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Attorney for the Commission Staff

## BEFORE THE IDAHO PUBLIC UTILITIES COMMISSION

**IN THE MATTER OF A PETITION FILED BY )**  
**IDAHO POWER 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 THE**  
**COMMISSION STAFF**

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COMES NOW the Staff of the Idaho Public Utilities Commission, by and through its attorney of record, Scott Woodbury, Deputy Attorney General, and in response to the Notice of Petition for Declaratory Ruling, Notice of Modified Procedure and Notice of Comment/Protest Deadline issued on February 20, 2004, submits the following comments.

On February 5, 2004, Idaho Power Company (Idaho Power; Company) filed a Petition with the Idaho Public Utilities Commission (Commission) requesting an Order determining ownership of the marketable “environmental attributes”<sup>1</sup> associated with a PURPA qualifying facility (QF) when Idaho Power enters into a long-term, fixed rate contract to purchase the energy produced by that QF. Reference IDAPA 31.01.01.101.

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<sup>1</sup> Idaho Power does not define “environmental attributes.” A good definition is included in a white paper prepared by the Energy Trust of Oregon Inc. \_\_\_ Green Tag Ownership and Disposition (September 17, 2003). See attached “Appendix A.”

## Background

In June 2003, the Federal Energy Regulatory Commission (FERC) received a Petition for Declaratory Order from PURPA QFs seeking FERC interpretation of its avoided cost rules under PURPA. Specifically, Petitioners sought an Order declaring that avoided cost contracts entered into pursuant to PURPA, absent express provisions to the contrary, do not inherently convey to the purchasing utility any renewable energy credits (RECs) or similar tradable certificates. It was the contention of Petitioners that the power purchase price that the utility pays under such a contract compensates a QF only for the energy and capacity produced by that facility and not for any environmental attributes associated with the facility. Reference FERC Docket EL03-133-000.

In an Order issued on October 1, 2003 (105 FERC ¶ 61,004), FERC granted the Petitioners request for a declaratory order, to the extent that the petition asked the Commission to declare that Commission's avoided cost regulations did not contemplate the existence of RECs and that the avoided cost rates for capacity and energy sold under contracts entered into pursuant to PURPA do not convey the RECs, in the absence of an expressed contractual provision. FERC's Order made the following specific findings:

19. Section 210(a) of PURPA requires the Commission to prescribe rules imposing on electric utilities the obligation to offer to purchase electric energy from QFs. Under Section 210(b) of PURPA, such purchases must be at rates that are: (1) just and reasonable to electric consumers and in the public interest; (2) not discriminatory against QFs; and (3) not in excess of the incremental cost to the electric utility of alternative electric energy. Section 210(d) of PURPA, in turn, defines "incremental costs of alternative electric energy" as "the cost to the electric utility of the electric energy of which, but for the purchases from [the QF], such utility would generate or purchase from another source."
20. The Commission implemented the purchase obligations set forth in PURPA in Section 292.303 of its regulations, 18 CFR § 292.303(a) (2003), which provides:

Each electric utility shall purchase in accordance with Section 292.304, any energy and capacity which is made available from a qualifying facility. . . .

Section 292.304, in turn, requires that rates for purchases shall: (1) be just and reasonable to the electric customer of the electric utility and in the public interest; and (2) not discriminate against qualifying cogeneration

and small power production facilities. 18 CFR § 292.304(a)(1) (2003). The regulation further provides that nothing in the regulation requires any electric utility to pay more than the avoided costs for purchases. 18 CFR § 292.304(a)(2) (2003). “Avoided costs” is defined as the “incremental costs to an electric utility of electric energy or capacity or both which, but for the purchase from the qualifying facility or qualifying facilities, such utility would generate itself or purchase from another source.” 18 CFR § 292.101(b)(6) (2003).

21. Section 292.304 sets forth what factors are to be considered in determining avoided costs. See 18 CFR § 292.304(e) (2003). The factors to be considered include:

- (1) The utility’s system cost data;
- (2) The availability of capacity or energy from a QF during the system daily and season peak periods;
- (3) The relationship between the availability of energy or capacity from the QF to the ability of the electric utility to avoid costs; and
- (4) The costs or savings resulting from variations in line losses from those that would have existed in the absence of purchases from the QF.

