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IDAHO PUBLIC
UTILITIES COMMISSION

July 20, 2012

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

RE: GNR-E-11-03 – PRE-HEARING LEGAL BRIEF OF CLEARWATER PAPER CORPORATION, J.R. SIMPLOT COMPANY, AND EXERGY DEVELOPMENT GROUP OF IDAHO, LLC

Dear Ms. Jewell:

Enclosed please find the prepared Pre-hearing Legal Brief of Clearwater Paper Corporation, J.R. Simplot Company, and Exergy Development Group of Idaho, LLC. Per the Commission's Rules of Procedure, we have enclosed and original and seven (7) copies.

Sincerely,

Chynna C. Tipton
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encl.

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Attorneys for Clearwater Paper Corporation,
J.R. Simplot Company, and
Exergy Development Group of Idaho, LLC

BEFORE THE IDAHO PUBLIC UTILITIES COMMISSION

CASE NO. GNR-E-11-03

IN THE MATTER OF THE COMMISSION'S REVIEW OF PURPA QF CONTRACT PROVISIONS INCLUDING THE SURROGATE AVOIDED RESOURCE (SAR) AND INTEGRATED RESOURCE PLANNING METHODOLOGIES FOR CALCULATING PUBLISHED AVOIDED COST RATES.	PRE-HEARING LEGAL BRIEF OF CLEARWATER PAPER CORPORATION, THE J.R. SIMPLOT COMPANY, AND EXERGY DEVELOPMENT GROUP OF IDAHO, LLC

July 20, 2012

TABLE OF CONTENTS

I. INTRODUCTION

COMES NOW, Clearwater Paper Corporation, Exergy Development Group of Idaho, LLC, and the J. R. Simplot Company (individually "Clearwater," "Exergy," or "Simplot" and collectively "Intervenors") and pursuant to the Idaho Public Utilities Commission's ("PUC" or "Commission") Order No. 32388 and hereby lodges the Intervenor's Pre-Hearing Brief. The Intervenors intend to address many of the most significant legal issues, however, because this docket is so wide-ranging, it is likely some relevant legal issues may not be addressed – either because they may be raised for the first time in another party's pre-hearing brief or they have been assumed to be settled law not deserving of briefing. Nevertheless, the Intervenors reserve their rights to request to file a post-hearing or reply brief should the need arise.

This brief is organized to address the legal issues surrounding (1) avoided cost rates; (2) length of QF contract term; (3) delay default liquidated damages provisions in PURPA[1] contracts; (4) economic curtailment; (5) ownership of environmental attributes; (6) the need for an "as available" QF PPA; and (7) adoption of non-discriminatory interconnection procedures and agreements for Idaho QFs.

II. BACKGROUND

In the Commission's Notice of Review Order No. 323512 issued on September 1, 2011, the Commission stated it intended "to review the terms of PURPA power purchase agreements including, but not limited to, the surrogate avoided resource (SAR) and Integrated Resource Planning (IRP) methodologies for calculating published avoided cost rates." Idaho Power Company ("Idaho Power"), Rocky Mountain Power, and Avista (collectively the "Utilities") filed opening testimony on January 31, 2012. Commission Staff and several intervenors filed

1 Public Utilities Regulatory Policies Act of 1978, 16 U.S.C. § 824a-3, §§ 2601 *et seq.* (2011).

direct testimony on May 4, 2012. Parties then filed rebuttal testimony on June 29, 2011. The testimony has addressed a broad range of issues related to QF transactions and contracts. After one round of pre-hearing legal briefing, the dates for the technical hearing are August 6, 2012 through August 7, 2012.

III. ARGUMENT

A. The Commission Should Adopt Dr. Reading's Recommendations Tailored to Compensate QFs for the Full Avoided Costs of Energy and Capacity Supplied.

Idaho Power, through various witnesses, is urging the Commission to adopt short-run avoided cost rates. It is also asking the Commission to restrict contract length for the sole purpose of keeping avoided cost rates artificially low:

> The only way to limit the difference between the actual value of QF power and prices paid for it is to keep contracts short and/or severely limit the period for which prices are fixed. This can be done in a number of ways, including reopeners and indexation.

Hieronymus, DI, Idaho Power, p. 6.

Adopting a short-run avoided cost model for the purpose of artificially deflating avoided cost rates is contrary to federal law and regulations. Federal law requires utilities to contract with each QF at the *full* avoided cost rates. The U.S. Supreme Court has upheld the Federal Energy Regulatory Commission's ("FERC") regulations requiring utilities to purchase capacity and output of QFs at full avoided cost rates. *American Paper Institute, Inc. v. American Electric Power Service Corp.,* 461 U.S. 402, 413, 417-18 (1983) (unanimously affirming FERC's requirement that utilities compensate QFs for the *full* avoided costs, not some lesser amount); 16 U.S.C. § 824a-3(b), (d); *see also Small Power Production and Cogeneration Facilities; Regulations Implementing Section 210 of the Public Utility Regulatory Policy Act of 1978* ("*Order No. 69*"), 45 Fed. Reg. 12,214, 12,222-12,223 (Feb. 25, 1980) (promulgating avoided cost regulations and directly rejecting proposals to provide QFs with rates at less than the full avoided cost).

Using short-term measures for avoided cost rates ignores the fact that all three utilities in Idaho plan for a 20-year horizon in their respective integrated resource plans ("IRP"). Ignoring this fact and limiting avoided cost calculations to short-term avoided costs fails to set the avoided cost rates at "full avoided costs." This problem is highlighted by the view taken by the Utilities, which is best exemplified by Dr. Hieronymus's direct testimony on behalf of Idaho Power. Throughout his testimony, Dr. Hieronymus demonstrates a fundamental misapplication of FERC's avoided cost principles. His testimony completely ignores FERC's orders. In one telling passage addressing capacity payments, Idaho Power's witness stated:

> What is not clear (and I pretend no legal analysis of the points) is whether a contract for non-dispatchable, intermittent energy such as wind is "as available" and hence is only entitled to a rate determined at the time of delivery. Assuming that such a QF is not deemed "as available" and hence is entitled to a rate determined at the time of contracting, it is similarly unclear whether this can be a formula rate (e.g., one that is indexed to vary with, for example, gas prices or inflation) or if the utility must offer a fixed schedule of rates for the term of the contract.
>
> Heironymus, DI, Idaho Power, p. 5

No legal analysis on Dr. Hieronymus's part is necessary. FERC has directly addressed the issue. *JD Wind 1, LLC*, 129 FERC ¶ 61,148 (2009), *reh'g denied* 130 FERC ¶ 61,127 (2010). There, FERC declared that all QFs, even those using an intermittent resource, have the option "to choose a rate based on avoided costs calculated at the time the obligation is incurred." *Id.*, 129 FERC ¶ 61,148 at ¶27. A formula or constantly changing avoided cost rate does not meet that requirement.

Dr. Hieronymus also purports to identify the "purpose" of PURPA:

> It is essential to not lose sight of the purpose of PURPA which *was limited to ending discrimination* against cogeneration and small renewable power facilities. This *limited purpose* is underscored by the statutory provision that prices paid shall not exceed the utility's avoided cost. Not only was PURPA not meant to subsidize QFs at the expense of customers, such subsidies are in fact illegal if provided through PURPA prices.
>
> Hieronymus, DI, Idaho Power, p. 5 (emphasis added).

It is, of course, misleading to suggest that the purpose of PURPA was "limited" to ending discrimination against independent power producers.

PURPA was passed in 1978 in response to the Arab oil embargo as well as in response to the end of a long period of declining real prices of electricity. Between 1973 and 1982 electricity prices increased, on a national basis, by sixty percent in real terms.[2] Congress passed PURPA in 1978 to encourage industrial and commercial cogeneration by providing rate benefits and prohibiting electric utility rate discrimination against qualifying cogeneration and small power production facilities. PURPA also provides QFs with the right to connect to the electric utility grid and exempts them from rate regulation by FERC or financial regulation by state commissions. *See* 16 U.S.C. §§ 824a-3(a), (e); 18 C.F.R. §§ 292.303(c), -306, -601-602.

The role of the state commissions in implementing PURPA is quite broad. States are free to establish the terms and conditions of PURPA mandated purchases by electric utilities under their jurisdiction as long as those terms and conditions are within the general guidelines found in PURPA as implemented by FERC. *See Cedar Creek Wind LLC*, 137 FERC ¶ 61,006, ¶ 27 (2011). States may not, however (as repeatedly pointed out in the Utilities' pre-filed testimony), set the rates at which utilities purchase QF power at a level higher than the purchasing utility's actual avoided costs. *See Connecticut Light & Power Co.* 70 F.E.R.C. § 61,012, 61,031 (1995).

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2 *See A Report to the President of the United States*, U. S. Department of Energy, DOE/S-0057, Energy Security, at 154. (1987).

As noted above, however, states must also implement rates which compensate QFs for the *full* avoided cost rates, not some lesser amount. *American Paper Institute, Inc.*, 461 U.S. at 413, 417-18. With these restrictions in mind, this Commission is charged by Congress with encouraging the development of the QF industry in furtherance of a national policy to diversify our national energy portfolio away from reliance on energy sources that are subject to interruption, price fluctuations, and outside of the control of the United States.

