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Attorney for the Commission Staff

**BEFORE THE IDAHO PUBLIC UTILITIES COMMISSION**

<b>IN THE MATTER OF THE APPLICATION OF</b>	)	
<b>IDAHO POWER COMPANY FOR APPROVAL</b>	)	<b>CASE NO. IPC-E-09-25</b>
<b>OF A FIRM ENERGY SALES AGREEMENT</b>	)	
<b>FOR THE SALE AND PURCHASE OF</b>	)	
<b>ELECTRIC ENERGY BETWEEN IDAHO</b>	)	<b>COMMENTS OF THE</b>
<b>POWER COMPANY AND IDAHO WINDS LLC</b>	)	<b>COMMISSION STAFF</b>
	)	
	)	

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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 Application, Notice of Modified Procedure and Notice of Comment/Protest Deadline issued on October 28, 2009, submits the following comments.

**BACKGROUND**

On September 10, 2009, Idaho Power Company (Idaho Power; Company) filed an Application with the Idaho Public Utilities Commission (Commission) requesting approval of a 20-year Firm Energy Sales Agreement between Idaho Power and Idaho Winds LLC (Idaho Winds) dated September 1, 2009 (Agreement).

Idaho Winds proposes to design, construct, own, operate and maintain a 21 MW (nameplate rating) wind generating facility located approximately six miles northwest of Glens Ferry in Elmore County, Idaho. The facility will be known as the Sawtooth Wind Project. Idaho

Winds warrants that the facility will be a qualified small power production facility (QF) under the applicable provisions of the Public Utility Regulatory Policies Act of 1978 (PURPA).

Under normal and/or average conditions, the facility's generation will not exceed 10 aMW on a monthly basis. Should the facility exceed 10 aMW on a monthly basis, Idaho Power will accept the energy (Inadvertent Energy) that does not exceed the maximum capacity amount; however, the Company will not purchase or pay for this Inadvertent Energy. ¶ 7.5. Idaho Winds has selected October 31, 2012, as the first energy date and December 31, 2012 as the Scheduled Operation Date. Appendix B-3.

## **STAFF ANALYSIS**

The Agreement contains non-levelized published avoided cost rates as currently established by the Commission for energy deliveries of less than 10 aMW. All other terms and conditions of the Agreement are nearly identical to those included in several contracts recently approved by the Commission. For example, in conformance with Commission Order No. 30488, the Agreement includes a Mechanical Availability Guarantee (MAG) (¶ 6.4), wind integration cost reduction (¶ 7.1), and wind forecasting cost sharing (Appendix E). In addition, the Agreement contains provisions for Delay Liquidated Damages (¶ 5.3) and associated Delay Security (¶ 5.7) to secure the established Scheduled Operation Date of December 31, 2012. Idaho Winds has been advised and understands that delays in the interconnection process do not constitute excusable delays in achieving the Scheduled Operation Date and if the Scheduled Operation Date is not achieved, delay damages will be assessed.

The primary issue with this Agreement is that this is the second firm energy sales agreement executed by Idaho Power and Idaho Winds LLC for this exact location. The first power sales agreement for the 18 MW Alkali Wind Project was approved on February 26, 2007. Reference Case No. IPC-E-06-36, Order No. 30253. On May 6, 2008, Idaho Power filed with the Commission a copy of a letter agreement between Idaho Power and the Alkali Wind Project terminating the Agreement. The power purchase rates contained in the Alkali agreement were roughly 30 percent less than the rates in the Sawtooth Agreement for which the parties are now seeking approval. The issue considered by Staff is whether Idaho Winds is entitled to terminate its original agreement and negotiate a new agreement at considerably higher rates for a project at exactly the same site.

Although Idaho Winds considers the Alkali and Sawtooth Wind Projects to be different, the only difference apparent to Staff is that the Sawtooth Project is 3 MW larger. In all other respects, the proposed Sawtooth Wind Project appears to be substantially the same as the Alkali Wind Project.

