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IDAHO PUBLIC
UTILITIES COMMISSION

29 November 2011

Ms. Jean Jewell
Commission Secretary
Idaho Public Utilities Commission
P O Box 83720
Boise ID 83720-0074

RE: Case No. IPC-E-11-15

Dear Ms. Jewell:

Enclosed please find an original and (7) copies of the **MOTION FOR SUMMARY JUDGMENT OF GRAND VIEW SOLAR PV II, LLC** in the above case.

An additional copy is included to be date stamped and returned to our office.

Sincerely,

Nina Curtis
Administrative Assistant to Peter Richardson
Richardson & O'Leary, PLLC

encl.

210(e) of PURPA¹, the Takings Clauses of the U.S. and Idaho Constitutions, and the Dormant Commerce Clause of the U.S. Constitution. Grand View therefore requests that the Commission issue a declaratory judgment that Grand View is entitled to a standard PURPA PPA wherein Idaho Power disclaims ownership of all environmental attributes of Grand View's solar project, and order that Idaho Power enter into such a PPA with rates calculated under the methodology in effect on the date of the filing of Grand View's complaint.

I. STATEMENT OF THE CASE

A. Background on Environmental Attributes and Renewable Energy Credits

This case involves a dispute over the ownership of valuable environmental attributes of renewable electric energy generation. "To promote the construction of renewable resources, a system was created that separates renewable generation into two parts: (1) the electrical energy produced by a renewable resource and (2) the renewable attributes of that generation." *Idaho Power's Renewable Energy Credit Management Plan* (hereinafter "*IPCO REC Plan*"), IPUC Case No. IPC-E-08-24, p. 1 (Dec. 30, 2009). Paul Affidavit, Exhibit 2. The "renewable attributes are referred to as renewable energy credits ('RECs') or green tags." *IPCO REC Plan* at 1. "One REC is issued for each megawatt-hour ('MWh') of electricity generated by a qualified resource." *IPCO REC Plan* at 1. Twenty-five states and the District of Columbia now have some form of renewable portfolio standard that requires utilities to purchase a certain percentage of overall electric generation from renewable energy sources or alternatively purchase unbundled RECs from renewable generators located in-state or out-of-state. Steven Ferrey, Chad Laurent, Cameron Ferrey, "Fire and Ice: World Renewable Energy and Carbon

¹ 16 U.S.C.A. § 824a-3(e).

Control Mechanisms Confront Constitutional Barriers,” 20 Duke Envtl. L. and Pol’y F. 125, at pp. 146-56 (Winter 2010).

“A Green Tag is a tradeable environmental commodity attributable to renewable energy generation.” Idaho PUC Order No. 30868, p. 1.² “The same REC may not be claimed by more than one entity” *IPCO REC Plan* at 1. “An active market exists for the purchase and sale of Green Tags.” Idaho PUC Order No. 30720, p. 1; *see also Idaho Power Company’s Application Requesting Approval of Sale of Renewable Energy Credits (hereinafter “IPCO OR REC Application”)*, Oregon PUC Docket No. UP 269, p. 3 (October 22, 2010) Paul Affidavit, Exhibit 3. (“Because utilities may buy and sell RECs, a market has developed”). For an entity selling RECs from projects in this region, “counterparties consist primarily of investor-owned utilities (‘IOU’) that are subject to renewable energy standards and make up what is referred to as the ‘compliance market.’” *Idaho Power’s Letter Filing Regarding Modification of REC Plan (hereinafter “IPCO REC Plan Modification Letter”)*, Oregon PUC Docket No. UP 269, p. 1 (June 6, 2011). Paul Affidavit, Exhibit 4. And “[t]he other main segment of the REC market is the ‘voluntary market’ which consists of IOUs that purchase RECs as part of voluntary ‘green power’ programs or businesses that wish to purchase renewable attributes as a voluntary business practice.” *Id.* at 1.

RECs are valuable. “As of September 30, 2010, [Idaho Power] has received approximately \$3.1 million in net proceeds from these sales” *IPCO OR REC Application*, at 6. In some areas of the United States, RECs have sold in excess of \$50 per REC (or MWh of electricity produced). Ferrey et al., 20 Duke Envtl. L. and Pol’y F. 125, at n. 166 and

² Case No. IPC-E-08-04.

accompanying text. Idaho Power's initial plan was to sell its RECs in the wholesale spot market. *IPCO REC Plan Modification Letter* at 1. But "the Company has found that most REC buyers in the compliance market have moved toward purchasing the majority of their RECs under longer-term agreements through requests for proposals ('RFP')." *Id.* The Company now plans to bid into these REC RFPs for multi-year strips of RECs that will be produced in the future, which "may require the Company to commit to selling a portion of its available RECs for up to a five-year period." *IPCO REC Plan Modification Letter* at 1-2.

Finally, although RECs are valuable, by Idaho Power's own admission, "they are not necessary or useful to Idaho Power's provision of utility services to the public. Idaho Power's ownership, or lack thereof, of RECs has no bearing on its ability to provide safe, reliable, and efficient power to customers at just and reasonable rates." *IPCO OR REC Application*, at 8. (Emphasis provided.)

B. Grand View's Negotiations with Idaho Power for a PURPA PPA

Grand View is a self-certified qualifying facility ("QF") under the Federal Energy Regulatory Commission's ("FERC's") regulations implementing PURPA's mandatory purchase provisions. FERC Docket No. QF11-405. Grand View will utilize photovoltaic solar panels installed at a site near Grand View, Idaho, to convert solar energy into clean renewable electric energy, which it plans to sell to Idaho Power. *Id.* Grand View has been in contact with Idaho Power for several months discussing contract terms and conditions, including that the project will have a nameplate capacity of 20 megawatts ("MW"). *Complaint* at ¶¶ 5, 7; *Answer* at ¶¶ 5, 7. The draft PPA provided by Idaho Power, which includes all material terms to which it would have agreed but for inclusion of a clause clouding Grand View's title to the environmental attributes is attached as Exhibit 1 to the Paul Affidavit.

Pursuant to applicable Commission orders, Idaho Power offered Grand View avoided cost rates calculated using the IRP Methodology for calculating the value of the energy and capacity from QFs sized above the eligibility cap for published avoided cost rates. *Complaint* at p. 1; *Answer* at pp. 1-2.³ Idaho Power does not assert that its avoided cost rates offered to Grand View included an estimated avoided cost for anything other than the value of the energy and capacity Grand View would deliver. Nor has Idaho Power asserted as a defense that the avoided cost rates offered to Grand View included the avoided cost of purchasing environmental attributes from another source, or the avoided cost of building Idaho Power's own solar facility.

Idaho Power admits that the Idaho Legislature has not legislatively created RECs, and has not imposed a renewable portfolio standard on utilities operating in Idaho. *Answer* at ¶¶ 21, 22, and 23. Additionally, Idaho Power has denied "the factual insinuation that RECs are neither created nor exist in the state of Idaho," *id.*, and Idaho Power therefore acknowledges that valuable RECs are created by projects in Idaho despite the lack of an RPS in Idaho. Idaho Power admits that it has disclaimed ownership of environmental attributes in PURPA PPAs in the past, and that the Commission has approved contracts wherein Idaho Power waived (disclaimed) ownership of environmental attributes. *Id.* at ¶ 10.

But Idaho Power has refused to disclaim ownership of environmental attributes for Grand View's solar project. *Complaint* at ¶ 9; *Answer* at ¶ 9. Instead, Idaho Power required a clause in the PURPA PPA stating:

Under this Agreement, ownership of Green Tags and Renewable Energy Certificates (RECs), or the equivalent environmental attributes, directly associated with the production of energy from the Seller's Facility sold to Idaho Power will be governed by any and all applicable Federal or State laws and/or any regulatory

³ Although Idaho Power has not expressly admitted or denied Grand View's allegation that its solar project will have IRP Methodology rates, the PPA attached to the Paul Affidavit sets forth the IRP methodology rates in Section 7. See Paul Affidavit at Exhibit 1 § 7.

body or agency deemed to have authority to regulate these Environmental Attributes or to implement Federal and/or State laws regarding same.

Answer at ¶¶ 11, 12, and 14. See Paul Affidavit, Exhibit 1 at § 8.

Idaho Power asserts in its Answer that “Idaho Power does not believe that PURPA, nor this state’s implementation thereof, requires it to disclaim any possible legal claim that it may have to the environmental attributes associated with its purchase of power from a PURPA Qualifying Facility (‘QF’) for the next 20 years.” *Answer* at p. 2. Idaho Power is concerned of the “potentially costly consequences for Idaho Power’s customers should the Legislature or other legal body determine some time during the proposed 20-year term of the contract that the environmental attributes from the purchase of QF power in Idaho are in fact owned by the purchasing utility and its customers.” *Id.* The Company is also concerned that acquiring QF power without ownership of the environmental attributes “could have large and costly consequences for customers should the Company come under future federal and/or state renewable portfolio standards that require such environmental attributes for compliance.” *Id.* at p. 3.

But, rather than offer to purchase such environmental attributes to mitigate its risk of incurring this future compliance cost, Idaho Power proposed PURPA contract language that states the ownership of environmental attributes will be determined by the applicable federal or state laws. *Id.* at p. 2. In other words, Idaho Power proposes a clause in this PURPA contract that will allow for the environmental attribute ownership to change if the law changes after execution and Commission approval of the contract.

On August 2, 2011, Grand View filed a complaint against Idaho Power for its failure to disclaim the ownership of the environmental attributes for which Idaho Power will provide no compensation. Idaho Power filed its answer on September 6, 2011, and Avista Corporation has

subsequently intervened in this matter. Grand View now files this dispositive Motion for Summary Judgment relying on the admissions in the pleadings and the limited facts contained in the attached Affidavit and Exhibits. The Affidavit and Exhibits include Idaho Power's own statements in its regulatory filings and very limited factual assertions regarding Grand View's project which Grand View expects to be undisputed. In short, the disputed issues before the Commission are purely legal, and expeditious resolution of the case at this stage of the proceedings would be in the interests of Idaho's qualifying facility developers, its utilities, and its retail electric customers.

II. LEGAL BACKGROUND

The mandatory purchase provisions of PURPA require electric utilities to purchase power produced by cogenerators or small power producers that obtain status as a QF. 16 U.S.C. § 824a-3(a)(2). PURPA instructs FERC to promulgate implementing regulations, and directs the state public utilities commissions to implement FERC's regulations. 16 U.S.C. § 824a-3(a)(2), (f). The price PURPA section 210(b) requires the utilities to pay to QFs in exchange for a QF's electrical output is termed the 'avoided cost rate,' which is "the cost to the electric utility of the electric energy which, but for the purchase from such cogenerator or small power producer, such utility would generate or purchase from another source." 16 U.S.C. § 824a-3(d).

Subsequent to the enactment of PURPA and FERC's regulations, several states have enacted renewable energy portfolio standards ("RPSs"), and mandatory and voluntary markets for tradable RECs have emerged to create a commodity separate from electricity and capacity produced by QFs. *See American Ref-Fuel Co.*, 105 FERC ¶ 61,004 (2003). In *American Ref-Fuel, Co.*, FERC found that "the avoided cost that a utility pays a QF does not depend on the type of QF, i.e., whether it is a fossil-fuel-cogeneration facility or a renewable-energy small

power production facility.” *Id.* at ¶ 22. FERC stated, “[t]he avoided cost rates, in short, are not intended to compensate the QF for more than capacity and energy.” *Id.* FERC declared “that contracts for the sale of QF capacity and energy entered into pursuant to PURPA do not convey RECs to the purchasing utility (absent an express provision in [the relevant] contract)” or a rule or state law to the contrary. *Id.* at ¶ 24. FERC clarified, however, that “[A] state may decide that a sale of power at wholesale automatically transfers ownership of the *state-created RECs*, [but] that requirement must find its authority in state law, not PURPA.” *Id.* (emphasis added).

FERC subsequently denied rehearing, and stated, “As those seeking rehearing recognize, only renewable energy small power production facilities have renewable attributes, yet the energy from a cogeneration facility is priced the same as the energy from a small power production facility.” *American Ref-Fuel Co.*, 107 FERC ¶ 61,016, ¶15 (2004). “If avoided cost rates are not intended to compensate a QF for more than capacity and energy, it follows that other attributes associated with the facilities are separate from, *and may be sold separately from*, the capacity and energy.” *Id.* at ¶ 16 (emphasis added). FERC additionally reasoned that cogeneration QFs are entitled to sell the thermal output from their projects as part of a separate transaction from sale of the electricity and capacity to the utility, and thus “If the thermal output of a cogeneration QF is separately saleable, the renewable attributes of a small power production QF are similarly separate.” *Id.* at ¶ 16 n. 9; *appeal dismissed sub. nom., Xcel Energy Services Inc. v. FERC*, 407 F.3d 1242 (D.C. Cir. 2005).

More recently, FERC ruled that a state utility commission has the authority to require a utility to pay a separate, higher avoided cost rate stream for QFs providing the utility with environmental attributes that will help the utility avoid real costs of environmental compliance. *Cal. Pub. Util. Commn.*, 133 FERC ¶ 61,059 (2010) (order granting clarification and dismissing

rehearing), *rehearing denied*, 134 FERC ¶ 61,044 (2011). California had enacted a state law, titled AB 1613, that required utilities to procure a specified amount of energy and capacity from combined heat and power facilities that met stringent efficiency standards. FERC declared that the state commission could implement a two-tiered rate structure, where AB 1613-compliant QFs receive rates based on higher, long-run avoided cost rates reflecting more stringent efficiency standards, and non-AB 1613 compliant QFs continue to receive rates based on lower short-run avoided costs. 133 FERC ¶ 61,059, at ¶ 26.

Even more recently, FERC again re-emphasized its prior rulings by rejecting an attempt by an Idaho utility – Avista – to obtain ownership of environmental attributes without additional compensation. *See Idaho Wind Partners 1, LLC*, 136 FERC ¶ 61,174 (Sept. 15, 2011) (order dismissing rehearing). There, Avista requested FERC rule that the QF owns the RECs in a PURPA contract only if it is expressly allowed under state law or under the terms of a PURPA contract. *Id.* at ¶ 7. FERC dismissed Avista’s request on the ground that Avista filed it after the applicable deadline. *Id.* at ¶ 9. But FERC stated, “We also reiterate our holding in *American Ref-Fuel*, specifically, that under PURPA the sale and trading of RECs are for the states to determine, and that this is not an issue that PURPA controls.” *Id.* at ¶ 10. FERC therefore rejected Avista’s attempt to secure a ruling that – absent a state law or contract provision to the contrary – the utility is the default owner of environmental attributes in a PURPA contract.

III. LEGAL STANDARD

In ruling on a motion for summary judgment, the Commission uses the same standard contained in the Idaho Rules of Civil Procedure. *See Idaho PUC Order No. 28888*, p. 12.

“Summary judgment under I.R.C.P. 56(c) is proper only when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.” *Ackerman v.*

Bonneville County, 140 Idaho 307, 310, 92 P.3d 557, 560 (Ct. App. 2004). “When ruling on a motion for summary judgment, the trial court must determine whether the evidence, when construed in the light most favorable to the nonmoving party, presents a genuine issue of material fact or shows that the moving party is not entitled to judgment as a matter of law.” *Chandler v. Hayden*, 147 Idaho 765, 769, 215 P.3d 485, 489 (2009). “[T]he moving party bears the burden of proving the absence of material facts.” *Id.*

IV. ARGUMENT

A. Idaho Power will not compensate Grand View for more than energy and capacity in the IRP Methodology contract, and no Idaho law transfers the RECs to Idaho Power without payment. Thus, Grand View owns the RECs under existing law.

1. Idaho QF contracts only compensate QFs for energy and capacity.

The Commission calculates the published avoided cost rates using a methodology “based on the estimated costs that a utility would incur in constructing a natural gas-fired combine cycle combustion turbine (‘CCCT’) power plant.” Idaho PUC, Order No. 30873, at p. 3. The Commission publishes a “non-fueled” rate stream calculated with a forward gas price forecast for QFs not using fossil fuels. Idaho PUC Order No. 28945, at p. 7. This avoided cost rate stream is available to QFs regardless of whether they qualify for any particular state’s RPS, and is available even to old co-generation or hydropower facilities unable to qualify to create RECs. *See* Idaho PUC Order No. 28945, at p. 7.⁴

The Commission has also approved the IRP Methodology for QFs – such as Grand View – which are over the size limitation for published rates. *See* Idaho PUC Order No. 26576

⁴ Older QFs often cannot create RECs of any marketable value because most REC-creating statutes include limitations on the initial in-service date of the renewable energy facility. *See, e.g.* Ferrey et al., 20 Duke Envtl. L. and Pol’y F. 125, at pp. 153-155; Ore. Rev. Stat. § 469A.020 (generally excluding facilities in service prior to 1995 as facilities that may generate Oregon RECs); Rev. Code Wash. § 19.285.030(10) (same for facilities in service prior to March 31, 1999 for Washington RECs).

(approving Stipulation to adopt methodology contained in Direct Testimony of Rick Sterling, Case No. IPC-E-95-09, Exhibit 101). The IRP Methodology compares the present value of the revenue requirements of the base case with one that includes the utility's system including the QF to estimate the value of both capacity and energy delivered by the QF. Direct Testimony of Rick Sterling, IPC-E-95-09, Exhibit 101, p. 8. The IRP Methodology itself values all of the utility's resources and therefore does not provide a value for the avoided cost of acquiring a renewable-specific resource, or otherwise include any adder for the value of the RECs a QF may convey. *Id.*

Thus, the IRP Methodology – like the SAR methodology for published rates – compensates QFs for the estimated value of the energy and capacity alone, not for the avoided costs a utility may otherwise incur in acquiring any non-energy environmental attributes such as RECs. Indeed, the Idaho Commission vigilantly ensures that the avoided cost rates do not exceed the cost of energy and capacity alone. Idaho PUC Order No. 31057, at pp. 6-7 (stating, “It is well established that a utility cannot be required to pay more for QF power than its avoided cost,” and therefore a “delay in changing avoided cost rates . . . ultimately means that ratepayers are saddled with rates that are too high and therefore unreasonable”); *see also* Idaho PUC Order No. 31092, at p. 11.

The same is true for the IRP Methodology rates. In the recent Interconnect Solar QF docket, Commission Staff identified a mathematical error in Idaho Power's calculation of the IRP Methodology rates for the Interconnect Solar QF, and argued the Commission should require a reduction of approximately \$10/MWh in the contract rates corresponding to the amount of the error. *See* Idaho PUC Order No. 32361, at p. 1. Interconnect Solar argued that it had provided Idaho Power with other non-energy concessions – such as 50% of the QF's RECs for

no additional charge – which would more than compensate for the mathematical error. *Id.* at pp. 1-2. But the Commission stated, “this Commission would not be fulfilling its role of ensuring just and reasonable rates if it approved an Agreement that contained a known computation error. Idaho Code §§ 61-301, 61-502. In other words, we are unable to approve the Agreement that is presently filed with the Commission due to a mathematical error.” *Id.* at p. 2. The Commission therefore refused to compensate Interconnect Solar for the value of anything other than the estimated value of the energy and capacity. *See* Idaho PUC Order No. 32384 (approving the Interconnect Solar PPA only with lower rates after correcting the calculation error).

There is no question therefore that neither Idaho avoided cost model considers the costs of building or procuring a renewable-specific resource, and neither model explicitly or implicitly includes compensation to the QF for RECs or any other valuable environmental attributes.

2. Because QFs are not compensated for environmental attributes and no law conveys them to Idaho utilities free of additional charge, QFs retain legal title to their project’s environmental attributes.

The Commission itself twice addressed ownership of environmental attributes shortly after FERC’s *American Ref-Fuel, Co.* orders. First, Idaho Power petitioned the Commission for an order declaring that QFs generating green tags must grant Idaho Power “a ‘right of first refusal’ to purchase those tags.” Idaho PUC Order No. 29480, at p. 5. The other two investor-owned utilities in Idaho – PacifiCorp and Avista – both intervened and requested that the Commission determine the utilities own the environmental attributes associated with QF generation. *Id.* at pp. 5-8. The Idaho PUC found that Idaho Power’s petition did “not present an actual or justiciable controversy in Idaho and [wa]s not ripe for a declaratory judgment[.]” *Id.* at p. 16. The Commission noted the *American Ref-Fuel, Co.* orders and noted that the State of Idaho does not have a green tag program or an RPS. It stated:

While *this Commission will not permit [Idaho Power] in its contracting practice to condition QF contracts on inclusion of such a right-of-first refusal term*, neither do we preclude the parties from voluntarily negotiating the sale and purchase of such a green tag should it be perceived to have value. The price of same we find, however, is not a PURPA cost and is not recoverable as such by the Company.

Id. at pp. 16-17 (emphasis added).

Shortly thereafter, Idaho Power filed for approval of a PURPA contract containing the published rates for a non-fueled co-generation project, wherein Idaho Power expressly waived any claim to ownership of environmental attributes. Idaho Power requested the Commission provide it with assurance that it would not be penalized in a future ratemaking proceeding for waiving ownership of the environmental attributes. Idaho PUC Order No. 29577, at pp. 2-3. The Commission stated, “The State of Idaho still has not created a green tag program, has not established a trading market for green tags, nor does it require a renewable portfolio standard.” *Id.* at pp. 5-6. It again stated that the QF and the utility were free to separately negotiate for the sale of environmental attributes, but that the costs associated with the sale could not be recovered by the utility as a PURPA cost. The Commission ruled, “[a]s qualified above, the Commission finds it reasonable to approve the submitted Agreement and further finds it reasonable to allow payments made under the Agreement as prudently incurred expenses for ratemaking purposes.” *Id.* at p. 6. Thus, the Commission found it reasonable for the utilities to waive ownership of environmental attributes because Idaho law did not convey them to the utility.

Decisions in neighboring states using similar avoided cost calculation mechanisms are also instructive. For example, like the Idaho Commission, the Public Utility Commission of Oregon (“Oregon PUC”) calculates the published avoided cost rates available to QFs under 10 megawatts with a surrogate combined cycle combustion gas plant model. *See In Re Staff’s Investigation Relating to Electric Utility Purchases from Qualifying Facilities*, Oregon PUC,

Case No. UM 1129, Order No. 05-584, at pp. 26-27. The Oregon PUC ruled that the QFs retain the RECs because the “rates based on avoided costs do not include compensation for any social or environmental benefits that may be associated with a particular facility’s generation of electricity.” See *In Re Rulemaking to Adopt and Amend Rules Related to Ownership of the Non-energy Attributes of Renewable Energy (Green Tags), Energy Service Supplier Certification Requirements, and Use of Terms “Electric Utility” and “Electric Company,”* Oregon PUC Case No. AR 495, Order No. 05-1229, at p. 8; see also Oregon Administrative Regulation 860-022-0075 (2011) (codifying the same). Accordingly, Idaho Power’s Oregon standard QF contract on file with the Oregon PUC as part of its Schedule 85 contains an express waiver by Idaho Power of RECs.

The Montana Public Service Commission (“Montana PSC”), too, has determined that QFs retain ownership of environmental attributes if they are compensated only for the energy and capacity. See *In the Matter of the NorthWestern Energy’s Application for Approval of Avoided Cost Tariff For New Qualifying Facilities*, Montana PSC, Docket No. D2008.12.146, Order No. 6973d, p. 58 ¶ 136 (May 6, 2010). Montana QF Option 1 and Option 2 rates estimate the avoided cost of energy and capacity from non-renewable resources possessing no valuable environmental attributes.⁵ The Montana PSC stated QF Option 1 and 2 rate contracts “must include provisions that explicitly address the disposition of RECs for the entire length of the contract.” *Id.* p. 58, ¶ 136 and p. 60, ¶ 143. If the QF decides to convey the RECs to the utility

⁵ Option 1 rates previously estimated the value of Northwestern Energy’s Coalstrip 4 (referenced as C4 or CU4) coal plant contract, Montana PSC Order No. 6973d, p. 57 ¶ 133, but recently the Montana PSC switched Option 1 rates to the estimated cost of energy and capacity from a blended market and new combined cycle gas-fired plant. *In the Matter of Northwestern Energy’s Application for Approval of Avoided Cost Tariff for New Qualifying Facilities*, Docket No. D2010.7.77, Order No. 7108e, p. 16 ¶ 51 to p. 25 ¶ 70 (Oct. 19, 2011). QF Option 2 rates use a market price index, and the October 19th order did not alter that approach. Montana PSC Order No. 6973d, p. 59-60 ¶ 139; Montana PSC Order No. 7108e.

under the PPA, the utility “must adjust the . . . rates at the time a state or federal law or regulation results in actual costs to [Northwestern Energy] for CO2 emissions.” *Id.* at ¶ 136. Alternatively, “[n]on-CO2-emitting QFs that do not convey RECs to [Northwestern Energy] in a contract . . . may still separately attempt to negotiate for the sale of RECs to [Northwestern Energy] or other interested entities at any time.” *Id.*⁶ Thus, Montana QFs paid for the estimated value of non-renewable energy and capacity retain ownership of the RECs, and the QF PPA expressly addresses that ownership.