Contrary to Dr. Hieronymus' assertion, the courts have consistently and explicitly found that the purpose of PURPA was to *encourage* the development of cogeneration and small power production facilities:

> Responding to heightened fuel costs and potential fuel shortages, Congress sought to promote conservation of oil and natural gas by electric utilities. *See* FERC v. Mississippi, 456 U.S. 742, 745-46 (1982). Thus, to *encourage the development of facilities that generate electricity using renewable resources and facilities engaged in cogeneration of electricity and useful heat or steam that might otherwise be wasted*, *Id.* at 750, and to overcome the reluctance of traditional utilities to buy from, and sell to, these alternative producers, Congress granted qualifying small power production certain benefits. Under PURPA, such facilities were exempt from certain regulatory controls, and they were assured a market by providing a right to interconnect with the local public utility and to receive rates, as prescribed by FERC, up to the full avoided cost of the utility. American Paper Inst. V. American Elec. Power Serv. Corp., 461 U.S. 402, 404-06 (1983); PURPA §§ 824a-3, 824i, 824k.
>
> *Southern California Edison v. FERC,* 195 F.3d 17, 19 (D.C. Cir. 1999) (emphasis added).

This Commission is charged by the United States Congress with implementing PURPA in such a manner as to actually *encourage* the development of the QF industry. Implementing rules and regulations that discourage the development of the QF industry are contrary to law, contrary to good public policy and contrary to good utility planning. This Commission should not be misled by assertions that somehow the purpose of PURPA was "limited" to simply ending utility discrimination.

The Utilities recommend turning back the clock to shorter contract terms and reducing the avoided cost rates by using short-term costing forecasts for the explicit purpose of discouraging the development of QFs in Idaho. That is simply contrary to law. Similarly, reducing the eligibility cap will discourage QF development, as the evidence overwhelmingly shows. In the years after the Commission last reduced the eligibility cap, 1995 – 2002, ***only one new QF contract was executed***. The act of reducing the eligibility cap from 10 MW to 1 MW had the opposite effect from what is required of this Commission under federal law. Instead of "encourage[ing] the development of [QF] facilities"[3] it actually discouraged the development of the QF industry in Idaho. The Commission should adopt Dr. Reading's recommendations for calculation of avoided cost rates.

B. The Commission Should Reject Proposals to Limit QF Contract Terms to Five Years Because PURPA Requires the Commission to Provide for Long-Term QF Contracts.

FERC's regulations require states to provide for long-term contract options. *See JD Wind 1, LLC*, 130 FERC ¶ 61,127 at ¶ 23 (stating FERC "has consistently affirmed the right of QFs to long-term avoided cost contracts . . . ."). Short-term contracts alone would deprive QFs of the right to receive payment for avoided capacity, and therefore violate FERC's regulations. There are no restrictions under PURPA as to an upper boundary of the length of time a QF may require a utility to purchase its power. In fact, PURPA contemplates that the QF has the choice of the term to which it will obligate itself and the utility. As noted above, the FERC's regulations under PURPA also include a requirement that QFs have the option to sell not only as available

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3 *Southern California Edison,* 195 F.3d at 19.

but pursuant to legally enforceable obligations over specified terms. Section 292.304(d) provides:

> (d) *Purchases "as available" or pursuant to a legally enforceable obligation.* Each qualifying facility shall have the option either:
>
> (1) To provide energy as the qualifying facility determines such energy to be available for such purchases, in which case the rates for such purchases shall be based on the purchasing utility's avoided costs calculated at the time of delivery; or
>
> (2) To provide energy or capacity pursuant to a legally enforceable obligation for the delivery of energy or capacity ***over a specified term***, in which case the rates for such purchases shall, ***at the option of the qualifying facility*** exercised prior to the beginning of the specified term, be based on either:
>
> (i) The avoided costs calculated at the time of delivery; or
>
> (ii) The avoided costs calculated at the time the obligation is incurred.

18 C.F.R. § 292.304(d) (emphasis added).

Thus, the QF has the explicit "option" to choose the time at which a legally enforceable obligation is incurred for a "specified term." Since "specified term" is not defined, it remains the QFs' option to choose a term. The use of a five-year contract and short-term avoided cost calculations will likely eliminate capacity payments under the IRP methodology. This frustrates the ability of the QFs to obtain fixed capacity payments and hence frustrates the purpose of PURPA in allowing QFs to choose to sell capacity under a long term fixed legally enforceable obligation. *See JD Wind 1, LLC*, 130 FERC ¶ 61,127 at ¶ 23. Because all three utilities use a 20-year IRP planning horizon and because QFs seeking a legally enforceable obligation have the ability to require utilities to purchase capacity from them, the legally enforceable obligation should mirror the utilities' planning horizon.

Restricting the ability of a QF to unilaterally select its desired "specified term" is akin to this Commission's failed attempt to restrict the ability of a QF to unilaterally create a legally binding obligation on the utility's part to purchase its capacity and energy. FERC has repeatedly said:

> [O]ur regulations [implementing PURPA] specifically allow rates for the purchase of QF energy or capacity pursuant to a contract over a specified term to be based on avoided costs calculated, at the option of the QF, at the time of delivery or at the time the [legally enforceable obligation] is incurred . . .even if they differ from avoided costs at the time of delivery.
>
> *N.Y. State Electric and Gas Corp.*, 71 FERC ¶ 61,027 at ¶ 61,115 (1995).

One can only read the words "legally enforceable obligation for the delivery of energy or capacity "*over a specified term*" to simply mean a contract "for the delivery of energy or capacity over a specified term." How can the words "over a specified term" mean anything else? Dr. Reading explains further in his direct testimony why limiting contracts to five years is contrary to FERC's interpretation of PURPA and its own rules. Reading, DI, Clearwater, Simplot and Exergy, p. 46. The Commission should adopt Dr. Reading's recommendation and allow QFs to enter into long-term contracts.

C. The Commission Should Reject the Illegal Delay Liquidated Damages Provisions Advocated by Idaho Power and Avista.

Idaho utilities have been coercing QFs into "agreeing" to a take-it-or-leave-it QF contract that requires the QF to post $45 per kilowatt of capacity as a delay default security and forfeit that entire amount as a penalty for non-performance if the QF delays its online date by 90 days. *See* Kalich, DI, Avista, pp. 31-33; Reading, DI, Clearwater, Simplot and Exergy, pp. 36-42 and Exhibit 503; Kalich, REB, Avista, p. 13; *see also Application for Approval of FESA with Riverside Investment Group*, IPUC Case No. IPC-E-11-27 (2011) (containing Idaho Power's current delay liquated damages provision, in Section 5 of the contract, which allows Idaho Power to terminate the agreement and retain the $45/kw amount after a 90-day delay, even if the cause is delays in Idaho Power completing the interconnection). This is a substantial amount for many QFs. For example, a 10 MW wind project would forfeit $450,000 in liquidated damages once the utility decided to terminate the PPA, regardless of the cost of replacement power. Avista and Idaho Power have expressed their intent to continue the practice of including this amount as a "meaningful" liquidated damages provision designed to deter the QF's breach. However, Idaho law does not permit such punitive provisions.

The leading case is *Graves v. Cupic,* 75 Idaho 451, 456, 272 P.2d 1020, 1023 (1954), *overruled on another point by Benz v. D.L. Evans Bank*, 152 Idaho 215, 229, 268 P.3d 1167, 1181 (2012). The Supreme Court stated the rule as follows:

> Generally speaking, parties to a contract may agree upon liquidated damages in anticipation of a breach, in any case where the circumstances are such that accurate determination of the damages would be difficult or impossible, and provided that the liquidated damages 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 therefore is void and unenforceable.
>
> *Graves*, 75 Idaho at 456, 272 P.2d at 1023.[4]

In *Graves*, the Court concluded the liquidated damages clause was "arbitrary and bears no reasonable relation to the damages which the parties could have anticipated from the breach which occurred. Hence, the provision is for a penalty and is unenforceable." 75 Idaho at 459, 272 P.2d at 1025.

The Idaho Supreme Court has most recently stated, "as long as a liquidated damages clause is intended at the outset to reasonably compensate a party for potential damages resulting from a breach, *rather than <u>to</u> <u>deter</u> <u>or</u> <u>punish</u> <u>the</u> <u>breach</u>,* the clause will be enforceable."

[4] These same principles are also incorporated into Idaho's version of the Uniform Commercial Code for the sale of goods, which would apply here to the extent that a contract for the sale of electricity is the sale of a good. *See* I.C. §§ 28-2-102, -718(1).

Schroeder v. Partin, 151 Idaho 471, 477-78, 259 P.3d 617, 623-24 (2011) (emphasis added); *see also Magic Valley Truck Brokers, Inc. v. Meyer*, 133 Idaho 110, 117, 982 P.2d 945, 952 (Ct. App. 1999) (affirming district court's finding that "the imposition of $5,000 a month penalty on an employee who was hired at $10,200 per year is clearly a punishment for working in the same business in the same area" and thus constituted an unenforceable liquidated damages clause). The Commission has also stated that delay default liquidated damages should not be punitive in nature. *In Re Application for Approval of FESA with DP-AP#1 LLC*, IPUC Order No. 30608, p. 4, Case No. IPC-E-08-09 (2008). Instead, the amount must be a "fair and reasonable offset of a regulated utility's estimated increase in power supply costs attributable to the PURPA supplier's failure to meet its contractually scheduled operation date." *Id.* The Commission's statements are consistent with Idaho law.

