

KRISTINE A. SASSER  
DEPUTY ATTORNEY GENERAL  
IDAHO PUBLIC UTILITIES COMMISSION  
PO BOX 83720  
BOISE, IDAHO 83720-0074  
(208) 334-0357  
BAR NO. 6618

RECEIVED  
2012 OCT 25 PM 4:24  
IDAHO PUBLIC  
UTILITIES COMMISSION  
P

Street Address for Express Mail:  
472 W. WASHINGTON  
BOISE, IDAHO 83702-5918

Attorney for the Commission Staff

**BEFORE THE IDAHO PUBLIC UTILITIES COMMISSION**

<b>IN THE MATTER OF THE COMMISSION'S</b>	)	
<b>REVIEW OF PURPA QF CONTRACT</b>	)	<b>CASE NO. GNR-E-11-03</b>
<b>PROVISIONS INCLUDING THE SURROGATE</b>	)	
<b>AVOIDED RESOURCE (SAR) AND</b>	)	<b>COMMENTS IN SUPPORT OF</b>
<b>INTEGRATED RESOURCE PLANNING (IRP)</b>	)	<b>PARTIAL SETTLEMENT</b>
<b>METHODOLOGIES FOR CALCULATING</b>	)	<b>STIPULATION</b>
<b>PUBLISHED AVOIDED COST RATES.</b>	)	
	)	
	)	

---

**COMES NOW** the Staff of the Idaho Public Utilities Commission, by and through its Attorney of record, Kristine A. Sasser, Deputy Attorney General, and in response to the Notice of Partial Settlement Stipulation and Request for Comment issued in Order No. 32665 on October 16, 2012, in Case No. GNR-E-11-3, submits the following comments.

**BACKGROUND**

On August 15, 2012, the Commission issued a Notice scheduling a settlement conference in this case for parties to discuss two issues: (1) light load curtailment as proposed by Idaho Power Company in its Schedule No. 74 or an alternative process; and (2) power purchase agreement (PPA) terms related to delay security or liquidated damages. Order No. 32617. The participating parties met in settlement conferences on August 23, and September 7, 2012.

Negotiations regarding curtailment were not fruitful. However, on October 2, 2012, a "Partial Settlement Stipulation" was filed on behalf of 13 parties in the case that generally addresses the issue of performance security, delay damages, and termination damages in PURPA contracts. The signing parties agreed the Partial Settlement Stipulation represents a compromise of the positions of the parties.

## **STAFF ANALYSIS**

The signing parties agreed to settle the issues discussed below. The signing parties also agreed that all new PPAs approved after the date of the Partial Settlement Stipulation shall conform to the terms of the Stipulation.

### **Security Deposit**

The parties agree that a security deposit or performance bond will be required for each new PURPA agreement. The purpose of the security deposit is to provide security for performance by the Qualifying Facility ("QF") under the PPA and provide an upfront source of liquid funds that can be used to pay the following damages in the event they are incurred:

- 1) Delay damages during the 120-day cure period if the QF is not in commercial operation by the scheduled commercial operation date set out in the PPA; and
- 2) Termination damages if the QF cannot cure a failure to achieve commercial operation and a party seeks termination of the PPA.

The need for security deposits first became apparent when some QFs defaulted on their PPAs and the utilities alleged that damages had been incurred. Instances arose wherein the QF had few or no liquid assets, thus, they had no real ability to pay damages to the utilities. A requirement that QFs post security helps ensure that the QF will perform and that funds will be available to cover damages should they arise. As discussed below, if commercial operation is achieved per the PPA, the deposit is to be returned to the QF.

Security deposits have been negotiated and included in nearly all PURPA agreements signed since 2009, although the Commission has never formally adopted specific requirements for them. Consistent inclusion of certain terms, conditions and deposit amounts in recent PURPA

contracts, particularly by Idaho Power, has tended to make them fairly standard. Formal adoption of standard terms, conditions and deposit amounts by the Commission, however, will help to ensure consistency and eliminate disputes.

The terms of the Partial Settlement require that the security deposit be set at \$45 per kilowatt (kW) of nameplate capacity for each new PPA. This is the same amount that has been included in contracts since January of 2010. Under the terms of the Settlement, the cash or other liquid security deposit will be forwarded to the utility no later than thirty days after the Commission issues its final Order approving the PPA.

Staff believes that a requirement for a security deposit is essential in order to adequately protect the utility and its ratepayers from default by a QF. Staff also believes that \$45 per kW is not onerous to the QF, and is instead a reasonable deposit amount that would likely cover most, if not all delay and/or termination damages.

