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 IDAHO PUBLIC
 UTILITIES COMMISSION

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BEFORE THE IDAHO PUBLIC UTILITIES COMMISSION

| | | |
|--------------------------------|---|--------------------------------|
| IN THE MATTER OF THE PETITION |) | |
| OF IDAHO POWER COMPANY FOR |) | CASE NO. IPC-E-05-22 |
| AN ORDER TEMPORARILY |) | |
| SUSPENDING IDAHO POWER'S |) | LEGAL MEMORANDUM OF AVISTA |
| PURPA OBLIGATION TO ENTER INTO |) | CORPORATION REGARDING |
| CONTRACTS TO PURCHASE ENERGY |) | TEMPORARY SUSPENSION OF PURPA |
| GENERATED BY WIND-POWERED |) | MANDATORY PURCHASE OBLIGATIONS |
| SMALL POWER PRODUCTION |) | FOR NEW WIND QF PROJECTS |
| FACILITIES |) | |
| |) | |

Pursuant to the Commission's Notice of July 1, 2005, Avista Corporation ("Avista") submits this legal memorandum regarding the Commission's authority to temporarily suspend utility obligations under the Public Utility Regulatory Policies Act of 1978 ("PURPA") to enter into contracts to purchase energy generated by wind-powered small production facilities. Avista concurs with the suspension request of Idaho Power Company. However, for the reasons set forth in the Direct Testimony of Robert J. Lafferty, Avista submits that any suspension of obligations to purchase wind generation should be suspended with respect to Avista, as well as

Idaho Power Company ("Idaho Power"). A suspension will serve, in part, to prevent an unintended situation where wind developers will reconfigure their projects so they fall below the ten megawatt threshold in order to qualify for Commission approved published rates. A suspension should also apply to Avista, as a petitioning utility, in order to avoid creating an incentive for wind resource developers, who are currently making their proposals to Idaho Power, to shift their proposals to Avista. The issues raised by Idaho Power regarding the impact and cost of integration of wind resources has broader application to other utilities in this jurisdiction.

1. The Commission has general responsibility for implementation of PURPA in Idaho.

The Commission has regulatory authority over Avista and Idaho Power pursuant to the Idaho Public Utilities Law and the Public Utility Regulatory Policies Act of 1978 ("PURPA"). *See* I.C. § 61-501-540 (1994); PURPA, §§ 3(16), (17); 16 U.S.C.A. § 796(15), (21) (1985). The Commission's authority under PURPA and implementing regulations of the Federal Energy Regulatory Commission ("FERC") is to set avoided costs, to order electric utilities to purchase power from small power producers, and to implement FERC rules. PURPA §§ 210, 210(a), and 210(f); 16 U.S.C.A. § 824a-3(a), (f) (West 1985 & Supp. 1995); *See also, Afton Energy, Inc. v. Idaho Power Co.*, 107 Idaho 781, 693 P.2d 427 (1984); *Rosebud Entr. v. Idaho Pub. Util. Com'n.*, 128 Idaho 609, 613, 917 P.2d 766 (1996). Consistent with this authority, it is within the Commission's discretion to determine whether changed, new, or previously unrecognized conditions warrant investigation, and whether during the investigation the obligation to purchase wind power should be suspended.

2. The Commission must suspend the utility purchase obligation, or revise avoided cost rates when it appears that avoided costs rates may exceed the utility avoided cost.

Section 210(f) of PURPA requires the states to establish avoided cost rates as provided by the rules of the FERC 16 U.S.C. § 824a-3(f)(1). Rates paid for the purchase of power under PURPA must be just, reasonable and in the public interest. 18 C.F.R. § 292.304(a)(1)(i). Avoided costs are those costs which a public utility would otherwise incur for electric energy and/or capacity, either by purchasing from another source or through its own production. 18 C.F.R. § 292.101(b)(6). However, the legislative history of PURPA indicates that the avoided cost limit, "is meant to act as an upper limit on the price at which utilities can be required under this section to purchase electric energy." 1978 U.S. Code Cong. & Ad. News 7797, 7832. In fact, the FERC has expressly held that any state authority to require the purchase of power at rates in excess of avoided cost is preempted by PURPA. *See Orange and Rockland Utilities, Inc.* 43 FERC ¶ 61,067 (1988).

