-Delivered ____ Overnight Mail ____ Facsimile _X__ Via E-Mail billpiske@cableone.net
Robert D. Kahn, Executive Director Northwest and Intermountain Power Producers Coalition 1117 Minor Ave., Ste. 300 Seattle, WA 98101	____ U.S. Mail, postage prepaid ____ Hand-Delivered ____ Overnight Mail ____ Facsimile _X__ Via E-Mail rkahn@nippc.org

Michael G. Andrea
Avista Corporation
1411 East Mission Ave.
Spokane, WA 99202

____ U.S. Mail, postage prepaid
____ Hand-Delivered
____ Overnight Mail
____ Facsimile
_X__ Via E-Mail michael.andrea@avistacorp.com

Dean J. Miller
McDevitt & Miller, LLP
P.O. Box 2564
Boise, Idaho 83701

____ U.S. Mail, postage prepaid
____ Hand-Delivered
____ Overnight Mail
____ Facsimile
_X__ Via E-Mail joe@mcdevitt-miller.com

Don Sturtevant, Energy Director
J.R. Simplot Company
P.O. Box 27
Boise, Idaho 83707

____ U.S. Mail, postage prepaid
____ Hand-Delivered
____ Overnight Mail
____ Facsimile
_X__ Via E-Mail don.sturtevan@simplot.com

James Carkulis, Managing Member
Exergy Development Group of ID, LLC
802 W. Bannock St., Ste. 1200
Boise, Idaho 83702

____ U.S. Mail, postage prepaid
____ Hand-Delivered
____ Overnight Mail
____ Facsimile
_X__ Via E-Mail jcarku-
lis@exergydevelopment.com

M.J. Humphries
Blue Ribbon Energy LLC
4515 S. Ammon Rd.
Ammon, Idaho 83406

____ U.S. Mail, postage prepaid
____ Hand-Delivered
____ Overnight Mail
____ Facsimile
_X__ Via E-Mail blueribbonenergy@gmail.com

Brian Olmstead, General Manager
Twin Falls Canal Company
P.O. Box 326
Twin Falls, Idaho 83303

____ U.S. Mail, postage prepaid
____ Hand-Delivered
____ Overnight Mail
____ Facsimile
_X__ Via E-Mail olmstead@tfcanal.com

John R. Lowe
Consultant to Renewable Energy
Coalition
12050 SW Tremont St.
Portland, OR 97225

____ U.S. Mail, postage prepaid
____ Hand-Delivered
____ Overnight Mail
____ Facsimile
_X__ Via E-Mail jravenesanmarcos@yahoo.com

Donovan E. Walker Jason B. Williams Idaho Power Company P.O. Box 70 Boise, Idaho 83707-0700	____ U.S. Mail, postage prepaid ____ Hand-Delivered ____ Overnight Mail ____ Facsimile _X__ Via E-Mail dwalker@idahopower.com jwil- liams@idahopower.com
Ted Sorensen PE Birch Power Company 5203 South 11th East Idaho Falls, Idaho 83404	____ U.S. Mail, postage prepaid ____ Hand-Delivered ____ Overnight Mail ____ Facsimile _X__ Via E-Mail ted@tsorenson.net
Bill Brown, Chair Board of Commissioners of Adams County, ID P.O. Box 48 Council, Idaho 83612	____ U.S. Mail, postage prepaid ____ Hand-Delivered ____ Overnight Mail ____ Facsimile _X__ Via E-Mail bdbrown@frontiernet.net
Donald L. Howell, II Kristine A. Sasser Deputy Attorneys General Idaho Public Utilities Commission 472 W. Washington St. Boise, Idaho 83702	____ U.S. Mail, postage prepaid ____ Hand-Delivered ____ Overnight Mail ____ Facsimile _X__ Via E-Mail don.howell@puc.idaho.gov kris.sasser@puc.idaho.gov
Arron F. Jepsen Blue Ribbon Energy, LLC 10660 South 540 East Sandy, UT 84070	____ U.S. Mail, postage prepaid ____ Hand-Delivered ____ Overnight Mail ____ Facsimile _X__ Via E-Mail arronesq@aol.com
Wade Thomas, General Counsel Dynamis Energy, LLC 776 W. Riverside Dr., Ste. 15 Eagle, Idaho 83616	____ U.S. Mail, postage prepaid ____ Hand-Delivered ____ Overnight Mail ____ Facsimile _X__ Via E-Mail wthomas@dynamisenergy.com
Glenn Ikemoto Margaret Rueger Idaho Windfarms, LLC 672 Blair Ave. Piedmont, CA 94611	____ U.S. Mail, postage prepaid ____ Hand-Delivered ____ Overnight Mail ____ Facsimile _X__ Via E-Mail glenni@envisionwind.com margaret@envisionwind.com

