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IDAHO PUBLIC  
UTILITIES COMMISSION

*Attorneys for Magic Wind, LLC, Cassia  
Wind Farm LLC and Cassia Gulch  
Wind Park LLC (Magic and Cassia)*

ORIGINAL

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-05-22

**BRIEF OF MAGIC WIND LLC,  
CASSIA WIND FARM LLC AND  
CASSIA GULCH WIND PARK LLC**

COME NOW Magic Wind LLC, Cassia Wind Farm LLC and Cassia Gulch Wind Park LLC (referred to collectively as "Magic and Cassia") and submit the following Brief in response to the Commission's Notice of Petition dated July 1, 2005.

**INTRODUCTION AND SUMMARY OF ARGUMENT**

Magic Wind LLC, Cassia Wind Farm LLC and Cassia Gulch Wind Park LLC are limited purpose companies formed by two owners of agricultural lands located in Twin Falls County, Mr. Armand Eckert and Mr. Jared Grover. In light of the declining fortunes of the agricultural sector, Mr. Eckert and Mr. Grover hope to convert their lands to a potentially productive use—wind generation. (*See Direct Testimony of Armand Eckert, Jared Grover*).

Magic and Cassia do not object to an investigation to examine the issues raised in Idaho Power Company's (IPCo) Petition and would participate to the extent their resources permit. In this Brief, however, Magic and Cassia advance two contentions:

1. Idaho Power Company has not made a record showing sufficient to warrant a suspension of its PURPA obligations.
2. If the Commission nonetheless orders a suspension, the suspension should not apply to projects that were filed with IPCo, on or before June 17, 2005 an Interconnection Application for Small Generators.

## ARGUMENT

### I.

#### **SUSPENSION OF PURPA OBLIGATIONS IS AN EXTRAORDINARY AND POTENTIALLY ILLEGAL REMEDY WHICH SHOULD BE GRANTED ONLY IN AN EXTREME CIRCUMSTANCE**

A. A Puported suspension of PURPA obligations is of doubtful legality.

As Exergy Development Group correctly points out in its June 27, 2005 Answer to Petition the utility obligation to purchase arises sections 201 and 210 of the federal Public Utility Regulatory Act of 1978. While a state commission can adopt reasonable policies and procedures to implement the federal scheme (*See A.W. Brown v. Idaho Power* 121 Idaho 812 (1992)), it is not clear that a state commission can suspend, even temporarily, a federally created obligation. A totally chaotic circumstance would arise, for example, if the Idaho State Tax Commission could temporarily suspend IPCo's obligation to pay taxes required by the federal Internal Revenue Code or if the Idaho Department of Environmental Quality could temporarily suspend IPCo's obligation to comply with the Federal Clean Air Act. For this reason, it has always been the law that state legislative and judicial decision makers must

give preclusive effect to federal enactments no matter what the strength of the competing local interests. Every first year law student knows this. *See, Martin v. Hunter's Lessee* 14 U.S. 304 (1816).

It is also a requirement of section 201 and 210, as well as state law (*See Idaho Code 61-325*) that rates and practices between qualifying facilities must be non-discriminatory. IPCo's proposal to suspend its obligation with respect to some quality facilities—wind generators—while not suspending its obligations for others is, without doubt, discriminatory on its face. When a proposal is discriminatory on its face, the burden is upon the proponent to show that the discrimination is not “undue or unreasonable.” The Commission is required to make record based, evidentiary findings justifying a different in treatment. *Cf. Agricultural Products v. Utah Power* 98 Idaho 23 (1976).

When faced with the prospect that a proposed course of action is legally infirm, a reasoned decision making approach is to weigh the prospect of illegality against the magnitude of harm that would result from inaction. For example, if great and immediate injury (such as loss of life, financial collapse or the like) would undoubtedly result from inaction, the risk of illegality fades in significant. If, on the other hand, the risk of real harm is slight and the risk of illegality is measurable, the balance tips in favor of inaction.

Also to be considered in this balancing is the harm caused to the legitimate interests of third parties. In particular, as established by the testimony of Mr. Eckert and Mr. Grover, the requested “temporary suspension,” from their perspective, is not a simply a temporary hiatus in the development process, but is more in the nature of a death sentence for their projects.

As will be discussed in more in testimony to be filed herewith and by others, the risk of irreversible harm to IPCo or its customers is slight. As discussed above, the risk of illegality

is significant and the risk of harm to legitimate interests of third parties is great. Accordingly, the requested suspension should be denied pending a full investigation of the issues raised by the IPCo petition.

B. Commission precedent in the area of interim rate increases establishes a standard for deciding whether to change course prior to a full hearing.