If the QF achieves commercial operation in accordance with the scheduled commercial operation date set out in the PPA, under the terms of the Partial Settlement, the utility must promptly refund the security deposit to the QF. In addition, if there is a delay and a cure within the cure period, the undisputed portion of the deposit will be returned to the QF. Staff believes the security deposit is reasonable because it maintains the QFs financial commitment to perform, but only for as long as necessary.

The parties agree that a security deposit shall not be required in situations where an existing QF project already in commercial operation is simply signing a new PPA, so long as the new PPA is between the same parties and there are no material changes or modifications to the existing QF project.

### **Delay Damages**

Whenever a QF fails to achieve commercial operation by the scheduled commercial operation date contained in the PPA, utilities will sometimes incur delay damages. Determination of the exact amount of those damages has frequently led to disputes in the past. The Partial Settlement will help to alleviate disputes by specifying the manner in which delay damages will be calculated.

Under the terms of the Partial Settlement, delay damages shall be calculated based upon the difference between market rates at the time the QF fails to achieve its scheduled commercial

operation date and the avoided cost rates contained in the PPA during the cure period. The cure period is now specified as a standard 120 days from the scheduled operation date during which the defaulting party is permitted to cure its default.

Delay damages, if any, during the cure period will be drawn from the security deposit held by the utility. If the security deposit is insufficient to defray all of the delay damages, then the QF will promptly pay the outstanding delay damages. If the QF achieves commercial operation during the cure period, any undisputed or remaining security deposit beyond the amount of any delay damages shall be refunded to the QF.

Staff believes it is reasonable to base calculation of delay damages on the difference between market rates and the contract rates. This approach fairly assesses the amount of the damages and holds the QF responsible for the full amount of actual damages without imposing a penalty. The security deposit helps ensure that funds are available to pay the damages, yet does not limit the amount of damages that may be claimed by the utility.

### **Termination Damages**

Termination damages are damages that could be alleged to extend beyond the delay period and the cure period. Under the terms of the Partial Settlement, if a default occurs and the contract is terminated, the utility is required to communicate its notice of default and claim for any termination damages to the QF within a reasonable period of time. The QF must then respond within 15 days. The Partial Settlement does not specify exactly how termination damages shall be calculated, however, in the event of a dispute regarding the calculation of termination damages, either party may resort to a court of competent jurisdiction.

Because termination damages are exceedingly difficult to quantify in advance, and because they depend on the circumstances of each individual case, Staff believes it is appropriate to leave determination of the damages to negotiation between the parties or to a court if there is a dispute. Allowing the courts, in lieu of the Commission, to decide termination damages provides a neutral forum for both parties.

### **Payment for Damages**

If the QF fails to achieve commercial operation within the cure period, then the utility may collect delay damages, terminate the agreement, and calculate termination damages, if any. If the

utility elects to terminate the agreement, the security deposit may be used to first pay the delay damages, then to pay termination damages, if any, arising after the cure period for the remaining term of the agreement. In the event that the security deposit is insufficient to pay the undisputed damages, such undisputed damages will be paid promptly by the defaulting party. If the security deposit exceeds the total amount claimed as delay damages or termination damages, the utility shall promptly refund any portion of the deposit that is in excess of the claimed delay damages or termination damages. Staff supports this approach and believes it is fair to both the QFs and the utilities. Calculating delay damages based on actual damages eliminates an argument that the previous liquidated damages (now security deposit or performance bond) were punitive and unreasonable.

As a result of the settlement discussions, 13 of the 25 parties that participated in the settlement conference signed the Partial Settlement Stipulation. The table below shows those parties who signed the Partial Settlement Stipulation, and those parties who chose not to sign the Stipulation but who participated in one of more of the settlement conferences. Two intervenors in the case, Interconnect Solar Development, LLC and the Energy Integrity Project, declined to participate in either of the settlement conferences; thus, they also did not sign the Partial Settlement Stipulation.

**Parties in Support of the Stipulation**

PacifiCorp dba Rocky Mountain Power  
Commission Staff  
Snake River Alliance  
Idaho Conservation League  
Idaho Wind Partners I, LLC  
North Side Canal Co.  
Twin Falls Canal Co.  
Big Wood Canal Co.  
American Falls Reservoir Dist. No. 2  
Renewable Energy Coalition  
Dynamis Energy, LLC  
Ridgeline Energy, LLC  
Birch Power Company (Ted Sorenson)

**Parties Not Signing the Stipulation**

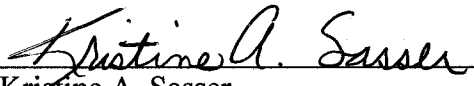
Idaho Power Company  
Avista Corporation  
Renewable Northwest Project  
Exergy Development Group of Idaho, LLC  
Clearwater Paper Corporation  
Blue Ribbon Energy, LLC  
Mountain Air Projects, LLC  
Adams County Board of Commissioners  
Grand View Solar II  
Idaho Windfarms  
J.R. Simplot Co.  
Northwest and Intermountain Power Producers  
Coalition

The signing parties agreed that existing PPAs that have been approved by the Commission shall not be affected by the Partial Settlement Stipulation.

