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2004 MAR 18 AM 8:45  
IDAHO PUBLIC  
UTILITIES COMMISSION

BEFORE THE  
IDAHO PUBLIC UTILITIES COMMISSION

IN THE MATTER OF A PETITION  
FILED BY IDAHO OWER COMPANY )  
FOR AN ORDER DETERMINING )  
OWNERSHIP OF THE )  
ENVIRONMENTAL ATTRIBUTES )  
ASSOCIATED WITH A QUALIFYING )  
FACILITY UPON PURCHASE BY A )  
UTILITY OF THE ENERGY )  
PRODUCED BY A QUALIFYING )  
FACILITY )

CASE NO. IPC-E-04-2

COMMENTS OF BOB  
LEWANDOWSKI AND MARK  
SCHROEDER AND PETITION  
TO INTERVENE

MOTION TO STRIKE  
PORTIONS OF IDAHO  
POWER'S PETITION FOR  
DECLARATORY RULING

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COMES NOW, Mr. Bob Lewandowski and Mr. Mark Schroeder by and  
through their attorney of record in response to that Notice of Comment / Protest  
Deadline issued by the Secretary of the Idaho Public Utilities Commission  
(Commission) on February 20, 2004, and make the following comments:

INTRODUCTION

Mr. Lewandowski is the current owner of Idaho's first commercial wind  
power generating facility. Located South of Interstate 84 between Boise and

Mountain home, Mr. Lewandowski currently operates one wind generator and has plans to construct additional wind generators in the future. Mr. Schroeder currently owns and farms several thousand acres contained within the Bell Rapids Irrigation District. Given the cost of electrical power to irrigate his farm and its location in a desirable wind resource area, Mr. Schroeder is currently actively planning to construct a large (under ten megawatt) wind facility. Both Mr. Lewandowski and Mr. Schoeder are vitally interested in the outcome of this proceeding and hereby request to be made parties to this proceeding should the Commission expand the procedural scope of this matter beyond just Modified Procedure.

#### SUMMARY

The Commission should reject Idaho Power's Petition for a right of first refusal to purchase Green Tags<sup>1</sup> from QFs from whom it is also purchasing electricity at avoided cost rates. In the argument below, Mr. Lewandowski and Mr. Schroeder point out that the premise used by Idaho Power in its "argument" that Green tags should follow a power purchase agreement to the purchasing utility is faulty, and that Idaho Power has no interest in, or right to, the Green Tags created by a QF.

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<sup>1</sup> We are using the term "Green Tags" as defined by Idaho Power in its Petition at page 3 fn #1.

MOTION TO STRIKE PORTIONS OF IDAHO POWER'S PETITION  
FOR DECLARATORY RULING AND/OR REQUEST FOR EVIDENTIARY  
HEARING

A not insignificant portion of Idaho Power's Petition is filled with an exposition on why Idaho Power should actually own the Green Tags produced by a QF from whom it purchases electricity at avoided cost rates. Idaho Power asserts that QFs in Idaho are actually receiving more value for their electricity than the "avoided cost paid to the QFs for the energy produced." Petition at p. 3.

According to the Company, "QF developers . . . receive value from Idaho Power for the electricity the QFs generate beyond the purchase price of the energy."

Petition at p. 5, the emphasis is Idaho Power's. It is unclear why Idaho Power goes through the exercise of arguing that it ought to own the Green Tags if, at the end of the day, it concludes that the developer should retain them. Nevertheless, the premise that the QF is compensated *in addition* to the avoided cost rates is simply false and should be stricken from the record used by this Commission as support for any decision giving Idaho Power a right of first refusal to the ownership of Green Tags.

The Company's avoided cost rates are totally unrelated to a QF's internal

finances. Avoided cost rates are determined based on the utilities' cost of bringing on a new resource. The fact that a QF is entitled to a twenty-year contract only assures the QF of receiving the utility's avoided cost rate for a twenty-year period - nothing more. Similarly, the fact that Idaho Power is able to rate base generating plant for *the life of the plant* assures Idaho Power of recovering its costs – nothing more. If Idaho Power truly believes that QFs are receiving more than avoided costs for their power then it should bring that fact to the attention of the Commission in an appropriate docket. However, the Commission just recently concluded an extensive avoided cost proceeding in which Idaho Power actively participated. Idaho Power did not, at the conclusion of that proceeding seek reconsideration or proffer an appeal of ostensibly overstated avoided cost rates. QFs in Idaho do not receive additional value over and above the bare-bone avoided cost rates by virtue of twenty-year contracts. Idaho Power's assertion to the contrary is simply wrong.