### **Circumstances of the Alkali Contract Termination**

The Alkali Wind Project was proposed to be located near Glenns Ferry, not far from a cluster of numerous other proposed projects in the Hagerman – Magic Valley area. This dense cluster of proposed projects necessitated that studies be performed to resolve issues related to necessary transmission system improvements and fair cost sharing mechanisms amongst all of the proposed projects. Reference Case No. IPC-E-06-21, Order No. 30414. Although the Alkali project was not included in the transmission cluster studies, the analysis and design work that was being performed by Idaho Power's transmission group for the cluster studies impacted the interconnection and transmission upgrade analysis the Company performed for the Alkali project.<sup>1</sup> During the analysis of the "cluster," Idaho Power and the developer of the Alkali project became aware of previously unknown transmission and interconnection issues and potential costs, and resolution of these issues caused time delays in the interconnection process. In addition, the interconnection analysis for the Alkali project was delayed by unavoidable internal problems at Idaho Power involving the need to replace the study engineer in the middle of the Alkali interconnection study. While it was ultimately determined that the Alkali project could interconnect to the Company's system, Idaho Power admits that processing the interconnection request was inordinately delayed. At least some of the delay, the Company readily concedes, can be attributed to Idaho Power. Commission Order No. 30253 discussed the uncertainty associated with transmission issues occurring at the time (Order No. 30253, pp. 4-7).

This period of transmission uncertainty occurred at a time when the costs of material and equipment for the Alkali project were rising quickly. As a result, the developer of the Alkali project advised Idaho Power that he desired to cancel the power sales agreement rather than continue to develop the project and risk a financial failure. Idaho Power maintains that it made a diligent effort to work with the developer with the intention of extending the on-line date rather than terminating the contract. However, in the end, the developer concluded that he could not proceed and Idaho Power agreed to a mutual termination of the contract. On May 6, 2008, Idaho

Power filed a copy of the termination agreement between Idaho Power and the Alkali project with the Commission.

The power sales agreement for the Alkali project was terminated by mutual agreement of the parties. By its express terms, the agreement and cover letter specify that "Termination of the Agreement shall only be effective upon execution of this document by both parties and acceptance of this termination by the Idaho Public Utilities Commission." (See Attachment). Although Idaho Power filed the termination letter agreement with the Commission on May 20, 2008, the Commission never took any action to either notice, acknowledge, or accept it. Idaho Power does not contend that the Company's May 20, 2008, filing of the termination agreement between Idaho Power and the Alkali project binds the Commission. Idaho Power made the filing with the Commission in good faith with the expectation that if the Commission or Staff had questions or concerns relating to the cancellation, the filing of the cancellation agreement would provide a vehicle for the Commission to inquire further. Idaho Power acknowledges that the Commission has not issued an order formally accepting the termination of the Alkali contract. Both Staff and the Company agree that the Commission is certainly free to reject the Sawtooth Wind Project Agreement. The Sawtooth Wind Project Agreement explicitly provides that it is contingent on the Commission issuing its order accepting the agreement and approving it for ratemaking purposes.

### **Idaho Power's Justification for Offering a New Contract to Sawtooth Wind**

In offering a new contract to the Sawtooth Project, Idaho Power does not believe that the Sawtooth Wind Project should be bound by the same rates, terms and conditions as were included in the Alkali contract that preceded it. As justification for its decision to offer the Sawtooth project a new contract, Idaho Power points out that that at the time of cancellation, the Commission had neither considered nor ordered a change in the published avoided cost rates. The current avoided cost rates were approved in February of 2009, approximately one year after the decision was made to cancel the Alkali contract.

Based on its review of the facts and circumstances in this case, Staff does not believe that Idaho Winds deliberately terminated its existing agreement for the Alkali project with the intention of later signing a new contract at much higher rates for essentially the same project. At

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<sup>1</sup> Staff's recitation of facts is informed by the Company's response to Staff's Production Request Nos. 1-5.

the time the Alkali contract was terminated, Idaho Winds had no knowledge that published avoided cost rates would increase substantially in the near future. Staff believes that Idaho Winds terminated its original agreement in good faith, knowing that the escalation in project costs that occurred during transmission study delays made its project uneconomical at the avoided cost rates contained in the contract.

The eventual outcome of termination of the original Alkali agreement was a new Agreement for the Sawtooth project at much higher rates. Although ratepayers ultimately lose out on the benefits of the Alkali contract with its much lower rates, Staff believes that the unusual circumstances of this case justify a new contract. There is no evidence that either Idaho Winds or Idaho Power took any actions to deliberately "game" the system to the disadvantage of ratepayers.