22. Significantly, what factor is not mentioned in the Commission’s regulations is the environmental attributes of the QF selling to the utility. This is because avoided costs were intended to put the utility into the same position when purchasing QF capacity and energy as if the utility generated the energy itself or purchased the energy from another source. In this regard, the avoided costs 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. The avoided costs rates, in short, are not intended to compensate the QF for more than capacity and energy.

23. As noted above, RECs are relative recent creations of the states. Seven states have adopted renewable portfolio standards that use unbundled RECs. What is relevant here is that the RECs are created by the states. They exist outside the confines of PURPA. PURPA thus does not address the ownership of RECs. The contracts for sales of QF capacity and energy, entered into pursuant to PURPA, likewise do not control the ownership of the RECs (absent an express provision in the contract). States, in creating RECs, have the power to determine who owns the REC in the initial instance, and how they may be sold and traded; it is not an issue controlled by PURPA.

24. We thus grant Petitioners' Petition for Declaratory Order, to the extent that they ask the Commission to declare that contracts for the sale of QF capacity and energy entered into pursuant to PURPA do not convey RECs to the purchasing utility (absent an express provision in a contract to the contrary). While a state may decide that a sale of power at wholesale automatically transfers ownership of the state-created RECs, that requirement must find its authority in state law, not PURPA.

### **Petition for Declaratory Ruling**

Regional organizations, Idaho Power contends, exist to facilitate green energy transactions from resources that have been certified as green energy compliant by those organizations e.g., Bonneville Environmental Foundation (BEF). These entities issue tradable "green tags" to certified renewable energy producers. Green tags are also known as green certificates, renewable energy credits (RECs) and tradable renewable certificates (TRCs). A green tag represents the environmental and other non-power attributes associated with 1 megawatt hour (MWh) of electricity generated from a renewable resource. Some of the QFs from whom Idaho Power anticipates making purchases in the future, the Company contends, have indicated an intention to obtain marketable green tags as a result of entering into contracts with Idaho Power. Green tags avoid the need to package the electricity with its environmental attributes. The tags provide a way in which to "unbundle" the environmental attributes from the electricity and permit the sale of the environmental attributes of renewable generation separately from the electricity generated. In effect, the Company states that green tags are a currency that can be traded to individuals and entities wishing to support "green" energy. Example: Idaho Power Schedule 62\_\_Green Energy Purchase Program (Case No. IPC-E-00-18, Order No. 28655).

Referencing the foregoing FERC Order, Idaho Power states that FERC suggested that individual states may decide ownership of the green tags. As a result, the Company seeks guidance from the Commission as to ownership of potentially marketable certificates in Idaho.

Idaho Power contends that in Idaho, a utility and its customers confer additional value on QFs by virtue of the long-term, levelized, fixed rate contracts that the utility enters into with the QFs. That value, it asserts, is in addition to the avoided costs paid to the QFs for the energy produced. Vesting the utility with some ownership interest in the green tags, it states, would remunerate the utility for the additional value conferred to the QFs. The QF position, the

Company represents, is that QF ownership of the green tags provides the incentive they need to invest in the production of energy from a renewable resource. They assert that the sale of the green tags associated with the generation of green power compensates the QF with the facility's environmental attributes and rewards the additional risks associated with the investment in and the design and operation of a renewable energy resource plant.

In this Petition, Idaho Power Company requests a declaratory order from the Commission clarifying ownership of these green tags. The "respective arguments" of the Company and QFs are presented in the Company's Petition.

Despite Idaho Power's interest in owning the green tags, the Company acknowledges that retention of those tags by the QF developers may encourage the development of additional green energy resources in Idaho without the need to increase energy purchase prices. Given the heightened public interest in the development of new renewable resources, Idaho Power respectfully recommends that the Commission determine that the developers of such generation facilities receive full ownership rights in any green tags issued to them conditioned upon the requirement that the QF developers who qualify for green tags and from whom Idaho Power purchases energy grant the Company a "right of first refusal" to purchase those tags.