These Oregon and Montana rulings are correct applications of FERC’s PURPA framework. *American Ref-Fuel Co.*, 107 FERC ¶ 61,016, ¶15 (2004). “If avoided costs are not intended to compensate a QF for more than capacity and energy, it follows that other attributes associated with the facilities are separate from, *and may be sold separately from*, the capacity and energy.” *Id.* at ¶ 16 (emphasis added). Just as the cogeneration QFs are entitled to sell the thermal output from their projects as part of a separate transaction from sale of the electricity and capacity to the utility, “the renewable attributes of a small power production QF are similarly separate.” *Id.* at ¶ 16 n. 9; *see also Idaho Wind Partners 1, LLC*, 136 FERC ¶ 61,174 (Sept. 15, 2011) (order dismissing rehearing) (rejecting Avista’s attempt to have FERC deem the utility the default owner of RECs in PURPA contracts entered into in state’s without an express ownership rule).

As in Oregon and Montana, no Idaho law currently vests ownership of environmental

⁶ In QF “Option 3,” the Montana Commission allowed wind QFs to choose to take a levelized rate calculated based on the costs to the utility to build and operate a wind plant. Montana PSC Order No. 6973d, p. 61 ¶ 147. Wind QFs choosing this option, which provided a higher rate, had to agree to convey the RECs to the utility. *Id.* at p. 62, ¶ 148; *see also* Montana PSC Order No. 7108e, pp. 28-29 ¶ 77 (recent order terminating the Option 3 wind rate but reiterating the utility should purchase RECs in Option 1 and 2 contracts to the extent it needs them).

attributes to a utility in an Idaho QF contract. Thus, just as in Oregon and Montana, under any reasonable interpretation of the current QF rate mechanisms and existing Idaho Commission orders implementing PURPA, Idaho QFs are the default owners the environmental attributes. There is no question that RECs exist and have value. *IPCO OR REC Application*, at 6 (noting Idaho Power had sold \$3.1 million worth of RECs from projects conveying it RECs). Yet the rate provided to QFs under both of the Idaho Commission's approved methodologies includes no express or implicit compensation for the value of RECs. The rate in renewable QF contracts is the same rate that would be included in a contract for a fossil-fueled cogeneration QF too old to produce RECs. Just as an Idaho cogeneration QF retains and may separately sell the thermal output from its QF, a renewable QF retains and may separately sell the environmental attributes. *American Ref-Fuel Co.*, 107 FERC ¶ 61,016, ¶ 16 n. 9.

The Commission has ruled it “will not permit [Idaho Power] in its contracting practice to condition QF contracts on inclusion of such a right-of-first refusal term [regarding RECs].” Idaho PUC Order No. 29480, p. 16. This ruling can be read as nothing other than an implicit rejection of the request by PacifiCorp and Avista in that case for a determination that they own the environmental attributes. The circumstances are no different today, and the rule remains that Idaho QFs being paid the SAR or IRP Methodology rates own and may separately convey their environmental attributes and RECs for compensation in addition to the estimated value of the electric energy and capacity in the Idaho avoided cost rates.

B. Idaho Power's environmental attributes clause is a reopener clause that would subject Grand View's QF to ongoing regulation and changed circumstances, and Section 210(e) of PURPA therefore preempts its approval.

In general, courts will recognize a contract reopener clause in a utility contract – if agreed to by the contracting parties – as being effective and subjecting the contract to ongoing

regulation. See *Energy Reserves Group, Inc. v. Kan. Power & Light Co.*, 459 U.S. 400, 416 (1983) (holding that such a “provision could be interpreted to incorporate all future price regulation, and thus dispose of the Contract Clause claim”). Thus, the reopener clause proposed by Idaho Power – if agreed to by Grand View and approved by the Commission – would subject Grand View’s QF to ongoing changes in regulatory conditions regarding REC ownership of its project.

The problem with Idaho Power’s contract clause is that Congress expressly intended that Section 210(e) of PURPA prevent this type of ongoing uncertainty in PURPA contracts. U.S.C. 824a-3(e); 18 C.F.R. § 292.602. “Congress did not intend to impose traditional ratemaking concepts on sales by qualifying facilities to utilities.” *American Paper Institute, Inc. v. American Elec. Power Service Corp.*, 461 U.S. 402, 414 (1983) (citing legislative history). Congress recognized “ ‘that cogenerators and small power producers are different from electric utilities, not being guaranteed a rate of return on their activities generally or on the activities vis-a vis the sale of power to the utility and whose risk in proceeding forward in the cogeneration or small power production enterprise is not guaranteed to be recoverable.’ ” *Id.* (quoting the H.R. Conf. Rep. No. 95-1750).

Federal law – such as Section 210(e) of PURPA – preempts any state action that “stands as an obstacle to the accomplishment and execution of the full objectives of Congress.” *Freehold Cogeneration Associates, L.P. v. Board of Regulatory Com’rs of State of N.J.*, 44 F.3d 1178, 1190 (3rd Cir. 1995). The *Freehold* court held Section 210(e) pre-empted a state commission order relying on a contract re-opener provision, and stated “we cannot disregard the impact on cogeneration financing if a purchase power agreement is at any time in the future subject to the arbitrary reconsideration by a state utility regulatory body.” *Id.* at 1193; see also

Independent Energy Producers Ass'n, Inc. v. Cal. Pub. Util. Commn., 36 F.3d 848, 858 (9th Cir. 1994); *New York State Electric & Gas Corp.*, 71 FERC ¶ 61,027, at pp. 24-26 (1995) (stating, “If we were to . . . allow the reopening of QF contracts that had not been challenged at the time of their execution, financeability of such projects would be severely hampered. Such a result is not . . . consistent with Congress’s directive that we encourage the development of QFs.”).

Indeed, the Idaho Supreme Court has so held. See *Afton Energy, Inc. v. Idaho Power Co.* (“*Afton I*”), 107 Idaho 781, 786-88, 693 P.2d 427, 432-34 (1984). Idaho Power had proposed a PPA provision stating the “*terms and conditions under this agreement are subject to change and revision by order of the Commission . . .*” *Id.*, 107 Idaho at 786, 693 P.2d at 432 (emphasis added). But the Idaho Supreme Court agreed with the Commission that this provision violated PURPA. *Id.*, 107 Idaho at 788, 693 P.2d at 434. The Court reasoned, “It is clear that both Congress and FERC, through its implementing regulations, intended that [QFs] should not be subjected to the pervasive utility-type regulation which would result if the contract language proposed by Idaho Power were approved by the Commission.” *Id.*; see also Idaho PUC Order No. 29632, p. 7 (rejecting a contract re-opener clause that could have allowed for termination of contract if Congress repealed PURPA).

Other states have reached the same conclusion. See *Smith Cogeneration Mgt. v. Corp. Commn.*, 863 P.2d 1227, 1240 (Okla. 1993) (PURPA prohibited state utility commission from requiring a modification term in PURPA PPAs); *Oregon Trail Elec. Consumers Co-op, Inc. v. Co-Gen Co.*, 7 P.3d 594, 605 (Or. App. 2000) (finding that “courts have uniformly held that state regulators cannot intervene in the public interest and modify the prices fixed by a cogeneration contract because PURPA does not provide for such authority (typically termed ‘utility-type’ regulation)”). The Oregon court stated, “The flaw in this contract is that it sought to use a state

regulator, exercising utility-type authority, as the mechanism for modifying the prices set by the contract. PURPA bars that.” *Id.*

Here, Idaho Power’s attempt to include a term in Grand View’s contract purporting to allow the ownership of environmental attributes to change throughout the term of the agreement is no different in any material regard from the similar provisions rejected by every state and federal authority to address the issue. The only difference is that, rather than being “at any time in the future subject to the arbitrary reconsideration by a utility regulatory body,” *Freehold Cogeneration Associates, L.P.*, 44 F.3d at 1193, Idaho Power’s new clause would leave Grand View subject to the ongoing arbitrary whims of future Idaho legislatures. Much like the term rejected in *Afton Energy, Inc., Smith Cogeneration Mgt.*, and Idaho PUC Order No. 29632, Idaho Power’s PPA term would call for constant re-opening of environmental attribute ownership in the QF contract, and destroy the ability to rely on a projected revenue stream in financing the project.

Indeed, FERC’s recent ruling allowing California to require utilities to compensate QFs for actual avoided environmental costs – analogous to RECs – further underscores the applicability of Section 210(e) of PURPA to RECs. *Cal. Pub. Util. Commn.*, 133 FERC ¶ 61,059, ¶¶ 21, 26. Although valuable environmental attributes such as RECs were not in existence when FERC promulgated its QF rules in 1980, FERC has now endorsed the use of environmental attributes as an additional revenue stream in PURPA contracts to QFs providing those attributes to utilities. *Id.* A QF contract term regarding RECs must therefore comply with Section 210(e) of PURPA and FERC’s regulations, 18 C.F.R. § 292.602, by providing a QF with a lock in of long-term prices and terms based upon conditions in existence at the time the QF obligates itself to the legally enforceable obligation. *See also JD Wind 1, LLC*, 130 FERC ¶

61,127, ¶¶ 16, 23 (February 19, 2010), *denying r'hg* (citing 18 C.F.R. § 292.304(d)); *JD Wind 1, LLC*, 129 FERC ¶ 61,148, ¶¶ 25-29 (November 19, 2009). The value to the utility of the environmental attributes of the QF projects in the *Cal. Pub. Util. Commn.* case would be calculated on the date the QF incurred its obligation just as any other component of the rates. The utility in that case could not reduce its payments to the QF if at some future time the costs of environmental compliance turn out to be substantially less than estimated at the time of the QF contract any more than it could reduce payments if its alternative fuel or energy costs decreased.

It follows that QFs choosing not to provide their environmental attributes to the utility – such as Grand View – are entitled to lock in avoided energy and capacity costs alone without being subject to a re-opener clause regarding ownership of the environmental attributes. Grand View simply wishes to obtain what FERC's rules intended to provide QFs like it from the beginning – certainty regarding the avoided cost rates and terms of its contract that will allow it to calculate its revenue stream for purposes of financing its project. Idaho Power's re-opener clause does not allow that, and it therefore violates Section 210(e) of PURPA and FERC's implementing regulations and orders.

C. The Commission's requirement of inclusion of Idaho Power's proposed environmental attributes clause would constitute a taking of Grand View's property without just compensation in violation of the Takings Clauses of the Idaho and U.S. Constitutions.

The Fifth Amendment of the U.S. Constitution and the Article 1 Section 14 of the Idaho Constitution each provide that private property shall not be taken for public use without just compensation. U.S. Const. amend. V, cl. 4; Idaho Const. art. 1 § 14. The purpose of the takings clause is to prohibit the "Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49 (1960). Courts first examine whether the claimant possesses a property

interest that is protected by the Fifth Amendment. *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1003-04 (1984). If such an interest is established, courts then examine whether the government's action amounts to a compensable taking of that interest. *Id.* at 1005-06. When such a taking occurs, an aggrieved individual may file a claim for "inverse condemnation," which is a shorthand description of the manner in which a property owner recovers just compensation for a taking of his property when condemnation proceedings have not been instituted. *United States v. Clarke*, 445 U.S. 253, 257 (1980).

1. Grand View's RECs and its going concern business value are compensable property rights.

In analyzing whether a claimant possess a property interest, courts describe the term "property" as referring to "the group of rights inhering in the citizen's relation to the physical thing, as the right to possess, use and dispose of it." *United States v. General Motors Corp.*, 323 U.S. 373, 377-378 (1945); *see also Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 539 (2005); *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435 (1982). Property interests "are about as diverse as the human mind can conceive," *Florida Rock Industries v. United States*, 18 F.3d 1560, 1572 n. 32 (Fed.Cir.1994), and the Takings Clause "is addressed to every sort of interest the citizen may possess." *General Motors*, 323 U.S. at 378; *see also Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1019 (1992) (real property); *Monsanto Co.*, 467 U.S. at 1003-04 (intangible trade secret property); *United States Trust Co. v. New Jersey*, 431 U.S. 1, 19 n.16 (1977) (contract rights); *Roth v. Pritikin*, 710 F.2d 934, 939 (2d Cir.1983) (copyright); *Leesona Corp. v. United States*, 599 F.2d 958, 964 (Fed. Cir. 1979).

Transferrable property created by government programs is compensable property under the Takings Clause. *See e.g. Redevelopment Authority of Philadelphia v. Lieberman*, 336 A.2d 249, 257-59 (Pa. 1975) (collecting cases and awarding compensation for lost value of liquor

license associated with condemnation of liquor store premises); *see also Members of the Peanut Quota Holders Ass'n v. United States*, 421 F. 3d 1323, 1332 (Fed. Cir. 2005) (finding property right existed in government issued peanut quotas and stating the “right to transfer is a traditional hallmark of property.”).

Grand View’s interest in the transferrable environmental attributes of its solar QF is a compensable property interest. As the Commission and Idaho Power have acknowledged in prior orders and filings, RECs are indeed valuable and transferrable. Grand View clearly owns the RECs for which Idaho Power will not pay and which no law transfers to Idaho Power. Grand View agrees with Idaho Power that in the current REC market a sale of a forward strip of RECs up to five years is more valuable than selling RECs on the spot market, and like Idaho Power, Grand View wishes to sell its RECs in that manner. *See IPCO REC Plan Modification Letter* at 1, Paul Affidavit at ¶¶ 18-23. There can be no doubt that Grand View’s right to transfer a five-year forward strip of RECs through the interstate market that exists today is a compensable property interest. *See Andrus v. Allard*, 444 U.S. 51, 65–66 (1979) (labeling the right to dispose of property—e.g., through commercial transactions—as “one traditional property right” and one “strand” of the “bundle” of property rights an owner possesses).

Likewise, another strand in the bundle of property rights possessed by Grand View is the going concern value of its QF business. *See Kimball Laundry Co. v. United States*, 338 U.S. 1, 8-13 (1949) (holding going concern value of laundry was compensable property right); *Coeur d’Alene Garbage Service v. Coeur d’Alene*, 114 Idaho 588, 591, 759 P.2d 879, 881 (1988) (collecting cases and applying Idaho Constitution to find property interest in trash collection company); *State v. Saugen*, 169 N.W.2d 37, 42-46 (Minn. 1969) (liquor store). The going concern value of Grand View’s development efforts to date include items such as its real

property lease, its efforts and expenditures in evaluating the solar capability and feasibility of the project, and its good will obtained in negotiations with the landowner, possible REC purchasers, and others. All of these items make up the going concern value of Grand View's QF, which Grand View could transfer today in exchange for monetary compensation. This going concern value is a compensable property interest separate and distinct from the RECs. *Kimball Laundry Co.*, 338 U.S. at 8-13.

2. Commission approval of Idaho Power's environmental attributes clause would constitute a taking.

Where the government requires an owner to suffer a permanent physical invasion of her property – however minor – it must provide just compensation. *See Loretto*, 458 U.S. at 435 (state law requiring landlords to permit cable companies to install cable facilities in apartment buildings effected a taking). A second categorical rule applies to regulations that completely deprive an owner of all economically beneficial use of her property. *Lucas*, 505 U.S., at 1019; *Boise Tower Associates, LLC v. Hogland*, 147 Idaho 774, 773, 215 P.3d 494, 503 (2009); *Coeur d'Alene Garbage Service*, 114 Idaho at 591, 759 P.2d at 881 (collecting Idaho cases and applying Idaho Constitution to find taking of garbage collection business by City action curtailing its business).⁷ Since what the owner had was transferable value, “the question is, What has the owner lost? not, What has the taker gained?” *Kimball Laundry Co.*, 338 U.S. at 12-13 (finding compensable taking when government took temporary possession of a laundry); *Yancey*

⁷ Even when the claimant still retains economic value of its property, just compensation may be required by weighing relevant factors set forth in *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978). Grand View maintains that Idaho Power's environmental attributes clause would effect a direct appropriation of private property required for a categorical taking, thus precluding the need to engage in balancing the *Penn Central* factors. Grand View nevertheless submits that Idaho Power's PPA clause would also constitute a taking under application of the factors set forth in *Penn Central*. *See Ruckelshaus*, 467 U.S. at 1005-1016; *Cienega Gardens v. United States*, 331 F.3d 1319, 1337-53 (Fed. Cir. 2003); *NRG Co. v. United States.*, 24 Cl.Ct. 51, 56-63 (1991).

v. *United States*, 915 F.2d 1534, 1541–42 (Fed. Cir. 1990) (finding a compensable taking where “the Yanceys had no choice but to sell their birds for substantially less than their value”).

In *Armstrong*, the Court found a compensable taking of the claimants’ liens on uncompleted boat hulls seized by the Government pursuant to a contract. *Armstrong*, 364 U.S. at 48-49. “Since this acquisition was for public use, however accomplished, whether with an intent and purpose of extinguishing the liens or not, the Government’s action did destroy them and in the circumstances of this case did thereby take the property value of those liens within the meaning of the Fifth Amendment.” *Id.* “And it matters not whether [the property was] taken over by the government or destroyed, since, as has been said, destruction is tantamount to taking.” *General Motors*, 323 U.S. at 384.

Because authorizing Idaho Power’s proposed environmental attributes clause would cloud Grand View’s clear title to valuable environmental attributes without any compensation, Commission approval of the clause over Grand View’s objection would constitute a categorical taking. As noted above, Idaho Power itself recognizes that RECs are most valuable right now sold as a long-term forward strip of up to 5 years. *See IPCO REC Plan Modification Letter* at 1. But Grand View cannot sell such a forward strip for any time period beyond the next sitting of the Idaho legislature because Idaho Power’s proposed contract clause clouds title beyond that time. Paul Affidavit at ¶¶ 18-23.

Inclusion of such clauses in QF PPAs would leave the QFs with no choice but to cut a deal selling their RECs for “substantially less than their value,” *Yancey*, 915 F.2d at 1542, or to retain RECs with a title so clouded they could not be sold at all. That this is, in fact, the case is highlighted by the recently approved Clark Canyon power purchase agreement with Idaho Power. *See Case No. IPC-E-11-09*. In the Clark Canyon PPA, Idaho Power and Clark Canyon

recite that they had agreed to address REC ownership in a separate agreement not filed for approval with the Commission: “Ownership of Environmental Attributes associated with the Facility is determined in a separate agreement between Idaho Power and the Seller.” *See* Case No. IPC-E-11-09, Idaho Power Application at p. 3. Paul Affidavit, Exhibit 5.1. In response to Commission Staff discovery requests, (Paul Affidavit, Exhibit 5.4) Idaho Power explained that it reached an agreement with Clark Canyon to split ownership of the RECs in half – with the Seller retaining ownership in the first ten years of the 20 year PPA and Idaho Power retaining ownership in the last ten years of the agreement. Idaho Power admitted that it did not compensate Clark Canyon for that transfer. In other words, Clark Canyon gave away half of its RECs, simply to obtain clear title to any RECs. *See* Staff and Clark Canyon Comments, Paul Affidavit, Exhibits 5.2 and 5.3. Idaho Power offered the same 50/50 split to Grand View. Paul Affidavit at ¶¶ 27-28. Idaho Power’s clause simply destroys the value of the RECs. Further, the impact of such a clause would undermine Grand View’s entire going concern business by removing RECs to be produced by the solar QF as a future revenue stream. Paul Affidavit at ¶¶ 25-29.

Idaho Power’s stated purpose for the clause is to protect its ratepayers from a future change in the law that may require it to obtain its own RECs, not that Idaho Power intends to pay for the RECs. *Answer* at pp. 2-3. To authorize such the clause under this reasoning would be a classic case of requiring an individual (Grand View) to forfeit its property (valuable environmental attributes and going concern value of its QF business) for public benefit (reduced regulatory risk for Idaho Power’s customers) without any compensation. The Commission would therefore be subject to an inverse condemnation proceeding whereby a court would order it to compensate Grand View for (1) the value of its environmental attributes impaired by Idaho

Power's contract clause, and (2) the going concern value of Grand View's business impaired by taking of the environmental attributes.

The Idaho PUC Staff has concurred with Grand View's position on ownership of environmental attributes on at least two occasions.⁸ In Case No. IPC-E-04-02 Idaho Power sought a declaratory order from the Commission approving a PPA clause that granted Idaho Power a right of first refusal to purchase green tags from PURPA developers. In that case the Commission Staff took a position essentially identical to Grand View's argument on the takings issue: The PUC's Staff stated:

Arguably what Idaho Power proposes is an impermissible "taking" of property. The Fifth Amendment of the U.S. Constitution states, "nor shall private property be taken for public use without just compensation." This provision is called the "takings clause." Idaho Power requests a Commission Order granting the utility by regulatory fiat a "right of first refusal." It proposes no compensation to the QF for that right. Electric utility purchases of energy and capacity from PURPA QFs are mandatory. 18 C.F.R. § 292.303(a). The environmental attributes associated with renewable QF projects are currently separate from the capacity and energy sold to Idaho utilities. They are not bundled together as a matter of law. Nor is the cost to purchase environmental attributes included in an Idaho utility' avoided cost. To the extent those attributes have value and provide additional developer incentive, Staff believes they should remain with the developer. . . . no argument has been advanced nor authority cited to justify or require placing any regulatory restriction by this Commission on their ownership.

Staff Comments IPC-E-04-02, March 19, 2004 at p. 7. (Emphasis provided).

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⁸ Case No. IPC-E-04-02 in which Idaho Power sought a right of first refusal for RECs it acknowledged belonged to the developer. Case No. IPC-E-04-16 referenced above.

D. Any action by the IPUC in this case to cloud a QF's title to RECs created by neighboring states' RPS laws would unduly burden interstate commerce for protectionist purposes and therefore violate the Dormant Commerce Clause of the United States Constitution.

The Commerce Clause of the United States Constitution provides that “Congress shall have Power . . . To regulate Commerce . . . among the several States . . .” U.S. Const., Art. I, § 8, cl. 3. The Dormant Commerce Clause, however, also imposes limitations on states in the absence of congressional action. “It is well settled that actions are within the domain of the Commerce Clause if they burden interstate commerce, *or impede its free flow.*” *C&A Carbone, Inc. v. Town of Clarkstown, New York*, 511 U.S. 383, 389 (1994) (emphasis added). “The central rationale for the rule against discrimination is to prohibit state or municipal laws whose object is local economic protectionism.” *Id.* at 390. State laws requiring that goods be processed in-state prior to entering interstate commerce are *per se* invalid because such laws block the flow of interstate commerce at the state’s borders. *See, e.g., id.* at 390 (striking down town ordinance requiring non-recyclable solid waste to be processed at designated facility within municipality before shipping); *South Central Timber Development, Inc. v. Wunnicke*, 467 U.S. 82, 100 (1984) (striking down Alaska regulation that required all Alaska timber to be processed within the state before export); *New England Power v. New Hampshire*, 455 U.S. 331, 339 (1982) (holding that law restricting exports of hydropower violated commerce clause by hoarding resources for State’s economic benefit).

In *C.A. Carbone, Inc.*, the Court specifically noted the ordinance requiring local processing of solid waste favored only a “single local proprietor,” rather a class of in-state processors, and held “this difference just ma[de] the protectionist effect of the ordinance more acute.” *C&A Carbone, Inc.*, 511 U.S. at 392. “Discrimination against interstate commerce in favor of local business or investment is *per se* invalid, save in a narrow class of cases in which

the municipality can demonstrate under rigorous scrutiny, that it has no other means to advance a legitimate local interest.” *Id.* at 392. (distinguishing *Maine v. Taylor*, 477 U.S. 131 (1986), where the Court upheld a restriction on importation of baitfish because Maine had no other way to prevent spread of parasites and local economic interests were not that state’s justification for the ban).