### **Effect on Other Contracts**

Besides the Alkali/Sawtooth project, fifteen other wind projects with signed QF contracts were either directly involved or indirectly impacted by the Magic Valley QF interconnection and transmission cluster issue. Four of those projects have been developed and are currently online. All of the other projects experienced transmission study delays but decided to remain in the interconnection and transmission queue. They have each continued to progress through the interconnection study process. They have all retained their power sales agreements but revised their estimated operation dates to September 30, 2010.

Staff inquired of Idaho Power as to why each of these uncompleted projects could not also terminate their existing contracts and seek new contracts at higher avoided cost rates in the same manner in which Idaho Winds LLC has done for the Sawtooth project. Idaho Power responded that it does not believe any of these uncompleted projects stand on the same footing as the Alkali project did when Idaho Winds LLC and Idaho Power agreed to terminate the Alkali contract. Idaho Power points out that it was only after the filing of the multiple interconnection requests for the numerous wind projects in the "cluster" area that the complexity of the interconnection and transmission issues in the cluster area became known. This sudden and large influx of megawatts of interconnection requests required a cluster study be performed. Upon completion of this cluster study, the results were presented to the impacted projects. The impacted projects rejected the results of the study and the matter was submitted to the

Commission in form of a complaint. This complaint was ultimately resolved by Commission Order No. 30414.

As stated earlier, this entire process consumed more time than is typically required to perform interconnection and transmission studies. It was during this same time that the Alkali project experienced unexpected time delays and uncertainty of costs in the interconnection process that resulted in the project withdrawing its interconnection request and requesting termination of the Alkali agreement.

The issues relating to the interconnection process have now been resolved. The affected uncompleted projects did not seek to cancel their contracts but instead requested to extend the operation date within their contracts. Because the interconnection studies are now substantially complete and the magnitude of the interconnection-upgrade costs have been disclosed, Idaho Power believes that the remaining projects have no basis to claim they do not know the construction schedule or the general magnitude of costs of interconnection at this time. Contract cancellation at this point, Idaho Power contends, would simply be an attempt to obtain the new, higher rates and would be a clear breach of contract.

Idaho Power believes that dispositive difference between the status of the uncompleted projects and the Alkali-Sawtooth projects is that the Alkali project decided to cancel its contract nearly a year before the Commission increased the published avoided cost rates to the current level. At the time the Company and the Alkali project agreed to voluntarily terminate the power sales agreement, neither Idaho Power nor the project developer knew that the Commission would, many months later, increase the published avoided cost rates.

Idaho Power maintains that is not the same situation for the remaining uncompleted projects. If the remaining projects choose to default now and subsequently request a contract at rates they now know are higher, the Company believes denial of a new contract would be reasonable and legally sustainable.

#### **New Contract Provisions to Guard Against Defaulting to Obtain Higher Rates**

In most instances, the owner of a QF resource is a limited liability company ("LLC") with little or no assets other than the power sales agreement and the project's equipment and facilities. In most instances, the project's equipment and facilities are subject to substantial first mortgage liens, thereby putting Idaho Power behind other creditors in the event of a default or bankruptcy.

As a result, under most vintages of power sales agreements, it is unlikely that Idaho Power will be able to recover its damages if a QF developer defaults or terminates a contract.

Idaho Power and the Commission Staff have struggled to address the balance between including terms and conditions in QF contracts that will adequately protect customers while at the same time not unduly inhibit the development of QF projects. In the end, the only mechanism the Company believes is both fair and effective is the posting of liquid security to be retained for a period of time to ensure QF developers do not cancel or terminate projects in an effort to "game" the system.

It is Idaho Power's opinion that the only effective way to deter QF developers from terminating or defaulting on existing contracts in order to negotiate new contracts at higher avoided cost rates is for the Commission to allow Idaho Power to include reasonable liquidated damages provisions in QF contracts and to allow the Company to include contract provisions that require QF developers to provide meaningful amounts of liquid security to be retained by the utility in the event of a termination or default. Unless the QF developer has a meaningful financial incentive not to terminate or default, some QF developers will continue to look at power sales agreements as options which they can exercise or ignore without adverse consequences.