Idaho Power's Petition spends an inordinate amount of time on its view of the value that twenty-year contracts "bestow" on QF developers in Idaho – especially since contract length is not at all relevant to the question of whether or not Idaho Power should be bestowed with a right of first refusal for a QF's Green Tags. The Company points out that twenty-year contracts are not required in surrounding states. But it is worth noting here that every single state that is

adjacent to Idaho has multiple tax incentives, including outright monetary grants to encourage the development of renewable energy projects. The State of Idaho has no such incentives. Nevertheless, Idaho Power's ratepayers enjoy the benefits of what was once a robust QF industry<sup>2</sup> thanks to the innovative foresight of this Commission. The 69 QF contracts that Idaho Power's ratepayers currently benefit from actually produce power at a lower overall cost than the Idaho Power projects brought on line during the same time period. This fact alone, suggests that QFs are actually being paid less than Idaho Power's true avoided costs – not more as argued by Idaho Power in its Petition.

The Commission's decision in this matter must be based on the record before it. Idaho Power's Petition contains factual assertions that are unsupported and are, obviously, quite controversial. In addition, those assertions relative to the value "bestowed" on QFs by twenty-year contracts is completely irrelevant to the question of whether Idaho Power should retain a right of first refusal as to the ownership of Green Tags. Because the Commission's decision in this matter cannot be based on any of the assertions contained in Idaho Power's Petition relative to QFs in Idaho being overcompensated by Idaho Power then, those provisions should be stricken from the record. At a minimum, if those provisions

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<sup>2</sup> The industry was robust prior to the reduction of standard contract terms to five years and one megawatt. Although the Commission recently returned to the old standard, it remains to be seen whether Idaho Power will be successful in preventing the development of a robust QF industry

remain in the record then it is clear that that modified procedure is inappropriate and a full evidentiary hearing must be conducted. Contested factual assertions dealing with the proper level of Idaho Power's avoided cost rates cannot be answered absent a full hearing.

THE IDAHO COMMISSION HAS ONLY LIMITED AUTHORITY AND HAS  
NO AUTHORITY TO RULE ON OWNERSHIP OF GREEN TAGS

Although given great discretion in interpreting and implementing the Public Utility Code by the Courts, it is clear that the Idaho Public Utilities Commission has limited (if any) authority when it comes to making law. The Commission's jurisdiction is limited and must be found entirely in its enabling statutes. *Arrow Transportation Company v. Idaho Public Utilities Commission*, 85 Idaho 307, 379 P.2d 422 (1963). The Idaho Supreme Court in *Empire Lumber v. Washington Water Power*, 114 Idaho 191, 755 P.2d 1229 (1988), provides a cogent overview of the authority granted to the Commission under the Public Utility Regulatory Policy Act of 1978.<sup>3</sup> That Court observed:

Section 210 of that Act [PURPA] requires electric utilities to purchase the power produced by co-generators or small power producers, which obtain qualifying status under the Act. Pursuant to section 201 of the Act, co-generators or small producers must meet three criteria to become Qualified Facilities (QF). Those criteria encompass size, fuel, and ownership. Upon satisfaction of those criteria, the owner or operator is required to furnish notice to the Federal Energy Regulatory Commission (FERC). FERC

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through burdensome contract terms that make long term financing difficult.

<sup>3</sup> P.L. 95-617, 92 Stat. 3117 (1978)

promulgated regulations implementing sections 201-210 of PURPA.

The Court also noted that the State Commission is the proper entity in Idaho to implement PURPA:

The implementation of PURPA as it relates to co-generation and small power producers, and the regulations promulgated by FERC, have been largely left to the regulatory authorities of the individual states. PURPA, section 210(f), provides in part: “Each state regulatory . . . shall implement such FERC rule . . . for each electric utility for which it has ratemaking authority.”

The relevant FERC regulation is found at 18 C.F.R. § 29.401(a) which provides:

Such [state] implementation may consist of the issuance of regulations, an undertaking to resolve disputes between qualifying facilities and electric utilities under subpart C (arrangements between electric utilities and qualifying cogeneration and small power production facilities under § 210 of (PURPA) or any other action reasonably designed to implement such subpart.