Here, Idaho Power proposes that the Commission authorize a clause in Grand View’s PPA – over Grand View’s objection – that will cloud Grand View’s title to an interstate commodity created by other states’ RPS laws – RECs. Because RECs are most valuable sold in forward strips up to at least five years into the future, *IPCO REC Plan Modification Letter* at 1, Idaho Power’s proposed language will burden the flow of an interstate commodity – a forward strip of RECs. Nobody will purchase Grand View’s five-year strip of RECs if the Commission approves a PPA that clouds title to Grand View’s ownership of those RECs. *See Paul Affidavit* at ¶¶ 18 - 23. Indeed, with Idaho Power’s proposed contract clause, it is unlikely any buyer would purchase RECs from Grand View to be generated any later than the next session of the Idaho legislature. The burden on interstate commerce is undeniable.

Idaho Power’s stated purpose for its PPA clause clouding ownership and impairing the free flow of this interstate commodity is for the local economic protection of Idaho Power and its customers by reducing Idaho Power’s regulatory risk solely at Grand View’s expense. *See Answer* at pp. 2-3. Idaho Power’s hope that it will someday retroactively own the RECs under Idaho or federal law, without paying for them, is not a legitimate local basis unrelated to economic protectionism. Instead, it would be local protectionism of Idaho’s investor-owned electric utilities that would burden the interstate flow of goods created by neighboring states’

RPS laws, and it would therefore violate the Dormant Commerce Clause. *C&A Carbone, Inc.*, 511 U.S. at 390.

Furthermore, the practical effect of Idaho Power's proposed clause clouding ownership to RECs is analogous to the illegal in-state processing requirements. Idaho does not have an RPS law that creates "Idaho RECs," and the Idaho legislature has stated no purpose whatsoever – let alone a legitimate purpose – to require QFs to sell any RECs to the utility.⁹ Thus, requiring QFs to sell RECs to an Idaho utility prior to allowing the RECs to enter interstate commerce would unlawfully require the RECs to be processed in-state prior to entering interstate commerce. *See C&A Carbone, Inc.*, 511 U.S. at 390; *South Central Timber Development, Inc.*, 467 U.S. at 100; *New England Power*, 455 U.S. at 339. Idaho Power's proposed PPA clause has the same effect on the interstate flow of RECs as the other *per se* invalid in-state processing laws because in order to obtain clear, marketable title to a long-term strip of RECs a QF must agree to gift some RECs to Idaho Power.

The practical effect of the PPA clause is to stop the flow of the RECs at the border, so that Idaho Power can obtain substantial value from a commodity for which it refuses to pay. That the goods may then enter interstate commerce after passing through Idaho Power's hands is of no moment because local protectionist motive would stop the original owner – Grand View – from selling its RECs to the buyer of its choice in interstate commerce. *See C&A Carbone, Inc.*, 511 U.S. at 390-93. Likewise, Idaho Power's proposed PPA clause is not saved by the fact that – if adopted as a standard QF contract clause – it would treat in-state QFs and out-of-state QFs the

⁹ Indeed, just the opposite is true. The Idaho Legislature has affirmatively declared that it is the policy of the State of Idaho to not adopt a renewable portfolio standard. *2007 Idaho Energy Plan* January 26, 2007 at p. 44. The proposed 2012 Idaho Energy Plan also contains a policy statement against the adoption of any sort of a renewable portfolio standard. *2012 Draft Energy Plan* at p. 94.

same. The Supreme Court directly rejected the same argument in *C&A Carbone, Inc.* and noted that the obvious protectionist motive for a “single local proprietor” only makes the protectionist effect “more acute.” *Id.* at 392.

E. Clearly Grand View is being Coerced into Giving Idaho Power its RECs -- Or Where is the Consideration Being Offered to Grand View for Clear Legal Title to Grand View's RECs?

Idaho Power seeks to place a condition on the execution of PURPA contracts that gives it ownership of one half of the RECs generated by the Grand View project. *See* Paul Affidavit. It is axiomatic that every contract to be valid must be supported by consideration, *see Sirius v. Erickson* 144 Idaho 38, 42, 156 P.3d 539 (2007), and a contract that is based on illegal consideration is not enforceable. *See Trees v. Kersey* 138 Idaho 3, 6, 56 P.3d 765, 769 (Idaho 2002). Here, Idaho Power is not offering “good and valuable” consideration for Grand View’s RECs. Instead, Idaho Power is coercing Grand View to surrender ownership of half of the RECs in exchange for its forbearance from insisting on a clause in the agreement that destroys the value of the RECs for both parties – even though Idaho Power admits it has no use for RECs in its provision of utility service. As discussed above, Idaho Power has no legal right to Grand View’s RECs. Hence, not only is Idaho Power failing to offer consideration, it is actually insisting on a clause that is not legally sustainable. Even if forbearance from insisting on the reopener clause constitutes a proper form of consideration, the coercive (and arguably illegal) manner in which it is obtained does not constitute adequate consideration to support a contract transferring REC ownership to Idaho Power.

Idaho Power’s actions are akin to the situation in *Nolan v. California Coastal Commn* 483 U.S. 825, 107 S.Ct. 3141 (1987). There, the Supreme Court overturned a ruling by the California Coastal Commission that conditioned a building permit on the landowner’s grant to

the state of an access easement across his property. The Supreme Court found that there was no relationship between the conditions necessary for a building permit and an access easement for the public to access a beach. Like here, there is absolutely no relationship between Idaho Power's reach for Grand View's RECs and the rates, terms and conditions in the PURPA mandated power purchase agreement that is approved by the Idaho PUC. As the Supreme Court observed:

The evident constitutional propriety disappears, however, if the condition substituted for the prohibition utterly fails to further the end advanced as the justification for the prohibition. When that essential nexus is eliminated, the situation becomes the same as if California law forbade shouting fire in a crowded theater, but granted dispensations to those willing to contribute \$100 to the state treasury. While a ban on shouting fire can be a core exercise of the State's police power to protect the public safety, and can thus meet even our stringent standards for regulation of speech, adding the unrelated condition alters the purpose to one which, while it may be legitimate, is inadequate to sustain the ban. ... Whatever may be the outer limits of "legitimate state interests" in the takings and land use context, this is not one of them. In short, unless the permit condition serves the same governmental purpose as the development ban, the building restriction is not a valid regulation of land use but "an out-and-out plan of extortion." *J.E.D. Associates, Inc. v. Atkinson*

Id. at 837. Likewise, unless Idaho Power's insistence on one half of Grand View's RECs -- or else it will impose a reopener clause in the PPA -- serves some purpose under PURPA, it is not a valid contract clause but "an out-and-out plan of extortion." The New Hampshire Supreme Court was even more direct under similar facts:

Municipal officials having authority to adopt ordinances and regulations have a constitutional duty to observe these [private property] protections. They may not attempt to extort from a citizen a surrender of his right to just compensation for any part of his property that is taken from him for public use as a price for permission to exercise his right to put his property to whatever legitimate use he desires subject only to reasonable regulation.

J.E.D. Associates, Inc. v. Atkinson 121 N. H. 581, 584, 432 A.2d 12, 15 (1981). It would not be appropriate for this Commission to become complicit in Idaho Power's out-and-out plan to coerce Grand View into giving its RECs up without compensation.

Idaho Power has established a pattern of preying on developers who are anxious to move their projects forward, thereby forcing them to agree to the illegal extraction of their RECs in exchange for a clause in the power purchase agreement giving clear title to the remaining RECs to the developer. A recent case in which the Commission approved a power purchase agreement between Clark Canyon Hydro and Idaho Power provides a good example.¹⁰ In its application for approval of the Clark Canyon PPA, Idaho Power recited that "Ownership of Environmental Attributes associated with the Facility is determined in a separated [sic] agreement between Idaho Power and the Seller."¹¹

In response to Staff's inquiry in the Clark Canyon Application Docket as to why the parties negotiated a separate contract addressing environmental attributes, Idaho Power explained:

Idaho Power initially proposed reservation of rights language for the contract that would preserve for Idaho Power and its customers the right in this contract should the rules, regulations, laws or legal status as to the ownership of RECs in PURPA contracts be clarified or changed to abide by such change in law.¹² As an alternative to this reservation of rights, the parties saw a mutual value to both the project and to Idaho Power and its customers in clarifying the ownership of RECs and negotiated the separate agreement whereby the project retains all RECs for the first ten years of the contract and Idaho Power owns all RECs for the last ten

¹⁰ *In the Matter of the Application of Idaho Power Company for a Determination Regarding the Firm Energy Sales Agreement with Clark Canyon, LLC, for the Sale and Purchase of Electricity* IPUC Docket No. IPC-E-11-09

¹¹ Idaho Power Application, Case No. IPC-E-09-11, at p. 3. Paul Affidavit, Exhibit 5.1.

¹² This is identical to the language Grand View is challenging in the instant proceeding.

years of the contract. There is no monetary payment for RECs in the agreement. The project receives clarification as to ownership and retains RECs for the first ten years...¹³

It is clear from Idaho Power's own explanation that by insisting on a clause that neither party can live with due to the uncertainty surrounding title should law or regulations affecting RECs change at some point in the future, that it is forcing the developer to surrender half of the RECs in exchange for Idaho Power willingness to drop that clause. This is a classic case of "The act or practice of obtaining something or compelling some action by illegal means, as by force or coercion." *Extortion, Blacks Law Dictionary* 9th ed. (West 1999). Here Idaho Power is coercing the developer to give Idaho Power half of its RECs by insisting on inserting an clause in the PPA that destroys the value of the RECs.

F. The Commission should reject any reliance by Idaho Power on distinguishable cases regarding REC ownership in other states.

Idaho Power and Avista will no doubt rely on decisions from some other states determining that a utility owned RECs under PURPA contracts pre-dating any creation of any mandatory or voluntary REC markets. *See In Re Ownership of Renewable Energy Certificates*, 913 A.2d 825, 828 (N.J. Super. App. Div., 2007) (citing Edward A. Holt et al., *Who Owns Renewable Energy Certificates? An Exploration of Policy Options and Practice*, at xiv (Ernest Orlando Lawrence Berkeley National Laboratory 2006), available at <http://eetd.lbl.gov/ea/emp/reports/59965.pdf>). These cases are distinguishable from the situation in the present case for several reasons, and the Commission should not rely upon them.

First, those cases relied upon a factual scenario where the PURPA contracts pre-dated the existence of RECs. The leading case followed by others arose in Connecticut. *See*

¹³ *Id.* Idaho Power Response to the third question in Staff's First Production Request, emphasis provided. Paul Affidavit, Exhibit 5.4.

Wheelabrator Lisbon, Inc. v. Connecticut Dept. of Pub. Util. Control, 531 F.3d 183 (2nd Cir. 2008). There, the waste-to-energy QF at issue entered into a power purchase agreement pursuant to PURPA in 1991. *Id.* at 186. “In 2002, the specific credits at issue . . . became marketable by the creation of a market for such credits pursuant to the laws of several states, including Connecticut.” *Id.*

The Connecticut Supreme Court held that the Connecticut state commission had reasonably concluded the term “electricity” in the applicable state statute implementing PURPA and in the contract “necessarily included the renewable attribute that later was ‘unbundled’ from the energy and represented by the certificates.” *Wheelabrator Lisbon, Inc. v. Dept. of Pub. Util. Control*, 931 A.2d 159, 176 (Conn. 2007). The Connecticut Supreme Court concluded that because the 1991 contract assigned ownership to the utility, the state commission’s decision did not constitute a taking in violation of the state constitution. *Id.* at 177. The federal district court likewise rejected a challenge under the takings clause on the ground that the RECs “were created after the parties entered into the [contract].” *Wheelabrator Lisbon, Inc. v. Connecticut Dept. of Pub. Util. Control*, 526 F.Supp.2d 295, 306 (D. Conn. 2006).¹⁴ The Second Circuit held that the Connecticut state commission did not violate Section 210(e) of PURPA by modifying the original agreement because it “did not order the renegotiation of the terms of the Agreement but simply exercised its authority to interpret the Agreement’s provisions.” *Wheelabrator Lisbon, Inc.*, 531 F.3d at 189.

Second, unlike the Idaho Commission which vigilantly ensures that PURPA contracts do not contain rates above the avoided cost of energy and capacity, some of the states to find RECs passed to the utility relied upon a finding that the PURPA contracts compensated the QFs for

¹⁴ The QF did not appeal to the Second Circuit with the taking argument.

more than the energy and capacity alone. *In Re Ownership of Renewable Energy Certificates*, 913 A.2d at 830 (“when it approved the contracts at issue, [the state commission] required the utilities to pay and allowed appellants to receive substantially more than the mere value of the electricity, and that it did so specifically because the electricity was produced with renewable resources”).

These cases are distinguishable and inapplicable to the circumstances here because at the time of contracting in this case the parties clearly recognize the QF projects will generate RECs marketable in mandatory and voluntary markets outside of Idaho. Indeed, the Grand View contract directly contemplates creation of RECs by defining them. To pretend they do not exist and are not valuable is indefensible. Further, because of the RECs obviously exist and Idaho Power will not pay for more than the mere value of the electricity, destruction of the value of the RECs to Grand View without any compensation would clearly constitute a taking. *Compare to In Re Ownership of Renewable Energy Certificates*, 913 A.2d at 830 (addressing contracts containing compensation for “substantially more than the mere value of the electricity”); *Wheelabrator Lisbon, Inc.*, 526 F.Supp.2d 295, 306 (D. Conn. 2006) (finding no taking because RECs “were created after the parties entered into the [contract]”). Unlike in the Connecticut case, Grand View’s challenge under Section 210(e) of PURPA argues that Idaho Power’s REC clause is itself an impermissible contract modifier or reopener, not a subsequent modification of the terms of the contract. *See Wheelabrator Lisbon, Inc.*, 531 F.3d at 189. Finally, those cases did not even address the question of whether the Dormant Commerce Clause allows the Idaho Commission to impose a protectionist policy requiring the RECs to pass through Idaho Power’s hands before entering interstate commerce.

V. CONCLUSION

The Commission's authorization of Idaho Power's proposed contract language regarding environmental attributes would violate Section 210(e) of PURPA, the Takings Clauses of the U.S. and Idaho Constitutions, and the Dormant Commerce Clause of the U.S. Constitution. Grand View therefore requests that the Commission issue a declaratory judgment that Grand View is entitled to a standard PURPA PPA wherein Idaho Power disclaims ownership of all environmental attributes of Grand View's solar project, and order that Idaho Power enter into such a PPA with rates calculated under the methodology in effect on the date of the filing of Grand View's complaint.

Respectfully submitted this 29th day of November 2010.

RICHARDSON AND O'LEARY, PLLC



Peter J. Richardson
Peter J. Richardson (ISB No: 3195)
Gregory M. Adams (ISB No. 7454)
Attorneys for Complainant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 29th day of December, 2011, a true and correct copy of the within and foregoing MOTION FOR SUMMARY JUDGMENT in Case No. IPC-E-11-15 was served in the manner shown to:

Ms. Jean Jewell

Commission Secretary
Idaho Public Utilities Commission
P O Box 83720
Boise, ID 83720-0074

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

Kris Sasser

Deputy Attorney General
Idaho Public Utilities Commission
472 W. Washington St.
Boise, ID 83702

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

Donovan E. Walker

Jason B Williams
Idaho Power Company
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Hand Delivery
 U.S. Mail, postage pre-paid
 Facsimile
 Electronic Mail

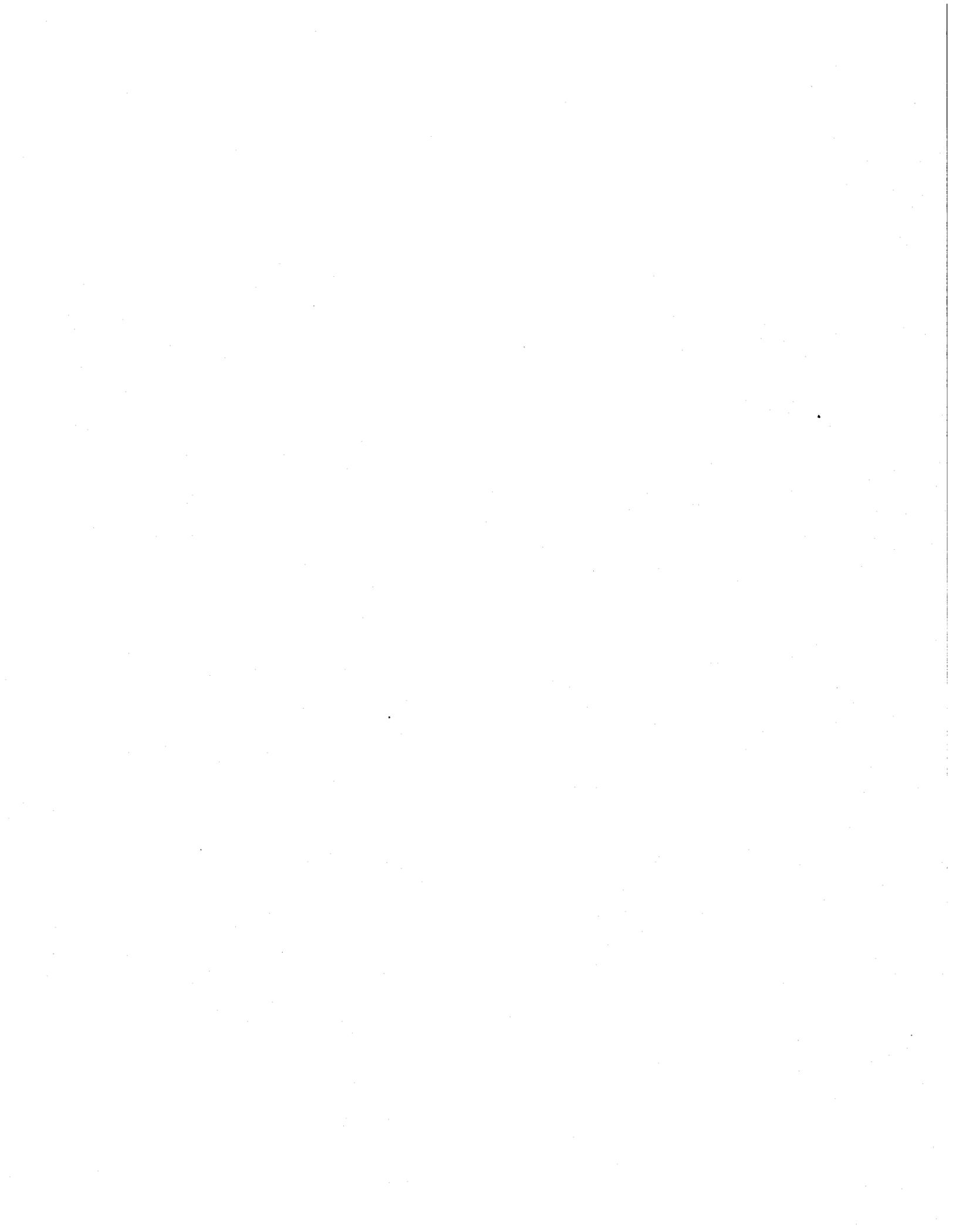
Michael G. Andrea

Avista Corporation
1411 E. Mission Ave., MSC-23
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Hand Delivery
 U.S. Mail, postage pre-paid
 Facsimile
 Electronic Mail



Nina Curtis
Administrative Assistant





5. Grand View PV Solar Two, LLC is an Idaho limited liability company formed for the purpose of developing a 20 MW solar project near Grand View, Idaho.

6. Alternative Power Development, Northwest, LLC is the managing member of Grand View PV Solar Two.

7. I actively participated in the negotiations with Idaho Power Company for a power purchase agreement for the Grand View PV Solar Two project as a qualifying facility under the Public Utility Regulatory Policy Act of 1978.

8. I have attached as **Exhibit 1** a copy of the draft power purchase agreement provided to Grand View PV Solar Two by Idaho Power along with the transmittal email from Mr. Randy Allphin of Idaho Power.

9. The contract contains standard Idaho Power PURPA contract provisions with which I am familiar from my work on past projects, with the exception of the clause regarding ownership of RECs.

10. In past PURPA contracts, I understood Idaho Power affirmatively waived ownership of the environmental attributes of the generation.

11. I also understood that the Idaho Public Utilities Commission routinely approved, without expressing any concern, those PURPA contracts in which Idaho Power affirmatively waived the ownership of the environmental attributes of the generation.

12. Grand View PV Solar Two had no objections to Idaho Power's draft contract other than the clause clouding ownership of the RECs. But for that clause, I would have signed the power purchase agreement on behalf of Grand View PV Solar Two.

13. I authorized attorneys at Richardson and O'Leary to file the complaint in this proceeding.

14. I understand the factual assertions in the complaint to be true and correct based on my own personal knowledge, and I hereby incorporate the factual allegations therein by reference.

15. I have experience in negotiating the sale of renewable energy credits ("RECs") generated from renewable energy projects, including another solar qualifying facility currently being developed near Grand View, Idaho.

16. I have reviewed several documents Idaho Power has filed before regulatory regarding its REC Management Plan.

17. I have attached as exhibits the following Idaho Power filings which I have reviewed: **(Exhibit 2)** Idaho Power's Renewable Energy Credit Management Plan IPUC Case No. IPC-E-08-24 dated December 30, 2009; **(Exhibit 3)** Idaho Power's Application Requesting Approval of Sale of Renewable Energy Credits, Oregon PUC Docket No. UP 269 dated October 22, 2010; **(Exhibit 4)** Idaho Power's Letter Filing Regarding Modification of REC Plan filed in Oregon Docket No. UM 269, dated June 6, 2011; **(Exhibits 5.1 – 5.4)** the Application, Staff Comments and the Reply Comments of Clark Canyon and IPCo responses to Staff discovery in Docket No. IPC-E-11-09.

18. I know that there currently exists a market for RECs and that the market includes both forward strips of varying lengths of time as well as wholesale spot markets.

19. To effect such sales I must provide the buyer certainty that I own and will own the RECs I sell from the project over the term of the contract.

20. If I had clean title to the RECs I would attempt to sell them from the Grand View PV Solar Two project in a forward strip of at least five years.

21. All forward sales of RECs require that the seller be able to prove ownership of the RECs.

22. Idaho Power's proposed contract provision in the Grand View PV Solar Two

project states that REC ownership will be determined by applicable state or federal laws.

23. I cannot sell Grand View PV Solar Two's RECs with Idaho Power's REC clause in the PPA because ownership of the RECs is dependent upon a subsequent change in state or federal law. That lack of certainty places a cloud over the title of the RECs.

24. The business plan for the Grand View PV Solar Two project includes an additional revenue stream for the sale of the RECs.

25. Without fair compensation from Idaho Power for the RECs at their full market value, and without the ability to sell the RECs to another purchaser at their full market value, the Grand View PV Solar Two project's financial viability will be compromised.

26. I also expect that the project's profitability would be compromised at the power purchase rates offered by Idaho Power if we are unable to sell the RECs, and therefore my ability to raise the capital necessary to build and operate the project would also be compromised.

27. Idaho Power offered to eliminate the cloud on title to the RECs in exchange for my giving it, without compensation, one half of the RECs generated by the project.

28. The ability to sell only one half of the RECs from the project compromises the financial viability of the project.

29. The ability to sell only one half of the RECs from the project likewise compromises my ability to raise the capital necessary to build and operate the project.

I declare under penalty of perjury under the laws of the United States and under laws of the state of Idaho that the foregoing is true and correct.

DATED this 21 day of November 2011.

By 
Robert Paul

STATE OF IDAHO)
) ss.
COUNTY OF ADA)

On this 21st day of November 2011, before me, a Notary Public in and for the State of Idaho, personally appeared Robert Paul, personally known to me (or proved to me on the basis of satisfactory evidence) to be the person who executed this instrument and acknowledged it to be his free and voluntary act and deed for the uses and purposes mentioned in the instrument.

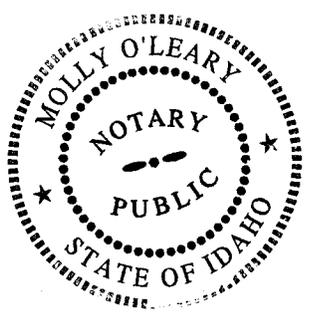
IN WITNESS WHEREOF, I have hereunto set my hand and official seal the day and year first above written.