The upper limit on the price that utilities can be required to purchase electric energy protects the consuming public against paying unwarranted subsidies to project developers through the PURPA process and protects the public from being exposed to costs in excess of those that would be incurred were utilities to acquire power from non-PURPA sources. This upper limit may be violated if unrestricted and unlimited sales of wind power occur under existing Commission PURPA tariffs and policies while the Commission considers revising PURPA policies applicable to wind power projects.

The Direct Testimony of Mr. Lafferty of Avista and Mr. Gale of Idaho Power indicate, that, in practice, there are costs associated with integrating intermittent wind-powered resources that are not reflected in the published avoided cost rates approved by the Commission.

Therefore, the rates presently being offered to wind projects under Idaho approved avoided cost tariffs exceed the costs to acquire the wind generated power from non-PURPA sources. The witnesses also point out the recent significant magnitude and speed of wind resource development being made available to Idaho utilities. The recently renewed federal production tax credit is a significant factor in encouraging wind resource development. Additionally, developers have flexibility in configuring the size of their wind power projects to take advantage of published avoided cost rates. All these factors point to the need for an investigation and a suspension during the investigation.

Under these circumstances, it is incumbent upon the Commission to determine whether the costs of wind-power purchases under existing PURPA policies and rates in Idaho are reasonable or will result in acquisition costs that exceed utility avoided costs in violation of PURPA. During its consideration of these issues, it is also reasonable and permissible that the Commission suspend mandatory purchase offers to wind power developers under PURPA.

3. Developers have no legally vested rights to receive contracts with utilities for the sale of power pending a possible change in Commission approved PURPA terms and conditions.

Wind power developers may oppose a suspension on the theory that they have a legal right or entitlement to receive a contract at existing avoided cost rates until new rates are established. However, the Commission has held that developers have no rights to be "locked-in" to an entitlement to preexisting avoided cost rates after the Commission has found that it is likely that those rates no longer reflect the utility's changed avoided costs. *See A.W. Brown Co., Inc. v. Idaho Power Co.*, Order No. 23271, Case No. IPC-E-88-9 (1990); *aff'd*, 121 Idaho 812, 828 P.2d 841 (1992). A developer has to have a substantially mature project and have been ready, willing and able to sign a contract with a particular utility before the avoided cost rate is superseded in

order to be locked into to a right to receive the superseded rate. *Id.*; also see *Empire Lumber v. Washington Water Power Company*, 114 Idaho 191, 755 P.2d 1229 (1987).

Similar logic applies to the suspension of an avoided cost terms, conditions and purchase rates as to their supersession. The Commission may find that it is likely that existing avoided cost terms, conditions and purchase rates are no longer just, reasonable, or in the public interest. Alternatively, the Commission may find that the public interest will be adversely affected if the existing avoided cost terms, conditions or purchase rates remain in effect during an investigation. In either event, the Commission should suspend the mandatory avoided cost rates while it completes its investigation. PURPA developers have no legal right under PURPA or Idaho law to prevent such a suspension.

4. Utilities and their customers will be prejudiced if utilities are compelled to offer to purchase at avoided cost rates that fail to take into account additional costs imposed on utilities as a result of the unique nature of large volumes of wind-generated power.

In Order No. 29029, Case No. GNR-E-02-1, the Commission reinstated a policy of twenty-year standard offers for the purchase of power from PURPA projects. However, it also reiterated the Commission's long-standing policy that, "ratepayers should be indifferent to whether a resource serving them was constructed by a utility or by an independent contractor." This principle will be violated if the Commission fails to suspend the obligation to acquire wind-generated power at Commission adopted purchase rates, but ultimately determines that acquisition of wind power under PURPA actually increases costs to utilities when compared to acquisitions from non-PURPA sources, or that the avoided cost rates applicable to wind power exceed the cost of comparable non-PURPA wind generated power. Absent a suspension, developers will have a significant incentive to submit a barrage of requests to Idaho utilities in

order to take advantage of a guaranteed twenty-year contract before the Commission completes its deliberations that may change the policies in the future.

