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IDAHO PUBLIC UTILITIES COMMISSION

Attorneys for Complainant AgPower Jerome, LLC

**BEFORE THE
IDAHO PUBLIC UTILITIES COMMISSION**

AGPOWER JEROME, LLC,
Complainant,

vs.

IDAHO POWER COMPANY,
Defendant.

Case No. IPC-E-10-11

FORMAL COMPLAINT

INTRODUCTION

1
2 This is a formal complaint filed by AgPower Jerome, LLC (“AgPower”) with the Idaho
3 Public Utilities Commission (the “Commission”) pursuant to Idaho Administrative Rules
4 31.01.01.054. Prior to March 16, 2010, AgPower requested, that Idaho Power Company (“Idaho
5 Power”), execute a standard Public Utility Regulatory Policies Act of 1978 (“PURPA”) power
6 purchase agreement (“PPA”) for qualifying facilities (“QFs”) under 10 average monthly mega-
7 watts (“aMW) for AgPower’s biomass to renewable energy QF – the Double A Dairy Digester
8 Project in Jerome, Idaho. Because Idaho Power has rejected AgPower’s attempt to obligate itself
9 the terms of a standard PPA at the published avoided cost rates effective prior to March 16,
10 2010, AgPower respectfully requests that the Commission issue a declaratory judgment that

1 AgPower is entitled to such a PPA and further requests that the Commission order Idaho Power
2 to enter into a PPA at the rates in effect prior to March 16, 2010.

3 **PRELIMINARY MATTERS**

4 Copies of all pleadings and other correspondence in this matter should be served upon
5 counsel for AgPower at:

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16 **In support of this Complaint, AgPower alleges as follows:**

17 **IDENTITY OF PARTIES**

18 1. Idaho Power is an Idaho Corporation with its principal place of business at 1221
19 West Idaho Street, Boise, Idaho 83702. Idaho Power Company is an electric company and a
20 public utility subject to the jurisdiction and regulation of the Idaho Public Utilities Commission
21 pursuant to I.C. § 61-129. Idaho Power is subject to the jurisdiction of the Commission, the
22 Public Utility Commission of Oregon, and the Federal Energy Regulatory Commission
23 (“FERC”).

24 2. AgPower is a Delaware limited liability company, and the address of its principle
25 place of business is AgPower Jerome, LLC, c/o Cenergy, USA, Inc., 11500 Parham Road, Suite
26 9, Little Rock, Arkansas 72212. AgPower has assumed the rights of other entities engaged in
27 developing the anaerobic digester at the Double A Dairy in Jerome, Idaho – the Double A Dairy

1 Digester. For purposes of this complaint, “AgPower” includes AgPower and those other entities
2 previously engaged in developing the Double A Dairy Digester.

3 JURISDICTION

4 3. This case involves PURPA’s avoided cost provisions and FERC implementing
5 regulations thereto, which PURPA directs states to implement. *See* 16 U.S.C. § 824a-3 (a)-(g);
6 *FERC v. Mississippi*, 456 U.S. 742, 751 (1982). In Idaho, the Commission possesses jurisdiction
7 over complaints regarding rates of public utilities, including PURPA rates. I.C. §§ 61-129, -501.
8 -502, -503, -612; *see also Afton Energy Inc. v. Idaho Power Co.*, 111 Idaho 925, 929, 729 P. 2d
9 400, 404 (1986). The Commission has jurisdiction to issue declaratory judgments regarding
10 utility contracts pursuant Idaho’s Declaratory Judgment Act, I.C. § 10-1203. *See Utah Power*
11 *and Light v. Idaho Pub. Utilities Commission*, 112 Idaho 10, 12, 730 P.2d 930, 932 (1986).

12 APPLICABLE LAWS AND REGULATIONS

13 4. Section 210 of PURPA requires electric utilities to purchase power produced by
14 small power producers that obtain QF status under section 201. 16 U.S.C. § 824a-3(a)(2). FERC
15 rules provide QFs with the option of selling electricity and capacity to a utility based on the
16 utility’s “avoided costs” at the time the QF incurs a legally enforceable obligation to deliver
17 energy or capacity over a specified term. *See* 18 C.F.R. § 292.304(d)(2)(ii). Thus, “a QF, by
18 committing itself to sell to an electric utility, also commits the electric utility to buy from the QF;
19 these commitments result either in contracts or in non-contractual, but binding, legally
20 enforceable obligations.” *JD Wind 1, LLC*, “Notice of Intent Not to Act and Declaratory Order,”
21 129 FERC ¶ 61,148, at p. 10-11 (November 19, 2009).

1 **FACTUAL BACKGROUND**

2 5. AgPower has been actively engaged in the development of a 4.5 MW anaerobic
3 digester project at the Double A Dairy in Jerome, Idaho.

4 6. AgPower's Double A Dairy Digester will employ six 750 kW synchronous
5 generators to convert methane gas given off from dairy waste into 4.5 MW of clean, renewable
6 energy, and is already a self-certified QF under PURPA.