[Signature]

NOTARY PUBLIC for the State of Idaho

Residing at Boise, Idaho

My Commission expires 03.10.2015



Peter Richardson

From: Allphin, Randy [RAllphin@idahopower.com]
Sent: Thursday, March 10, 2011 2:00 PM
To: 'robertapaul08@gmail.com'
Cc: Peter Richardson; Walker, Donovan
Subject: Draft Grand View Solar II purchase power agreement
Attachments: Grand View Solar II draft PPA 3-10-2011.doc

Mr. Paul,

As you requested attached is a draft PURPA purchase power agreement for your proposed Grand View II 20 MW solar project.

The pricing contained within this proposed agreement is based upon the energy shape you provided that we then used to execute the IRP pricing model.

This draft agreement is for discussion purposes only and Idaho Power reserves the right to modify this agreement at any time until both parties have executed an agreed upon document.

Only after agreement by both parties, execution of an agreement by both parties and approval of the Agreement by the Commission shall a binding commitment exist.

Please review and contact me with any questions you may have.

Randy



This transmission may contain information that is privileged, confidential and/or exempt from disclosure under applicable law. If you are not the intended recipient, you are hereby notified that any disclosure, copying, distribution, or use of the information contained herein (including any reliance thereon) is STRICTLY PROHIBITED. If you received this transmission in error, please immediately contact the sender and destroy the material in its entirety, whether in electronic or hard copy format. Thank you.

!SIG:4d793bcf3341693223914!

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FIRM ENERGY SALES AGREEMENT

BETWEEN

IDAHO POWER COMPANY

AND

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Appendix A

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Appendix D

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FIRM ENERGY SALES AGREEMENT
(Solar Project – Greater than 100 kW)

Project Name: Grand View Solar II

Project Number: _____

THIS AGREEMENT, entered into on this ____ day of _____ 2011 between

(Seller), and IDAHO POWER COMPANY, an Idaho corporation (Idaho Power), hereinafter sometimes referred to collectively as “Parties” or individually as “Party.”

WITNESSETH:

WHEREAS, Seller will design, construct, own, maintain and operate an electric generation facility; and

WHEREAS, Seller wishes to sell, and Idaho Power is willing to purchase, firm electric energy produced by the Seller’s Facility.

THEREFORE, In consideration of the mutual covenants and agreements hereinafter set forth, the Parties agree as follows:

ARTICLE I: DEFINITIONS

As used in this Agreement and the appendices attached hereto, the following terms shall have the following meanings:

- 1.1 “Base Energy” – Monthly Net Energy less than 110% of the monthly Net Energy Amount as specified in paragraph 6.2 of this Agreement less any Net Energy that is determined to be Surplus Energy as specified within this Agreement.
- 1.2 “Commission” - The Idaho Public Utilities Commission.
- 1.3 “Contract Year” - The period commencing each calendar year on the same calendar date as the Operation Date and ending 364 days thereafter.

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- 1.4 “Delay Liquidated Damages” – Damages payable to Idaho Power as calculated in paragraph 5.3, 5.4, 5.5, 5.6 and 5.8.
- 1.5 “Delay Period” – All days past the Scheduled Operation Date until the Seller’s Facility achieves the Operation Date.
- 1.6 “Delay Price” - The current month’s Mid-Columbia Market Energy Cost minus the current month’s All Hours Energy Price specified in paragraph 7.2 of this Agreement. If this calculation results in a value less than 0, the result of this calculation will be 0.
- 1.7 “Designated Dispatch Facility” - Idaho Power’s Systems Operations Group, or any subsequent group designated by Idaho Power.
- 1.8 “Facility” - That electric generation facility described in Appendix B of this Agreement.
- 1.9 “First Energy Date” - The day commencing at 00:01 hours, Mountain Time, following the day that Seller has satisfied the requirements of Article IV and the Seller begins delivering energy to the Idaho Power electrical system at the Point of Delivery.
- 1.10 “Heavy Load Hours” – The daily hours beginning at 7:00 am, ending at 11:00 pm Mountain Time, (16 hours) excluding all hours on all Sundays, New Years Day, Memorial Day, Independence Day, Labor Day, Thanksgiving and Christmas.
- 1.11 “Heavy Load Peak Hours” – The daily Heavy Load Hours from hour beginning at 3:00 pm through hour ending 7 pm Mountain time, (4 hours).
- 1.12 “Heavy Load Standard Hours” – The daily Heavy Load Hours not included as Heavy Load Peak Hours.
- 1.13 “Interconnection Facilities” - All equipment specified in Schedule 72.
- 1.14 “Light Load Hours” – The daily hours beginning at 11:00 pm, ending at 7:00 am Mountain Time (8 hours), plus all other hours on all Sundays, New Years Day, Memorial Day, Independence Day, Labor Day, Thanksgiving and Christmas.
- 1.15 “Losses” – The loss of electrical energy expressed in kilowatt hours (kWh) occurring as a result of the transformation and transmission of energy between the point where the Facility’s energy is metered and

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the point the Facility's energy is delivered to the Idaho Power electrical system. The loss calculation formula will be as specified in Appendix B of this Agreement.

- 1.16 "Market Energy Reference Price" – Eighty-five percent (85%) of the Mid-Columbia Market Energy Cost.
- 1.17 "Material Breach" – A Default (paragraph 19.2.1) subject to paragraph 19.2.2.
- 1.18 "Maximum Capacity Amount" – The maximum capacity (MW) of the Facility will be as specified in Appendix B of this Agreement.
- 1.19 "Metering Equipment" - All equipment specified in Schedule 72, this Agreement and any additional equipment specified in Appendix B required to measure, record and telemeter bi directional power flows between the Seller's electric generation plant and Idaho Power's system.
- 1.20 "Metering Point" - The physical point at which the Metering Equipment is located that enables accurate measurement of the Test Energy and Net Energy deliveries to Idaho Power at the Point of Delivery for this Facility that provides all necessary data to administer this Agreement.
- 1.21 "Mid-Columbia Market Energy Cost" – The monthly weighted average of the daily on-peak and off-peak Dow Jones Mid-Columbia Index (Dow Jones Mid-C Index) prices for non-firm energy. If the Dow Jones Mid-Columbia Index price is discontinued by the reporting agency, both Parties will mutually agree upon a replacement index, which is similar to the Dow Jones Mid-Columbia Index. The selected replacement index will be consistent with other similar agreements and a commonly used index by the electrical industry.
- 1.22 "Nameplate Capacity" –The full-load electrical quantities assigned by the designer to a generator and its prime mover or other piece of electrical equipment, such as transformers and circuit breakers, under standardized conditions, expressed in amperes, kilovolt-amperes, kilowatts, volts or other appropriate units. Usually indicated on a nameplate attached to the individual machine or device.
- 1.23 "Net Energy" – All of the electric energy produced by the Facility, less Station Use, less Losses, expressed in kilowatt hours (kWh) delivered to Idaho Power at the Point of Delivery. Subject to the

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terms of this Agreement, Seller commits to deliver all Net Energy to Idaho Power at the Point of Delivery for the full term of the Agreement.

- 1.24 “Operation Date” – The day commencing at 00:01 hours, Mountain Time, following the day that all requirements of paragraph 5.2 have been completed.
- 1.25 “Point of Delivery” – The location specified in Appendix B, where Idaho Power’s and the Seller’s electrical facilities are interconnected and the energy from this Facility is delivered to the Idaho Power electrical system.
- 1.26 “Prudent Electrical Practices” – Those practices, methods and equipment that are commonly and ordinarily used in electrical engineering and operations to operate electric equipment lawfully, safely, dependably, efficiently and economically.
- 1.27 “Scheduled Operation Date” – The date specified in Appendix B when Seller anticipates achieving the Operation Date. It is expected that the Scheduled Operation Date provided by the Seller shall be a reasonable estimate of the date that the Seller anticipates that the Seller’s Facility shall achieve the Operation Date.
- 1.28 “Schedule 72” – Idaho Power’s Tariff No 101, Schedule 72 or its successor schedules as approved by the Commission. The Seller shall be responsible to pay all costs of interconnection and integration of this Facility into the Idaho Power electrical system as specified within Schedule 72 and this Agreement.
- 1.29 “Season” – The three periods identified in paragraph 6.2.1 of this Agreement.
- 1.30 “Special Facilities” - Additions or alterations of transmission and/or distribution lines and transformers as described in Schedule 72.
- 1.31 “Station Use” – Electric energy that is used to operate equipment that is auxiliary or otherwise related to the production of electricity by the Facility.
- 1.32 “Surplus Energy” – Is (1) Net Energy produced by the Seller’s Facility and delivered to the Idaho Power electrical system during the month which exceeds 110% of the monthly Net Energy Amount for the corresponding month specified in paragraph 6.2. or (2) All Net Energy produced by the Seller’s Facility and delivered to the Idaho Power electrical system in any month where the Net Energy delivered for

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that month is less than 90% of the monthly Net Energy Amount for the corresponding month specified in paragraph 6.2. or (3) All Net Energy produced by the Seller's Facility and delivered by the Facility to the Idaho Power electrical system prior to the Operation Date.

- 1.33 "Total Cost of the Facility" - The total cost of structures, equipment and appurtenances.

ARTICLE II: NO RELIANCE ON IDAHO POWER

- 2.1 Seller Independent Investigation - Seller warrants and represents to Idaho Power that in entering into this Agreement and the undertaking by Seller of the obligations set forth herein, Seller has investigated and determined that it is capable of performing hereunder and has not relied upon the advice, experience or expertise of Idaho Power in connection with the transactions contemplated by this Agreement.
- 2.2 Seller Independent Experts - All professionals or experts including, but not limited to, engineers, attorneys or accountants, that Seller may have consulted or relied on in undertaking the transactions contemplated by this Agreement have been solely those of Seller.

ARTICLE III: WARRANTIES

- 3.1 No Warranty by Idaho Power - Any review, acceptance or failure to review Seller's design, specifications, equipment or facilities shall not be an endorsement or a confirmation by Idaho Power and Idaho Power makes no warranties, expressed or implied, regarding any aspect of Seller's design, specifications, equipment or facilities, including, but not limited to, safety, durability, reliability, strength, capacity, adequacy or economic feasibility.
- 3.2 Qualifying Facility Status - Seller warrants that the Facility is a "Qualifying Facility," as that term is used and defined in 18 CFR 292.201 et seq. After initial qualification, Seller will take such steps as may be required to maintain the Facility's Qualifying Facility status during the term of this Agreement and Seller's failure to maintain Qualifying Facility status will be a Material Breach of this Agreement. Idaho Power reserves the right to review the Facility's Qualifying Facility status and associated support and compliance documents at anytime during the term of this Agreement.

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ARTICLE IV: CONDITIONS TO ACCEPTANCE OF ENERGY

- 4.1 Prior to the First Energy Date and as a condition of Idaho Power's acceptance of deliveries of energy from the Seller under this Agreement, Seller shall:
- 4.1.1 Submit proof to Idaho Power that all licenses, permits or approvals necessary for Seller's operations have been obtained from applicable federal, state or local authorities, including, but not limited to, evidence of compliance with Subpart B, 18 CFR 292.201 et seq. as a certified Qualifying Facility.
- 4.1.2 Opinion of Counsel - Submit to Idaho Power an Opinion Letter signed by an attorney admitted to practice and in good standing in the State of Idaho providing an opinion that Seller's licenses, permits and approvals as set forth in paragraph 4.1.1 above are legally and validly issued, are held in the name of the Seller and, based on a reasonable independent review, counsel is of the opinion that Seller is in substantial compliance with said permits as of the date of the Opinion Letter. The Opinion Letter will be in a form acceptable to Idaho Power and will acknowledge that the attorney rendering the opinion understands that Idaho Power is relying on said opinion. Idaho Power's acceptance of the form will not be unreasonably withheld. The Opinion Letter will be governed by and shall be interpreted in accordance with the legal opinion accord of the American Bar Association Section of Business Law (1991).
- 4.1.3 Nameplate Capacity – Submit to Idaho Power manufacturer's and engineering documentation that establishes the Nameplate Capacity of each individual generation unit that is included within this entire Facility and also the total of these components to determine the Facility Nameplate Capacity rating. Upon receipt of this data, Idaho Power shall review the provided data and determine if the Nameplate Capacity specified is reasonable based upon the manufacturer's specified generation ratings for the specific generation units.
- 4.1.4 Engineer's Certifications - Submit an executed Engineer's Certification of Design & Construction Adequacy and an Engineer's Certification of Operations and Maintenance (O&M) Policy as described in Commission Order No. 21690. These certificates will be in the form

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specified in Appendix C but may be modified to the extent necessary to recognize the different engineering disciplines providing the certificates.

4.1.5 Insurance - Submit written proof to Idaho Power of all insurance required in Article XIII.

4.1.6 Interconnection – Provide written confirmation from Idaho Power’s delivery business unit that Seller has satisfied all interconnection requirements.

4.1.7 Network Resource Designation – The Seller’s Facility has been designated as a network resource capable of delivering firm energy up to the amount of the Maximum Capacity.

4.1.8 Written Acceptance – Request and obtain written confirmation from Idaho Power that all conditions to acceptance of energy have been fulfilled. Such written confirmation shall be provided within a commercially reasonable time following the Seller’s request and will not be unreasonably withheld by Idaho Power.

ARTICLE V: TERM AND OPERATION DATE

5.1 Term - Subject to the provisions of paragraph 5.2 below, this Agreement shall become effective on the date first written and shall continue in full force and effect for a period of twenty (20) Contract Years from the Operation Date.

5.2 Operation Date - The Operation Date may occur only after the Facility has achieved all of the following:

- a) Achieved the First Energy Date.
- b) Commission approval of this Agreement in a form acceptable to Idaho Power has been received.
- c) Seller has demonstrated to Idaho Power's satisfaction that the Facility is complete and able to provide energy in a consistent, reliable and safe manner.
- d) Seller has requested an Operation Date from Idaho Power in a written format.
- e) Seller has received written confirmation from Idaho Power of the Operation Date. This confirmation will not be unreasonably withheld by Idaho Power.

5.3 Operation Date Delay - Seller shall cause the Facility{xe "Facility"} to achieve the Operation{xe

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"Commercial Operation"} Date on or before the Scheduled Operation Date{x "Commercial Operation Date"}. Delays in the interconnection and transmission network upgrade study, design and construction process that **are not** Force Majeure events accepted by both Parties, **shall not** prevent Delay Liquidated Damages from being due and owing as calculated in accordance with this Agreement.

5.3.1 If the Operation Date occurs after the Scheduled Operation Date but on or prior to ninety (90) days following the Scheduled Operation Date, Seller shall pay Idaho Power Delay Liquidated Damages calculated at the end of each calendar month after the Scheduled Operation Date as follows:

Delay Liquidated Damages are equal to ((Current month's Initial Year Net Energy Amount as specified in paragraph 6.2.1 divided by the number of days in the current month) multiplied by the number of days in the Delay Period in the current month) multiplied by the current month's Delay Price.

5.3.2 If the Operation Date does not occur within ninety (90) days following the Scheduled Operation Date, the Seller shall pay Idaho Power Delay Liquidated Damages in addition to those provided in paragraph 5.3.1, calculated as follows:

Forty five dollars (\$45) multiplied by the Maximum Capacity with the Maximum Capacity being measured in kW. {xe "Delay Liquidated Damages"}

5.4 If Seller fails to achieve the Operation Date within ninety (90) days following the Scheduled Operation Date, such failure will be a Material Breach and Idaho Power may terminate this Agreement at any time until the Seller cures the Material Breach. Additional Delay Liquidated Damages beyond those calculated in 5.3.1 and 5.3.2 will be calculated and payable using the Delay Liquidated Damage calculation described in 5.3.1 above for all days exceeding 90 days past the Scheduled Operation Date until such time as the Seller cures this Material Breach or Idaho Power terminates this Agreement.

5.5 Seller shall pay Idaho Power any calculated Delay Damages or Delay Liquidated Damages within seven (7) days of when Idaho Power calculates and presents any Delay Damages or Delay Liquidated Damages billings to the Seller. Seller's failure to pay these damages within the specified time will be a

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Material Breach of this Agreement and Idaho Power shall draw funds from the Delay Security provided by the Seller in an amount equal to the calculated Delay Damages or Delay Liquidated Damages.

5.6 The Parties agree that the damages Idaho Power would incur due to delay in the Facility achieving the Operation Date on or before the Scheduled Operation Date would be difficult or impossible to predict with certainty, and that the Delay Liquidated Damages are an appropriate approximation of such damages.

5.7 Prior to the Seller executing this Agreement, the Seller shall have:

- a) Filed for interconnection and is in compliance with all payments and requirements of the interconnection process
- b) Received and accepted an interconnection feasibility study for this Facility.
- c) Provided all information required to enable Idaho Power to file an initial transmission capacity request.
- d) Accepted the results of the initial transmission capacity request.
- e) Acknowledged responsibility for all interconnection costs and any costs associated with acquiring adequate firm transmission capacity to enable the project to be classified as an Idaho Power firm network resource. If final interconnection or transmission studies are not complete at the time the Seller executes this Agreement, the Seller understands that the Seller's obligations to pay Damages and Liquidated Damages associated with the projects failure to achieve the Operation Date by the Scheduled Operation Date as specified in this Agreement is not relieved by final interconnection or transmission processes and schedules.

5.8 Within thirty (30) days of the date of a final non-appealable Commission Order as specified in Article XXI approving this Agreement, the Seller shall post liquid security ("Delay Security") in a form as described in Appendix D equal to or exceeding the amount calculated in paragraph 5.8.1. Failure to post this Delay Security in the time specified above will be a Material Breach of this Agreement and Idaho Power may terminate this Agreement.

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5.8.1 Delay Security The greater of forty five (\$45) multiplied by the Maximum Capacity with the Maximum Capacity being measured in kW or the sum of three month's estimated revenue. Where the estimated three months of revenue is the estimated revenue associated with the first three full months following the estimated Scheduled Operation Date, the estimated kWh of energy production as specified in paragraph 6.2.1 for those three months multiplied by the All Hours Energy Price specified in paragraph 7.2 for each of those three months.

5.8.1.1 In the event (a) Seller provides Idaho Power with certification that (1) a generation interconnection agreement specifying a schedule that will enable this Facility to achieve the Operation Date no later than the Scheduled Operation Date has been completed and the Seller has paid all required interconnection costs, or (2) a generation interconnection agreement is substantially complete and all material costs of interconnection have been identified and agreed upon and the Seller is in compliance with all terms and conditions of the generation interconnection agreement, the Delay Security calculated in accordance with paragraph 5.8.1 will be reduced by ten percent (10%).

5.8.1.2 If the Seller has received a reduction in the calculated Delay Security as specified in paragraph 5.8.1.1 and subsequently (1) at Seller's request, the generation interconnection agreement specified in paragraph 5.8.1.1 is revised and as a result the Facility will not achieve its Operation Date by the Scheduled Operation Date or (2) if the Seller does not maintain compliance with the generation interconnection agreement, the full amount of the Delay Security as calculated in paragraph 5.8.1 will be subject to reinstatement and will be due and owing within five (5) business days from the date Idaho Power requests reinstatement. Failure to timely reinstate the Delay Security will be a Material Breach of this Agreement.

5.8.2 Idaho Power shall release any remaining security posted hereunder after all calculated Delay Damages and/or Delay Liquidated Damages are paid in full to Idaho Power and the earlier of , 1) thirty (30) days after the Operation Date has been achieved, or 2) sixty (60) days after the Agreement has been

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terminated.

ARTICLE VI: PURCHASE AND SALE OF NET ENERGY

6.1 Delivery and Acceptance of Net Energy - Except when either Party's performance is excused as provided herein, Idaho Power will purchase and Seller will sell all of the Net Energy to Idaho Power at the Point of Delivery. Net Energy produced by the Facility and delivered by the Seller at any moment in time to the Point of Delivery that exceeds the Maximum Capacity Amount will be a Material Breach of this Agreement.

6.2 Net Energy Amounts - Seller intends to produce and deliver Net Energy in the following monthly amounts:

6.2.1 Initial Year Monthly Net Energy Amounts:

	<u>Month</u>	<u>kWh</u>
Season 1	March	_____
	April	_____
	May	_____
Season 2	July	_____
	August	_____
	November	_____
Season 3	December	_____
	June	_____
	September	_____
	October	_____
	January	_____
	February	_____

6.2.2 Ongoing Monthly Net Energy Amounts - Seller shall initially provide Idaho Power with one year of monthly generation estimates (Initial Year Monthly Net Energy Amounts) and beginning at the end of month nine and every three months thereafter provide Idaho Power with an additional three months of forward generation estimates beyond those generation estimates previously provided. This information will be provided to Idaho Power by written notice in

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accordance with paragraph 25.1, no later than 5:00 PM of the 5th day following the end of the previous month. If the Seller does not provide the Ongoing Monthly Net Energy Amounts in a timely manner, Idaho Power will use the most recently provided 3 matching months of the Initial Year Monthly Net Energy Amounts specified in paragraph 6.2.1 for the next 3 months of monthly Net Energy amounts.

6.2.3 Seller's Adjustment of Net Energy Amount

6.2.3.1 No later than the Operation Date, by written notice given to Idaho Power in accordance with paragraph 25.1, the Seller may revise all of the previously provided Initial Year Monthly Net Energy Amounts.

6.2.3.2 Beginning with the end of the 9th month after the Operation Date and at the end of every third month thereafter: (1) the Seller may not revise the immediate next three months of previously provided Net Energy Amounts, (2) but by written notice given to Idaho Power in accordance with paragraph 25.1, no later than 5:00 PM of the 5th day following the end of the previous month, the Seller may revise all other previously provided Net Energy Amounts. Failure to provide timely written notice of changed amounts will be deemed to be an election of no change.

6.2.4 Idaho Power Adjustment of Net Energy Amount – If Idaho Power is excused from accepting the Seller's Net Energy as specified in paragraph 12.2.1 or if the Seller declares a Suspension of Energy Deliveries as specified in paragraph 12.3.1 and the Seller's declared Suspension of Energy Deliveries is not unreasonably rejected accepted by Idaho Power, the Net Energy Amount as specified in paragraph 6.2 for the specific month in which the reduction or suspension under paragraph 12.2.1 or 12.3.1 occurs will be reduced in accordance with the following:

Where: _____

NEA = Current Month's Net Energy Amount (Paragraph 6.2)

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- SGU = a.) If Idaho Power is excused from accepting the Seller's Net Energy as specified in paragraph 12.2.1 this value will be equal to the percentage of curtailment as specified by Idaho Power multiplied by the TGU as defined below.
- b.) If the Seller declares a Suspension of Energy Deliveries as specified in paragraph 12.3.1 this value will be the sum of the individual generation units size ratings as specified in Appendix B that are impacted by the circumstances causing the Seller to declare a Suspension of Energy Deliveries.
- TGU = Sum of all of the individual generator ratings of the generation units at this Facility as specified in Appendix B of this agreement.
- RSH = Actual hours the Facility's Net Energy deliveries were either reduced or suspended under paragraph 12.2.1 or 12.3.1
- TH = Actual total hours in the current month

Resulting formula being:

$$\text{Adjusted Net Energy Amount} = \text{NEA} - \left(\left(\frac{\text{SGU}}{\text{TGU}} \times \text{NEA} \right) \times \left(\frac{\text{RSH}}{\text{TH}} \right) \right)$$

This Adjusted Net Energy Amount will be used in applicable Surplus Energy calculations for only the specific month in which Idaho Power was excused from accepting the Seller's Net Energy or the Seller declared a Suspension of Energy.

- 6.3 Unless excused by an event of Force Majeure, Seller's failure to deliver Net Energy in any Contract Year in an amount equal to at least ten percent (10%) of the sum of the Initial Year Net Energy Amounts as specified in paragraph 6.2 shall constitute an event of default.