The Utilities' purpose, however, in calculating the $45/kilowatt amount is in direct contradiction to Idaho law. Avista derived the $45/kw amount by conducting a survey of amounts required by other utilities. Reading, DI, Clearwater, Simplot and Exergy, at Exhibit 503, pp. 1-2. This approach is incorrect. Idaho law requires that liquidated damages be an approximation of actual damages – ***not*** a compilation of what other utilities with superior bargaining power are able to extract from independent developers in other monopsony electricity markets outside of Idaho. Likewise, Idaho Power has missed the mark by relying on an unsupported assertion that there are some unidentified "financial instruments . . . . that would allow a utility to lock in a 20-year, or long-term, stream of prices." Stokes, REB, Idaho Power, p. 47. Idaho Power does not assert that it sells such "financial instruments," let alone that signing QF contracts precludes Idaho Power from selling such products. This post hoc justification for Idaho Power's QF penalty provision makes no sense.

The Utilities cannot produce any evidence that \$45/kilowatt is a reasonable approximation of a 90-day delay default. No evidence supporting that punitive amount exists. Avista freely admits that it has not even attempted to approximate its likely actual damages in the event of a QF delay. Reading, DI, Clearwater, Simplot and Exergy, at Exhibit 503, p. 3. In fact, Avista even stated, "Such approximation would depend on the market condition at the time of the contract." *Id.* QF parties agree, and therefore propose a mark-to-market approach where the liquidated damage amount is the positive difference between the market rate for replacement power and the contract price during the delay period. Reading, DI, Clearwater, Simplot and Exergy, p. 39; Schoenbeck, DI, Northside Canal Company, Twin Falls Canal Company and Renewable Energy Coalition, p. 44. Further, the provision should allow QFs to cure a delay default if the QF is making commercially reasonable efforts to cure the default, which could be caused by factors beyond the QF's control such as a utility's delay in completing the interconnection. *See* Reading, DI, Clearwater, Simplot and Exergy, at pp. 41-42; *infra* Section III. G., pp. 44-47 (discussing the interconnection process).

The Utilities are attempting to secure Commission-endorsement of a liquidated damage provision designed to deter non-performance. Kalich, REB, Avista, p. 13 (asserting that a mark-to-market approach "has the potential to weaken developer performance incentives"). They propose to do so despite that a mark-to-market approach is a reasonable approximation of the actual damages. The Utilities' position is contrary to Idaho law. *See Schroeder*, 151 Idaho at 477-78, 259 P.3d at 623-24; *Graves*, 75 Idaho at 459, 272 P.2d at 1025.

Finally, it is highly relevant that QFs have played no part in "negotiating" the punitive \$45/kw liquidated damage provision. Rather, QFs have reluctantly signed PPAs containing the clause because they have had no other choice. *Compare to Schroeder*, 151 Idaho at 477-78, 259

P.3d at 623-24 (affirming jury finding of enforceability of liquidated damage clause *drafted by the breaching party* because record contained evidence, *including testimony of breaching party*, that amount set was fair approximation of likely damages). The Utilities have presented no evidence that any QFs helped them draft these provisions. Some QFs have even filed formal complaints challenging this illegal provision prior to deciding not to further compromise their project with the time and expense of litigating the issue. Reading, DI, Clearwater, Simplot and Exergy, at p. 40. The Commission should end the use of punitive delay default liquidated damages provisions and instead require the utilities to use delay liquidated damages provisions that use a mark-to-market calculation of the Utility's actual damages in the event of a delay.

D. The Commission Should Reject Idaho Power's Economic Curtailment Proposal.

The Commission should reject Idaho Power's economic curtailment tariff in its entirety because: (1) FERC's rules do not allow for general economic curtailment; (2) Section 292.304(f) does not apply to fixed rate QF contracts; (3) Section 210(e) of PURPA prohibits modification of existing contracts through the retroactive curtailment provision; (4) Idaho Power has not demonstrated that it would ever experience the "operational circumstances" described by FERC to permit curtailment; and (5) Idaho Power's tariff completely fails to incorporate the protections required by Section 292.304(f).

1. FERC's Rules Do Not Allow for Idaho Power's Proposal for General Economic Curtailment.

PURPA and FERC's implementing regulations require utilities to purchase the full net output of a QF subject to two, limited exceptions: (1) where there is a "system emergency," *see* 18 C.F.R. § 292.307(b); or (2) under "light loading" conditions in which continued QF purchases could result in negative avoided costs, 18 C.F.R. § 292.304(f). FERC has consistently rejected proposals that would permit the curtailment of QF output in any other circumstance. *Entergy Servs., Inc.*, 137 FERC ¶ 61,199 at ¶¶ 52-58 (2011) ("*Entergy*"); *Southwest Power Pool, Inc.*, 136 FERC ¶ 61,097 at ¶¶ 14-15 (2011).

The latter exception – relied upon here by Idaho Power – provides that a utility is not required to purchase QF energy:

> 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.
>
> 18 C.F.R. § 292.304(f)(1) (emphasis added).

FERC explained that this exception applies only in very limited circumstances, which it described as follows:

> If a utility operating only base load units during these periods were forced to cut back output from the units in order to accommodate purchases from qualifying facilities, ***these base load units might not be able to increase their output level rapidly*** when the system demand later increased. ***As a result***, the utility would be ***required to utilize less efficient, higher cost units with faster start-up*** to meet the demand that would have been supplied by the less expensive base load unit had it been permitted to operate at constant output.
>
> *Order No. 69*, 45 Fed. Reg. 12,214, 12,227 (emphasis added).

For example, where running a base load coal or nuclear unit below its minimum generation limit would cause the unit to shut down and be off line for several days (or weeks), the host utility might be required to operate faster ramping peaking facilities in the intervening days until the base load coal or nuclear unit can be returned to service. The limitation to "operational circumstances" means this provision "cannot be relied upon to curtail purchases of unscheduled QF energy for general economic reasons." *Entergy*, 137 FERC ¶ 61,199 at ¶ 55 (*citing Order No. 69*, 45 Fed. Reg. 12,214, 12,227).

Yet Idaho Power has asked the Commission to approve its tariff to give it general economic curtailment rights, in order to cure what it perceives as "the uneconomic dispatch of Idaho Power base load resources." Park, DI, Idaho Power, pp. 1-2. Idaho Power misunderstands Section 304(f) as providing it with right of curtailment any time it is "operating only base load resources and would be forced to cut back output from those resources in order to accommodate unscheduled QF energy." *Id.* at 18. Idaho Power over broadly defines "base load" as not only its coal units "that are in the money," but also its entire run-of-river hydro fleet, the Hells Canyon complex, and even the Langley Gulch gas plant that was build for the purpose of integrating wind. *See id.* at 23-24; Reading, DI, Clearwater, Simplot and Exergy, p. 53.

However, FERC's regulation does not grant general economic curtailment rights whenever purchasing QF output would require a utility to cut back output at any coal or hydro unit that is "must run" because it is "in the money." Idaho Power's provision attempts to broaden its right to include generalized economic curtailment. The Commission should reject the tariff on that basis alone.

2. Section 292.304(f) Does Not Apply to Fixed Rate QF Contracts.

FERC's regulations do not permit Idaho Power to apply Schedule 74 so as to curtail an existing or future QF that has a contract with forecasted avoided cost rates. FERC explained that QF curtailment under Section 292.304(f) of its regulations is permitted only in very limited circumstances, namely, during "light loading" periods where "operational circumstances" would drive base load generation units below minimum generation limits. *Order No. 69*, 45 Fed. Reg. 12,214, 12,227-28.

This justification does not apply to a QF with forecasted avoided cost rates because such rates are calculated as an average avoided cost over a long term (*e.g.*, 20 years), and therefore already reflect the lower value of QF energy during low loading periods where the time-of-delivery avoided costs could be lower than the average, long-run forecast avoided costs in the contract. In Order No. 69, FERC held that forecast avoided cost rates will, by necessity, be higher than time of delivery avoided costs at some points and lower at others, but that, "in the long run, 'overestimations' and 'underestimations' will balance out." *Id.* at 12,224. Similarly, in *Entergy*, FERC held that forecasted avoided cost rates "already reflect the variations in the value of the purchase in the lower overall rate," and that "the utility is already compensated," through this lower overall rate, "for any periods in which it purchases unscheduled QF energy even though that energy's value is lower than the true avoided cost." *Entergy*, 137 FERC ¶ 61,199 at ¶ 56.

FERC designed the rule to avoid a situation where a QF must pay the utility to accept its output at times when such operational circumstances would result in negative avoided cost prices, i.e. to prevent the anomalous result of the QF being required to pay the utility to accept its output when the actual avoided costs are negative. *See Order No. 69*, 45 Fed. Reg. 12,214, 12,227-28. This situation could only occur if the QF's rates were calculated at the time of delivery pursuant to Section 292.304(a)(1). A fixed rate contract with rates calculated at the time the obligation is incurred under Section 292.304(a)(2) would obviously contain no mechanism for the utility to assess charges to the QF for brief periods of time where the actual avoided costs might be negative.

