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IDAHO PUBLIC
UTILITIES COMMISSION

Attorneys for Exergy Development Group of Idaho LLC

BEFORE THE

IDAHO PUBLIC UTILITIES COMMISSION

IN THE MATTER OF THE PETITION OF)
IDAHO POWER COMPANY FOR AN ORDER)
TEMPORARILY SUSPENDING IDAHO)
POWER'S PURPA OBLIGATION TO ENTER)
INTO CONTRACTS TO PURCHASE)
ENERGY GENERATED BY WIND-)
POWERED SMALL POWER PRODUCTION)
FACILITIES)

CASE NO. IPC-E-005-22

EXERGY DEVELOPMENT GROUP
OF IDAHO LLC'S OPENING BRIEF
ON SUSPENSION ISSUE

COMES NOW, Exergy Development Group of Idaho LLC by and through its attorney of record, Peter J. Richardson, and pursuant to that notice issued by the Idaho Public Utilities Commission ("Commission") on July 7 1, 2005, and hereby lodges opening brief in response to Idaho Power Company's ("Idaho Power" or the "Company") above captioned Petition. In support hereof Exergy says as follows:

I

IDAHO POWER'S TESTIMONY IS INSUFFICIENT UPON WHICH TO BASE A
SUSPENSION OF PURPA

Idaho Power initiated this case by filing a Petition to "temporarily suspend" its obligations under the Public Utility Regulatory Policies Act of 1978 (PURPA). In its order issued on July 1, 2005, the Commission rejected the Petition stating that, "the Commission has
Opening Brief of Exergy

reviewed the filings of record in Case No. IPC-E-05-22 and finds the Company's Petition alone provides insufficient basis to grant the temporary suspension requested." Notice at p. 6. In response, Idaho Power filed the direct prefiled testimony of Company witness Gale. That testimony is substantively identical to the Petition and offers no new justification for draconian action such as suspension of Idaho Power's federal obligation to make purchases from Qualifying Facilities. Indeed, much of Mr. Gale's testimony is nothing more than the Petition reformatted into Qs and As. To demonstrate, it is instructive to read the two documents side by side.

Mr. Gale's testimony at page 10 asserts that:

In deciding to move forward with an RFP program to competitively acquire wind resources, Idaho Power was hopeful that a bidding process would allow the Company to take advantage of competition and the economies of scale associated with large-sized wind generation projects.

The Petition at page 5 states:

In deciding to move forward with an RFP program to competitively acquire wind resources, the Company was hopeful that a bidding process would allow the Company to take advantage of competition and the economies of scale associated with larger sized wind generation projects.

Mr. Gale's testimony asserts at page 10:

Idaho Power anticipated that this strategy would moderate the total cost of wind energy acquired by averaging the higher cost of smaller QF wind projects acquired by averaging the higher cost of smaller QF wind projects acquired at the avoided cost rate with the presumably lower cost of wind acquired by competitive RFPs.

The Petition at page 5 states:

It was hoped that this strategy would moderate the total cost of wind energy acquired by averaging the higher cost of smaller QF wind projects acquired at the avoided cost rate with the presumably lower cost of wind acquired by competitive RFPs.

Mr. Gale's testimony states at page ten:

Q. Have these expectations been met?

A. No, these expectations have not been met.

The Petition states at page 5:

Unfortunately, these expectations have not been met.

Idaho Power's Petition was denied for lack of demonstrating a prima facie case for suspension of its obligation to purchase from QFs under PURPA. Mr. Gale's testimony has, almost literally, been cut and pasted from the Petition. Idaho Power has still not met its burden of proof sufficient for this Commission to take any action.

II

THE COMMISSION LACKS JURISDICTION

Exergy incorporates by reference the legal arguments made in its Answer filed previously with the Commission in this docket and which has yet to be responded to by Idaho Power. By way of supplemental argument, Exergy notes that this Commission's suspension of Idaho Power's obligation to purchase under PURPA is utterly and completely preempted by PURPA. States are compelled to administer the federally determined avoided cost rate methodology. FERC v. Mississippi, 456 U.S. 742 (1982). Even though FERC, pursuant to PURPA, delegates the regulation and administration of one aspect of interstate wholesale power purchases to the state commissions, FERC nonetheless declares that "in establishing avoided cost rates, the state commissions act pursuant to federal, not state, law." Middle S. Servs., Inc., FERC Docket Nos. ER81-428-000 and ER82-483-000, 33 FERC (CCH) ¶ 61,408, 71 P.U.R 4th 580 (Dec. 23, 1985).

This Commission simply does not have the legal authority to suspend PURPA for any resource. Doing so would subject the Commission to enforcement action by FERC.

III
SEPARATE AVOIDED COST RATE/SCHEMES
BASED ON THE NATURE OF A QFs MOTIVE
FORCE IS DISCRIMINATORY AND ILLEGAL

It is important to remember that avoided cost rates are based on THE UTILITY'S AVOIDED COSTS and not on the QF's cost to produce power. This Commission has already determined what Idaho Power's avoided cost rate is and has applied that finding in a non-discriminatory manner to all QFs seeking to sell their power to it. Rates for purchases from QFs by such utilities may not discriminate as between cogenerators. Section 210 of PURPA provides:

The rules prescribed under subsection (a) shall insure that, in requiring any electric utility to offer to purchase electric energy from any qualifying cogeneration facility or qualifying small power production facility, the rates for such purchase

- (1) shall be just and reasonable to the electric consumers of the electric utility and in the public interest, and
- (2) shall not discriminate against qualifying cogenerators or qualifying small power producers.

16 U.S.C. § 824a-3. This prohibition against discriminatory treatment is also found in FERC's implementing regulations at 18 C.F.R. § 292.304(a)(i), which provides that, "Rates for purchases shall . . . not discriminate against qualifying cogeneration and small power production facilities." By definition, if Idaho Power is successful in achieving a suspension of entitlement for wind QFs to take advantage of the Commission's published avoided cost rates it will be discriminating as between cogenerators and small power producers.

The Commission may take into account several factors affecting rates that are unique to different types of QFs. Those factors include such things as the ability to dispatch, the

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availability of capacity during times of system peaks, the reliability of the particular QF, the terms of the contract and etc. *See* 18 C.F.R. 292.304(e). However, only taking those factors into consideration for one type of QF would violate the non-discriminatory provisions found in PURPA and FERC's implementing regulations.

PRAYER FOR RELIEF

For the foregoing reasons the Commission is respectfully requested to deny Idaho Power's Petition, with prejudice. It is beyond the scope of this Commission's jurisdiction to set avoided cost rates for just one type of QF resource.

DATED this 15th day of July 2005.

RICHARDSON & O'LEARY PLLC

By 
Peter J. Richardson
Attorneys for Exergy Development Group
of Idaho, LLC

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this day, July 15, 2005, I caused a true and correct copy of the foregoing **OPENING BRIEF OF EXERGY DEVELOPMENT GROUP OF IDAHO LLC TO IDAHO POWER COMPANY** to be served by the method indicated below, and addressed to the following:

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