ARTICLE VII: PURCHASE PRICE AND METHOD OF PAYMENT

7.1 Base Energy Purchase Price

- 7.1.1 During the months of March, April and May Idaho Power shall pay the non-levelized Heavy Load Energy Price for all Base Energy received during Heavy Load Hours and the Light Load

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Energy Price for all Base Energy received during Light Load hours for each year as specified

below:

	<u>Heavy Load Energy Price</u>	<u>Light Load Energy Price</u>
<u>Year</u>	<u>Mills/kWh</u>	<u>Mills/kWh</u>
2012	67.16	61.81
2013	70.61	65.26
2014	71.93	66.58
2015	73.26	67.91
2016	74.63	69.28
2017	76.03	70.68
2018	77.45	72.10
2019	78.89	73.54
2020	80.37	75.02
2021	81.88	76.53
2022	83.41	78.06
2023	84.97	79.62
2024	86.57	81.22
2025	88.19	82.84
2026	89.85	84.50
2027	91.54	86.19
2028	93.26	87.91
2029	95.01	89.66
2030	96.80	91.45
2031	98.61	93.26

7.1.2 During the months of November and December, Idaho Power shall pay the non-levelized Heavy Load Energy Price for all Base Energy received during Heavy Load Hours and the Light Load Energy Price for all Base Energy received during Light Load hours as for each year as specified below:

	<u>Heavy Load Energy Price</u>	<u>Light Load Energy Price</u>
<u>Year</u>	<u>Mills/kWh</u>	<u>Mills/kWh</u>
2012	109.64	100.91
2013	115.28	106.55
2014	117.43	108.70
2015	119.62	110.88
2016	121.85	113.11
2017	124.13	115.39
2018	126.44	117.71

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2019	128.81	120.07
2020	131.22	122.48
2021	133.68	124.94
2022	136.19	127.45
2023	138.73	130.00
2024	141.34	132.60
2025	143.99	135.25
2026	146.69	137.95
2027	149.45	140.71
2028	152.26	143.52
2029	155.11	146.38
2030	158.04	149.30
2031	161.00	152.27

7.1.3 During the months of July and August, Idaho Power shall pay the non-levelized Heavy Load Standard Energy Price for all Base Energy received during Heavy Load Standard Hours, the Heavy Load Peak Hour Prices for all Base Energy received during Heavy Load Peak Hours and the Light Load Energy Price for all Base Energy received during Light Load Hours for each year as specified below:

<u>Year</u>	<u>Heavy Load Standard Energy Price</u> Mills/kWh	<u>Heavy Load Peak Energy Price</u> Mills/kWh	<u>Light Load Energy Price</u> Mills/kWh
2012	107.45	115.12	100.91
2013	112.97	121.04	106.55
2014	115.08	123.30	108.70
2015	117.23	125.60	110.88
2016	119.41	127.94	113.11
2017	121.65	130.34	115.39
2018	123.91	132.76	117.71
2019	126.23	135.25	120.07
2020	128.60	137.78	122.48
2021	131.01	140.36	124.94
2022	133.47	143.00	127.45
2023	135.96	145.67	130.00
2024	138.51	148.41	132.60
2025	141.11	151.19	135.25
2026	143.76	154.02	137.95

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2027	146.46	156.92	140.71
2028	149.21	159.87	143.52
2029	152.01	162.87	146.38
2030	154.88	165.94	149.30
2031	157.78	169.05	152.27

7.1.4 During the months of June, September, October, January and February, Idaho Power shall pay the non-levelized Heavy Load Energy Price for all Base Energy received during Heavy Load Hours and the Light Load Energy Price for all Base Energy received during Light Load hours as specified below:

<u>Year</u>	<u>Heavy Load Energy Price</u>	<u>Light Load Energy Price</u>
	<u>Mills/kWh</u>	<u>Mills/kWh</u>
2012	91.37	84.09
2013	96.07	88.79
2014	97.86	90.58
2015	99.68	92.40
2016	101.54	94.26
2017	103.44	96.16
2018	105.37	98.09
2019	107.34	100.06
2020	109.35	102.07
2021	111.40	104.12
2022	113.49	106.21
2023	115.61	108.33
2024	117.78	110.50
2025	119.99	112.71
2026	122.24	114.96
2027	124.54	117.26
2028	126.88	119.60
2029	129.26	121.98
2030	131.70	124.42
2031	134.17	126.89

7.2 All Hours Energy Price – The price to be used in the calculation of the Surplus Energy Price and Delay Damage Price shall be the non-levelized energy price for each year as specified below:

March, April and May	July, August, November and December	June, September, October, January and February
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<u>Year</u>	<u>Mills/kWh</u>	<u>Mills/kWh</u>	<u>Mills/kWh</u>
2012	64.78	105.76	88.13
2013	68.23	111.40	92.83
2014	69.55	113.54	94.62
2015	70.88	115.73	96.44
2016	72.25	117.96	98.30
2017	73.65	120.24	100.20
2018	75.07	122.56	102.13
2019	76.51	124.92	104.10
2020	77.99	127.33	106.11
2021	79.50	129.79	108.16
2022	81.03	132.30	110.25
2023	82.59	134.84	112.37
2024	84.19	137.45	114.54
2025	85.81	140.10	116.75
2026	87.47	142.80	119.00
2027	89.16	145.56	121.30
2028	90.88	148.37	123.64
2029	92.62	151.22	126.02
2030	94.42	154.15	128.46
2031	96.23	157.12	130.93

- 7.3 Surplus Energy Price - For all Surplus Energy, Idaho Power shall pay to the Seller the lower of the current month's Market Energy Reference Price, Light Load Energy Price or the All Hours Energy Price specified in paragraph 7.2.
- 7.4 Payment Due Date – Undisputed Energy payments, less any payments due to Idaho Power will be disbursed to the Seller within 30 days of the date which Idaho Power receives and accepts the documentation of the monthly Net Energy actually delivered to Idaho Power as specified in Appendix A.
- 7.5 Continuing Jurisdiction of the Commission .This Agreement is a special contract and, as such, the rates, terms and conditions contained in this Agreement will be construed in accordance with Idaho Power Company v. Idaho Public Utilities Commission and Afton Energy, Inc., 107 Idaho 781, 693 P.2d 427 (1984), Idaho Power Company v. Idaho Public Utilities Commission, 107 Idaho 1122, 695 P.2d 1 261 (1985), Afton Energy, Inc. v. Idaho Power Company, 111 Idaho 925, 729 P.2d 400 (1986), Section 210 of the Public Utility Regulatory Policies Act of 1978 and 18 CFR §292.303-308

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ARTICLE VIII: ENVIRONMENTAL ATTRIBUTES

- 8.1 Under this Agreement, ownership of Green Tags and Renewable Energy Certificate (RECs), or the equivalent environmental attributes, directly associated with the production of energy from the Seller's Facility sold to Idaho Power will be governed by any and all applicable Federal or State laws and/or any regulatory body or agency deemed to have authority to regulate these Environmental Attributes or to implement Federal and/or State laws regarding the same.

ARTICLE IX: FACILITY AND INTERCONNECTION

- 9.1 Design of Facility - Seller will design, construct, install, own, operate and maintain the Facility and any Seller-owned Interconnection Facilities so as to allow safe and reliable generation and delivery of Net Energy to the Idaho Power Point of Delivery for the full term of the Agreement.
- 9.2 Interconnection Facilities - Except as specifically provided for in this Agreement, the required Interconnection Facilities will be in accordance with Schedule 72, the Generation Interconnection Process and Appendix B. The Seller is responsible for all costs associated with this equipment as specified in Schedule 72 and the Generation Interconnection Process, including but not limited to initial costs incurred by Idaho Power for equipment costs, installation costs and ongoing monthly Idaho Power operations and maintenance expenses.

ARTICLE X: METERING AND TELEMETRY

- 10.1 Metering - Idaho Power shall, for the account of Seller, provide, install, and maintain Metering Equipment to be located at a mutually agreed upon location to record and measure power flows to Idaho Power in accordance with this Agreement and Schedule 72. The Metering Equipment will be at the location and the type required to measure, record and report the Facility's Net Energy, Station Use, and maximum energy deliveries (kW) at the Point of Delivery in a manner to provide Idaho Power adequate energy measurement data to administer this Agreement and to integrate this Facility's energy production into the Idaho Power electrical system.

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- 10.2 Telemetry – Idaho Power will install, operate and maintain at Seller's expense communications and telemetry equipment which will be capable of providing Idaho Power with continuous instantaneous telemetry of Seller's Net Energy produced and delivered to the Idaho Power Point of Delivery to Idaho Power's Designated Dispatch Facility.

ARTICLE XI - RECORDS

- 11.1 Maintenance of Records - Seller shall maintain at the Facility or such other location mutually acceptable to the Parties adequate total generation, Net Energy, Station Use, and maximum generation (kW) records in a form and content acceptable to Idaho Power.
- 11.2 Inspection - Either Party, after reasonable notice to the other Party, shall have the right, during normal business hours, to inspect and audit any or all generation, Net Energy, Station Use, and maximum generation (kW) records pertaining to the Seller's Facility.

ARTICLE XII: OPERATIONS

- 12.1 Communications - Idaho Power and the Seller shall maintain appropriate operating communications through Idaho Power's Designated Dispatch Facility in accordance with Appendix A of this Agreement.
- 12.2 Energy Acceptance –
- 12.2.1 Idaho Power shall be excused from accepting and paying for Net Energy which would have otherwise been produced by the Facility and delivered by the Seller to the Point of Delivery, if it is prevented from doing so by an event of Force Majeure, or temporary disconnection of the Facility in accordance with Schedule 72. If, for reasons other than an event of Force Majeure, a temporary disconnection under Schedule 72 exceeds twenty (20) days, beginning with the twenty-first day of such interruption, curtailment or reduction, Seller will be deemed to be delivering Net Energy at a rate equivalent to the pro rata daily average of the amounts specified for the applicable month in paragraph 6.2. Idaho Power will notify Seller when the interruption, curtailment or reduction is terminated.
- 12.2.2 If, in the reasonable opinion of Idaho Power, Seller's operation of the Facility or Interconnection

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Facilities is unsafe or may otherwise adversely affect Idaho Power's equipment, personnel or service to its customers, Idaho Power may temporarily disconnect the Facility from Idaho Power's transmission/distribution system as specified within Schedule 72 or take such other reasonable steps as Idaho Power deems appropriate.

12.2.3 Under no circumstances will the Seller deliver Net Energy from the Facility to the Point of Delivery in an amount that exceeds the Maximum Capacity Amount at any moment in time. Seller's failure to limit deliveries to the Maximum Capacity Amount will be a Material Breach of this Agreement.

12.2.4 If Idaho Power is unable to accept the energy from this Facility and is not excused from accepting the Facility's energy, Idaho Power's damages shall be limited to only the contract value of the estimated energy that Idaho Power was unable to accept. Idaho Power will have no responsibility to pay for any other costs, lost revenue or consequential damages the Facility may incur.

12.3 Seller Declared Suspension of Energy Deliveries

12.3.1 If the Seller's Facility experiences a forced outage due to equipment failure which is not caused by an event of Force Majeure or by neglect, disrepair or lack of adequate preventative maintenance of the Seller's Facility, Seller may, after giving notice as provided in paragraph 12.3.2 below, temporarily suspend all deliveries of Net Energy to Idaho Power from the Facility or from individual generation unit(s) within the Facility impacted by the forced outage for a period of not less than 48 hours to correct the forced outage condition ("Declared Suspension of Energy Deliveries"). The Seller's Declared Suspension of Energy Deliveries will begin at the start of the next full hour following the Seller's telephone notification as specified in paragraph 12.3.2 and will continue for the time as specified (not less than 48 hours) in the written notification provided by the Seller. In the month(s) in which the Declared Suspension of Energy occurred, the Net Energy Amount will be adjusted as specified in paragraph 6.2.4.

12.3.2 If the Seller desires to initiate a Declared Suspension of Energy Deliveries as provided in

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paragraph 12.3.1, the Seller will notify the Designated Dispatch Facility by telephone. The beginning hour of the Declared Suspension of Energy Deliveries will be at the earliest the next full hour after making telephone contact with Idaho Power. The Seller will, within 24 hours after the telephone contact, provide Idaho Power a written notice in accordance with XXIV that will contain the beginning hour and duration of the Declared Suspension of Energy Deliveries and a description of the conditions that caused the Seller to initiate a Declared Suspension of Energy Deliveries. Idaho Power will review the documentation provided by the Seller to determine Idaho Power's acceptance of the described forced outage as qualifying for a Declared Suspension of Energy Deliveries as specified in paragraph 12.3.1. Idaho Power's acceptance of the Seller's forced outage as an acceptable forced outage will be based upon the clear documentation provided by the Seller that the forced outage is not due to an event of Force Majeure or by neglect, disrepair or lack of adequate preventative maintenance of the Seller's Facility.

- 12.4 Scheduled Maintenance – On or before January 31st of each calendar year, Seller shall submit a written proposed maintenance schedule of significant Facility maintenance for that calendar year and Idaho Power and Seller shall mutually agree as to the acceptability of the proposed schedule. The Parties determination as to the acceptability of the Seller's timetable for scheduled maintenance will take into consideration Prudent Electrical Practices, Idaho Power system requirements and the Seller's preferred schedule. Neither Party shall unreasonably withhold acceptance of the proposed maintenance schedule.
- 12.5 Maintenance Coordination - The Seller and Idaho Power shall, to the extent practical, coordinate their respective line and Facility maintenance schedules such that they occur simultaneously.
- 12.6 Contact Prior to Curtailment - Idaho Power will make a reasonable attempt to contact the Seller prior to exercising its rights to interrupt interconnection or curtail deliveries from the Seller's Facility. Seller understands that in the case of emergency circumstances, real time operations of the electrical system, and/or unplanned events Idaho Power may not be able to provide notice to the Seller prior to interruption, curtailment, or reduction of electrical energy deliveries to Idaho Power.

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ARTICLE XIII: INDEMNIFICATION AND INSURANCE

- 13.1 **Indemnification** - Each Party shall agree to hold harmless and to indemnify the other Party, its officers, agents, affiliates, subsidiaries, parent company and employees against all loss, damage, expense and liability to third persons for injury to or death of person or injury to property, proximately caused by the indemnifying Party's (a) construction, ownership, operation or maintenance of, or by failure of, any of such Party's works or facilities used in connection with this Agreement or (b) negligent or intentional acts, errors or omissions. The indemnifying Party shall, on the other Party's request, defend any suit asserting a claim covered by this indemnity. The indemnifying Party shall pay all documented costs, including reasonable attorney fees that may be incurred by the other Party in enforcing this indemnity.
- 13.2 **Insurance** - During the term of this Agreement, Seller shall secure and continuously carry the following insurance coverage:
- 13.2.1 Comprehensive General Liability Insurance for both bodily injury and property damage with limits equal to \$1,000,000, each occurrence, combined single limit. The deductible for such insurance shall be consistent with current Insurance Industry Utility practices for similar property.
- 13.2.2 The above insurance coverage shall be placed with an insurance company with an A.M. Best Company rating of A- or better and shall include:
- (a) An endorsement naming Idaho Power as an additional insured and loss payee as applicable; and
 - (b) A provision stating that such policy shall not be canceled or the limits of liability reduced without sixty (60) days' prior written notice to Idaho Power.
- 13.3 **Seller to Provide Certificate of Insurance** - As required in paragraph 4.1.6 herein and annually thereafter, Seller shall furnish Idaho Power a certificate of insurance, together with the endorsements required therein, evidencing the coverage as set forth above.
- 13.4 **Seller to Notify Idaho Power of Loss of Coverage** - If the insurance coverage required by paragraph 13.2 shall lapse for any reason, Seller will immediately notify Idaho Power in writing. The notice will

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advise Idaho Power of the specific reason for the lapse and the steps Seller is taking to reinstate the coverage. Failure to provide this notice and to expeditiously reinstate or replace the coverage will constitute a Material Breach of this Agreement.

ARTICLE XIV: FORCE MAJEURE

14.1 As used in this Agreement, "Force Majeure" or "an event of Force Majeure" means any cause beyond the control of the Seller or of Idaho Power which, despite the exercise of due diligence, such Party is unable to prevent or overcome. Force Majeure includes, but is not limited to, acts of God, fire, flood, storms, wars, hostilities, civil strife, strikes and other labor disturbances, earthquakes, fires, lightning, epidemics, sabotage, or changes in law or regulation occurring after the Effective Date, which, by the exercise of reasonable foresight such party could not reasonably have been expected to avoid and by the exercise of due diligence, it shall be unable to overcome. If either Party is rendered wholly or in part unable to perform its obligations under this Agreement because of an event of Force Majeure, both Parties shall be excused from whatever performance is affected by the event of Force Majeure, provided that:

- (1) The non-performing Party shall, as soon as is reasonably possible after the occurrence of the Force Majeure, give the other Party written notice describing the particulars of the occurrence.
- (2) The suspension of performance shall be of no greater scope and of no longer duration than is required by the event of Force Majeure.
- (3) No obligations of either Party which arose before the occurrence causing the suspension of performance and which could and should have been fully performed before such occurrence shall be excused as a result of such occurrence.

ARTICLE XV: LIABILITY; DEDICATION

15.1 Limitation of Liability. Nothing in this Agreement shall be construed to create any duty to, any standard of care with reference to, or any liability to any person not a Party to this Agreement. Neither

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party shall be liable to the other for any indirect, special, consequential, nor punitive damages, except as expressly authorized by this Agreement. Consequential damages will include, but not be limited to, the value of any environmental attributes.

- 15.2 Dedication. No undertaking by one Party to the other under any provision of this Agreement shall constitute the dedication of that Party's system or any portion thereof to the Party or the public or affect the status of Idaho Power as an independent public utility corporation or Seller as an independent individual or entity.

ARTICLE XVI: SEVERAL OBLIGATIONS

- 16.1 Except where specifically stated in this Agreement to be otherwise, the duties, obligations and liabilities of the Parties are intended to be several and not joint or collective. Nothing contained in this Agreement shall ever be construed to create an association, trust, partnership or joint venture or impose a trust or partnership duty, obligation or liability on or with regard to either Party. Each Party shall be individually and severally liable for its own obligations under this Agreement.

ARTICLE XVII: WAIVER

- 17.1 Any waiver at any time by either Party of its rights with respect to a default under this Agreement or with respect to any other matters arising in connection with this Agreement shall not be deemed a waiver with respect to any subsequent default or other matter.

ARTICLE XVIII: CHOICE OF LAWS AND VENUE

- 18.1 This Agreement shall be construed and interpreted in accordance with the laws of the State of Idaho without reference to its choice of law provisions.
- 18.2 Venue for any litigation arising out of or related to this Agreement will lie in the District Court of the Fourth Judicial District of Idaho in and for the County of Ada.

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ARTICLE XIX: DISPUTES AND DEFAULT

- 19.1 **Disputes** - All disputes related to or arising under this Agreement, including, but not limited to, the interpretation of the terms and conditions of this Agreement, will be submitted to the Commission for resolution.
- 19.2 **Notice of Default**
- 19.2.1 **Defaults.** If either Party fails to perform any of the terms or conditions of this Agreement (an “event of default”), the non defaulting Party shall cause notice in writing to be given to the defaulting Party, specifying the manner in which such default occurred. If the defaulting Party shall fail to cure such default within the sixty (60) days after service of such notice, or if the defaulting Party reasonably demonstrates to the other Party that the default can be cured within a commercially reasonable time but not within such sixty (60) day period and then fails to diligently pursue such cure, then, the non defaulting Party may, at its option, terminate this Agreement and/or pursue its legal or equitable remedies.
- 19.2.2 **Material Breaches** – The notice and cure provisions in paragraph 19.2.1 do not apply to defaults identified in this Agreement as Material Breaches. Material Breaches must be cured as expeditiously as possible following occurrence of the breach.
- 19.3 **Security for Performance** - Prior to the Operation Date and thereafter for the full term of this Agreement, Seller will provide Idaho Power with the following:
- 19.3.1 **Insurance** - Evidence of compliance with the provisions of paragraph 13.2. If Seller fails to comply, such failure will be a Material Breach and may only be cured by Seller supplying evidence that the required insurance coverage has been replaced or reinstated;
- 19.3.2 **Engineer’s Certifications** - Every three (3) years after the Operation Date, Seller will supply Idaho Power with a Certification of Ongoing Operations and Maintenance (O&M) from a Registered Professional Engineer licensed in the State of Idaho, which Certification of Ongoing O & M shall be in the form specified in Appendix C. Seller’s failure to supply the

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required certificate will be an event of default. Such a default may only be cured by Seller providing the required certificate; and

- 19.3.3 Licenses and Permits - During the full term of this Agreement, Seller shall maintain compliance with all permits and licenses described in paragraph 4.1.1 of this Agreement. In addition, Seller will supply Idaho Power with copies of any new or additional permits or licenses. At least every fifth Contract Year, Seller will update the documentation described in Paragraph 4.1.1. If at any time Seller fails to maintain compliance with the permits and licenses described in paragraph 4.1.1 or to provide the documentation required by this paragraph, such failure will be an event of default and may only be cured by Seller submitting to Idaho Power evidence of compliance from the permitting agency.

ARTICLE XX: GOVERNMENTAL AUTHORIZATION

- 20.1 This Agreement is subject to the jurisdiction of those governmental agencies having control over either Party of this Agreement.

ARTICLE XXI: COMMISSION ORDER

- 21.1 This Agreement shall become finally effective upon the Commission's approval of all terms and provisions hereof without change or condition and declaration that all payments to be made to Seller hereunder shall be allowed as prudently incurred expenses for ratemaking purposes.

ARTICLE XXII: SUCCESSORS AND ASSIGNS

- 22.1 This Agreement and all of the terms and provisions hereof shall be binding upon and inure to the benefit of the respective successors and assigns of the Parties hereto, except that no assignment hereof by either Party shall become effective without the written consent of both Parties being first obtained. Such consent shall not be unreasonably withheld. Notwithstanding the foregoing, any party which Idaho Power may consolidate, or into which it may merge, or to which it may convey or transfer substantially all of its electric utility assets, shall automatically, without further act, and without need of consent or

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approval by the Seller, succeed to all of Idaho Power's rights, obligations and interests under this Agreement. This article shall not prevent a financing entity with recorded or secured rights from exercising all rights and remedies available to it under law or contract. Idaho Power shall have the right to be notified by the financing entity that it is exercising such rights or remedies.

ARTICLE XXIII: MODIFICATION

23.1 No modification to this Agreement shall be valid unless it is in writing and signed by both Parties and subsequently approved by the Commission.

ARTICLE XXIV: TAXES

24.1 Each Party shall pay before delinquency all taxes and other governmental charges which, if failed to be paid when due, could result in a lien upon the Facility or the Interconnection Facilities.

ARTICLE XXV: NOTICES

25.1 All written notices under this Agreement shall be directed as follows and shall be considered delivered when faxed, e-mailed and confirmed with deposit in the U.S. Mail, first-class, postage prepaid, as follows:

To Seller:

Original document to:

Telephone: _____

Cell: _____

FAX: _____

E-mail: _____

Copy of document to:

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Telephone: _____
Email: _____

To Idaho Power:

Original document to:

Senior Vice President, Power Supply
Idaho Power Company
P O Box 70
Boise, Idaho 83707
Email: Lgrow@idahopower.com

Copy of document to:

Cogeneration and Small Power Production
Idaho Power Company
P O Box 70
Boise, Idaho 83707
E-mail: rallphin@idahopower.com

Either Party may change the contact person and/or address information listed above, by providing written notice from an authorized person representing the Party.

ARTICLE XXVI: ADDITIONAL TERMS AND CONDITIONS

26.1 This Agreement includes the following appendices, which are attached hereto and included by reference:

Appendix A	-	Generation Scheduling and Reporting
Appendix B	-	Facility and Point of Delivery
Appendix C	-	Engineer's Certifications
Appendix D	-	Forms of Liquid Security

ARTICLE XXVII: SEVERABILITY

27.1 The invalidity or unenforceability of any term or provision of this Agreement shall not affect the validity or enforceability of any other terms or provisions and this Agreement shall be construed in all other respects as if the invalid or unenforceable term or provision were omitted.

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ARTICLE XXVIII: COUNTERPARTS

28.1 This Agreement may be executed in two or more counterparts, each of which shall be deemed an original but all of which together shall constitute one and the same instrument.

ARTICLE XXIX: ENTIRE AGREEMENT

29.1 This Agreement constitutes the entire Agreement of the Parties concerning the subject matter hereof and supersedes all prior or contemporaneous oral or written agreements between the Parties concerning the subject matter hereof.

