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IDAHO PUBLIC
UTILITIES COMMISSION

October 25, 2012

Ms. Jean Jewell
Commission Secretary
Idaho Public Utilities Commission
P O Box 83720
Boise ID 83720-0074

RE: **Case No. GNR-E-11-03**

Dear Ms. Jewell:

Enclosed please find an original and (7) copies of the **COMMENTS OF CLEARWATER PAPER CORPORATION, EXERGY DEVELOPMENT GROUP OF IDAHO AND J.R. SILOT COMPANY ON PARTIAL SETTLEMENT STIPULATION** in the above case.

An extra copy is also enclosed to be stamped & returned to our office.

Sincerely,

Nina Curtis

Administrative Assistant

encl.

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IDAHO PUBLIC
UTILITIES COMMISSION

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

BEFORE THE

IDAHO PUBLIC UTILITIES COMMISSION

IN THE MATTER OF THE COMMISSION'S)	
REVIEW OF PURPA QF CONTRACT)	CASE NO. GNR-E-11-03
PROVISIONS INCLUDING THE)	
SURROGATE AVOIDED RESOURCE)	COMMENTS OF CLEARWATER
PLANNING (IRP) METHODOLOGIES FOR)	PAPER CORPORATION, EXERGY
CALCULATING PUBLISHED AVOIDED)	DEVELOPMENT GROUP OF IDAHO
COST RATES)	AND J. R. SIMPLOT COMPANY ON
	PARTIAL SETTLEMENT
	STIPULATION

Pursuant to Order No. 32665 of the Idaho Public Utilities Commission (the "Commission"), Clearwater Paper Corporation, Exergy Development Group of Idaho, LLC and the J. R. Simplot Company ("Intervenors") hereby provides the following Comments on that Partial Settlement Stipulation ("Stipulation") filed with the Commission on October 2, 2012.

The Intervenors did not sign the Stipulation because it simply codifies the status quo. The only true settlement issue that was resolved was the unremarkable and obvious concession that EXISTING projects will not be required to post a delay security deposit. The Intervenors

stand by the testimony of their expert witness, Dr. Reading, a copy of which is attached and incorporated herein by this reference.

DATED this 25th day of October, 2012.

A handwritten signature in black ink, appearing to read "P. J. Richardson", written over a horizontal line.

Peter J. Richardson

Gregory M. Adams

RICHARDSON & O'LEARY PLLC

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 25th day of October, 2012, a true and correct copy of the within and foregoing COMMENTS OF CLEARWATER PAPER CORPORATION, EXERGY DEVELOPMENT GROUP OF IDAHO AND J.R. SIMPLOT COMPANY ON PARTIAL SETTLEMENT STIPULATION was served as shown to:

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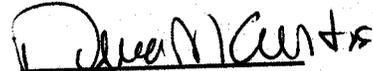
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Nina M. Curtis

ATTACHMENT 1
to

COMMENTS OF
CLEARWATER PAPER
CORPORATION, EXERGY
DEVELOPMENT GROUP
OF IDAHO AND J.R.
SIMPLOT COMPANY

1 allowed between approved IRP's with the exception of natural gas prices based on EIA's annual
2 updates or from another publicly available third party source on a predetermined date. The
3 single model run approach advocated by Idaho Power should be rejected, and the models should
4 instead be run twice – once with the QF at zero cost and once without the QF. QF projects
5 should be eligible for capacity payments for the full term of their contract with no deficit period
6 allowed, and a 20 year contract term should remain the standard which is discussed further
7 below.

8

9 **PART 2: OTHER QF ISSUES**

10 **I. LIQUIDATED DAMAGES AND DELAY SECURITY**

11 **Q. AVISTA COMPANY WITNESS CLINT KALICH STATES QF CONTRACTS**
12 **SHOULD CONTAIN A PROVISION WITH "MEANINGFUL" DELAY DEFAULT**
13 **LIQUIDATED DAMAGES IN HIS DIRECT TESTIMONY. DO YOU HAVE ANY**
14 **COMMENTS ON HIS DISCUSSION ON PAGES 31 THROUGH 33?**

15 **A. Yes. In addition to my comments, I have also included discovery responses by Avista**
16 **addressing this issue as Exhibit 503 to my testimony. "Meaningful" of course is another term**
17 **that is in the eyes of the beholder. Mr. Kalich recommends the Commission authorize utilities to**
18 **require QFs to post a security deposit equivalent to \$45 per kilowatt of nameplate capacity, and**
19 **allow the utility to terminate the contract and keep the \$45 per kilowatt deposit if the actual on**

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1 line date is more than 180 days beyond that stated in the contract.³¹ The rationale for the 180
2 day termination condition is the Company fears a developer may simply hold off bringing the
3 project on line if prices are falling and waiting for prices to hopefully increase. Mr. Kalich
4 supports the security provision because it creates a meaningful deterrent to delay in achieving the
5 proposed on line date. There are two major issues with what Avista (or any other utility) is
6 proposing for liquidated damages for a QF.