Ted Diehl, General Manager North Side Canal Company 921 N. Lincoln St. Jerome, Idaho 83338	____ U.S. Mail, postage prepaid ____ Hand-Delivered ____ Overnight Mail ____ Facsimile _X__ Via E-Mail nscanal@cableone.net
Megan Walseth Decker Senior Staff Counsel Renewable Northwest Project 917 SW Oak St., Ste. 303 Portland, OR 97205	____ U.S. Mail, postage prepaid ____ Hand-Delivered ____ Overnight Mail ____ Facsimile _X__ Via E-Mail megan@rnp.org
Peter J. Richardson Gregory M. Adams Richardson & O'Leary, PLLC P.O. Box 7218 Boise, Idaho 83702	____ U.S. Mail, postage prepaid ____ Hand-Delivered ____ Overnight Mail ____ Facsimile _X__ Via E-Mail peter@richardsonandoleary.com greg@richardsonandoleary.com
Marv Lewallen Clearwater Paper Corporation 601 W. Riverside Ave., Ste. 1100 Spokane, WA 99201	____ U.S. Mail, postage prepaid ____ Hand-Delivered ____ Overnight Mail ____ Facsimile _X__ Via E-Mail marv.lewallen@clearwaterpaper.com
Benjamin J. Otto Idaho Conservation League P.O. Box 844 Boise, Idaho 83701	____ U.S. Mail, postage prepaid ____ Hand-Delivered ____ Overnight Mail ____ Facsimile _X__ Via E-Mail botto@idahoconservation.org
Don Schoenbeck RCS 900 Washington St., Ste. 78 Vancouver, WA 98660	____ U.S. Mail, postage prepaid ____ Hand-Delivered ____ Overnight Mail ____ Facsimile _X__ Via E-Mail dws@r-c-s-inc.com
Liz Woodruff Ken Miller Snake River Alliance P.O. Box 1731 Boise, Idaho 83701	____ U.S. Mail, postage prepaid ____ Hand-Delivered ____ Overnight Mail ____ Facsimile _X__ Via E-Mail lwooruff@snakeriveralliance.org kmiller@snakeriveralliance.org

Deborah E. Nelson
Kelsey J. Nunez
Givens Pursley LLP
P.O. Box 2720
Boise, Idaho 83701-2720

____ U.S. Mail, postage prepaid
____ Hand-Delivered
____ Overnight Mail
____ Facsimile
_X__ Via E-Mail den@givenspursley.com
kjn@givenspursley.com

Dr. Don Reading
6070 Hill Rd.
Boise, Idaho 83703

____ U.S. Mail, postage prepaid
____ Hand-Delivered
____ Overnight Mail
____ Facsimile
_X__ Via E-Mail dreading@mindspring.com

Tauna Christensen
Energy Integrity Project
769 N. 1100 E.
Shelley, Idaho 83274

____ U.S. Mail, postage prepaid
____ Hand-Delivered
____ Overnight Mail
____ Facsimile
_X__ Via E-Mail tauna@energyintegrityproject.org

Lynn Harmon
AFRD #2
409 N. Apple St.
Shoshone, Idaho 83352

____ U.S. Mail, postage prepaid
____ Hand-Delivered
____ Overnight Mail
____ Facsimile
_X__ Via E-Mail lynnharmon@cableone.net

C. Thomas Arkoosh