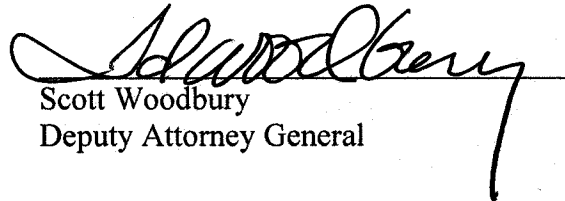
Recent power sales agreements between Idaho Power and QF developers have included such liquidated damage and security provisions. The Tuana Springs expansion, Camp Reed, Yahoo Creek, and Payne's Ferry QF contracts recently approved in Commission Order Nos. 30917, 30924, 30925, and 30926, respectively, all include delay damage contract language and security in the amount of \$20 per kW. The proposed Sawtooth contract includes them as well. Now however, Idaho Power believes that the \$20 amount is probably too low to be a meaningful deterrent. The Company believes that an amount of security equal to the greater of three months anticipated revenues or \$45 per kW is more realistic. In comments filed in the pending GNR-E-09-03 case, Idaho Power and Avista have suggested that \$45/kW or approximately three months of revenue is an appropriate amount of security for new QF contracts going forward.

## **RECOMMENDATIONS**

Although Idaho Winds originally signed a contract for the Alkali project with much lower rates than are contained in the new proposed Sawtooth contract, Staff believes that the unusual circumstances of this case justify termination of the Alkali contract and approval of the

new Sawtooth contract. There is no evidence that either Idaho Winds or Idaho Power took any actions to deliberately "game" the system to the disadvantage of ratepayers. Staff recommends that the Commission acknowledge termination of the Alkali agreement. Staff recommends that the Commission approve all of the Sawtooth Agreement's terms and conditions and declare that all payments Idaho Power makes to Idaho Winds for purchases of energy from the Sawtooth Wind Project will be allowed as prudently incurred expenses for ratemaking purposes.

Respectfully submitted this 25<sup>th</sup> day of November 2009.



Scott Woodbury  
Deputy Attorney General

Technical Staff: Rick Sterling

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UTILITIES COMMISSION

May 19, 2008

**Randy C. Allphin**  
Senior Planning Administrator  
Tel: (208) 388-2614  
[rallphin@idahopower.com](mailto:rallphin@idahopower.com)

Jean Jewell  
Commission Secretary  
Idaho Public Utilities Commission  
PO Box 83720  
Boise, ID 83720-0074

RE: Idaho Winds LLC , Alkali Wind Project, Case No. IPC-E-06-36

Dear Ms. Jewell:

On February 26, 2007 in Order No. 30253, the Idaho Public Utilities Commission approved the Firm Energy Sales Agreement ("Agreement") between Idaho Power Company and Idaho Winds LLC. ("Idaho Winds") for the sale of energy to Idaho Power Company from the proposed Alkali Wind Project (the "Project") to be located near Glenns Ferry, Idaho. As proposed, the 18 MW Project would have been considered a Qualified Facility ("QF") under the Public Utility Regulatory Policies Act of 1978. The specified Scheduled Operation Date within this Agreement was December 31, 2007.

Due to various issues, including the process of resolving the QF interconnection issues included in IPUC case IPC-E-06-21, the Project delayed construction and did not meet the December 31, 2007 Scheduled Operation Date.

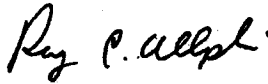
In various e-mails, letters and conversations since December 2007, Idaho Power and Idaho Winds have been discussing possible revisions to the Scheduled Operation Date. At this time both parties have agreed that a mutually agreeable revised Scheduled Operation Date is not achievable and therefore termination of the Agreement is appropriate.

Attached is a termination letter executed by both Idaho Power and Idaho Winds summarizing the termination of this Agreement.

This termination agreement specifies that it shall only be effective upon execution by both parties and acceptance of this termination by the Idaho Public Utilities Commission.

If the Commission requires any further information or action from Idaho Power Company prior to providing Idaho Power acceptance of this termination, please notify me (388-2614) or attorney Bart Kline (388-2682).