Simply put, Section 292.304(f) applies only to QFs who choose to receive avoided cost rates calculated at the time of delivery pursuant to Section 292.304(a)(1). The Commission should reject Schedule 74 on that basis.

3. **Even if Section 292.304(f) Applied to Fixed Rate Contracts, Section 210(e) of PURPA Prohibits Modifying Contract Rates Through the Retroactive Curtailment Provision.**

Idaho Power's proposed Schedule 74 would authorize Idaho Power to modify, unilaterally and retroactively, the curtailment provisions of existing PURPA PPAs – PPAs that have already been executed by Idaho Power and reviewed and approved by the Commission. As such, it would violate Section 210(e) of PURPA and FERC's long-standing policy against invalidating, or permitting retroactive modifications, of pre-existing PURPA PPAs. FERC has consistently held that an existing PURPA PPA cannot be retroactively modified to change the avoided cost rate, or other terms and conditions set forth therein. In *Connecticut Valley Elec. Co. v. Wheelabrator Claremont Co.*, FERC explained that:

> It would not be consistent with Congress' directive to encourage cogeneration and small power production to upset the settled expectations of parties to, and to invalidate any of their obligations and responsibilities thereunder, such executed PURPA sales contracts.
>
> 82 FERC ¶ 61,116, , ¶ 61,419-20 (1998), *on reh'g, clarification and reconsideration*, 83 FERC ¶ 61,136.

Section 210(e) prohibits unilateral modification of QF contracts to account for changed circumstances. *Freehold Cogeneration Associates, L.P. v. Board of Regulatory Com'rs of State of N.J.*, 44 F.3d 1178, 1190 (3rd Cir. 1995); *Independent Energy Producers Ass'n, Inc. v. Cal. Pub. Util. Comm'n.*, 36 F.3d 848, 858 (9th Cir. 1994).

Indeed, FERC recognized this when it explained that Section 292.304(f) is not intended to:

> [O]verride 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 purchases 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. The occurrence of such periods may similarly be taken into account in determining rates for purchases.

Order No. 69, 45 Fed. Reg. 12,214, 12,228 (emphasis added).

Thus, where a QF has entered into a PURPA PPA with forecast avoided cost rates, the "utility is already compensated … for any periods during which it purchases unscheduled QF energy even though that energy's value is lower than the true avoided cost." *Entergy*, 137 FERC ¶ 61,199 at ¶ 56. Consequently, a utility is not authorized to rely on the Section 292.304(f)(1) provision to unilaterally curtail QF output because its avoided costs at the time of delivery are lower than the forecast avoided cost rates in the PURPA contract. *Id.*

Moreover, Idaho Power's Schedule 74 is explicitly intended to address the costs of integrating wind generation. It would illegally permit Idaho Power to collect additional payments for such costs over and above those set forth in the contracts (and thereby further reduce the forecast avoided cost rates in existing PURPA contracts). If Idaho Power believes it has underestimated wind integration costs, it may propose that the Commission authorize it to increase this charge in future PURPA contracts and include evidence supporting the change, but it may not retroactively modify the forecast avoided cost rates in existing PURPA PPAs.

4. Idaho Power Has Not Demonstrated That It Would Ever Experience the "Operational Circumstances" Described By FERC As Justifying Curtailment.

Curtailment under Section 292.304(f) is limited to specific "operational circumstances" in which Idaho Power would ***actually*** have to back down its base load coal units below their minimum generation limits and the units could not be returned to service in a timely manner when needed to serve load, not when economic conditions are not to Idaho Power's liking. The "operational circumstance" identified by FERC would not occur on Idaho Power's system, and

Idaho Power has instead impermissibly broadened the "operational circumstances" allowing for curtailment to justify its request. Idaho Power states it should be permitted to curtail in three distinct sets of circumstances: (1) when base load coal generation would be turned down below its minimum generating limits, such that the coal units would be forced off line, and would not be able to return to service in time for the next peak; (2) to avoid backing down its run-of-the-river hydro facilities because of economic concerns and environmental limitations on spill; and (3) to avoid backing down its Hells Canyon hydro complex because of environmental license conditions. Park, DI, Idaho Power, pp. 20-21.

The entire faulty premise of Idaho Power's tariff is that its run-of-river hydro plants and its Hells Canyon Complex are the types of base load resources contemplated by Section 292.304(f). *See* Reading, DI, Clearwater, Simplot and Exergy, p. 55. Without the hydro resources counting as "base load" facilities, Idaho Power could easily accommodate all of its QF generation and the 300 MW of minimum load from its Bridger and Boardman plants. However, Idaho Power's hydro resources are not the type of slow ramping base load units addressed by this provision. As Idaho Power acknowledges, its hydro resources, have "effectively no incremental cost" and can be dispatched "on demand;" they are used "to meet system balancing needs ... of the wind generators." Park, DI, Idaho Power, pp. 11-12. Idaho Power acknowledges that it can ramp its hydro resources down and back up again and that it can otherwise sell excess hydro energy through off-system sales or on the spot market at the Mid Columbia hub. Park, REB, Idaho Power, pp. 4-5, 9-11. Idaho Power's contrary claims that these hydro resources cannot be rapidly ramped up or down to accommodate QF purchases are therefore not credible. Idaho Power has even misread its own FERC licenses as a basis for curtailing QFs. *See generally* Hayes, DI, Idaho Conservation League.

Additionally, Schedule 74 impermissibly permits QF curtailment based on Idaho Power's alleged environmental limitations. Absent the environmental limitations at its hydro facilities, Idaho Power would itself have to admit that it could easily use its hydro facilities and Langley Gulch to meet any peak load occurring in the days after a light loading event caused it to take all coal plants off line. *See* Reading, DI, Clearwater, Simplot and Exergy, pp. 53-55. Such environmental requirements do not constitute "operational circumstances" within the meaning of Section 292.304(f), and therefore cannot be used as grounds to justify QF curtailment. FERC has strictly interpreted the exceptions to the PURPA purchase obligation, and has not permitted utilities to curtail QF output for any other reason than those set forth in FERC's regulations. Idaho Power cannot use environmental curtailment as a basis to give its hydro units priority rights over all QFs selling under PPAs to Idaho Power and avoid its PURPA purchase obligation.

5. Idaho Power's Tariff Completely Fails to Incorporate the Protections Required by Section 292.304(f).

Even if Idaho Power had otherwise justified its economic curtailment proposal (which it has not), Idaho Power has failed to incorporate any of the necessary protections developed to prevent utilities from abusing their right to very limited curtailments. *Order No. 69*, 45 Fed. Reg. 12,214, 12,227- 12,228.

Section 292.304(f)(2)-(3) states:

> (2) Any electric utility seeking to invoke paragraph (f)(1) of this section must notify, in accordance with applicable State law or regulation, each affected qualifying facility in time for the qualifying facility to cease the delivery of energy or capacity to the electric utility.
>
> (3) Any electric utility which fails to comply with the provisions of paragraph (f)(2) of this section will be required to pay the same rate for such purchase of energy or capacity as would be required had the period described in paragraph (f)(1) of this section not occurred.

Idaho Power's proposed one-hour notice falls far short of that necessary to provide QFs with an opportunity to properly cease delivery without causing undue harm. *See* Guy, DI, Idaho Wind Partners LLC, p. 6. Furthermore, Idaho Power provided no mechanism for compensating QFs when it fails to meet its unreasonable one-hour notice requirement.

Section 292.304(f)(4) states:

> (4) A claim by an electric utility that such a period has occurred or will occur is subject to such verification by its State regulatory authority as the State regulatory authority determines necessary or appropriate, either before or after the occurrence.

Idaho Power's economic curtailment tariff does not contain this procedure. Idaho Power has not proposed a method by which the Commission might be able to review evidence supporting Idaho Power's use of each instance of curtailment, or a necessary and appropriate process by which the public and QFs might be able to review all such evidence.

FERC further explained:

> Moreover, any electric utility which fails to provide adequate notice *or which incorrectly identifies such a period will be required to reimburse the qualifying facility*, for energy or capacity supplied as if such a light loading period had not occurred.

Order No. 69, 45 Fed. Reg. 12,214, 12,228 (emphasis added).

Idaho Power ignored this requirement as well. Its proposed tariff provides no mechanism by which QFs would be compensated for incorrectly identified curtailments.

With Schedule 74, Idaho Power proposes to vastly expand its own rights to curtail beyond any reasonable reading of Section 292.304(f), and at the same time completely ignore the protections provided for QFs. The Commission should reject Idaho Power's Schedule 74.

E. The Commission Should Require Idaho Utilities to Disclaim Ownership of Environmental Attributes in QF PPAs Because Idaho's Avoided Cost Rates Do Not Compensate QFs for More Than the Value of the Energy and Capacity Alone.

The Commission should order the Utilities to explicitly disclaim REC ownership in all future power purchase agreements. The law is clear that the developer of a QF project in Idaho owns any ancillary environmental attributes associated with its electrical generation. Lately, the Utilities have used strong-arm tactics to extort ownership of RECs in exchange for either not stalling the contract process or not clouding title to any such environmental attributes. Unfortunately, the Commission has failed to clear the air on this question when presented with several opportunities to do so.