## STAFF RECOMMENDATION

Staff believes that the proposed Partial Settlement Stipulation resolving disputed issues in this case and agreed to by many of the parties participating in the settlement process is in the public interest, is just and reasonable and should be approved by the Commission without condition or modification.

Dated at Boise, Idaho, this 25<sup>TH</sup> day of October 2012.

  
Kristine A. Sasser  
Deputy Attorney General

Technical Staff: Rick Sterling

i:\misc\comments\gnrel1.3ksrps stipulation comments.doc

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY THAT I HAVE THIS 25TH DAY OF OCTOBER 2012, SERVED THE FOREGOING **COMMENTS IN SUPPORT OF PARTIAL SETTLEMENT STIPULATION**, IN CASE NO. GNR-E-11-03, BY E-MAILING A COPY THEREOF TO THE FOLLOWING:

DONOVAN E WALKER  
JASON B WILLIAMS  
IDAHO POWER COMPANY  
PO BOX 70  
BOISE ID 83707-0070  
E-mail: [dwalker@idahopower.com](mailto:dwalker@idahopower.com)  
[jwilliams@idahopower.com](mailto:jwilliams@idahopower.com)

DANIEL E SOLANDER  
ROCKY MOUNTAIN POWER  
201 S MAIN ST STE 2300  
SALT LAKE CITY UT 84111  
E-mail: [daniel.solander@pacificorp.com](mailto:daniel.solander@pacificorp.com)

MICHAEL G ANDREA  
AVISTA CORPORATION  
1411 E MISSION AVE  
SPOKANE WA 99202  
E-mail: [michael.andrea@avistacorp.com](mailto:michael.andrea@avistacorp.com)

PETER J RICHARDSON  
GREGORY M ADAMS  
RICHARDSON & O'LEARY  
515 N 27<sup>TH</sup> STREET  
BOISE ID 83702  
E-mail: [peter@richardsonandoleary.com](mailto:peter@richardsonandoleary.com)  
[greg@richardsonandoleary.com](mailto:greg@richardsonandoleary.com)

ROBERT D KAHN  
NW & INTERMOUNTAIN POWER  
PRODUCERS COALITION  
1117 MINOR AVE STE 300  
SEATTLE WA 98101  
E-mail: [rkahn@nippc.org](mailto:rkahn@nippc.org)

DON STURTEVANT  
ENERGY DIRECTOR  
J R SIMPLOT COMPANY  
PO BOX 27  
BOISE ID 83707-0027  
E-mail: [don.sturtevant@simplot.com](mailto:don.sturtevant@simplot.com)

ROBERT A PAUL  
GRAND VIEW SOLAR II  
15690 VISTA CIRCLE  
DESERT HOT SPRINGS CA 92241  
E-mail: [robertpaul08@gmail.com](mailto:robertpaul08@gmail.com)

JAMES CARKULIS  
EXERGY DEVELOPMENT GROUP OF  
IDAHO LLC  
802 W BANNOCK ST STE 1200  
BOISE ID 83702  
E-mail: [jcarkulis@exergydevelopment.com](mailto:jcarkulis@exergydevelopment.com)

### ELECTRONIC SERVICE ONLY:

DR. DON READING  
E-mail: [dreading@mindspring.com](mailto:dreading@mindspring.com)

BILL BROWN CHAIR  
BOARD OF COMMISSIONERS  
OF ADAMS COUNTY ID  
PO BOX 48  
COUNCIL ID 83612  
E-mail: [bdbrown@frontiernet.net](mailto:bdbrown@frontiernet.net)

MARV LEWALLEN  
CLEARWATER PAPER CORP  
601 W RIVERSIDE AVE STE 1100  
SPOKANE WA 99201  
E-mail: [marv.lewallen@clearwaterpaper.com](mailto:marv.lewallen@clearwaterpaper.com)

TED S SORENSON P E  
BIRCH POWER COMPANY  
5203 SOUTH 11<sup>TH</sup> EAST  
IDAHO FALLS ID 83404  
E-mail: [ted@tsorensen.net](mailto:ted@tsorensen.net)

CERTIFICATE OF SERVICE

R GREG FERNEY  
MIMURA LAW OFFICES PLLC  
2176 E FRANKLIN RD STE 120  
MERIDIAN ID 83642  
E-mail: [greg@mimuralaw.com](mailto:greg@mimuralaw.com)