#### **Staff Analysis**

Idaho Power has requested a Commission Order determining ownership of the marketable "environmental attributes" associated with the sale of renewable energy from a PURPA qualifying facility to Idaho Power. The Company acquiesces to the ownership of environmental attributes being confirmed as belonging to the developer but requests a "right of first refusal" should the developer choose to sell. In Idaho the environmental attributes of renewable power are generally referred to as "green tags." Reference Idaho Power Schedule 62, Green Energy Purchase Program (Case No. IPC-E-00-18, Order No. 28655). The Company's Green Energy Program is a voluntary program for customers. Idaho Power was not required by the State or any regulatory authority to offer the Program.

Staff contends that the initial question before the Commission is one of jurisdiction. Does the Commission have the statutory authority and jurisdiction to determine who owns the "environmental attributes" associated with a QF project that requests a PURPA contract and proposes to sell capacity and energy to a regulated utility? If PURPA and FERC rules do not address and do not require a QF developer to sell "environmental attributes," to the purchasing

utility can the Commission in its implementation of PURPA restrict their sale to other parties? If the Commission has the authority under PURPA, should it restrict their sale? Can the Commission require as a PURPA contract condition that a QF grant a purchasing utility a “right of first refusal” to purchase the “Green Tags” associated with the QF facility?

It is well settled that the Idaho Commission is a creature of statute and derives its general authority vis-à-vis electric utilities from Title 61, Idaho Code. Under State Law, the Commission has authority over retail electric service. Wholesale power transactions are regulated by the Federal Energy Regulatory Commission (FERC). The Federal Power Act defines “sale at wholesale” as any sale to any person for resale. 16 U.S.C. § 824(d). Therefore, all QF sales to an electric utility are wholesale transactions. Under federal authority, i.e., PURPA and the implementing regulations of FERC, the Idaho Commission has the authority to set avoided costs, to order electric utilities to enter into fixed term obligations for the wholesale purchase of energy from qualifying facilities and to implement FERC rules regarding such purchases. PURPA Sections 210, 210(a), 210(f); 16 U.S.C. §§ 824a-3, 824a-3(a)(f); accord: *Afton Energy, Inc. v. Idaho Power Company*, 107 Idaho 781 (1984). FERC in the Order cited by Idaho Power in its Petition (105 FERC ¶ 61, 004) states that the contract sale of QF capacity and energy entered into pursuant to PURPA does not convey renewable energy credits (RECs) to the purchasing utility (absent an express provision in the contract to the contrary). FERC notes that RECs are relatively recent creations of the States and suggested that “States, in creating RECs, have the power to determine who owns the REC in the initial instance, and how they may be sold and traded.” “It is not,” FERC states, “an issue controlled by PURPA.” Staff notes that Idaho is not a State that has established a renewable energy portfolio standard for electric utilities. Nor is it a State that has by legislation created green certificates, green tags, renewable energy credits (RECs) or tradable renewable certificates (TRCs) or established a market for same. Nor also is Idaho presently a state that has provided tax incentives or credits for the development of renewable energy.<sup>2</sup> In short, there appears to Staff to be no hook that gives the Commission

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<sup>2</sup> Staff notes the following bills introduced in the 2004 Idaho legislative session:

- Idaho HB 760 – Income tax credit (capital investment)/alternative energy;
- Idaho HB 761 – Income tax credit (generation)/alternative energy;
- Idaho HB 827 – Alternative energy/sales tax exemption (equipment/supplies).

jurisdiction over “environmental attributes,” not under PURPA or federal law (including the Energy Policies Act of 1992), and not under Title 61 of the Idaho Code.

The avoided cost rate methodology in Idaho does not include an adder for “environmental attributes” associated with QF renewable energy. Environmental attributes are not an identified factor affecting rates for purchases. 18 C.F.R. § 292.304. Under PURPA, the avoided cost is the utility’s avoided cost. It is the incremental costs to an electric utility of electric energy or capacity or both which, but for the purchase from the qualifying facility the utility would generate itself or purchase from another source. 18 C.F.R. § 292.101(b)(6). In the context of PURPA wholesale transactions, FERC has barred state commissions from establishing different wholesale prices for otherwise qualified cogeneration or small power production facilities. 18 C.F.R. § 292.304(a)(ii). Accordingly, contracts for renewable resources cannot be at a higher price than for non-renewable resources, nor can the requirements of contract be different. Discrimination either directly or indirectly is not permitted.