1. Recent Events Demonstrate the Need for Clarity.

This Commission's failure to resolve this issue has spawned additional needless litigation before it and has caused the Utilities to actually seek legislation regarding REC ownership as evidenced by the testimony of Idaho Power witness Grow:

> Issues relating to PURPA QFs and RECs are currently being litigated by the Company [Idaho Power] before the Commission in Case No. IPC-E-11-15. The Commission has had proceedings in the past regarding issues related to the ownership of RECs between PURPA QFs and the purchasing utility, but the issue of ownership of RECs in the state of Idaho remains an unsettled issue. Idaho Power understands that the Idaho Legislature, which is currently in session, may be considering proposed legislation that would address the ownership of RECs from PURPA projects, and thus the Company has no specific request of the Commission in this regard at this time.
>
> Grow, DI, Idaho Power, p. 14.

The Idaho Legislature did not pass legislation on REC ownership; indeed, it did not even authorize a bill addressing that subject to be printed for consideration. The hot potato has been passed back to this Commission.

The Commission has struggled with the question of REC ownership for many years without speaking clearly on the subject. For example, in the most recent REC litigation, (referenced in Ms. Grow's testimony above) the Commission was presented with a clear opportunity to resolve this utility-created 'dispute,' but failed to do so. In August 2011, Grand View PV Solar Two ("Grand View") filed a complaint against Idaho Power by requesting that the Commission issue an order requiring Idaho Power to return to the practice of disclaiming REC ownership in PURPA power purchase agreements with QFs.[5] Grand View subsequently filed a Motion for Summary Judgment alleging that it was improper for Idaho Power to insist on language in its power purchase agreement providing that REC ownership would be determined by future changes in the law. The Commission issued Order No. 32580 denying Grand View's Motion for Summary Judgment on June 21, 2012.[6] In that Order the Commission correctly noted that Idaho Power and Grand View were unable to agree on the appropriateness of including Section 8.1 in the power purchase agreement. Section 8.1 provides:

> Under this Agreement, ownership of Green Tags and Renewable Energy Certificate (RECs), or the equivalent Environmental Attributes, directly associated with the production of energy from the Seller's Facility sold to Idaho Power will be governed by any and all applicable Federal or State laws and/or regulatory body or agency deemed to have authority to regulate these Environmental Attributes or to implement Federal and/or State laws regarding the same.

Grand View argued in its pleadings that this clause is an illegal "reopener" under PURPA. The Commission expressly agreed with Grand View that reopeners are illegal under PURPA, stating at page 14 of the Order that, *"we generally agree in principle with Grand View that a contract provision that would require future changes in the rates or terms of PPAs would be impermissible*

5 *Grand View PV Solar Two, LLC v. Idaho Power Company*, IPUC Case No. IPC-E-11-15.

6 The order denying Grand View's Motion for Summary Judgment was interlocutory and hence was not ripe for a motion for reconsideration.

under PURPA, we find that § 8.1 is not a reopener." The Commission concluded that Section 8.1 is not a reopener because:

> As indicated above, § 8.1 of the March 2011 draft PPA merely reflects that REC ownership will be ***determined by applicable law when the PPA is executed and approved.*** It does not subject Grand View to future changes in the ownership of RECs. Moreover, we note that the parties have not entered into a contractual agreement and the Commission has not approved the PPA. Grand View attempts to create ambiguity where none exists and has misconstrued this clause. The plain language of § 8.1 would not subject the PPA to changing conditions. Consequently, we find that § 8.1 is not preempted by PURPA.
>
> Order No. 32580 at pp 14 – 15 (emphasis added).

Although the phrase "determined by applicable law when the PPA is executed and approved" does not appear in Section 8.1, or anywhere in the PPA, the Commission found that the "plain language of § 8.1 would not subject the PPA to changing conditions."

Grand View currently has a Petition for Clarification pending before the Commission to be sure the Commission intended to rewrite the PPA at issue in that case by inserting the phrase "determined by applicable law when the PPA is executed and approved." If that is the Commission's position, or if the Commission intends to view that clause as imputed in all PURPA PPAs it approves, then the issue of REC ownership would have some clarity. But even with that modicum of clarity, QFs would be still subject to the mischief and extortionate tactics the Utilities are currently using. Indeed, Idaho Power freely admits in this case that it has used the clause at issue in *Grand View PV Solar Two LLC* to obtain ownership of several QFs' RECs without paying for them. *See* Reading, DI, Clearwater, Simplot and Exergy, Exhibit 506. This dispute is unnecessary and subject to an easy cure if the Commission would simply require the Utilities to disclaim REC ownership in future power purchase agreements – as Idaho Power had been doing for many years. The Commission may do so because the current state of REC ownership under Idaho law is not disputable and is, in fact, clear -- as discussed in detail below.

2. Avoided Cost Rates Do Not Compensate QFs For Environmental Attributes.

The mandatory purchase provisions of 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 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 that PURPA section 210(b) requires the utilities to pay QFs in exchange for electrical output is termed 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 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 a 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.* FERC declared "contracts for the sale of . . . 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 [credits]*, [but] that requirement must find its authority in state law, not PURPA." *Id.* (emphasis added).

FERC subsequently denied rehearing, and stated, "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 costs 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." *Id.* at ¶ 16 (emphasis added). FERC additionally 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 "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).

FERC has also 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 actual costs of environmental compliance. *Cal. Pub. Util. Comm'n.*, 133 FERC ¶ 61,059 (2010) (order granting clarification and dismissing rehearing), *rehearing denied*, 134 FERC ¶ 61,044 (2011). California had enacted a state law, titled AB 1613, that required utilities to procure a specified amount of energy and capacity from combined heat and power facilities that met stringent efficiency standards. FERC declared that the state commission could implement a two-tiered rate structure, where AB 1613-compliant QFs receive rates based on higher, long-run avoided cost rates reflecting more stringent efficiency standards, and non-AB 1613 compliant QFs continue to receive rates based on lower short-run avoided costs. 133 FERC ¶ 61,059, at ¶ 26. This further demonstrates that when the utility is paying a rate calculated to account for the value of energy and capacity alone, there is no compensation to QFs for their environmental attributes. *See Morgantown Energy Associates*, 139 FERC ¶ 61,066 (2012) (re-affirming *American Ref-Fuel Co.*), *petition for reh'g pending.*

3. 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; *see also* Idaho PUC Order No. 29632, at p. 14. 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.[7]

The Commission has also approved the IRP Methodology for QFs which are over the size limitation for published rates. *See* Idaho PUC Order No. 26576 (approving Stipulation to adopt methodology contained in Direct Testimony of Rick Sterling, Case No. IPC-E-95-09, Exhibit 101). The 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's output in order 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

7 Older QFs often cannot create RECs of any marketable value because most REC-creating statutes include limitations on the initial in-service date of the renewable energy facility. *See, e.g.,*. Ferrey et al., 20 Duke Envtl. L. and Pol'y F. 125, at pp. 153-155; Ore. Rev. Stat. § 469A.020 (generally excluding facilities in service prior to 1995 as facilities that may generate Oregon RECs).

therefore does not provide a value for the avoided cost of acquiring a renewable-specific resource, or otherwise include any adder for 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 Commission vigilantly ensures that 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.

The same is true for the IRP Methodology rates. In the recent Interconnect Solar QF docket, Commission Staff identified a mathematical error in Idaho Power's calculation of the IRP Methodology rates for the Interconnect Solar QF, and argued the Commission should require a reduction of approximately $10/MWh in the contract rates corresponding to the amount of the error. *See* Idaho PUC Order No. 32361, at p. 1. Interconnect Solar argued that it had provided Idaho Power with other non-energy concessions – such as 50% of the QF's RECs for no additional charge – which would more than compensate for the mathematical error. *Id.* at pp. 1-2. But the Commission stated, "this Commission would not be fulfilling its role of ensuring just and reasonable rates if it approved an Agreement that contained a known computation error. Idaho Code §S 61-301, 61-502. In other words, we are unable to approve the Agreement that is presently filed with the Commission due to a mathematical error." *Id.* The Commission therefore refused to compensate Interconnect Solar for the value of anything other than the estimated value of the energy and capacity. *See* Idaho PUC Order No. 32384 (approving the Interconnect Solar PPA only with lower rates after correcting the calculation error).

The Idaho PUC Staff has concurred with QFs on ownership of environmental attributes on at least two occasions.[8] In Case No. IPC-E-04-02, Idaho Power sought a declaratory order from the Commission approving a PPA clause that granted Idaho Power a right of first refusal to purchase green tags from PURPA developers. In that case, the Commission Staff took a position strongly supportive of developer ownership of RECs when it stated:

> Arguably *what Idaho Power proposes is an impermissible "taking" of property*. The Fifth Amendment of the U.S. Constitution states, "nor shall private property be taken for public use without just compensation."[9] This provision is called the "takings clause." Idaho Power requests a Commission Order granting the utility by regulatory fiat a "right of first refusal." It proposes no compensation to the QF for that right. Electric utility purchases of energy and capacity from PURPA QFs are mandatory. 18 C.F.R. § 292.303(a). The environmental attributes associated with renewable QF projects are currently separate from the capacity and energy sold to Idaho utilities. They are not bundled together as a matter of law. *Nor is the cost to purchase environmental attributes included in an Idaho utility's avoided cost. To the extent those attributes have value and provide additional developer incentive, Staff believes they should remain with the developer.*

Staff Comments, IPC-E-04-02, March 19, 2004 at p. 7 (emphasis added).