Sincerely,



Randy C Allphin  
Idaho Power Company

cc: Rick Sterling (IPUC)  
Scott Woodbury (IPUC)

May 6, 2008

**Randy C. Allphin**  
Senior Planning Administrator  
Tel: (208) 388-2614  
[rallphin@idahopower.com](mailto:rallphin@idahopower.com)

Rick Koebbe  
Idaho Winds, LLC  
5356 N. Cattail Way  
Boise, Idaho 83714

Re: Idaho Winds 18 MW Alkali Wind Project

Dear Rick:

As you are aware, we have been in discussions the last few months to establish a revised Scheduled Operation Date for the Firm Energy Sales Agreement between Idaho Winds LLC and Idaho Power Company dated December 12, 2006 for the Alkali Wind Farm (Agreement). The Scheduled Operation Date within the Agreement was originally established as December 31, 2007.

At this point the parties are unable to agree upon an acceptable revised Scheduled Operation Date.

To summarize the past discussions

Idaho Winds contends:

- ✓ After the Agreement was completed, issues regarding transmission upgrades arose in regards to the interconnection costs and processes required to interconnect this project to the Idaho Power electrical system. Some of these issues were presented to the Idaho Public Utilities Commission for resolution.
- ✓ Considerable time passed in the resolution of the various interconnection issues and during that time, the project's construction costs and turbine availability status experienced significant adverse changes. As a result, Idaho Winds contends that the project is no longer viable.

Idaho Power contends:

- ✓ The project has cited that delays are due to the interconnection issues and these interconnection issues have now been resolved by Commission Order. Therefore, Idaho Power has suggested that a revised Scheduled Operation Date can now be established using the current interconnection process and timeline.
- ✓ Idaho Power believes the project did not perform adequate due diligence regarding the interconnection process prior to committing to the original Scheduled Operation Date. However, Idaho Power (Power Supply) also recognizes that resolution of the interconnection issues did take a considerable period of time.

Termination of the Agreement

- ✓ As of the date of this letter, both parties mutually agree that termination of the Agreement is acceptable.
- ✓ Upon termination of this Agreement both parties agree to waive any claims against the other based on either negligence or breach of contract.
- ✓ Termination of this Agreement shall be effective upon execution of this document by both parties and acceptance of this termination by the Idaho Public Utilities Commission without requirements for any material changes to this document.

Idaho Power is providing three copies of this termination document. Please sign each copy and return all three copies to me no later than Friday, May 16, 2008. Idaho Power reserves the right to modify this document if the signed documents are not received back by the date specified above.

US Mail:

Idaho Power Company  
Attn: Randy Allphin  
P O Box 70  
Boise, ID 83707



Overnight Mailing Address:

Idaho Power Company  
Attn: Randy Allphin  
1221 W Idaho  
Boise, ID 83702

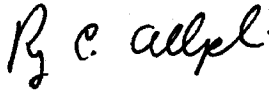
Upon receipt of the three signed copies I will arrange for and present the termination documentation to Idaho Power Company management for their signatures.

After Idaho Power Company signs these documents, I will return one complete signed original to you for your records, prepare and file one original with the Idaho Public Utilities Commission (IPUC) requesting their acceptance of this termination documentation and keep the third original for our records.

UNDERSTOOD, AGREED AND ACCEPTED:

	<u>Idaho Winds, LLC</u>	<u>Idaho Power Company</u>
Signature		
Name	Rick Koebbe	M. MARK STOKES
Title	President	MANAGER, POWER SUPPLY PLANNING
Date	06 May 2008	5/7/2008

Sincerely,



Randy C. Allphin

cc: Bart Kline (IPCo)  
Donovan Walker (IPCo)  
Mark Stokes (IPCo)

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY THAT I HAVE THIS 25<sup>TH</sup> DAY OF NOVEMBER 2009, SERVED THE FOREGOING **COMMENTS OF THE COMMISSION STAFF**, IN CASE NO. IPC-E-09-25, BY MAILING A COPY THEREOF, POSTAGE PREPAID, TO THE FOLLOWING:

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TOM FETZER  
IDAHO WIND FARMS LLC  
4255 S NICKEL CREEK PLACE  
MERIDIAN ID 83642

  
\_\_\_\_\_  
SECRETARY

CERTIFICATE OF SERVICE