IN WITNESS WHEREOF, The Parties hereto have caused this Agreement to be executed in their respective names on the dates set forth below:

Idaho Power Company _____

By

By

Lisa A Grow
Sr. Vice President, Power Supply

Dated

Dated

"Idaho Power"

"Seller"

APPENDIX A

A-1 MONTHLY POWER PRODUCTION AND SWITCHING REPORT

At the end of each month the following required documentation will be submitted to:

Idaho Power Company
Attn: Cogeneration and Small Power Production
P O Box 70
Boise, Idaho 83707

The meter readings required on this report will be the readings on the Idaho Power Meter Equipment measuring the Facility's total energy production and Station Usage delivered to Idaho Power and the maximum generated energy (kW) as recorded on the Metering Equipment and/or any other required energy measurements to adequately administer this Agreement. This document shall be the document to enable Idaho Power to begin the energy payment calculation and payment process. The meter readings on this report shall not be used to calculate the actual payment, but instead will be a check of the automated meter reading information that will be gathered as described in item A-2 below:

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A-2 AUTOMATED METER READING COLLECTION PROCESS

Monthly, Idaho Power will use the provided Metering and Telemetry equipment and processes to collect the meter reading information from the Idaho Power provided Metering Equipment that measures the Net Energy and energy delivered to supply Station Use for the Facility recorded at 12:00 AM (Midnight) of the last day of the month..

The meter information collected will include but not be limited to energy production, Station Use, the maximum generated power (kW) and any other required energy measurements to adequately administer this Agreement.

A-3 ROUTINE REPORTING

Once the Facility has achieved its Operation Date and has operated in a reliable and consistent manner for a reasonable period of time, the Parties may mutually agree to modify this Routine Reporting requirement.

Idaho Power Contact Information

Daily Energy Production Reporting

Call daily by 10 a.m., 1-800-356-4328 or 1-800-635-1093 and leave the following information:

- Project Identification - Project Name and Project Number
- Current Meter Reading
- Estimated Generation for the current day
- Estimated Generation for the next day

Planned and Unplanned Project outages

Call 1-800-345-1319 and leave the following information:

- Project Identification - Project Name and Project Number
- Approximate time outage occurred
- Estimated day and time of project coming back online

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Seller's Contact Information

24-Hour Project Operational Contact

Name: _____
Telephone Number: _____
Cell Phone: _____

Project On-site Contact information

Name: _____
Telephone Number: _____

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APPENDIX B

FACILITY AND POINT OF DELIVERY

Project Name: Grand View Solar II

Project Number: _____

B-1 DESCRIPTION OF FACILITY

Var Capability (Both leading and lagging: Leading is _____ Lagging is _____)

B-2 LOCATION OF FACILITY

Near: _____

Sections: _____ Township: _____ Range: _____ County: _____

Description of Interconnection Location: _____

Nearest Idaho Power Substation: _____

B-3 SCHEDULED FIRST ENERGY AND OPERATION DATE

Seller has selected _____ as the Scheduled First Energy Date.

Seller has selected _____ as the Scheduled Operation Date.

In making these selections, Seller recognizes that adequate testing of the Facility and completion of all requirements in paragraph 5.2 of this Agreement must be completed prior to the project being granted an Operation Date.

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B-4 MAXIMUM CAPACITY AMOUNT

This value will be _____ which is consistent with the value provided by the Seller to Idaho Power in accordance with Schedule 72. This value is the maximum energy (MW) that potentially could be delivered by the Seller's Facility to the Idaho Power electrical system at any moment in time.

B-5 POINT OF DELIVERY

"Point of Delivery" means, unless otherwise agreed by both Parties, the point of where the Sellers Facility's energy is delivered to the Idaho Power electrical system. Schedule 72 will determine the specific Point of Delivery for this Facility. The Point of Delivery identified by Schedule 72 will become an integral part of this Agreement.

B-6 LOSSES

If the Idaho Power Metering equipment is capable of measuring the exact energy deliveries by the Seller to the Idaho Power electrical system at the Point of Delivery, no Losses will be calculated for this Facility. If the Idaho Power Metering Equipment is unable to measure the exact energy deliveries by the Seller to the Idaho Power electrical system at the Point of Delivery, a Losses calculation will be established to measure the energy losses (kWh) between the Seller's Facility and the Idaho Power Point of Delivery. This loss calculation will be initially set at 2% of the kWh energy production recorded on the Facility generation metering equipment. At such time as Seller provides Idaho Power with the electrical equipment specifications (transformer loss specifications, conductor sizes, etc.) of all of the electrical equipment between the Facility and the Idaho Power electrical system, Idaho Power will configure a revised Losses calculation formula to be agreed to by both parties and used to calculate the kWh losses for the remaining term of the Agreement. If at any time during the term of this Agreement, Idaho Power determines that the loss calculation does not correctly reflect the actual kWh Losses attributed to the electrical equipment between the Facility and the Idaho Power electrical system, Idaho Power may adjust the calculation and retroactively adjust the previous months kWh losses calculations.

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B-7 METERING AND TELEMETRY

Schedule 72 will determine the specific metering and telemetry requirements for this Facility. At the minimum the Metering Equipment and Telemetry equipment must be able to provide and record hourly energy deliveries to the Point of Delivery and any other energy measurements required to administer this Agreement. These specifications will include but not be limited to equipment specifications, equipment location, Idaho Power provided equipment, Seller provided equipment, and all costs associated with the equipment, design and installation of the Idaho Power provided equipment. Seller will arrange for and make available at Seller's cost communication circuit(s) compatible with Idaho Power's communications equipment and dedicated to Idaho Power's use terminating at the Idaho Power facilities capable of providing Idaho Power with continuous instantaneous information on the Facilities energy production. Idaho Power provided equipment will be owned and maintained by Idaho Power, with total cost of purchase, installation, operation, and maintenance, including administrative cost to be reimbursed to Idaho Power by the Seller. Payment of these costs will be in accordance with Schedule 72 and the total metering cost will be included in the calculation of the Monthly Operation and Maintenance Charges specified in Schedule 72.

B-8 NETWORK RESOURCE DESIGNATION

Idaho Power cannot accept or pay for generation from this Facility until a Network Resource Designation ("NRD") application has been accepted by Idaho Power's delivery business unit. Federal Energy Regulatory Commission ("FERC") rules require Idaho Power to prepare and submit the NRD. Because much of the information Idaho Power needs to prepare the NRD is specific to the Seller's Facility, Idaho Power's ability to file the NRD in a timely manner is contingent upon timely receipt of the required information from the Seller. Prior to Idaho Power beginning the process to enable Idaho Power to submit a request for NRD status for this Facility, the Seller shall have completed all requirements as specified in Paragraph 5.7 of this Agreement. **Seller's failure to provide complete and accurate information in a timely manner can significantly impact Idaho Power's ability and**

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cost to attain the NRD designation for the Seller's Facility and the Seller shall bear the costs of any of these delays that are a result of any action or inaction by the Seller.

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APPENDIX C

ENGINEER'S CERTIFICATION

OF

OPERATIONS & MAINTENANCE POLICY

The undersigned _____, on behalf of himself /herself and _____, hereinafter collectively referred to as "Engineer," hereby states and certifies to the Seller as follows:

1. That Engineer is a Licensed Professional Engineer in good standing in the State of Idaho.
2. That Engineer has reviewed the Energy Sales Agreement, hereinafter "Agreement," between Idaho Power as Buyer, and _____ as Seller, dated _____.
3. That the cogeneration or small power production project which is the subject of the Agreement and this Statement is identified as Idaho Power Company (IPCo) Facility No. _____ and is hereinafter referred to as the "Project."
4. That the Project, which is commonly known as the _____ Project, is located in Section _____ Township _____ Range _____, Boise Meridian, _____ County, Idaho.
5. That Engineer recognizes that the Agreement provides for the Project to furnish electrical energy to Idaho Power for a _____ year period.
6. That Engineer has substantial experience in the design, construction and operation of electric power plants of the same type as this Project.
7. That Engineer has no economic relationship to the Design Engineer of this Project.
8. That Engineer has reviewed and/or supervised the review of the Policy for Operation and Maintenance ("O&M") for this Project and it is his professional opinion that, provided said Project has been designed and

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built to appropriate standards, adherence to said O&M Policy will result in the Project's producing at or near the design electrical output, efficiency and plant factor for a _____ year period.

9. That Engineer recognizes that Idaho Power, in accordance with paragraph 5.2 of the Agreement, is relying on Engineer's representations and opinions contained in this Statement.

10. That Engineer certifies that the above statements are complete, true and accurate to the best of his/her knowledge and therefore sets his/her hand and seal below.

By _____

(P.E. Stamp)

Date _____

DRAFT

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APPENDIX C

ENGINEER'S CERTIFICATION
OF
ONGOING OPERATIONS AND MAINTENANCE

The undersigned _____, on behalf of himself/herself and _____ hereinafter collectively referred to as "Engineer," hereby states and certifies to the Seller as follows:

1. That Engineer is a Licensed Professional Engineer in good standing in the State of Idaho.
2. That Engineer has reviewed the Energy Sales Agreement, hereinafter "Agreement," between Idaho Power as Buyer, and _____ as Seller, dated _____
3. That the cogeneration or small power production project which is the subject of the Agreement and this Statement is identified as Idaho Power Company (IPCo) Facility No. _____ and hereinafter referred to as the "Project".
4. That the Project, which is commonly known as the _____ Project, is located in Section _____ Township _____ Range _____, Boise Meridian, _____ County, Idaho.
5. That Engineer recognizes that the Agreement provides for the Project to furnish electrical energy to Idaho Power for a _____ year period.
6. That Engineer has substantial experience in the design, construction and operation of electric power plants of the same type as this Project.
7. That Engineer has no economic relationship to the Design Engineer of this Project.

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8. That Engineer has made a physical inspection of said Project, its operations and maintenance records since the last previous certified inspection. It is Engineer's professional opinion, based on the Project's appearance, that its ongoing O&M has been substantially in accordance with said O&M Policy; that it is in reasonably good operating condition; and that if adherence to said O&M Policy continues, the Project will continue producing at or near its design electrical output, efficiency and plant factor for the remaining _____ years of the Agreement.

9. That Engineer recognizes that Idaho Power, in accordance with paragraph 5.2 of the Agreement, is relying on Engineer's representations and opinions contained in this Statement.

10. That Engineer certifies that the above statements are complete, true and accurate to the best of his/her knowledge and therefore sets his/her hand and seal below.

By _____

(P.E. Stamp)

Date _____

Draft for Discussion Purposes Only

APPENDIX C

ENGINEER'S CERTIFICATION

OF

DESIGN & CONSTRUCTION ADEQUACY

The undersigned _____, on behalf of himself/herself and _____ hereinafter collectively referred to as "Engineer", hereby states and certifies to Idaho Power as follows:

1. That Engineer is a Licensed Professional Engineer in good standing in the State of Idaho.
2. That Engineer has reviewed the Firm Energy Sales Agreement, hereinafter "Agreement", between Idaho Power as Buyer, and _____ as Seller, dated _____.
3. That the cogeneration or small power production project, which is the subject of the Agreement and this Statement, is identified as Idaho Power Company (IPCo) Facility No _____ and is hereinafter referred to as the "Project".
4. That the Project, which is commonly known as the _____ Project, is located in Section _____ Township _____ Range _____, Boise Meridian, _____ County, Idaho.
5. That Engineer recognizes that the Agreement provides for the Project to furnish electrical energy to Idaho Power for a _____ year period.
6. That Engineer has substantial experience in the design, construction and operation of electric power plants of the same type as this Project.
7. That Engineer has no economic relationship to the Design Engineer of this Project and has made the analysis of the plans and specifications independently.

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8. That Engineer has reviewed the engineering design and construction of the Project, including the civil work, electrical work, generating equipment, prime mover conveyance system, Seller furnished Interconnection Facilities and other Project facilities and equipment.
9. That the Project has been constructed in accordance with said plans and specifications, all applicable codes and consistent with Prudent Electrical Practices as that term is described in the Agreement.
10. That the design and construction of the Project is such that with reasonable and prudent operation and maintenance practices by Seller, the Project is capable of performing in accordance with the terms of the Agreement and with Prudent Electrical Practices for a _____ year period.
11. That Engineer recognizes that Idaho Power, in accordance with paragraph 5.2 of the Agreement, in interconnecting the Project with its system, is relying on Engineer's representations and opinions contained in this Statement.
12. That Engineer certifies that the above statements are complete, true and accurate to the best of his/her knowledge and therefore sets his/her hand and seal below.

By _____
(P.E. Stamp)

Date _____

APPENDIX D

FORMS OF LIQUID SECURITY

The Seller shall provide Idaho Power with commercially reasonable security instruments such as Cash Escrow Security, Guarantee or Letter of Credit as those terms are defined below or other forms of liquid financial security that would provide readily available cash to Idaho Power to satisfy the Delay Security requirement and any other security requirement within this Agreement.

For the purpose of this Appendix D, the term "Credit Requirements" shall mean acceptable financial creditworthiness of the entity providing the security instrument in relation to the term of the obligation in the reasonable judgment of Idaho Power, provided that any guarantee and/or letter of credit issued by any other entity with a short-term or long-term investment grade credit rating by Standard & Poor's Corporation or Moody's Investor Services, Inc. shall be deemed to have acceptable financial creditworthiness.

1. **Cash Escrow Security** – Seller shall deposit funds in an escrow account established by the Seller in a banking institution acceptable to both Parties equal to the Delay Security or any other required security amount(s). The Seller shall be responsible for all costs, and receive any interest earned associated with establishing and maintaining the escrow account(s).
2. **Guarantee or Letter of Credit Security** – Seller shall post and maintain in an amount equal to the Delay Security or any other required security amounts: a) a guaranty from a party that satisfies the Credit Requirements, in a form acceptable to Idaho Power at its discretion, or b) an irrevocable Letter of Credit in a form acceptable to Idaho Power, in favor of Idaho Power. The Letter of Credit

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will be issued by a financial institution acceptable to both parties. The Seller shall be responsible for all costs associated with establishing and maintaining the Guarantee(s) or Letter(s) of Credit.

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RECEIVED

2009 DEC 30 PM 4:48

IDAHO PUBLIC UTILITIES COMMISSION

LISA D. NORDSTROM
Senior Counsel
lnordstrom@idahopower.com

December 30, 2009

VIA HAND DELIVERY

Jean D. Jewell, Secretary
Idaho Public Utilities Commission
472 West Washington Street
P.O. Box 83720
Boise, Idaho 83720-0074

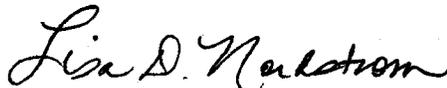
Re: Case No. IPC-E-08-24 – REC Management Plan

Dear Ms. Jewell:

In Order No. 30818, the Commission directed Idaho Power Company ("Idaho Power" or "the Company") to formulate a business plan that describes how it will manage Green Tags generated in 2009 and later. Enclosed with this letter is Idaho Power's Renewable Energy Credit ("REC") Management Plan describing the scenarios under which Idaho Power will likely acquire RECs and how it intends to manage them going forward.

If you have any questions or concerns, please do not hesitate to contact me at 388-5825.

Very truly yours,


Lisa D. Nordstrom

LDN:csb
Enclosures

P.O. Box 70 (83707)
1221 W. Idaho St.
Boise, ID 83702

IDAHO POWER REC MANAGEMENT PLAN

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IDAHO PUBLIC
UTILITIES COMMISSION

Renewable Energy Credits

To promote the construction of renewable resources, a system was created that separates renewable generation into two parts: (1) the electrical energy produced by a renewable resource and (2) the renewable attributes of that generation. These renewable attributes are referred to as renewable energy credits ("RECs") or green tags. The entity that holds a REC has the right to make claims about the environmental benefits associated with the renewable energy from the project. One REC is issued for each megawatt-hour ("MWh") of electricity generated by a qualified resource. Electricity that is split from the REC is no longer considered renewable and cannot be marketed as renewable by the entity that purchases the electricity.

A REC must be retired once it has been used for regulatory compliance and once a REC is retired, it cannot be sold or transferred to another party. The same REC may not be claimed by more than one entity, including any environmental claims made pursuant to electricity coming from renewable energy resources, environmental labeling, or disclosure requirements. State renewable portfolio standard ("RPS") requirements also typically specify a "shelf life" for RECs so they cannot be banked indefinitely.

Idaho Power's RECs

Idaho Power Company ("Idaho Power") is currently receiving all of the RECs from the 101 megawatt ("MW") Elkhorn Valley Wind Project in northeast Oregon. The Elkhorn Valley Wind Project is expected to provide approximately 300,000 RECs to Idaho Power annually throughout the term of the power purchase agreement ("PPA") that expires in 2027.

Idaho Power is also receiving RECs from the 13 MW Raft River Geothermal Project. For the first 10 years (2008-2017) of the agreement, Idaho Power is entitled to 75 percent of the RECs from the project for generation that exceeds a monthly average of 10 MW. For the second 10 years of the agreement (2018-2027), Idaho Power is entitled to 51 percent of the RECs generated by the Raft River Geothermal Project.

Regulatory Treatment of Idaho Power's RECs

In late 2008, Idaho Power filed an Application with the Idaho Public Utilities Commission in Case No. IPC-E-08-24 asking to retire RECs received as part of the long-term power purchase agreements for generation from the Elkhorn Valley Wind Project and the Raft River Geothermal Project. Because the state of Idaho does not have a RPS, these RECs could be either voluntarily retired or sold. Idaho Power's Application indicated that these RECs needed to be retired in order for Idaho Power to represent to its customers they were receiving renewable energy from these projects.

In May 2009, the Commission issued Order No. 30818 directing Idaho Power to sell eligible 2007 and 2008 RECs from these projects and include the proceeds in the Company's 2010 Power Cost Adjustment ("PCA") calculation. The Order also instructed Idaho Power to file a business plan addressing the disposition of future RECs by the end of 2009.

Idaho Power's REC Management Strategy

Idaho Power believes there is a reasonable likelihood that a federal renewable energy standard ("RES") will be passed by Congress that will require the Company to obtain and retire RECs for compliance. Idaho Power also believes it is prudent to continue acquiring ownership of RECs associated with renewable resources to minimize the impact when a federal RES is implemented. However, because of current economic conditions and recent increases in costs and customer rates, the basic philosophy of Idaho Power's REC Management Plan is to sell its RECs in the near-term and return the customers' share of the proceeds through the PCA mechanism while continuing to acquire and hold long-term contractual rights to own RECs for use in meeting a future federal RES.

Proposed federal RES legislation includes a shelf life for RECs, thereby allowing the holder to "bank" RECs for a period of time. The ability to bank RECs is important to Idaho Power because the number of RECs required to comply with a federal RES is expected to fluctuate depending on hydrologic conditions. The proposed federal RES legislation would allow Idaho Power to deduct generation from its hydroelectric resources from the sales base used to calculate the number of RECs required annually.

In above average water years, Idaho Power's REC requirement will be lower because of increased production from hydroelectric resources. In low water years, Idaho Power's hydroelectric resources will produce less electricity and the number of RECs required will increase. With the ability to bank RECs, Idaho Power would be able to save additional RECs from good water years and rely on banked RECs to meet requirements in low water years.

Therefore, Idaho Power's REC Management Plan is as follows:

1. **Existing Long-Term PPAs.** For existing projects, such as Elkhorn Valley Wind Project and the Raft River Geothermal Project, in which Idaho Power receives RECs as part of a long-term power purchase agreement, Idaho Power plans to sell the near-term RECs and return the customers' share of the proceeds through the PCA while continuing to acquire and hold long-term contractual rights to own RECs for use in meeting a future federal RES.

2. **Existing PURPA and REC Generating Contracts.** For existing PURPA and other REC generating projects that provide output to Idaho Power under mid- to long-term contracts (such as Fossil Gulch Wind Project or the Arrowrock Hydroelectric Project/Clatskanie Exchange), if a mutually agreeable price can be reached with the project owner, Idaho Power may enter into contracts to purchase the project's RECs on a mid- to long-term basis with the expectation that the REC acquisition costs will be treated as a PCA expense. In this situation, Idaho Power's intent is the same – to sell the near-term RECs and return the customers' share of proceeds through the PCA while continuing to acquire and hold long-term contractual rights to own RECs for use in meeting a future federal RES.

3. **New Long-Term PPAs.** For new long-term power purchase agreements, like the recently filed Neal Hot Springs Geothermal contract (Case No. IPC-E-09-34), Idaho Power intends to continue to acquire long-term rights to the RECs under these agreements. As noted above, Idaho Power intends to sell the near-term RECs and return the customers' share of the proceeds through the PCA while continuing to acquire and hold long-term contractual rights to RECs for use in meeting a future federal RES.

4. **Qualified Renewable Projects.** To the extent Idaho Power's small hydroelectric projects can be certified as renewable under other states' renewable portfolio standards, Idaho Power will consider selling the near-term RECs as opportunities become available and return the customers' share of the proceeds through the PCA.

Peter J. Richardson (ISB # 3195)
Gregory M. Adams (ISB # 7454)
Richardson & O'Leary, PLLC
515 N. 27th Street
P.O. Box 7218
Boise, Idaho 83702
Telephone: (208) 938-7901
Fax: (208) 938-7904
peter@richardsonandoleary.com
greg@richardsonandoleary.com

Attorneys for Complainant

**BEFORE THE
IDAHO PUBLIC UTILITIES COMMISSION**

GRAND VIEW PV SOLAR II, LLC, Complainant,	)	Case No. IPC-E-11-15
vs.	)	AFFIDAVIT OF ROBERT A. PAUL
IDAHO POWER COMPANY, Defendant.)	

**EXHIBIT 3
IDAHO POWER'S APPLICATION REQUESTING
APPROVAL OF SALE OF RENEWABLE ENERGY CREDITS
OREGON PUC DOCKET NO. UP 269
OCTOBER 22, 2010**

McDowell Rackner & Gibson PC



ADAM LOWNEY
Direct (503) 595-3926
adam@mcd-law.com

October 22, 2010

VIA ELECTRONIC AND U.S. MAIL

PUC Filing Center
Public Utility Commission of Oregon
PO Box 2148
Salem, OR 97308-2148

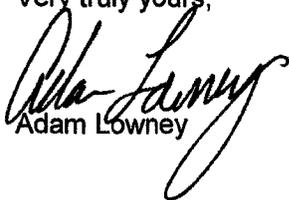
**Re: UP _____ - In The Matter of IDAHO POWER COMPANY Application Requesting
Approval of the Sale of Renewable Energy Credits**

Attention Filing Center:

Enclosed for filing in the above-referenced docket are an original and one copy of Idaho Power's Application Requesting Approval of the Sale of Renewable Energy Credits.

Please contact me with any questions.

Very truly yours,



Adam Lowney

BEFORE THE PUBLIC UTILITY COMMISSION
OF OREGON

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UP ____

In the Matter of

IDAHO POWER COMPANY

Application Requesting Approval of the
Sale of Renewable Energy Credits

APPLICATION OF IDAHO POWER AND
WAIVER OF PAPER SERVICE

Idaho Power Company ("Idaho Power" or "Company") requests an order from the Public Utility Commission of Oregon ("Commission") determining that ORS 757.480 does not apply to the sale of Renewable Energy Credits ("RECs") because they are not utility property necessary or useful to the performance of Idaho Power's duties to the public. In the alternative, pursuant to ORS 757.480(1)(a) and OAR 860-027-0025 the Company seeks approval from the Commission for the sale of RECs and requests that the Commission issue an accounting order authorizing Idaho Power to enter into contracts and record the net proceeds from the sale of RECs as a regulatory liability for the benefit of its Oregon customers. Pursuant to OAR 860-013-0070(4), the Company respectfully waives paper service in this docket.

I. Introduction

This Application addresses the sale of RECs obtained by Idaho Power that will not be used to comply with Oregon's Renewable Portfolio Standard ("RPS"), which applies to Idaho Power beginning in 2025.¹ Because the Company does not anticipate that RECs obtained now will be necessary to comply with the RPS in 2025, the Company has begun selling RECs and anticipates that it will continue to do so for the foreseeable future.

¹ See ORS 469A.055.

1 Here, Idaho Power seeks a finding by the Commission that Oregon's utility property
2 transaction statute, ORS 757.480, does not apply to the sale of RECs because RECs are
3 not utility property. The Company believes that because RECs are commodities they should
4 be treated in a manner comparable to the Company's sale of sulfur dioxide emission
5 allowances ("SO2"), which are *not* governed by ORS 757.480.