Idaho Power's request for a suspension of its PURPA obligations is analogous to a request for an interim rate increase in connection with a general rate increase. It asks the Commission to depart from the *status quo* based on untested allegations, before interested parties have been accorded a full opportunity for investigation and analysis. Most recently, in Case No. IPC-E-03-13, the Commission explained the standard for interim relief as follows: "Interim rate relief is an extraordinary remedy to be granted only in an emergency or where there is danger that the utility will not be able to render adequate service if relief is withheld." Order No. 29403, pg 96.

The logic behind the rule in interim rate increase cases is obvious: the Commission will not authorize sudden changes in rates or policy, with potentially harmful consequences to the legitimate interests of third parties, prior to a full hearing in which all matters can be fully explored unless there is an emergency or some other immediate need. As will be discussed below, and at oral argument, IPCo has not established the existence of anything resembling an emergency or immediate need of relief. Nor has IPCo alleged any facts establishing that its ratepayers would be materially harmed in the absence of a suspension.

C. Matters alleged in IPCo's Petition and supporting testimony do not establish the existence an emergency or a need for immediate relief in the form of a suspension of its PURPA obligations.

In its Notice of Petition dated July 1, 2005 found, "...the Company's Petition alone provides insufficient basis to grant the temporary suspension request." (Notice at pg 6). The

subsequently filed testimony of John R. Gale adds little in the way of substantive detail and consists, largely, of a re-packaging of the Company's Petition.

At the conclusion of the hearing schedule for July 22, 2005, after considering additional evidence and argument of other parties, Magic and Cassia believe the Commission will be left with an abiding conviction that the Company has not made a case for suspension.

## II.

### **IF THE COMMISSION ENTERS AN ORDER GRANTING A SUSPENSION OF IPCO'S PURPA OBLIGATIONS, DEVELOPERS WHO, ON OR BEFORE JUNE 17, 2005 SUBMITTED TO IPCo AN "INTERCONNECTION APPLICATION FOR SMALL GENERATORS" SHOULD BE EXEMPT THEREFROM.**

If the Commission determines, despite the foregoing, to order a suspension of some nature, it must then face the question of to whom the suspension should apply and to whom it should not apply. Idaho Power itself recognizes that the suspension should not apply to projects that are in some sense mature. (*See* Testimony of John R. Gale, pg 18).

Magic and Cassia respectfully suggest that the suspension should not apply to developers who have submitted to Idaho Power Company an "Interconnection Application for Small Generators." Examples of these Applications are Exhibits 600 and 602 to the testimony of Mr. Eckert and Mr. Grover. The following reasons support this recommendation.

First, it is based on publicly available information. On its internet website, IPCo maintains a public list of developers who have submitted the Application, a true copy of which is attached hereto as Exhibit A. (The list appears to include all small power producers, not just wind generators. Magic and Wind have asked, through a discovery request, for IPCo to provide a revised list eliminating non-wind projects, which, it is hoped will be available by the time of the July 22<sup>nd</sup> hearing). Idaho Power obviously views submission of an Interconnection Application as a significant milestone by its public publication of the list of applicants.

Second, filing the Application, and payment of the associated fee of \$10,000 is reasonable evidence of a serious intent to complete the proposed project. The Application requires submission of detailed engineering and other information. (See Exhibit Nos. 600 and 602, Testimony of Armand Eckert and Jared Grover). Only a developer who seriously intends to pursue the project would have assembled the detailed information necessary to complete the Application.

Finally, this recommendation offers an administratively simple “bright line” test for determining the scope of any suspension. It avoids the necessity of a case by case determination of which projects meet some ill-defined definition of “maturity.”

Specifically, Magic and Cassia recommend that any Commission order establishing a suspension contain the following language:

““It is further Ordered that the suspension established by this Order shall not apply to projects that on or before June 17, 2005 submitted to Idaho Power Company a completed Interconnection Application for Small Generators and it is further Ordered that Idaho Power Company shall continue the project development process, in accordance with policies procedures and rates in effect on July 17, 2005, with respect to those projects as if this suspension did not exist and in good faith.”<sup>1</sup>

Of course, adoption of this exemption standard would not preclude other individual projects from making a case for an individual exemption based on facts peculiar to their projects.

### **CONCLUSION**

Based on the foregoing, Magic and Cassia respectfully request that the Commission enter its order denying the requested suspension of the Company’s PURPA obligations. If, however,

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<sup>1</sup> Because Magic and Cassia are interested in contracting with Idaho Power Company, they have not examined the contracting process for Avista and PacifiCorp. Presumably, similar Applications are required by those Companies.

a suspension of some nature is ordered, the Commission should create an exemption to the suspension as suggested herein.

Dated this 15 day of July, 2005

Respectfully submitted,

MCDEVITT & MILLER LLP

A handwritten signature in black ink, appearing to read "Dean J. Miller", written over a horizontal line.

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**CERTIFICATE OF SERVICE**

I hereby certify that on the 15<sup>th</sup> day of July, 2005, I caused to be served, via the method(s) indicated below, true and correct copies of the foregoing document, upon:

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