Relying on the above regulation and its understanding that the Idaho PUC is the agency charged with regulating utilities, the court was able to conclude:

[I]t is clear that the Idaho Public Utilities Commission is granted authority by the Idaho statutes to, and is the appropriate forum to resolve whether a co-generator or small power producer has satisfied the criteria for “qualified facility” status, and to determine whether a regulated utility has an obligation under PURPA to purchase power from an applicant.

Id. at 192.

It is clear that the Idaho Courts view this Commission’s jurisdiction relative to QFs as stemming solely from PURPA and FERC’s implementing regulations. It is also clear that this Commission has no authority other than that conferred upon it by Idaho law or through its role as the state agency regulating utilities under PURPA.

Given that background on the limited jurisdiction of the Commission, what then, are the FERC's PURPA regulations this Commission is charged with implementing that deal with ownership of (including rights of first refusal to) Green Tags. Simply put, there are none. In fact FERC has ruled that in order for a state regulatory commission to exercise any authority over Green Tag ownership there must be a state law bestowing that authority upon the Commission. In the FERC order cited by Idaho Power and quoted in the Commission's Notice, the Federal agency made it clear that there is nothing in PURPA or FERC's regulations granting the Commission authority to adjudicate ownership of Green Tags:

RECs are relatively recent creations of the States. Seven States have adopted Renewable Portfolio Standards that use unbundled RECs. What is relevant here is that RECs are created by the States. *They exist outside the confines of PURPA. PURPA thus does not address the ownership of RECs. . . . States, in creating RECs, have the power to determine who owns the REC in the initial instance, and how they may be sold or traded; it is not an issue controlled by PURPA.*<sup>4</sup>

There are two significant points in the above language from the FERC order. First, is the recognition that RECs are "created by the states." That, of course does not apply to Idaho. Idaho has not created a Renewable Portfolio Standard that uses unbundled RECs. The other important point is that FERC declared that since the States create RECs they may regulate how RECs are traded. Since Idaho hasn't created RECs, there is nothing for the State to regulate. A REC, or Green Tag, is private property owned and created by the QF. It is no different from any other ancillary benefit that might accrue to a QF as a result of building a renewable energy resource. For example, Mr. Lewandowski's project has become a tourist attraction. Scores of people come by his site asking for tours and wanting to investigate his wind technology. Mr. Lewandowski has an ancillary asset (possible tourist revenue) that accrues to him as a result of

his project. Neither Idaho Power nor this Commission has any claim to those ancillary assets. Similarly, many renewable energy projects have some ancillary detriments such as environmental or visual pollution. The developer is responsible for the costs of those ancillary detriments in the same way the developer is entitled to ownership of any ancillary assets.

That Idaho Power is asking for a first right of refusal is different only in degree from asking for outright ownership. For all of the above reasons, Idaho Power's Petition should be denied because this Commission has no jurisdiction to rule – one way or the other – on ownership of Green Tags.

#### CONCLUSION AND PRAYER FOR RELIEF

1. Idaho Power's Petition for Declaratory Relief should be denied in full and dismissed with prejudice. Should the Commission decide not to dismiss Idaho Power's Petition then alternatively, the Commission is respectfully requested to:
2. Strike all language in said Petition referencing the appropriate level of avoided cost rates or proceed to hearing on the factual issues raised by that language.

DATED this \_\_\_\_\_ day of March, 2004.

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<sup>4</sup> FERC Docket No. EL03-133-000, October 1, 2003 at page 6.

BOB LEWANDOWSKI  
MARK SCHROEDER

By   
Peter Richardson,  
RICHARDSON AND OLEARY

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 17<sup>th</sup> day of March, 2004, I caused a true and correct copy of the foregoing **Comments of Bob Lewandowski and Mark Schroeder and Petition to Intervene and Motion to Strike Portions of Idaho Power's Petition for Declaratory Ruling** to be served by the method indicated below, and addressed to the following:

Jean Jewell  
Idaho Public Utilities Commission  
472 West Washington Street  
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Boise, Idaho 83720-0074

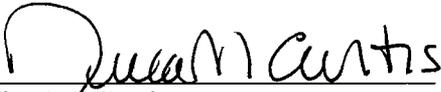
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