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.” 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 the 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. At this time, no argument has been advanced nor authority cited to justify or require placing any regulatory restriction by this Commission on their ownership.

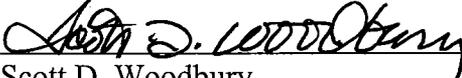
By way of aside, it is unclear from the Company’s Application why Idaho Power would purchase the tags of a QF that it has contracted with. The purchase of tags is not mandated by any state, federal or regulatory requirement. The Company should not be permitted to use such tags to satisfy its Tariff Schedule 62 obligations. Customers participating in Schedule 62 are paying a premium to promote the development of renewable energy. The purchase of QF green tags by Idaho Power does not promote the development of any additional

renewables by the Company. The purchase of QF renewables is already mandatory. The purchase price of green tags only increases the cost to the Company of QF energy.

**RECOMMENDATIONS**

Staff recommends that the Company's Petition for Declaratory Order be denied. Alternatively, should the Commission determine that it has jurisdiction, Staff recommends that the Commission issue a declaratory order stating that mandatory purchases from QFs under PURPA do not convey ownership of any marketable environmental attributes. Accordingly, any environmental attributes associated remain with the QF. Staff further recommends that the Commission deny the Company's proposal to require that QF developers from whom Idaho Power purchases energy grant Idaho Power a "right of first refusal" to purchase the environmental attributes associated with the QF facility.

RESPECTFULLY submitted this 19<sup>th</sup> day of March 2004.

  
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Scott D. Woodbury  
Deputy Attorney General

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## APPENDIX A

### Energy Trust Green Tag Definition

"Environmental Attributes" means any and all credits, benefits, emissions reductions, offsets, and allowances, howsoever entitled, resulting from the avoidance of the emission of any gas, chemical, or other substance to the air, soil, or water attributable to the Specified Resource, which are deemed of value by a Green Tag purchaser. Environmental Attributes include but are not limited to: (1) any avoided emissions of pollutants to the air, soil, or water such as (subject to the foregoing) sulfur oxides (SO<sub>x</sub>), nitrogen oxides (NO<sub>x</sub>), carbon monoxide (CO), and other pollutants; (2) any avoided emissions of carbon dioxide (CO<sub>2</sub>), methane (CH<sub>4</sub>), and other greenhouse gases (GHGs) that have been determined by the United Nations Intergovernmental Panel on Climate Change to contribute to the actual or potential threat of altering the Earth's climate by trapping heat in the atmosphere; and (3) the Green Tag Reporting Rights to these avoided emissions. Subject to the foregoing, Environmental Attributes do not include any energy, capacity, reliability, or other power attributes from the Specified Resource nor production tax credits or certain other financial incentives existing now or in the future associated with the construction or operation of the Specified Resource.

"Green Tag" means the Environmental Attributes associated with the power generated from the Specified Resource, together with the Green Tag Reporting Rights associated thereto. One Green Tag represents the Environmental Attributes made available by the generation of 1 MWh from the Specified Resource.

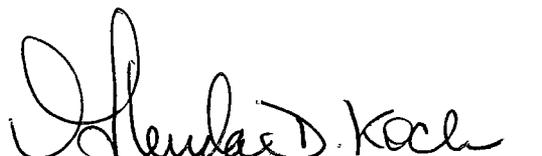
"Green Tag Reporting Right(s)" means the right of a Green Tag purchaser to report ownership of Green Tags in compliance with federal or state Law, if applicable, and to a federal or state agency, or other parties at the Green Tag purchaser's discretion, and include those accruing under Section 1605(b) of the Energy Policy Act of 1992, or under any present or future domestic, international, or foreign emissions trading program.

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY THAT I HAVE THIS 19<sup>TH</sup> DAY OF MARCH 2004, SERVED THE FOREGOING **COMMENTS OF THE COMMISSION STAFF**, IN CASE NO. IPC-E-04-02, BY MAILING A COPY THEREOF, POSTAGE PREPAID, TO THE FOLLOWING:

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