There is no question therefore that neither Idaho avoided cost model considers the costs of building or procuring a renewable-specific resource, nor does either model explicitly or implicitly include compensation to the QF for RECs or any other valuable environmental attributes.

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[8] *See* IPUC Case No. IPC-E-04-02 in which Idaho Power sought a right of first refusal for RECs it acknowledged belonged to the developer. Case No. IPC-E-04-16 referenced above.

[9] Staff's Fifth Amendment argument is clearly on point as more fully explained below.

4. 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 Project's Environmental Attributes.

Shortly after FERC's *American Ref-Fuel, Co.* orders but well prior to the Grand View case discussed above, the Commission itself twice addressed ownership of environmental attributes. 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 pp. 4-5. 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 a justiciable controversy in Idaho and [wa]s not ripe for a declaratory judgment[.]" *Id.* at p. 16. The Commission observed the *American Ref-Fuel, Co.* orders and noted that the State of Idaho does not have a green tag program or an RPS. It stated:

> 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*[10] 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 that the Commission provide it with assurance that it would not be penalized in a future ratemaking proceeding for

10 In *Grand View Solar PV II*, the Commission misconstrued its prior order to state that "we have held that the parties to a QF contract or PPA are free to contract for the ownership of RECs." Order No. 32580 at 10 (emphasis added). The Commission re-wrote its prior order in this passage. Parties do need to not contract ownership to a commodity clearly produced by one party and for which the other party pays nothing.

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, "[a]s 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 Utilities.

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 of 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. The rate in renewable QF contracts is the same rate that would be included in a contract for a fossil-fueled cogeneration 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 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 receiving 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.

5. The Utilities' REC Clause Is a Reopener Clause that Would Subject QFs to Changed Circumstances, and Section 210(e) of PURPA Therefore Preempts its Approval.

Section 210(e) of PURPA preempts any state commission action that subjects the rates and terms of QF contracts to changed circumstances. *See Independent Energy Producers Ass'n, Inc. v. Cal. Pub. Util. Comm'n.*, 36 F.3d 848, 858 (9th Cir. 1994); *New York State Electric & Gas Corp.*, 71 FERC ¶ 61,027, at pp. 24-26 (1995); *Afton Energy, Inc. v. Idaho Power Co.* ("*Afton I*"), 107 Idaho 781, 786-88, 693 P.2d 427, 432-34 (1984). In *Grand View PV Solar II*, the Commission agreed that a change in law provision acting to "subject Grand View to future changes in the ownership of RECs" would violate Section 210(e) of PURPA. *See* Order No. 32580 at 14-15. QFs choosing not to provide their environmental attributes to the utility – such as Grand View – are entitled to lock in avoided energy and capacity costs alone, and to separately convey their environmental attributes without being subject to a re-opener clause regarding ownership of the environmental attributes. The Utilities' re-opener clause does not allow that, and it therefore violates Section 210(e) of PURPA and FERC's implementing regulations and orders.

6. Commission Approval of Extortionate Tactics and or Title-Clouding Language Related to Environmental Attributes Constitutes a Taking of 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 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).

a. RECs are compensable property rights.

In analyzing whether a claimant possess a property interest, courts describe the term "property" as referring to "the group of rights inhering in the citizen's relation to the physical thing, 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. at 1003-04 (intangible trade secret property); *United States Trust Co. v. New Jersey,* 431 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,* 220 Ct.Cl. 234, 599 F.2d 958, 964 (1979) (patents).

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 (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.").

A QF's interest in the transferrable environmental attributes of its project is a compensable property interest. As the Commission and Idaho Power have acknowledged in prior orders and filings, RECs are indeed valuable and transferrable, and today they are most valuable sold as a forward strip of RECs that will be produced in future years. QFs clearly own the RECs for which the Utilities refuse to pay and which no law transfers to the Utilities. There can be no doubt that a QF's right to transfer RECs through the interstate market that exists today is a compensable property interest. *See Andrus v. Allard,* 444 U.S. 51, 65–66 (1979) (labeling the right to dispose of property – e.g., through commercial transactions – as "one traditional property right" and one "strand" of the "bundle" of property rights an owner possesses).

Likewise, another strand in the bundle of property rights possessed by a QF is the going concern value of its electrical generating business. *See Kimball Laundry Co. v. United States,* 338 U.S. 1, 8-13 (1949) (holding going concern value of laundry was compensable property right); *Coeur d'Alene Garbage Service v. Coeur d'Alene,* 114 Idaho 588, 591, 759 P.2d 879, 881 (1988) (collecting cases and applying Idaho Constitution to find property interest in trash collection company); *State v. Saugen,* 169 N.W.2d 37, 42-46 (1969) (liquor store). The going concern value of a QF's development efforts to date include items such as a real property lease, its efforts and expenditures in evaluating the feasibility of the project, and its goodwill obtained in negotiations with the landowner, possible REC purchasers, and others. All of these items make up the going concern value of a QF developer, which developer could transfer today in exchange for monetary compensation. This going concern value is a compensable property interest separate and distinct from the RECs. *Kimball Laundry Co.,* 338 U.S. at 8-13.

b. Requiring QFs to Gift Environmental Attributes to the Utilities Would Constitute a Taking By the Commission.

Where the government requires an owner to suffer a permanent physical invasion of their 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 apartment 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, 783, 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).[11] 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 taking 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 these 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. Granting the Utilities' title to valuable environmental attributes without providing any compensation to the QFs would constitute a categorical taking.

The inclusion of such clauses in QF PPAs that cloud the title or leave ownership "in dispute" would leave the QFs with no choice but to cut a deal selling their RECs for "substantially less than their value," *Yancey,* 915 F.2d at 1542, or to retain RECs with a title so clouded they could not be sold at all. This is exactly the case here, as highlighted, for example, by the recently approved Clark Canyon power purchase agreement with Idaho Power. *See* Case

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11 Even when the claimant still retains economic value of its property, just compensation may be required by weighing relevant factors set forth in *Penn Central Transp. Co. v. New York City,* 438 U.S. 104, 124 (1978). The Utilities' environmental attributes clause would effect a direct appropriation of private property required for a categorical taking, thus precluding the need to engage in balancing the *Penn Central* factors. However, Utilities' PPA clause would also constitute a taking under application of the factors set forth in *Penn Central. See Ruckelshaus,* 467 U.S. at 1005-1016; *Cienega Gardens v. United States,* 331 F.3d 1319, 1337-53 (Fed. Cir. 2003); *NRG Co. v. United States.,* 24 Cl.Ct. 51, 56-63 (1991).

No. IPC-E-11-09. In the Clark Canyon PPA, Idaho Power and Clark Canyon recite that they had agreed to address REC ownership in a separate agreement not filed for approval with the Commission: "Ownership of Environmental Attributes associated with the Facility is determined in a separate agreement between Idaho Power and the Seller." *See* Case No. IPC-E-11-09, Idaho Power Application at p. 3. In response to Commission Staff discovery requests, Idaho Power explained that it reached an agreement with Clark Canyon to split ownership of the RECs in half – with the Seller retaining ownership in the first ten years of the 20-year PPA and Idaho Power retaining ownership in the last ten years of the agreement. Idaho Power admitted that it did not compensate Clark Canyon for that transfer. In other words, Clark Canyon gave away half of its RECs, simply to obtain clear title to any of them. *See* Cark Canyon Comments in Case No. IPC-E-11-09; *see also* Reading, DI, Clearwater, Simplot and Exergy, Exhibit 506 (containing Idaho Power's admission to having obtained REC ownership from several other QFs in the same manner).

The Utilities' ostensible purpose for claiming title to RECs is to protect itself and its ratepayers from a future change in the law that may require them to obtain their own RECs, not that they intend to pay for the RECs. To authorize such a seizure under this reasoning would be a classic case of requiring an individual (QF) to forfeit its property (valuable environmental attributes and going concern value of its QF business) for public benefit (reduced regulatory risk for the Utilities and their customers) without any compensation. The Commission would therefore be subject to an inverse condemnation proceeding whereby a court would order it to compensate the QF for (1) the value of its environmental attributes impaired by the Utilities taking, and (2) the going concern value of the QF's business impaired by taking of the environmental attributes.

7. Any Action by the IPUC in this Case to Take a QF's Title to RECs Created by Neighboring States' RPS Laws Would Unduly Burden Interstate Commerce for Protectionist Purposes and Therefore Violate the Dormant Commerce Clause of the United States Constitution.

The Commerce Clause of the United States Constitution provides that "Congress shall have Power . . . To regulate Commerce . . . among the States . . . ." U.S. Const., Art. I, § 8, cl. 3. The Dormant Commerce Clause, however, also imposes limitations on states in the absence of congressional action. "It is well settled that actions are within the domain of the Commerce Clause if they burden interstate commerce, *or impede its free flow*." *C&A Carbone, Inc. v. Town of Clarkstown, New York*, 511 U.S. 383, 389 (1994) (emphasis added). "The central rationale for the rule against discrimination is to prohibit state or municipal laws whose object is local economic protectionism." *Id.* at 390. State laws requiring that goods be processed in-state prior to entering interstate commerce are per se invalid because such laws block the flow of interstate commerce at the state's borders. *See, e.g., id.* at 390 (striking down town ordinance requiring non-recyclable solid waste to be processed at designated facility within municipality before shipping); *South Central Timber Development, Inc. v. Wunnicke*, 467 U.S. 82, 100 (1984) (striking down Alaska regulation that required all Alaska timber to be processed within the state before export); *New Hampshire v. New England Power*, 455 U.S. 331, 339 (1982) (holding that law restricting exports of hydropower violated commerce clause by hoarding resources for State's economic benefit).