7 7. In addition to the benefits of renewable energy generated, the Double A Dairy
8 Digester will provide substantial waste-management benefits by converting a large quantity of
9 dairy cattle waste to a liquid effluent that can be used as fertilizer and a pathogen-free fiber
10 useful for cattle bedding or other purposes. Additionally, the project will reduce the amount of
11 methane – a very potent greenhouse gas – released into the atmosphere by putting it to the
12 beneficial use of renewable energy production.

13 8. AgPower's Double A Dairy Digester will also generate substantial income for the
14 host dairy, and therefore, as with other dairy digesters, will support Idaho's dairy industry with
15 an additional income stream from what was formerly a waste product.

16 9. To achieve these benefits, AgPower must secure a power purchase agreement
17 with Idaho Power – the nearest utility, and AgPower therefore initiated contact with Idaho Power
18 in 2007.

19 10. Over the two years since initiating contact with Idaho Power, AgPower has
20 incurred substantial expenses on a completed interconnection study and work orders relative to
21 upgrading Idaho Power's distribution system for interconnection of the project. Idaho Power has
22 not indicated that interconnection and transmission capacity are unattainable.

1 11. AgPower has also had extensive contact with Idaho Power regarding a PPA for
2 the project, and in response to AgPower's request, Idaho Power delivered a draft PPA to
3 AgPower in August 2009, containing the avoided cost rates contained in Order No. 30744.

4 12. In part in reliance on the rate structure contained in that draft PPA, AgPower has
5 made substantial investments in development of the project, including completing permitting,
6 finalizing site control, commencing construction and pouring foundations, and has secured
7 equity investors and is nearing completion of debt financing.

8 13. Idaho Power's draft contract contained clauses regarding liquidated damages and
9 a required delay security of \$20 per kw of maximum output.

10 14. These clauses required liquidated damages and delay security far in excess of the
11 clauses contained in a PURPA PPA with Idaho Power in April 2008 for the another dairy
12 digester – the Big Sky West Dairy Digester.

13 15. Idaho Power insisted on the increased delay damages even though energy prices
14 have dropped significantly since April 2008. And Idaho Power is even less likely to incur
15 damages to replace energy contracted for from Double A Dairy Digester in the event of a delay
16 in achieving the online date than Idaho Power would have been in the event of default on the
17 April 2008 contract. Idaho Power's delay damages clauses for the Double A Dairy Digester
18 were therefore punitive and designed to discourage this PURPA development.

19 16. Nevertheless, before the service date of Order No. 31025 and the new rates
20 contained therein, AgPower provided Idaho Power with the essential elements regarding the
21 Double A Dairy Digester to complete the draft PPA with the rates contained in Order No. 30744.
22 AgPower obligated itself to enter into that draft PPA, even though Idaho Power's draft PPA
23 contained the onerous and punitive clauses regarding liquidated damages and a required delay

1 security of \$20 per kw of maximum output because Idaho Power told AgPower it had no choice
2 regarding the security.

3 17. AgPower also informed Idaho Power's contract administrator at this time that
4 AgPower's interconnection study was complete.

5 18. On March 9, 2010, Idaho Power received a letter from the Commission's Staff,
6 stating that the published avoided cost rates would be recalculated. The letter included Staff's
7 recalculation of the avoided cost rates, which were substantially lower than those in Order No.
8 30744 and included in the draft PPA Idaho Power sent to AgPower.

9 19. Idaho Power concurred in Staff's recalculation on March 10, 2010, without
10 providing AgPower with notice of Staff's recalculated rates or Idaho Power's concurrence.

11 20. Instead, on March 11, 2010, two days after Idaho Power received notice of a
12 proposed significant decrease in the published avoided cost rates, Idaho Power rejected
13 AgPower's binding offer to enter into a PPA according to the terms in Idaho Power's draft PPA,
14 including the punitive delay damages clause and the rates from Order No. 30744.

15 21. Contrary to its prior representations, Idaho Power stated on March 11 that it
16 would not enter into a PPA according to terms Idaho Power had initially sent AgPower until
17 AgPower complied with a new process, memorialized in writing for the first time on March 11.
18 Idaho Power's new process required AgPower, prior to receiving a PPA, to (1) provide
19 documentation that it had filed for interconnection; (2) receive an interconnection feasibility
20 study; (3) sign a letter of understanding allowing Idaho Power to file an application to Idaho
21 Power requesting transmission capacity; and (4) provide acceptance of the results of Idaho
22 Power's initial transmission capacity study.

Respectfully submitted this 9th day of April 2010,



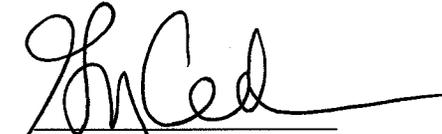
Peter J. Richardson
Attorney for AgPower Jerome, LLC
ISB No: 3195

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 9th day of April, 2010, a true and correct copy of the within and foregoing **FORMAL COMPLAINT OF AGPOWER PARTNERS, LLC** was served in the manner shown to:

Jean Jewell
Commission Secretary
Idaho Public Utilities Commission
472 W Washington
Boise ID 83702

- Hand Delivery
- U.S. Mail, postage pre-paid
- Facsimile
- Electronic Mail



Gregory M. Adams