6 While the Company maintains that ORS 757.480 should not govern REC sales, it
7 recognizes that this position is a departure from current Commission practice. The
8 Company also acknowledges that it believes it can work within the Commission's ORS
9 757.480 framework for REC sales. Therefore, if the Commission applies ORS 757.480,
10 Idaho Power seeks approval to sell both Oregon-eligible and non-eligible RECs in 2010 and
11 going forward. Because these sales are considered to be in the public interest the proceeds
12 will be recorded as a regulatory liability for the benefit of the customer and included as an
13 offset to the Oregon Allocated Power Cost Deviation calculated as part of the annual Power
14 Cost Adjustment Mechanism ("PCAM"), similar to the Company's treatment of its SO2
15 allowance sales in previous years. Authorizing these sales is also consistent the
16 Company's REC management strategy, which the Commission concluded is reasonable
17 and in the best interest of customers.

18 Idaho Power acknowledges that if ORS 757.480 applies, this application is not timely
19 filed because it has already sold RECs in 2010. Thus, the Company seeks approval for the
20 sales that have already occurred. Because the Commission has never ruled in an Idaho
21 Power docket that ORS 757.480 governs REC sales, the Company did not understand that
22 it required pre-authorization before selling RECs. Although these sales occurred without
23 Commission authorization they were beneficial to Idaho Power's customers and can be
24 given the same accounting treatment as sales occurring after Commission authorization.

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II. Background

A. Commission Treatment of REC Sales.

In 2007 the Oregon legislature passed Senate Bill 838 ("SB 838"), codified as ORS Chapter 469A. SB 838 established Oregon's RPS, which requires a certain percentage of the electricity utilities provide to their Oregon retail consumers be produced by eligible renewable resources.² Utilities demonstrate compliance with the RPS using RECs, which can be obtained from either utility-owned resources or by purchasing qualifying RECs.

Because utilities may buy and sell RECs, a market has developed and Oregon utilities have begun selling RECs on that market. In Order No. 07-083 the Commission approved Portland General Electric's ("PGE") application to sell "Tradable Renewable Energy Credits" and record the proceeds from those sales in a property sale balancing account.³ PGE's application sought authorization to sell RECs under ORS 757.480, which requires a utility to seek Commission approval prior to selling "property of such public utility necessary or useful in the performance of its duties to the public...of a value in excess of \$100,000."⁴

Thereafter, in Order No. 10-022—the final order approving a stipulation in PacifiCorp's Docket UE 210 general rate case—the Commission noted:

The Commission's rules governing treatment of REC sales include reporting requirements, but they do not explicitly require a utility to seek preapproval of REC sales. Commission Order No. 07-083 makes clear, however, that the sale of RECs will be treated as a property sale with gains on sale being placed in a property sales balancing account for return to customers.⁵

² ORS 469A.052-055.
³ *Re Portland General Electric Application for Approval to Sell Tradable Renewable Energy Credits*, Docket UP 236, Order No. 07-083 at 1 (Mar. 5, 2007).
⁴ ORS 757.480(1)(a).
⁵ *Re PacifiCorp Request for General Rate Revision*, Docket UE 210, Order No. 10-022 at 15 (Jan. 26, 2010).

1 In response to Order No. 10-022 PacifiCorp filed an application pursuant to ORS
2 757.480 requesting approval to sell RECs that were not eligible to meet Oregon's RPS.⁶
3 The Commission approved this application in Order No. 10-210. That order also required
4 PacifiCorp to seek separate approval if it intended to sell Oregon-eligible RECs.⁷ Thus,
5 PacifiCorp filed an Application to do so on August 26, 2010, which opened Docket UP 266.

6 The Commission has never ruled in an Idaho Power docket that ORS 757.480
7 governs the sale of RECs nor has the Commission issued an order addressing Idaho
8 Power's RECs. However, in the Company's 2009 Integrated Resource Plan docket, LC 50,
9 Staff analyzed the Company's REC management strategy, which indicated that the
10 Company intends to sell all RECs, and concluded that it is reasonable.⁸ The Commission
11 agreed noting that the Company's "REC management strategy is in the best interest of
12 customers, will reduce rates, and will provide the ability to meet future [renewable energy]
13 standards."⁹

14 **B. Idaho Public Utilities Commission Treatment of REC Sales**

15 Although the state of Idaho does not have a RPS, the Idaho Public Utilities
16 Commission ("IPUC") has addressed the question of RECs in several orders relating to
17 Idaho Power. In Order No. 30818 the IPUC ordered Idaho Power to sell its RECs generated
18 in 2007 and 2008 by two qualifying renewable energy facilities and account for the proceeds
19 from the sale of the RECs in the Company's annual power cost adjustment.¹⁰ These are the

20 _____
21 ⁶ *Re PacifiCorp Application Requesting Approval of Sale of Renewable Energy Credits*, Docket UP
260, Order No. 10-210 at 1 (June 9, 2010).

22 ⁷ *Id.* at 2.

23 ⁸ *Re Idaho Power Company's 2009 Integrated Resource Plan*, Docket LC 50, Staff's Final
Comments and Recommendations at 11 (July 9, 2010) ("Staff believes that the Company's REC
management strategy, as approved by the IPUC, is reasonable.").

24 ⁹ *Re Idaho Power Company's 2009 Integrated Resource Plan*, Order No. 10-392 at 13 (Oct. 11,
25 2010).

26 ¹⁰ *Re Application of Idaho Power Company for Authority to Retire its Green Tags*, Case No. IPC-E-
08-24, Order No. 30818 at 4-5 (May 20, 2009).

1 sales that occurred in 2010. In that same order the IPUC ordered the Company to formulate
2 a business plan describing how the Company intends to manage RECs generated in 2009
3 and beyond.¹¹

4 On December 30, 2009, Idaho Power filed its REC Management Plan with the IPUC.
5 This plan consists of four elements:

- 6 1. For existing, long-term power purchase agreements in which Idaho Power
7 receives RECs, the Company plans on selling the near-term RECs.
- 8 2. For existing PURPA and other REC generating projects that provide power to
9 Idaho Power under mid- to long-term contracts, the Company may enter into
10 contracts to purchase the RECs. If the Company does obtain RECs under
11 these contracts they will also sell the near-term RECs.
- 12 3. For new long-term power purchase agreements, the Company likewise
13 intends to sell near-term RECs.
- 14 4. For Idaho Power's small hydroelectric projects that can be certified as
15 qualified renewable projects, the Company intends to sell near-term RECs.

16 This plan provides benefits to the Company's customers because it allows the
17 proceeds from the REC sales to be refunded to customers through the Company's power
18 cost adjustment, while ensuring that the Company acquires and holds long-term contractual
19 rights to RECs for use in meeting future RPS. The IPUC accepted the REC Management
20 Plan as filed by the Company.¹² This is the same REC Management Plan that the
21 Commission found reasonable in Order No. 10-392.

22

23

24 ¹¹ In Oregon, OAR 860-083-0400 requires all electric company's subject to ORS 469A.052 to file
25 implementation plans with the Commission. Because Idaho Power is governed by ORS 469A.055
and not 469A.052, it is not required to comply with this rule.

26 ¹² *Re Application of Idaho Power Company for Authority to Retire its Green Tags*, Case No. IPC-E-
08-24, Order No. 32002 (June 11, 2010).

1 First, RECs are commodities and not property and therefore are not subject to ORS
2 757.480(1)(a). In Order No. 05-1229, which adopted rules related to the ownership of
3 RECs, the Commission recognized that RECs are commodities independent of the
4 electricity they are associated with.¹⁴ The Commission noted that RECs are a “discrete
5 commodity to be owned and managed by the owner of the generating renewable energy
6 facility,”¹⁵ and the rules adopted by the Commission specifically “identify[] [RECs] as a
7 commodity.”¹⁶

8 Moreover, the Commission has recognized that ORS 757.480 does not apply to
9 commodities, such as sulfur dioxide emission allowances.¹⁷ In Order No. 05-983, the
10 Commission adopted Staff’s report finding that the federal Clean Air Act (“CAA”) specifically
11 defined sulfur dioxide emission allowances as commodities and not property.¹⁸ Based on
12 that definition, Staff’s report stated:

13 ORS 757.480 grants the Commission authority to approve
14 utility transactions to sell, lease, assign or otherwise dispose of
15 property necessary or useful in the performance of its duties to
16 the public. Staff’s counsel advises that since the CAA
17 amendments of 1990 declare sulfur dioxide emissions to be
18 commodities rather than property, no waiver of ORS
19 757.480...is needed by Idaho Power to sell sulfur dioxide
20 emission allowances.¹⁹

19

20 ¹⁴ *Re Public Utility Commission Rulemaking to Adopt and Amend Rules Related to Ownership of the*
21 *Non-Energy Attributes of Renewable Energy*, Docket AR 495, Order No. 05-1229 at 7 (Nov. 28, 2005)
22 (“The recent development of ‘green tags’ as a commodity in energy markets has arguably unbundled
23 renewable energy into two products: megawatts of electricity and the non-energy attributes
24 associated with each megawatt.”).

22 ¹⁵ Order No. 05-1229 at 7.

23 ¹⁶ Order No. 05-1229 at 8; *see e.g.*, OAR 860-022-0001(4) (RECs are “non-energy attributes” of
24 generation from renewable resources).

24 ¹⁷ *Re Idaho Power Company Requests Blanket Authority to Sell Surplus Sulfur Dioxide Emission*
25 *Allowances*, Docket UM 1205, Order No. 05-983 (Sept. 13, 2005).

25 ¹⁸ *See* 42 USC § 7651b(f) (“Such allowance does not constitute a property right”).

26 ¹⁹ Order No. 05-983 at App. A at 2.

1 Like sulfur dioxide emission allowances, RECs are also commodities and therefore the
2 Commission should conclude that ORS 757.480 does not apply when RECs are sold.

3 *Second*, even if RECs are property, they are not necessary or useful to Idaho
4 Power's provision of utility services to the public. Idaho Power's ownership, or lack thereof,
5 of RECs has no bearing on its ability to provide safe, reliable, and efficient power to
6 customers at just and reasonable rates. Arguably, RECs impact only the Company's ability
7 to provide service to the extent they are required to satisfy Oregon's RPS. The RPS does
8 not apply to Idaho Power, however, until 2025. Even if RECs are "property" under ORS
9 757.480, because they are not necessary or useful today, the Company does not need
10 Commission authorization for their sale.

11 Because RECs are not property useful and necessary to the provision of utility
12 services ORS 757.480(1)(a) does not apply when RECs are sold. Thus, the Commission
13 should rule that ORS 757.480(1)(a) does not apply to REC sales, as the Commission
14 concluded with respect to sulfur dioxide emission allowances.

15 **B. In the Alternative, the Commission Should Approve the Sale of RECs.**

16 If the Commission concludes that ORS 757.480 does apply to REC sales, then
17 consistent with Orders Nos. 07-083 and 10-210, the Commission should grant Idaho
18 Power's request for authorization to sell RECs. These transactions will prove beneficial to
19 Idaho Power's customers because the net proceeds from the sales will be recorded as a
20 regulatory liability for the benefit of the customer and included as an offset to the Oregon
21 Allocated Power Cost Deviation calculated as part of the annual Power Cost Adjustment
22 Mechanism ("PCAM"), similar to the Company's treatment of its SO2 allowance sales in
23 previous years. Moreover, the first year Idaho Power must comply with Oregon's RPS is
24 2025; therefore, banking RECs currently owned by the Company is not necessary for RPS
25 compliance. The Commission previously examined the Company's REC management
26 strategy, which calls for the sale of all RECs, and concluded that it was in the best interests

1 of customers.²⁰ These sales are consistent with the public interest because not only will
2 they not harm Idaho Power's customers, they will provide a clear and significant benefit.²¹

3 Because the market for REC sales is fluid and constantly changing, the Commission
4 should authorize Idaho Power to sell RECs in 2010 and beyond. This blanket authorization
5 will ensure that the Company is not hindered in its ability to respond to changing market
6 conditions because it must seek pre-approval for each REC transaction. Thus, Idaho Power
7 can pursue more favorable transactions without delays caused by seeking preapproval.

8 In addition to providing prospective authorization to sell RECs, the Commission
9 should also approve the REC sales that have already occurred this year. Thus far, Idaho
10 Power has received approximately \$3.1 million through September 30, 2010, on a system-
11 wide basis for the sale of RECs. Notably, the Commission's RPS rules specifically did not
12 include a pre-sale approval requirement²² and the Commission had never ruled in an Idaho
13 Power docket that ORS 757.480 applied to the sale of RECs. Thus, the Company intended
14 to treat the sale of RECs in the same way it treats the sale of SO2 allowances, the net
15 proceeds of which are accounted for in the Company's annual Power Cost Adjustment

16

17

²⁰ Order No. 10-392 at 13.

18

²¹ See, e.g., *In the Matter of a Legal Standard for Approval of Mergers*, Docket UM 1011, Order No. 01-778 (Sept. 4, 2001) ("The remainder of the statutory scheme, those statutes governing transfer, sale, affiliated interest transactions, and contracts, either expresses no standard (for instance, ORS 757.480, .485) and has been read to require a no harm standard, or contains a 'not contrary to the public interest' standard (ORS 757.490, .495.)") (emphasis added); *In the Matter of the Application of PacifiCorp*, Docket UP 168, Order No. 00-112, at 6 (Feb. 29, 2000) (regarding the sale of the Centralia generating plant); *In the Matter of Portland General Electric*, Docket UP 158, Order No. 00-111, at 2 (Feb. 29, 2000) (regarding the sale of the Colstrip generating units); *In the Matter of the Application of Portland General Electric*, Docket UP 165/UP 170, Order No. 99-730, at 7 (Nov. 29, 1999) (regarding the sale of the Centralia generating plant).

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²² See OAR 860-083-0005 to -0500. The initial rules proposed by Staff required utilities to seek Commission approval prior to the sale of bundled RECs. See *Re Rulemaking to Implement SB 838 Relating to Renewable Portfolio Standard*, Docket AR518—Phase III, Order No. 09-299 at 12 (Aug. 3, 2009). However, prior to hearing, Staff removed the requirement and proposed instead a disclosure requirement. See OAR 860-083-0400(5)(c). The Commission approved Staff's revision noting that "[a]n after-the-fact reasonableness rule for such transactions is sufficient." Order No. 09-299 at 12.

1 Mechanism filing.²³ Because REC sales are in many ways analogous to SO2 allowance
2 sales, the Company believed it was reasonable to treat them in a comparable manner.
3 However, with the filing of PacifiCorp's Application in Docket UP 266, the Company has
4 become aware that the Commission treats the sale of RECs as a property sale under ORS
5 757.480.

6 Idaho Power's customers are not prejudiced by these previous sales, even though
7 they occurred without Commission authorization. As noted above, the Company has
8 received approximately \$3.1 million in net proceeds through September 30, 2010, which will
9 be refunded to customers system wide. The Company's current accounting treatment
10 allows the Company to easily account for any net proceeds allocated to Oregon in a
11 regulatory liability account for the benefit of the customer and subsequently included as an
12 adjustment in its annual PCAM filing. The inclusion in the PCAM filing is consistent with that
13 required by the IPUC. Therefore, the Commission should grant authorization for the RECs
14 sales that occurred prior to this application.

15 Recognizing that the Commission's past orders authorizing PGE and PacifiCorp to
16 sell RECs included reporting requirements, the Company proposes that the Commission
17 adopt the following requirements. These proposed conditions will ensure that the
18 Commission is able to regularly monitor Idaho Power's transactions, while the Company will
19 be able to pursue transactions on the most favorable available terms.

- 20 1. Idaho Power will provide the Commission access to all books of account, as
21 well as documents, data, and records that pertain to the sale of RECs.
- 22 2. Idaho Power will record all net proceeds from the sale of RECs in a
23 regulatory liability account and will report the net proceeds for all transactions

24
25
26 ²³ See Order No. 05-983.

1 with supporting documentation in its annual PCAM filing for Commission
2 review.

3 3. The Commission reserves the right to review all financial aspects of these
4 transactions in any rate proceeding or alternative form of regulation.

5 4. Idaho Power will provide the Commission notice of any material changes to
6 its REC Management Plan.

7 **IV. Compliance with OAR 860-027-0025(1) Filing Requirements**

8 **A. Address**

9 The Company's exact name and address of its principal business office are:

10 Idaho Power Company
11 PO Box 70
12 1221 West Idaho Street
13 Boise, ID 83702

14 **B. State in which incorporated; date of incorporation; other states in which
15 authorized to transact utility business**

16 Idaho Power is a corporation organized on May 6, 1915, under the laws of the State
17 of Maine. Idaho Power migrated its state of incorporation from the State of Maine to the
18 State of Idaho effective June 30, 1989. It is qualified as a foreign corporation to do business
19 in the states of Oregon, Nevada, Montana, and Wyoming in connection with its utility
20 business. Idaho Power is authorized to provide retail electric service in Idaho and Oregon.

21 **C. Communications and notices**

22 All notices and communications with respect to this Application should be addressed
23 to:

24 Lisa Nordstrom
25 Idaho Power Company
26 PO Box 70
Boise, ID 83707-0070
Telephone: 208-388-5317
Facsimile: 208-388-6936
Email: lnorstrom@idahopower.com

Christa Beary
Idaho Power Company
PO Box 70
Boise, ID 83707-0070
Telephone: 208-388-5996
Facsimile: 208-388-6936
Email: cbeary@idahopower.com

1 Lisa Rackner
2 McDowell Rackner & Gibson PC
3 419 SW 11th Ave., Suite 400
4 Portland, OR 97205
5 Telephone: 503-595-3925
6 Facsimile: 503-595-3928
7 Email: lisa@mcd-law.com

Adam Lowney
McDowell Rackner & Gibson PC
419 SW 11th Ave., Suite 400
Portland, OR 97205
Telephone: 503-595-3925
Facsimile: 503-595-3926
Email: adam@mcd-law.com

8 Wendy McIndoo
9 McDowell Rackner & Gibson PC
10 419 SW 11th Ave., Suite 400
11 Portland, OR 97205
12 Telephone: 503-595-3922
13 Facsimile: 503-595-3928
14 Email: wendy@mcd-law.com

15 **D. Principal officers**

<u>Name</u>	<u>Title</u>
J. LaMont Keen	President & Chief Executive Officer
Darrel T. Anderson	Executive Vice President of Administrative Services and Chief Financial Officer
Daniel B. Minor	Executive Vice President of Operations
Lisa A. Grow	Senior Vice President of Power Supply
Rex Blackburn	Senior Vice President and General Counsel
Patrick A. Harrington	Corporate Secretary
N. Vern Porter	Vice President of Delivery Engineering and Operations
Warren Kline	Vice President of Customer Operations
John R. Gale	Senior Vice President of Corporate Responsibility
Steve R. Keen	Vice President of Finance and Treasurer
Dennis C. Gribble	Vice President and Chief Information Officer
Luci K. McDonald	Vice President of Human Resources
Jeffrey L. Malmen	Vice President of Public Affairs
Lori D. Smith	Vice President and Chief Risk Officer
Ken Petersen	Corporate Controller and Chief Accounting Officer
Naomi C. Shankel	Vice President of Supply Chain

16 The address of all of the above officers is:

17 1221 W. Idaho Street
18 PO Box 70
19 Boise, ID 83702

1 **E. Description of business; designation of territories served**

2 The Company is an electric public utility engaged principally in the generation,
3 purchase, transmission, distribution, and sale of electric energy in an approximately 24,000
4 square mile area in southern Idaho and in the counties of Baker, Harney, and Malheur in
5 eastern Oregon. A map showing Applicant's service territory is on file with the Commission
6 as Exhibit H to Applicant's application in Docket UF 4063.

7 **F. Statement showing for each class and series of capital stock: brief**
8 **description; amount authorized; amount outstanding; amount held as**
9 **required securities; amount pledged; amount owned by affiliated**
 interests; amount held in any fund

10 Idaho Power requests the Commission waive the requirements of OAR 860-027-
11 0025(1)(f) because this transaction does not involve the acquisition or sale of financial
12 instruments. A grant of this waiver will not impede the Commission's analysis of this
13 Application.

14 **G. Statement showing for each class and series of long-term debt and**
15 **notes: brief description of amount authorized; amount outstanding;**
16 **amount held as required securities; amount pledged; amount held by**
 affiliated interests; amount in sinking and other funds

17 Idaho Power requests the Commission waive the requirements of OAR 860-027-
18 0025(1)(g) because this transaction does not involve the acquisition or sale of financial
19 instruments. A grant of this waiver will not impede the Commission's analysis of this
20 Application.

21 **H. Purpose of application; description of consideration and method of**
22 **arriving at amount thereof**

23 The Company seeks approval of the sale of both Oregon eligible and non-eligible
24 RECs sold in 2010 and beyond. The Company seeks authorization to record the net
25 proceeds from the sale in a property transaction balancing account for subsequent refund to
26 customers. The value of each sale will be determined by good faith negotiations.

1 In addition, the Company seeks approval for past REC sales occurring in 2010,
2 which total approximately \$3.1 million in net proceeds. The sales price for each REC
3 already sold was determined through an arms length transaction between Idaho Power and
4 the counterparty.

5 **I. Statement of facilities to be disposed of; description of present use and**
6 **proposed use; inclusion of all operating facilities of parties to the**
7 **transaction**

8 The Company intends to dispose of both Oregon eligible and non-eligible RECs sold
9 in 2010 and beyond. These RECs were generated in 2007 and beyond and are not
10 currently used to satisfy Oregon's RPS.

11 **J. Statement by primary account of cost of the facilities and applicable**
12 **depreciation reserve**

13 No cost of facilities or depreciation reserves are implicated in these sales.

14 **K. Required filings with other state or federal regulatory bodies**

15 No other state or federal filings are required to authorize the sale of RECs.

16 **L. Facts relied upon by applicant to show transaction is within the public**
17 **interest**

18 A proposed transaction must be consistent with the public interest for Commission
19 approval.²⁴ A transaction is consistent with the public interest when it will not harm the
20 Company's customers.²⁵ As described in Section III.B. above, the proposed transactions
21 satisfy this standard because the Company will be able to sell RECs that are not needed for
22 compliance with Oregon's RPS. The proceeds of these sales will be returned to customers.

23 **M. Reasons relied upon for entering into the proposed transaction;**
24 **benefits to customers**

25 Please refer to subsection L above.

26 ²⁴ See OAR 860-027-0025(1)(I).

²⁵ See, *supra* n. 21.

1 **N. Amount of stock, bonds, or other securities, now owned, held or**
2 **controlled by applicant, of the utility from which stock or bonds are**
3 **proposed to be acquired**

4 This requirement is not applicable to this transaction and therefore Idaho Power
5 requests the Commission waive the requirements of OAR 860-027-0025(n). This
6 transaction does not involve the acquisition or sale of financial instruments. A grant of this
7 waiver will not impede the Commission's analysis of this Application.

8 **O. Statement of franchises held; date of expiration; facilities of transferees**

9 This requirement is not applicable. Idaho Power requests the Commission waive the
10 requirements of OAR 860-027-0025(o) because this transaction does not involve the
11 acquisition or sale of financial instruments. A grant of this waiver will not impede the
12 Commission's analysis of this Application.

13 **V. Compliance with OAR 860-027-0025(2) Filing Requirements**

14 **A. Exhibit A. Articles of Incorporation**

15 Due to the burdensome nature of this requirement, Idaho Power respectfully
16 requests a waiver. The production of the Articles of Incorporation also would not advance
17 the Commission's analysis of this application. The transaction at issue here does not affect
18 the Company's corporate structure or governance.

19 **B. Exhibit B. Bylaws**

20 Due to the burdensome nature of this requirement, Idaho Power respectfully
21 requests a waiver. The production of the Bylaws also would not advance the Commission's
22 analysis of this application. The transaction at issue here does not affect the Company's
23 corporate structure or governance.

24 **C. Exhibit C. Resolution of directors authorizing transaction**

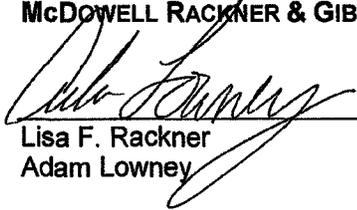
25 This transaction does not require a resolution of the directors for authorization.
26

1 record the net proceeds from the sale of RECs as a regulatory liability for the benefit of its
2 Oregon customers.

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DATED: October 22, 2010.