In *C.A. Carbone, Inc.*, the Court specifically noted the ordinance requiring local processing of solid waste favored only a "single local proprietor," rather a class of in-state processors, and held "this difference just ma[de] the protectionist effect of the ordinance more acute." *C&A Carbone, Inc.*, 511 U.S. at 392. "Discrimination against interstate commerce in favor of local business or investment is *per se* invalid, save in a narrow class of cases in which the municipality can demonstrate under rigorous scrutiny, that it has no other means to advance a legitimate local interest." *Id.* at 392. (distinguishing *Maine v. Taylor*, 477 U.S. 131 (1986), where the Court upheld a restriction on importation of baitfish because Maine had no other way to prevent spread of parasites and local economic interests were not that the state's justification for the ban).

Here, the Utilities propose that the Commission authorize them to take title to an interstate commodity created by ***other states'*** RPS laws – RECs. Such a proposal will burden the flow of an interstate commodity – RECs. The burden on interstate commerce is undeniable. Such an action would be local protectionism of Idaho's investor-owned electric utilities that would burden the interstate flow of goods created by neighboring states' RPS laws, and it would therefore violate the Dormant Commerce Clause. *C&A Carbone, Inc.*, 511 U.S. at 390.

Furthermore, the practical effect of the Utilities' proposed taking ownership of RECs is analogous to the illegal in-state processing requirements. Idaho does not have an RPS law that creates "Idaho RECs," and the Idaho legislature has stated no purpose whatsoever – let alone a legitimate purpose – to require QFs to give RECs to the utility.[12] Thus, requiring QFs to give RECs to an Idaho utility prior to allowing the RECs to enter interstate commerce would unlawfully require the RECs to be processed in-state prior to entering interstate commerce. *See C&A Carbone, Inc.*, 511 U.S. at 390; *South Central Timber Development, Inc.*, 467 U.S. at 100; *New Hampshire*, 455 U.S. at 339. Such a proposal has the same effect on the interstate flow of RECs as the other *per se* invalid in-state processing laws.

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12 Indeed, just the opposite is true. The Idaho Legislature has affirmatively declared that it is the policy of the State of Idaho to not adopt a renewable portfolio standard. *2007 Idaho Energy Plan* January 26, 2007 at p. 44. The proposed 2012 Idaho Energy Plan also contains a policy statement against the adoption of any sort of a renewable portfolio standard. *2010 Draft Energy Plan* at. p. 94.

The practical effect of the PPA clause is to stop the flow of the RECs at the border, so that Idaho utilities can extort some value from a commodity for which they refuse to pay. That the goods may then enter interstate commerce after passing through the Idaho Utilities' hands is of no moment because local protectionist motive would stop the original owner – the QF – from selling its RECs to the buyer of its choice in interstate commerce. *See C&A Carbone, Inc.*, 511 U.S. at 390-93. Likewise, the proposed taking is not saved by the fact that it would treat in-state QFs and out-of-state QFs the same. The Supreme Court directly rejected the same argument in *C&A Carbone, Inc.* and noted that the obvious protectionist motive for a "single local proprietor" only makes the protectionist effect "more acute." *Id.* at 392.

8. The Commission Should Reject Any Reliance by the Utilities on Distinguishable Cases Regarding REC Ownership in Other States.

The Utilities will no doubt rely on decisions from some other states determining that a utility owned RECs under PURPA contracts pre-dating any creation of any mandatory or voluntary REC markets. *See In Re Ownership of Renewable Energy Certificates*, 913 A.2d 825, 828 (N.J. Super. App. Div., 2007) (citing Edward A. Holt et al., *Who Owns Renewable Energy Certificates? An Exploration of Policy Options and Practice,* at xiv (Ernest Orlando Lawrence Berkeley National Laboratory 2006), available at http://eetd.lbl.gov/ea/emp/reports/59965.pdf)). These cases are distinguishable from the situation in the present case for several reasons, and therefore the Commission should not rely upon them.

First, those cases relied upon a factual scenario where the PURPA contracts pre-dated the existence of RECs. The leading case followed by others arose in Connecticut. *See Wheelabrator Lisbon, Inc. v. Connecticut Dept. of Pub. Util. Control*, 531 F.3d 183 (2nd Cir. 2008). There, the waste-to-energy QF at issue entered into a power purchase agreement pursuant to PURPA in 1991. *Id.* at 186. "In 2002, the specific credits at issue . . . became marketable by the creation of a market for such credits pursuant to the laws of several states, including Connecticut." *Id.*

The Connecticut Supreme Court held that the Connecticut state commission had reasonably concluded the term "electricity" in the applicable state statute implementing PURPA and in the contract "necessarily included the renewable attribute that later was 'unbundled' from the energy and represented by the certificates." *Wheelabrator Lisbon, Inc. v. Dept. of Pub. Util. Control,* 931 A.2d 159, 176 (Conn. 2007). The Connecticut Supreme Court concluded that because the 1991 contract assigned ownership to the utility, the state commission's decision did not constitute a taking in violation of the state constitution. *Id.* at 177. The federal district court likewise rejected a challenge under the takings clause on the ground that the RECs "were created after the parties entered into the [contract]." *Wheelabrator Lisbon, Inc. v. Connecticut Dept. of Pub. Util. Control*, 526 F.Supp.2d 295, 306 (D. Conn. 2006).[13] The Second Circuit held that the Connecticut state commission did not violate Section 210(e) of PURPA by modifying the original agreement because it "did not order the renegotiation of the terms of the Agreement but simply exercised its authority to interpret the Agreement's provisions." *Wheelabrator Lisbon, Inc*, 531 F.3d at 189.

Second, unlike the Idaho Commission which vigilantly ensures that PURPA contracts do not contain rates above the avoided cost of energy and capacity, some of the states that determined RECs passed to the utility relied upon a finding that the PURPA contracts compensated the QFs for more than the energy and capacity alone. *In Re Ownership of Renewable Energy Certificates*, 913 A.2d at 830 ("when it approved the contracts at issue, [the

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13 The QF did not appeal to the Second Circuit with the taking argument.

state commission] required the utilities to pay and allowed appellants to receive substantially more than the mere value of the electricity, and that it did so specifically because the electricity was produced with renewable resources").

These cases are distinguishable and inapplicable to the circumstances here because at the time of contracting in this case the parties clearly recognize the QF projects will generate RECs marketable in mandatory and voluntary markets outside of Idaho. Indeed, Idaho QF contracts directly contemplate the creation of RECs by defining them. To pretend they do not exist and are not valuable is indefensible. Furthermore, because the RECs obviously exist and the Utilities will not pay for more than the mere value of the electricity, destruction of the value of the RECs to QFs without any compensation would clearly constitute a taking. *Compare to In Re Ownership of Renewable Energy Certificates*, 913 A.2d at 830 (addressing contracts containing compensation for "substantially more than the mere value of the electricity"); *Wheelabrator Lisbon, Inc.*, 526 F.Supp.2d at 306 (finding no taking because RECs "were created after the parties entered into the [contract]"). Unlike in *Wheelabrator Lisbon, Inc.*, Intervenors' argument under Section 210(e) of PURPA is that the Utilities' REC clause is itself an impermissible contract modifier or reopener, not a subsequent modification of the terms of the contract. *See* 531 F.3d at 189.[14] Finally, those cases did not even address the question of whether the Dormant Commerce Clause allows the Idaho Commission to impose a protectionist policy requiring the RECs to pass through Idaho Power's hands before entering interstate commerce.

The Commission's authorization of the Utilities 'ownership proposal regarding environmental attributes would violate Section 210(e) of PURPA, the Takings Clauses of the

[14] The Commission has already determined that PURPA prohibits a REC clause that subject the QF to changed circumstances. *See* Order No. 32580 at 14-15.

U.S. and Idaho Constitutions, and the Dormant Commerce Clause of the U.S. Constitution. The Commission should require utilities to explicitly disclaim ownership of all environmental attributes in all future QF PPAs.

F. The Commission Should Require Each Utility to File a Streamlined PPA for "As Available" QF Sales.

Although most QFs opt to exercise their right to sell pursuant to a fixed rate contract, some QFs exercise the right to sell on an "as available" basis. *See* 18 C.F.R. § 292.304(d)(1), (2). This option may be attractive to QFs that wish to use their generation to serve their own load, as well as to QFs who are unable to complete a fully negotiated long-term agreement with a utility prior to commencing operations. Reading, DI, Clearwater, Simplot and Exergy, pp. 64-65. "Paragraph (d)(1) provides that a qualifying facility may provide energy or capacity on an 'as available' basis, i.e., without legal obligation." *Order No. 69*, 45 Fed. Reg. 12,214, 12,224. In contrast, "Paragraph (d)(2) permits a qualifying facility to enter into a contract or other legally enforceable obligation to provide energy or capacity over a specified term." *Id.*

Thus, FERC envisioned that QFs that decide to sell at rates calculated at the time of delivery can do so "*without legal obligation.*" *Id.* The QF incurs no ongoing legal obligation, and there should be no need to negotiate any specialized contract provisions. However, among the Utilities, only Idaho Power has a tariff contract that would allow a QF to commence and cease such "as available" sales on short notice.[15] There is recent precedent for Idaho QFs requesting or entering into such agreements. *See* IPUC Case No. AVU-E-12-01 (containing a recent "as available" contract). Such QFs should not be subjected to protracted negotiations because they will often seek such contracts on short notice. The Commission should require

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[15] See http://www.idahopower.com/AboutUs/RatesRegulatory/Tariffs/tariffPDF.cfm?id=55 (containing Idaho Power's Schedule 86 and short tariff contract, which is terminable by the QF on short notice).