7 **Q. WHAT IS THE FIRST ISSUE?**

8 **A.** The first issue is that no Idaho utility has provided the Commission with any analysis on
9 a utility's likely actual damages in the event that a PURPA project either did not come on line at
10 the stated contract date or failed to come on line completely. Instead, the \$45 per kilowatt delay
11 security amount appears to be an amount that the utilities have decided will provide adequate
12 deterrent to a breach. Avista simply conducted a survey of what other utilities have been able to
13 demand as a delay security in PPAs with independent power developers and states it has not
14 estimated the likely costs to Avista or any other utility should a QF default.³² This is out of line
15 with Commission orders, which I presume are based upon the Commission's understanding of
16 Idaho contract law.

17 With regard to a recent contract containing a delay liquidated damage security, the
18 Commission stated "the Commission is concerned that such provisions will have a potentially
19 deleterious effect upon future PURPA projects. Quite often, operators of qualified small power

³¹ Direct Testimony of Avista Witness Clint Kalich, GNR-E-11-03, pp. 32-33.

³² Avista Response to Clearwater Paper's Production Request Nos. 11, 13, and 14, contained in Exhibit 503.

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1 production facilities do not have ready access to the necessary amount of security or capital
2 delineated in this Agreement.”³³ The Commission declared:

3 Therefore, the Commission finds that such provisions calling for delay security
4 should not be punitive in nature. Rather, the amount of delay security ultimately provided
5 in this case, as well as future energy sales agreements with other PURPA suppliers,
6 should constitute a fair and reasonable offset of a regulated utility’s estimated increase in
7 power supply costs attributable to the PURPA supplier’s failure to meet its contractually
8 scheduled operation date.³⁴
9

10 In other words, a liquidated damages provision should not operate merely as a one-way penalty
11 to deter one party from breaching the agreement. It should not be derived from a canvassing of
12 terms required by other utility purchasers because the traditional utility market is essentially a
13 monopsony market with only very limited number of purchasers in the region of any independent
14 power project. Standard terms in such a monopsony market place should not be assumed to be
15 fair. Instead, the liquidated damage provision should be an actual estimate of the likely damages
16 the non-breaching party (here, the utility) would incur. The intent should be to keep the utility
17 and its customer’s whole in the event of a default. Otherwise, the provision is simply a penalty
18 provision unilaterally imposed by the party with superior bargaining strength. Avista has
19 admitted that it has made no effort to approximate its likely actual damages in the event of a QF
20 delay default.³⁵

21 **Q. HOW WOULD YOU ESTIMATE A UTILITY’S ACTUAL DAMAGES IN THE**

³³ IPUC Order No. 30608, p. 3, Case No. IPC-E-08-09 (2008).

³⁴ *Id.*, p. 4.

³⁵ Avista Response to Clearwater Paper’s Production Request No. 13, contained in Exhibit 503.

1 **EVENT OF A QF'S DELAY DEFAULT?**

2 A. One easy way to estimate a purchasing utility's actual damages in the event of a QF delay
3 default is to require the QF to pay the difference between the rate the utility would pay in the QF
4 contract and the actual cost for replacement power during the period the QF's delay default
5 forces the utility to secure replacement power. The replacement price would include the cost at
6 the relevant market hub plus the necessary transmission and administrative costs to secure that
7 replacement power. The period during which the utility would need to secure replacement
8 power should not last for the entire term of the power purchase agreement, which could be up to
9 twenty years, because the utility could obviously make alternative arrangements to meet its load
10 needs prior to the expiration of the 20-year contract term. The period during which the
11 breaching QF should be liable should be limited to a reasonable amount of time for the utility to
12 make alternative long-term arrangements to secure that amount of power. I understand that
13 Idaho QF power purchase agreements have in the past contained provisions tied to the
14 replacement price of electricity and capacity. The market price for replacement power in the
15 event of a QF default is quite low at the present time, and \$45 per kilowatt is an excessive
16 amount for a QF to automatically forfeit in the event of a delay. For example, at \$45 per
17 kilowatt, a 10 MW QF must provide \$450,000 to the utility at the time the contract is approved.
18 Under Mr. Kalich's proposal, the utility would receive \$450,000 for a 180 day delay in a QF's
19 achievement of its committed on line date. This appears far in excess of the utility's actual cost
20 for replacement power at the present time.