5. The Commission has previously exercised its authority to suspend purchase obligations under PURPA.

In order to avoid prejudice to utility customers in the past, the Commission has suspended the purchase obligation of utilities while it considered changes to its policies for implementing PURPA. In Order No. 21249, Case No. U-1500-170, the Commission instituted its own investigation regarding the implementation of PURPA in Idaho. The Commission noted, *"Prior experience of the Commission teaches us that whenever potential qualifying facilities sense a pending change in the Commission's policy with respect to price, there is a flood of applications seeking to obtain contracts at the existing rates."* The public interest will not be served in this case if the conduct of an investigation as requested by Idaho Power and Avista immediately prompts a flood of applications from wind-powered projects for twenty-year contracts. This will be particularly true if the Commission ultimately determines that terms offered to wind-powered projects should be less favorable than current terms.

Although more limited in effect, Order No. 19483 in Case No. U-1500-156 is another example of the Commission ordering a suspension of the obligation to purchase power from PURPA projects. In this case the Commission was concerned that Bonneville Power Administration, and its wholesale requirements customers over whom the Commission had no jurisdiction, were inadequately implementing PURPA, resulting in only Idaho jurisdictional utilities being required to purchase power from projects located in the Bonneville service area. The Commission, therefore, suspended for a year the obligation of Idaho utilities under its jurisdiction to purchase power from projects located in the service territories of Bonneville and its requirements customers.

Although Idaho Power instituted this proceeding with a petition, and in the proceedings discussed above, the Commission instituted the proceedings on its own motion, that procedural distinction is immaterial. In this case, as in the cases where the Commission initiated proceedings, serious policy issues respecting the implementation of PURPA are before the Commission. In order to avoid potential prejudice to utility customers while it considers these issues, the Commission should order a suspension of the mandatory purchase obligation from wind generators.

6. Prejudice will result to utility customers of Avista if only the obligation of Idaho Power Company to purchase wind power at avoided cost rates is suspended.

In the prior cases, discussed above, the Commission has suspended the obligation of all Idaho jurisdictional utilities. The Commission has cause to investigate the cost and impacts of integration of wind generation upon utilities. However, it clearly is not in the public interest if a suspension of the obligation to purchase during that investigation applies only to Idaho Power. As Mr. Lafferty points out in his prepared testimony, a suspension applicable only to Idaho Power Company could have the effect of encouraging wind power project developers to offer their power to sale to Avista. A disparate treatment of the customers of Idaho Power and Avista in this respect is clearly not warranted under PURPA and not is in the public interest.

For the foregoing reasons, the Commission should suspend the obligation of Idaho Power Company and Avista Corporation to purchase power generated by wind-powered QF facilities.

During the suspension period, an investigation should take place that includes an assessment of the total amount of intermittent wind resource that Avista's system can reasonably absorb, without affecting reliability, and the level of costs associated with different amounts of

wind resource acquisition. The investigation should consider appropriate application of those costs to the published avoided costs applicable to intermittent wind-powered resources

RESPECTFULLY SUBMITTED this 14th day of July, 2005.

PAINE, HAMBLEN, COFFIN, BROOKE
& MILLER LLP

By: _____

R. Blair Strong

R. Blair Strong

Attorneys for Avista Corporation

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have caused to be served on this 14th day of July, a copy of the attached LEGAL MEMORANDUM OF AVISTA CORPORATION REGARDING TEMPORARY SUSPENSION OF PURPA MANDATORY PURCHASE OBLIGATIONS FOR NEW WIND QF PROJECTS and DIRECT TESTIMONY OF ROBERT J. LAFFERTY in Case No. IPC-E-05-22, by mailing a copy thereof, property addressed with postage prepaid to:

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| Jean D. Jewell, Secretary | <input checked="" type="checkbox"/> | Via Federal Express |
| Idaho Public Utilities Commission | <input type="checkbox"/> | First Class Mail |
| 472 W. Washington Street | <input type="checkbox"/> | Hand Delivery |
| Boise, ID 83720-5983 | <input type="checkbox"/> | Facsimile |

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| Scott Woodbury | <input checked="" type="checkbox"/> | Via Federal Express |
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| Richardson & O'Leary, PLLC | <input checked="" type="checkbox"/> | First Class Mail |
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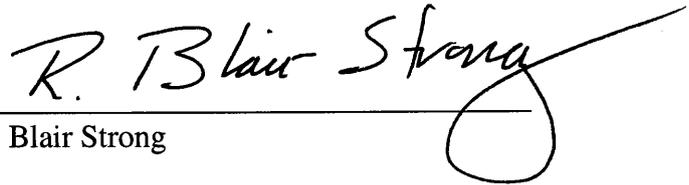
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