RONALD L WILLIAMS  
WILLIAMS BRADBURY  
1015 W HAYS ST  
BOISE ID 83702  
E-mail: [ron@williamsbradbury.com](mailto:ron@williamsbradbury.com)

JOHN R LOWE  
RENEWABLE ENERGY COALITION  
12050 SW TREMONT ST  
PORTLAND OR 97225  
E-mail: [jravensanmarcos@yahoo.com](mailto:jravensanmarcos@yahoo.com)

C THOMAS ARKOOSH  
CAPITOL LAW GROUP PLLC  
205 N 10<sup>TH</sup> ST 4<sup>TH</sup> FL  
PO BOX 2598  
BOISE ID 83701  
E-mail: [tarkoosh@capitollawgroup.com](mailto:tarkoosh@capitollawgroup.com)

M J HUMPHRIES  
BLUE RIBBON ENERGY LLC  
3470 RICH LANE  
AMMON ID 83406  
E-mail: [blueribbonenergy@gmail.com](mailto:blueribbonenergy@gmail.com)

DEAN J MILLER  
CHAS McDEVITT  
McDEVITT & MILLER LLP  
PO BOX 2564  
BOISE ID 83701  
E-mail: [joe@mcdevitt-miller.com](mailto:joe@mcdevitt-miller.com)  
[chas@mcdevitt-miller.com](mailto:chas@mcdevitt-miller.com)

BILL PISKE MGR  
INTERCONNECT SOLAR DEVELOPMENT LLC  
1303 E CARTER  
BOISE ID 83706  
E-mail: [billpiske@cableone.net](mailto:billpiske@cableone.net)

WADE THOMAS  
DYNAMIS ENERGY LLC  
776 E RIVERSIDE DR STE 15  
EAGLE ID 83616  
E-mail: [wthomas@dynamisenergy.com](mailto:wthomas@dynamisenergy.com)

LIZ WOODRUFF  
KEN MILLER  
SNAKE RIVER ALLIANCE  
BOX 1731  
BOISE ID 83701  
E-mail: [lwoodruff@snakeriveralliance.org](mailto:lwoodruff@snakeriveralliance.org)  
[kmiller@snakeriveralliance.org](mailto:kmiller@snakeriveralliance.org)

**ELECTRONIC SERVICE ONLY:**

BRIAN OLMSTEAD  
GENERAL MANAGER  
E-mail: [olmstead@tfcanal.com](mailto:olmstead@tfcanal.com)

TED DIEHL  
GENERAL MANAGER  
E-mail: [nscanal@cableone.net](mailto:nscanal@cableone.net)

DON SCHOENBECK  
RCS  
E-mail: [dws@r-c-s-inc.com](mailto:dws@r-c-s-inc.com)

LORI THOMAS  
CAPITOL LAW GROUP PLLC  
E-mail: [lthomas@capitollawgroup.com](mailto:lthomas@capitollawgroup.com)

ARRON F JEPSON  
BLUE RIBBON ENERGY LLC  
10660 SOUTH 540 EAST  
SANDY UT 84070  
E-mail: [aaronesq@aol.com](mailto:aaronesq@aol.com)

MEGAN WALSETH DECKER  
SR STAFF COUNSEL  
RENEWABLE NW PROJECT  
421 SW 6<sup>TH</sup> AVE STE 1125  
PORTLAND OR 97204  
E-mail: [megan@rnp.org](mailto:megan@rnp.org)

CERTIFICATE OF SERVICE

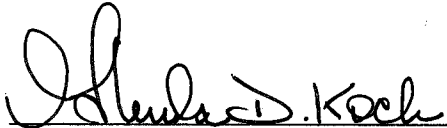


GLENN IKEMOTO  
MARGARET RUEGER  
IDAHO WINDFARMS LLC  
672 BLAIR AVE  
PIEDMONT CA 94611  
E-mail: [glenni@envisionwind.com](mailto:glenni@envisionwind.com)  
[margaret@envisionwind.com](mailto:margaret@envisionwind.com)

TAUNA CHRISTENSEN  
ENERGY INTEGRITY PROJECT  
769 N 1100 E  
SHELLEY ID 83274  
E-mail: [tauna@energyintegrityproject.org](mailto:tauna@energyintegrityproject.org)

BENJAMIN J OTTO  
IDAHO CONSERVATION LEAGUE  
PO BOX 844  
BOISE ID 83702

DEBORAH E NELSON  
KELSEY J NUNEZ  
GIVENS PURSLEY  
601 W BANNOCK ST (83702)  
PO BOX 2720  
BOISE ID 83701-2720  
E-mail: [den@givenspursley.com](mailto:den@givenspursley.com)  
[kjn@givenspursley.com](mailto:kjn@givenspursley.com)

  
\_\_\_\_\_  
SECRETARY