Avista and Rocky Mountain Power to also file with the Commission and make publicly available a tariff contract for "as available" deliveries.

G. The Commission Should Require Idaho Utilities to Use FERC's Standard Interconnection Procedures and Agreements for QFs Because Less Favorable Procedures Illegally Discriminate Against QFs.

FERC has jurisdiction over interconnections of non-QFs and even QFs using the interconnecting utility's system to wheel the QF output to another utility. *See Standardization of Small Generator Interconnection Agreements and Procedures* ("*Order No. 2006*"), 111 FERC ¶ 61,220 (2005); *Standardization of Generator Interconnection Agreements and Procedures* ("*Order No. 2003*"),104 FERC ¶ 61,103 (2003), *on reh'g Order No. 2003-A*, 106 FERC ¶ 61,220 (2004), *on reh'g Order No. 2003-B*, 109 FERC ¶ 61,287 (2004), *on reh'g Order No. 2003-C*, 111 FERC ¶ 61,401 (2005). State utility commissions retain jurisdiction under PURPA over interconnection terms for QFs selling their entire output to the regulated utility to which the QF interconnects. *See Order No. 2006*, 111 FERC ¶ 61,220 at ¶¶ 516-517; *Order No. 2003*,104 FERC ¶ 61,103 at ¶¶ 813-814.[16] It is well settled, however, that "a state may take action under PURPA only to the extent that that action is consistent with [FERC's] rules." *Cedar Creek Wind LLC*, 137 FERC ¶ 61,006 at ¶ 27. The terms of QF interconnections are no exception.

FERC's regulations generally require that QFs be treated in a non-discriminatory manner. *See* 18 C.F.R. § 292.304(a)(1)(ii), § 292.306(a). In promulgating Section 292.306 of its initial implementing regulations, FERC stated:

> Certain interconnection costs may be incurred as a result of sales from a utility to a qualifying facility. The Commission notes that the Joint Explanatory Statement of the Committee of Conference (Conference Report) *prohibits the use of*

16 However, states do not obtain jurisdiction over an interconnection initially requested pursuant to FERC's jurisdiction, solely because the generator chooses to later sell as a QF.

> "unreasonable rate structure impediments, such as *unreasonable hook up charges or other discriminatory practices. . .*" This prohibition is reflected in § 292.306(a) of these rules, which provides that interconnection costs must be assessed on a nondiscriminatory basis with respect to other customers with similar load characteristics.
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> *Order No. 69*, 45 Fed. Reg. at 12,217 (emphasis provided) (footnote omitted).

FERC has also defined "interconnection costs" as the reasonable costs of interconnection, transmission and distribution "*to the extent such costs are in excess of the corresponding costs which the electric utility would have incurred if it had* not engaged in interconnected operations, but *instead generated an equivalent amount of electric energy itself or purchased an equivalent amount of electric energy or capacity from other sources*." *Id.* at § 292.101(b)(7) (emphasis added). FERC further explained:

> This definition also incorporates the concept from the proposed rule, as clarified in an erratum notice, that *these costs are limited to the net increased interconnection costs imposed on an electric utility compared to those interconnection costs it would have incurred had it generated the energy itself or purchased an equivalent amount of energy or capacity from another source.*
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> *Order No. 69*, 45 Fed. Reg. at 12,217 (footnote omitted) (emphasis added).

Thus, FERC and Congress plainly intended to prevent discrimination against QFs in interconnection practices and costs. A state's rules governing QFs' interconnection costs and practices must be consistent with those costs and practices that would be applicable had the utility generated the energy itself or purchased the energy from another source.

Years after promulgation of these basic QF interconnection rules, FERC promulgated detailed interconnection procedures and agreements applicable to non-QF generators, including the utilities' own generation resources. *Order No. 2006*, 111 FERC ¶ 61,220 (establishing rules for small generators in 2005); *Order No. 2003*,104 FERC ¶ 61,103 (establishing rules for large generators in 2003). These fully vetted FERC proceedings resulted in a transparent and standard interconnection process and standard agreements available in each utility's Open Access Transmission Tariff ("OATT").

By contrast, the processes available to QFs under the Idaho Commission's orders addressing QF interconnections are out-dated and discriminatory compared to the FERC process used by the utilities and non-QF generators. Idaho Power still uses its Schedule 72 for QF interconnections, which was developed prior to the FERC-approved process and fails to incorporate the protections for generators adopted by FERC.[17] For example, Schedule 72 provides no deadlines for Idaho Power to respond to interconnection requests with applicable interconnection studies, while FERC's procedures provide strict deadlines the utility must follow. *See, e.g., Order No. 2003*,104 FERC ¶ 61,103 at ¶ 224 (imposing three-day deadline for utility to provide cost and time estimates for completing a system impact study); *Idaho Power's Schedule 72* at 3-4 (noting that Schedule 72 incorporates the FERC-approved procedures consistent with the terms of Schedule 72, but then providing non-specific and non-binding deadlines for Idaho Power to follow throughout the entire interconnection process). The FERC process allows generators to select the dates by which construction will be complete and the option to self-construct the interconnection if the utility will not agree to those dates. *Order No. 2003*,104 FERC ¶ 61,103 at ¶¶ 351-354. But Schedule 72 provides QFs no such rights.

Additionally, FERC's interconnection rules provide that "[t]he Interconnection Customer initially funds the cost of any required Network Upgrades (i.e., Upgrades to the Transmission System at or beyond the Point of Interconnection) and it is then subsequently reimbursed for this

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[17] *See* http://www.idahopower.com/AboutUs/RatesRegulatory/Tariffs/tariffPDF.cfm?id=52 (containing the tariff, which was most recently modified in IPUC Case Nos. IPC-E-06-18 and IPC-E-08-05) (*hereinafter "Idaho Power's Schedule 72"*); *see also In Re Application for Approval of Schedule 72*, IPUC Case No. IPC-E-90-20, Order No. 23631 (1991) (first implementing Schedule 72).

upfront payment by the Transmission Provider." *Order No. 2006*, 111 FERC ¶ 61,220, at ¶ 40; *see also Order No. 2003*,104 FERC ¶ 61,103 at ¶¶ 693-703; *id.* at ¶ 696 (implementing this policy because FERC was "concerned that, when the Transmission Provider is not independent and has an interest in frustrating rival generators, the implementation of participant funding, including the 'but for' pricing approach creates opportunities for undue discrimination").

Yet the Idaho Commission's implementation of PURPA provides no such assurance to QFs, leaving them instead to "negotiate" cost-sharing of network upgrades with the utility. *See* Clearwater, Simplot and Exergy, pp. 66-67. In the few cases where the Commission has approved cost-sharing for QFs paying for network transmission upgrades, the cost-sharing does not entitle QFs to a complete refund. *See,e.g., In Re Application for Idaho Winds, LLC*, IPUC Order No. 32136, Case No. IPC-E-09-25 (2010) (approving cost-sharing agreement where QF would ultimately receive no refund for 25% of the upgrades). The Utilities incorrectly assert that the FERC-approved process would fail to incentivize QFs to properly locate their interconnection and even allow QFs to recover transmission costs "prior to the purchase obligation being met." *See* Clements, RE, Rocky Mountain Power, p. 9 lns. 3-4. This is incorrect. The FERC-approved process permits refunds *only* after commercial operation, and the refund period extends for up to 20 years after initial operation. *Order No. 2006-C*, 111 FERC ¶ 61,401, at ¶¶ 6, 9. FERC designed the process to provide the interconnecting generator "with an incentive to make good faith requests for Network Upgrades." *Order No. 2006*, 111 FERC ¶ 61,220 at ¶ 722.

These are but a few examples of the unfair treatment of QFs without the protections of the FERC-approved process. To ensure that QFs are not provided with discriminatory treatment, the Commission should simply require the Utilities to use the FERC interconnection procedures and agreements for all QF interconnections in this case.

IV. CONCLUSION

For the reasons set forth above, the Intervenors respectfully request that the Commission implement PURPA in the manner recommended in the testimony of Dr. Reading, and as described herein.

DATED THIS 20th day of July 2012.

RICHARDSON AND O'LEARY, PLLC

By ______________________

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 20th day of July, 2012, a true and correct copy of the within and foregoing **PRE-HEARING LEGAL BRIEF OF CLEARWATER PAPER CORPORATION, J.R. SIMPLOT COMPANY, AND EXERGY DEVELOPMENT GROUP OF IDAHO, LLC** was served as shown to:

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