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1 It is only in the last few years that the utilities began unilaterally imposing the \$45 per
2 kilowatt delay security liquidated damages provision for QF contracts. Although I am aware of
3 complaint cases where QFs have alleged that a \$45 per kilowatt delay damage provision is
4 unfair, I am not aware of any QFs having fully litigating such a complaint at the Commission.³⁶
5 The Commission should not consider the absence of a fully litigated challenge to be
6 representative of a belief that these clauses are a fair estimation of the utility's actual damages, as
7 required by the Commission order cited above. Even for a QF with the financial resources to
8 litigate the legality of the clause, a delay caused by filing a complaint at the Commission could
9 compromise the viability of the entire project because the timing of tax credits, financing and
10 equipment supplies are critical in development of a generation project.

11 Mr. Kalich even recommends requiring the \$45 per kilowatt security amount be provided
12 by the QF simply to exercise the QF's right to create a legally enforceable obligation, i.e. a
13 binding contract that would lock in the fixed avoided cost rates. Many QFs cannot secure
14 financing and access to such large amounts of money until after the PPA is signed and approved
15 by the Commission. Thus, Mr. Kalich's proposal would create a timing problem for many QFs,
16 and would obviously be a substantial hurdle for all but the most well-funded QFs.

17 For all of these reasons, if such a requirement is to be authorized by the Commission, it
18 should not be based on a flawed method of calculating the utility's actual damages, so as to
19 unnecessarily deter otherwise viable QF projects. The Commission should take the opportunity

³⁶ See IPUC Case Nos. IPC-E-10-29 and -30; PAC-E-10-05.

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1 in this case to require the utilities to tie the delay default provision to a utility's actual damages.,

2 **Q. WHAT IS THE SECOND ISSUE YOU WOULD LIKE TO MENTION WITH**
3 **DELAY SECURITY AND LIQUIDATED DAMAGES PROVISIONS?**

4 **A.** Mr. Kalich notes in his testimony that the Company wants to "ensure a level playing
5 field" between the QF and the utility.³⁷ A true level playing field would be where the utility-
6 owned plants must be held to the same standard and issue rate payer refunds when their own
7 plants experience failures or delays. A good example is Avista's Reardan wind project that was
8 in the utility's Preferred Resource Strategy in its 2009 IRP. It was slated to come on line in 2010
9 or 2011, but now is not scheduled until 2014 or beyond. This is not to say that Avista
10 necessarily acted irrationally to replace this project with the Palouse wind RFP. I simply intend
11 to point out that utilities regularly incur expenditures for generation plants that either never come
12 on line or are delayed. If there are real costs to a utility and its customers that warrant a delay
13 default provision in a QF PPA, then there should likewise be compensation to the utility's
14 customers for a similar delay occurring at a utility-owned generation project. Avista's proposal
15 provides for unfair treatment to QFs and deprives the utilities' customers of a comparable market
16 check to the utilities' proposals to build their own generation resources.

17 **Q. IS THERE ANYTHING ELSE THAT WOULD LEVEL THE PLAYING FIELD?**

18 **A.** Yes, Mr. Kalich proposes only a provision that would address a default by the QF. But
19 there is the possibility that the QF could be harmed by a utility under certain circumstances, and

³⁷ Direct Testimony of Avista Witness Clint Kalich, GNR-E-11-03, p. 33.

1 therefore QF contracts should provide for compensation to the QF in the event of a utility
2 default. For example, a delay in achieving an on line date could occur solely because the utility
3 failed to complete interconnection construction as scheduled. The QF could be damaged by such
4 a delay because it could delay the project's schedule and the time by which the project would
5 start generating revenue. Such a delay by the utility in completing interconnection should not
6 result in the QF being in default on its power purchase agreement. Another potential cause of
7 damage to a QF is if the utility experiences a disruption on its system that requires curtailment of
8 the QF for a lengthy period of time. The QF should be compensated for the lost revenue and
9 other damages it might incur by the unscheduled outage. Further, as I will discuss below, Idaho
10 Power's proposed Schedule 74 curtailment provision would allow Idaho Power to curtail QFs
11 under certain circumstances. But Idaho Power's provision provides no express remedy to QFs if
12 Idaho Power implements the curtailment at an inappropriate time or in a manner that harms the
13 QF.

14 If Idaho QF PPAs will include damage provisions, they should address the possible
15 damages to the QFs also, not just the potential damages to the utilities.

16 **II. AVISTA'S PROPOSAL THAT QFs MUST ACHIEVE ON LINE STATUS**
17 **WITHIN 2 YEARS TO OBTAIN FIXED RATES.**

18 **Q. DO YOU HAVE ANY COMMENTS ON AVISTA COMPANY WITNESS**
19 **KALICH'S RECOMMENDATION THAT QF CONTRACTS NOT BE SIGNED**
20 **EARLIER THAN FIVE YEARS BEFORE COMMERCIAL OPERATION AND THAT**

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