McDOWELL RACKNER & GIBSON PC



Lisa F. Rackner
Adam Lowney

IDAHO POWER COMPANY

Lisa Nordstrom
Lead Counsel
PO Box 70
Boise, ID 83707

Attorneys for Idaho Power Company

**Oregon Renewable Energy Credit ("REC") Filing
Accounting Entries**

<u>Account</u>	<u>Account Description</u>	<u>Dr.</u>	<u>Cr.</u>
	(1)		
131	Cash	\$XXX.XX	
254	Other Regulatory Liability		\$XXX.XX

This entry is to record cash received (net of variable transaction fees) from the sale of Renewable Energy Credits ("RECs") for Oregon's jurisdictional portion which is currently 4.78%.

	(2)		
254	Other Regulatory Liability	\$XXX.XX	
411.8	Gains from Disposition of Allowances		\$XXX.XX

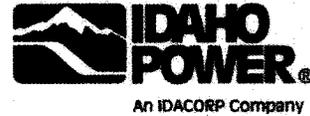
This entry is to record Idaho Power's gain from the sale of REC's for the Company's sharing percentage, at 10%, as incentive to maximize the the value of the RECs.

	(3)		
254	Other Regulatory Liability	\$XXX.XX	
431	Other Interest Expense		\$XXX.XX

This entry is to record interest accrued on the Other Regulatory Liability account balance for the benefit of the Oregon customers at the Company's allowed rate of return.

	(4)		
254	Other Regulatory Liability	\$XXX.XX	
182.3	Other Regulatory Asset - Current Year PCAM		\$XXX.XX

This entry is to provide the benefit to the Company's Oregon customers by offsetting the current years PCAM's deviation from the forecast.



Tim Tatum
Manager, Cost of Service
ttatum@idahopower.com

June 6, 2011

Vikie Bailey-Goggins
Public Utility Commission of Oregon
550 Capitol Street N.E., Suite 215
P.O. Box 2148
Salem, OR 97308-2148

RE: Idaho Power Sales of Renewable Energy Certificates ("REC"), UP 269, Order No. 11-086

Dear Ms. Bailey-Goggins:

On March 15, 2011, the Oregon Public Utility Commission ("Commission") issued Order No. 11-086 approving the sale of RECs by Idaho Power Company ("Company") under its REC Management Plan. Under the currently approved plan, the Company sells its RECs in the near-term and returns the customers' share of the proceeds through the power cost adjustment mechanism while continuing to acquire and hold long-term contractual rights to own RECs for use in meeting a future federal renewable energy standard. Since the plan was approved, the Company has had success selling its RECs into the wholesale or spot market. However, recent developments in the REC market have forced the Company to reevaluate its REC sales approach.

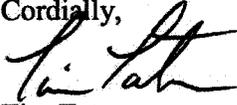
In recent months, the Company has observed a reduction in the demand for RECs in the spot market from counterparties that purchase RECs for compliance purposes. These counterparties consist primarily of investor-owned utilities ("IOU") that are subject to renewable energy standards and make up what is referred to as the "compliance market". The other main segment of the REC market is the "voluntary market" which consists of IOUs that purchase RECs as part of voluntary "green power" programs or businesses that wish to purchase renewable attributes as a voluntary business practice. REC sales into the voluntary market have also become increasingly more difficult to execute due to limited buyers and have typically brought lower prices than transactions in the compliance market.

Upon investigating the cause of recent changes in the REC market, the Company has found that most REC buyers in the compliance market have moved toward purchasing the majority of their RECs under longer-term agreements through requests for proposals ("RFP"). This change in market conditions has made it extremely difficult for Idaho Power find spot market buyers for its RECs in recent months. As a result, the Company is planning to include bidding into REC RFPs issued by compliance buyers in its REC sales strategy. This approach may require the Company

to commit to selling a portion of its available RECs for up to a five-year period. Until now, the Company has limited its REC transactions to agreements with a maximum term of two-years. Because the Company is aware of the possibility that it may become subject to a federal renewable energy standard in the future, it plans to evaluate each REC sales agreement with an eye toward minimizing its risk exposure under future requirements.

Order No. 11-086 directs the Company to "provide the Commission notice of any material changes to its REC Management Plan." While this new approach may require the Company to enter into sales agreements for up to five years, the Company believes that the approach is consistent with the intent of the currently approved REC Management Plan and does not constitute a material change. Idaho Power further believes that this modified approach will provide the Company with a better opportunity to maximize the value of its RECs to the benefit of its customers. Although Idaho Power is not requesting any specific action by the Commission at this time, the Company feels it is important to notify the Commission of this modification to its previous REC sales strategy. If the Commission prefers that Idaho Power formally clarify its REC Management Plan to address these maximum five-year contracts, please so advise.

Cordially,



Tim Tatum

TET:kt

cc: Maury Galbraith, OPUC
Marc Hellman, OPUC
Lisa Rackner
Lisa Grow
Johnny Anderson
Greg Said
Jason Williams
Regulatory Files



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2011 MAY 24 PM 2: 25

IDAHO PUBLIC UTILITIES COMMISSION

DONOVAN E. WALKER
Lead Counsel
dwalker@idahopower.com

May 24, 2011

VIA HAND DELIVERY

Jean D. Jewell, Secretary
Idaho Public Utilities Commission
472 West Washington Street
P.O. Box 83720
Boise, Idaho 83720-0074

Re: Case No. IPC-E-11-09
***IN THE MATTER OF THE APPLICATION OF IDAHO POWER COMPANY
FOR A DETERMINATION REGARDING THE FIRM ENERGY SALES
AGREEMENT FOR THE SALE AND PURCHASE OF ELECTRIC ENERGY
BETWEEN IDAHO POWER COMPANY AND CLARK CANYON, LLC***

Dear Ms. Jewell:

Enclosed for filing please find an original and seven (7) copies of Idaho Power Company's Application in the above matter.

Very truly yours,

Donovan E. Walker

DEW:csb
Enclosures

DONOVAN E. WALKER (ISB No. 5921)
JASON B. WILLIAMS
Idaho Power Company
1221 West Idaho Street (83702)
P.O. Box 70
Boise, Idaho 83707
Telephone: (208) 388-5317
Facsimile: (208) 388-6936
dwalker@idahopower.com
lnordstrom@idahopower.com

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2011 MAY 24 PM 2:25
IDAHO PUBLIC
UTILITIES COMMISSION

Attorneys for Idaho Power Company

BEFORE THE IDAHO PUBLIC UTILITIES COMMISSION

IN THE MATTER OF THE APPLICATION)
OF IDAHO POWER COMPANY FOR) CASE NO. IPC-E-11-09
A DETERMINATION REGARDING THE)
FIRM ENERGY SALES AGREEMENT FOR) APPLICATION
THE SALE AND PURCHASE OF ELECTRIC)
ENERGY BETWEEN IDAHO POWER)
COMPANY AND CLARK CANYON, LLC.)
_____)

Idaho Power Company ("Idaho Power" or "Company"), in accordance with RP 52 and the applicable provisions of the Public Utility Regulatory Policies Act of 1978 ("PURPA"), hereby respectfully applies to the Idaho Public Utilities Commission ("Commission") for an Order accepting or rejecting the Firm Energy Sales Agreement ("FESA") between Idaho Power and Clark Canyon, LLC ("Clark Canyon" or "Seller") under which Clark Canyon would sell and Idaho Power would purchase electric energy generated by the Clark Canyon hydroelectric project ("Facility") located near Dillon, Montana.

In support of this Application, Idaho Power represents as follows:

I. BACKGROUND

1. Sections 201 and 210 of PURPA, and pertinent regulations of the Federal Energy Regulatory Commission ("FERC"), require that regulated electric utilities purchase power produced by cogenerators or small power producers that obtain qualifying facility ("QF") status. The rate a QF receives for the sale of its power is generally referred to as the "avoided cost" rate and is to reflect the incremental cost to an electric utility of electric energy or capacity or both, which, but for the purchase from the QF, such utility would generate itself or purchase from another source. The Commission has authority under PURPA Sections 201 and 210 and the implementing regulations of the FERC, 18 C.F.R. § 292, to set avoided costs, to order electric utilities to enter into fixed-term obligations for the purchase of energy from QFs, and to implement FERC rules.

2. Clark Canyon proposes to own, operate, and maintain a 4.7 megawatt ("MW") (Maximum Capacity Amount) hydroelectric generating facility to be located near Dillon, Montana. The Facility will be a QF under the applicable provisions of PURPA. The FESA for this Facility has been executed by Kim Johnson, Executive Vice President for Clark Canyon, LLC.

II. THE FIRM ENERGY SALES AGREEMENT

3. On May 20, 2011, Idaho Power and Clark Canyon entered into a FESA, a copy of which is attached to this Application as Attachment No. 1. Under the terms of this FESA, Clark Canyon elected to contract with Idaho Power for a 20-year term using the non-levelized published avoided cost rates as currently established by the Commission for energy deliveries of less than 10 average megawatts ("aMW"). This

FESA was executed by Clark Canyon on May 18, 2011. It was subsequently executed by Idaho Power on May 20, 2011, and now filed for the Commission's review on May 24, 2011.

4. The nameplate rating of this Facility is 4.7 MW. As defined in paragraph 1.15 and paragraph 4.1.3 of the FESA, Clark Canyon will be required to provide data on the Facility that Idaho Power will use to confirm that under normal and/or average conditions, the Facility will not exceed 10 aMW on a monthly basis. Furthermore, as described in paragraph 7.5 of the FESA, 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, but will not purchase or pay for this Inadvertent Energy.

5. Clark Canyon and Idaho Power have agreed to Delay Liquidated Damages and associated Delay Security provisions of the greater of \$45 per kilowatt of nameplate capacity or the sum of three month's estimated revenue. These provisions have previously been approved as reasonable by the Commission in several PURPA FESAs. See Case Nos. IPC-E-10-02, IPC-E-10-05, IPC-E-10-15, IPC-E-10-16, IPC-E-10-17, IPC-E-10-18, IPC-E-10-19, and IPC-E-10-22. Ownership of Environmental Attributes associated with the Facility is determined in a separated agreement between Idaho Power and the Seller.

6. Clark Canyon has elected November 1, 2012, as the Scheduled First Energy Date and March 31, 2013, as the Scheduled Operation Date for this Facility. See Appendix B of the attached FESA. Various requirements have been placed upon Clark Canyon in order for Idaho Power to accept energy deliveries from this Facility.

Idaho Power will monitor compliance with these initial requirements. In addition, Idaho Power will monitor the ongoing requirements through the full term of the attached FESA.

7. The FESA, as signed and submitted by the parties thereto, contains non-levelized published avoided cost rates in conformity with applicable Commission Orders. All applicable interconnection charges and monthly operation and maintenance charges under Schedule 72 will be assessed to Clark Canyon. The Facility is currently in the generator interconnection process. Assuming that Seller continues to provide necessary technical information and make payments for interconnection materials and studies in a timely manner, Idaho Power's Delivery business unit will be able to proceed with its interconnection and transmission study processes, which ultimately results in a Schedule 72 Generator Interconnection Agreement, or "GIA" between Clark Canyon and Idaho Power. PURPA QF generation must be designated as a network resource ("DNR") on Idaho Power's system. Upon resolution of any and all upgrades required to acquire transmission capacity for this Facility's generation, and upon execution of the FESA and the GIA, this Facility may then be designated as a network resource.

8. Clark Canyon has been advised that it is Clark Canyon's responsibility to work with Idaho Power's Delivery business unit to ensure that sufficient time and resources will be available for Delivery to construct the interconnection facilities, and transmission upgrades if required, in time to allow the Facility to achieve the March 31, 2013, Scheduled Operation date. Seller has been further advised that delays in the interconnection or transmission process do not constitute excusable delays in achieving the Scheduled Operation date, and if Seller fails to achieve the Scheduled Operation date at the times specified in the FESA, delay damages will be assessed.

9. Clark Canyon has also been made aware of and accepted the provisions of the FESA and the Company's approved Tariff Schedule 72 regarding non-compensated curtailment or disconnection of its Facility should certain operating conditions develop on the Company's system. According to the standard provisions in Article XII of the FESA, curtailment without compensation may occur if there is an event of Force Majeure, a Forced Outage, or a temporary disconnection of the Facility in accordance with Tariff Schedule 72. If the generation from the Facility will have an adverse effect upon Idaho Power's service to its customers, Idaho Power may temporarily disconnect the Facility from Idaho Power's transmission/distribution system as specified within Schedule 72, or take such other reasonable steps as Idaho Power deems appropriate. The parties' intent and understanding is that non-compensated curtailment would be exercised when the generation being provided by the Facility in certain operating conditions exceeds or approaches the minimum load levels of the Company's system such that it may have a detrimental effect upon the Company's ability to manage its thermal, hydro, and other resources in order to meet its obligation to reliably serve loads on its system.

10. Section 21 of the FESA provides that the FESA will not become effective until the Commission has approved all of the FESA's terms and conditions and declared that all payments Idaho Power makes to Clark Canyon for purchases of energy will be allowed as prudently incurred expenses for ratemaking purposes.

III. MODIFIED PROCEDURE

11. Idaho Power believes that a hearing is not necessary to consider the issues presented herein and respectfully requests that this Application be processed under Modified Procedure; i.e., by written submissions rather than by hearing. RP 201

et seq. If, however, the Commission determines that a technical hearing is required, the Company stands ready to prepare and present its testimony in such hearing.

IV. COMMUNICATIONS AND SERVICE OF PLEADINGS

12. Communications and service of pleadings, exhibits, orders, and other documents relating to this proceeding should be sent to the following:

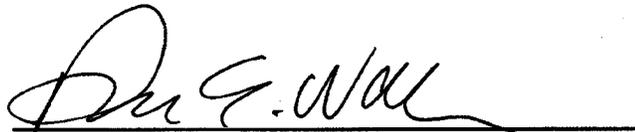
Donovan E. Walker
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Energy Contract Administrator
Idaho Power Company
1221 West Idaho Street
P.O. Box 70
Boise, Idaho 83707
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V. REQUEST FOR RELIEF

13. Idaho Power Company respectfully requests that the Commission issue an Order: (1) authorizing that this matter may be processed by Modified Procedure; (2) accepting or rejecting the Firm Energy Sales Agreement between Idaho Power Company and Clark Canyon, LLC, without change or condition; and, if accepted, (3) declaring that all payments for purchases of energy under the Firm Energy Sales Agreement between Idaho Power Company and Clark Canyon, LLC, be allowed as prudently incurred expenses for ratemaking purposes.

Respectfully submitted this 24th day of May 2011.



DONOVAN E. WALKER
Attorney for Idaho Power Company

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 24th day of May 2011 I served a true and correct copy of the within and foregoing APPLICATION upon the following named parties by the method indicated below, and addressed to the following:

Clark Canyon, LLC
Kim L. Johnson
Executive Vice President, Business
Development
Clark Canyon Hydro, LLC
c/o Symbiotics, LLC
2000 South Ocean Boulevard #703
DelRay Beach, Florida 33438

Hand Delivered
 U.S. Mail
 Overnight Mail
 FAX
 Email kim.johnson@riverbankpower.com



Donovan E. Walker

**BEFORE THE
IDAHO PUBLIC UTILITIES COMMISSION
CASE NO. IPC-E-11-09**

IDAHO POWER COMPANY

ATTACHMENT NO. 1

**FIRM ENERGY SALES AGREEMENT
BETWEEN
IDAHO POWER COMPANY
AND
CLARK CANYON, LLC
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FIRM ENERGY SALES AGREEMENT
(10 aMW or Less)

Project Name: Clark Canyon Hydroelectric

Project Number: 41455600

THIS AGREEMENT, entered into on this 20th day of May 2011 between CLARK CANYON, LLC (Seller), and IDAHO POWER COMPANY, an Idaho corporation (Idaho Power), hereinafter sometimes referred to collectively as "Parties" or individually as "Party."

WITNESSETH:

WHEREAS, Seller will design, construct, own, maintain and operate an electric generation facility; and

WHEREAS, Seller wishes to sell, and Idaho Power is willing to purchase, firm electric energy produced by the Seller's Facility.

THEREFORE, In consideration of the mutual covenants and agreements hereinafter set forth, the Parties agree as follows:

ARTICLE I: DEFINITIONS

As used in this Agreement and the appendices attached hereto, the following terms shall have the following meanings:

- 1.1 "Base Energy" – Monthly Net Energy less any Surplus Energy as calculated in paragraph 1.32.
- 1.2 "Commission" - The Idaho Public Utilities Commission.
- 1.3 "Contract Year" - The period commencing each calendar year on the same calendar date as the Operation Date and ending 364 days thereafter.
- 1.4 "Delay Liquidated Damages" – Damages payable to Idaho Power as calculated in Article V.
- 1.5 "Delay Period" – All days past the Scheduled Operation Date until the Seller's Facility achieves the Operation Date.

- 1.6 “Delay Price” - The current month’s Mid-Columbia Market Energy Cost minus the current month’s All Hours Energy Price specified in paragraph 7.3 of this Agreement. If this calculation results in a value less than 0, the result of this calculation will be 0.
- 1.7 “Designated Dispatch Facility” - Idaho Power’s Systems Operations Group, or any subsequent group designated by Idaho Power.
- 1.8 “Effective Date” – The date stated in the opening paragraph of this Firm Energy Sales Agreement representing the date upon which this Firm Energy Sales Agreement was fully executed by both Parties.
- 1.9 “Environmental Attributes”- means any and all credits, benefits, emissions reductions, offsets, and allowances, howsoever entitled, attributable to the generation from the Facility, and its avoided emission of pollutants. Environmental Attributes include but are not limited to: (1) any avoided emission of pollutants to the air, soil or water such as sulfur oxides (SOx), nitrogen oxides (NOx), carbon monoxide (CO) and other pollutants; (2) any avoided emissions of carbon dioxide (CO₂), methane (CH₄), nitrous oxide, hydrofluorocarbons, perfluorocarbons, sulfur hexafluoride and other greenhouse gases (GHGs) that have been determined by the United Nations Intergovernmental Panel on Climate Change, or otherwise by law, to contribute to the actual or potential threat of altering the Earth’s climate by trapping heat in the atmosphere;¹ (3) the reporting rights to these avoided emissions, such as REC Reporting Rights. REC Reporting Rights are the right of a REC Purchaser to report the ownership of accumulated RECs in compliance with federal or state law, if applicable, and to a federal or state agency or any other party at the REC Purchaser’s discretion, and include without limitation those REC Reporting Rights accruing under Section 1605(b) of The Energy Policy Act of 1992 and any present or future federal, state, or local law, regulation or bill, and international or foreign emissions trading program. RECs are accumulated on a MWh basis and one REC represents the Environmental Attributes associated with one (1) MWh of energy. Environmental Attributes do not include (i)

¹ Avoided emissions may or may not have any value for GHG compliance purposes. Although avoided emissions are included in the list of Environmental Attributes, this inclusion does not create any right to use those avoided emissions to comply with any GHG regulatory program.

any energy, capacity, reliability or other power attributes from the Facility, (ii) production tax credits associated with the construction or operation of the Facility and other financial incentives in the form of credits, reductions, or allowances associated with the Facility that are applicable to a state or federal income taxation obligation, (iii) the cash grant in lieu of the investment tax credit pursuant to Section 1603 of the American Recovery and Reinvestment Act of 2009, or (iv) emission reduction credits encumbered or used by the Facility for compliance with local, state, or federal operating and/or air quality permits.

- 1.10 "Facility" - That electric generation facility described in Appendix B of this Agreement.
- 1.11 "First Energy Date" - The day commencing at 00:01 hours, Mountain Time, following the day that Seller has satisfied the requirements of Article IV and the Seller begins delivering energy to Idaho Power's system at the Point of Delivery.
- 1.12 "Heavy Load Hours" – The daily hours beginning at 7:00 am, ending at 11:00 pm Mountain Time, (16 hours) excluding all hours on all Sundays, New Years Day, Memorial Day, Independence Day, Labor Day, Thanksgiving and Christmas.
- 1.13 "Inadvertent Energy" – Electric energy Seller does not intend to generate. Inadvertent energy is more particularly described in paragraph 7.5 of this Agreement.
- 1.14 "Interconnection Facilities" - All equipment specified in Schedule 72.
- 1.15 "Initial Capacity Determination" – The process by which Idaho Power confirms that under normal or average design conditions the Facility will generate at no more than 10 average MW per month and is therefore eligible to be paid the published rates in accordance with Commission Order No. 29632.
- 1.16 "Light Load Hours" – The daily hours beginning at 11:00 pm, ending at 7:00 am Mountain Time (8 hours), plus all other hours on all Sundays, New Years Day, Memorial Day, Independence Day, Labor Day, Thanksgiving and Christmas.
- 1.17 "Losses" – The loss of electrical energy expressed in kilowatt hours (kWh) occurring as a result of the transformation and transmission of energy between the point where the Facility's energy is

metered and the point the Facility's energy is delivered to the Idaho Power electrical system. The loss calculation formula will be as specified in Appendix B of this Agreement.

- 1.18 "Market Energy Reference Price" – Eighty-five percent (85%) of the Mid-Columbia Market Energy Cost.
- 1.19 "Material Breach" – A Default (paragraph 19.2.1) subject to paragraph 19.2.2.
- 1.20 "Maximum Capacity Amount" – The maximum capacity (MW) of the Facility will be as specified in Appendix B of this Agreement.
- 1.21 "Metering Equipment" - All equipment specified in Schedule 72, this Agreement and any additional equipment specified in Appendix B required to measure, record and telemeter bi-directional power flows between the Seller's electric generation plant and Idaho Power's system.
- 1.22 "Mid- Columbia Market Energy Cost" – The monthly weighted average of the daily on-peak and off-peak Dow Jones Mid-Columbia Index (Dow Jones Mid-C Index) prices for non-firm energy. If the Dow Jones Mid-Columbia Index price is discontinued by the reporting agency, both Parties will mutually agree upon a replacement index, which is similar to the Dow Jones Mid-Columbia Index. The selected replacement index will be consistent with other similar agreements and a commonly used index by the electrical industry.
- 1.23 "Nameplate Capacity" –The full-load electrical quantities assigned by the designer to a generator and its prime mover or other piece of electrical equipment, such as transformers and circuit breakers, under standardized conditions, expressed in amperes, kilovolt-amperes, kilowatts, volts or other appropriate units. Usually indicated on a nameplate attached to the individual machine or device.
- 1.24 "Net Energy" – All of the electric energy produced by the Facility, less Losses, expressed in kilowatt hours (kWh) delivered by the Facility to Idaho Power at the Point of Delivery. Subject to the terms of this Agreement, Seller commits to deliver all Net Energy to Idaho Power at the Point of Delivery for the full term of the Agreement. Net Energy does not include Inadvertent Energy.
- 1.25 "Operation Date" – The day commencing at 00:01 hours, Mountain Time, following the day that all requirements of paragraph 5.2 have been completed.

- 1.26 **“Point of Delivery”** – The location specified in Appendix B, where Idaho Power’s and the Seller’s electrical facilities are interconnected and the energy from this Facility is delivered to the Idaho Power electrical system.
- 1.27 **“Prudent Electrical Practices”** – Those practices, methods and equipment that are commonly and ordinarily used in electrical engineering and operations to operate electric equipment lawfully, safely, dependably, efficiently and economically.
- 1.28 **“Renewable Energy Certificate”** or “REC” means a certificate, credit, allowance, green tag, or other transferable indicia, howsoever entitled, indicating generation of renewable energy by the Facility, and includes all Environmental Attributes arising as a result of the generation of electricity associated with the REC. One REC represents the Environmental Attributes associated with the generation of one thousand (1,000) kWh of Net Energy.
- 1.29 **“Scheduled Operation Date”** – The date specified in Appendix B when Seller anticipates achieving the Operation Date. It is expected that the Scheduled Operation Date provided by the Seller shall be a reasonable estimate of the date that the Seller anticipates that the Seller’s Facility shall achieve the Operation Date.
- 1.30 **“Schedule 72”** – Idaho Power’s Tariff No 101, Schedule 72 or its successor schedules as approved by the Commission. The Seller shall be responsible to pay all costs of interconnection and integration of this Facility into the Idaho Power electrical system as specified within Schedule 72.
- 1.31 **“Season”** – The three periods identified in paragraph 6.2.1 of this Agreement.
- 1.32 **“Special Facilities”** - Additions or alterations of transmission and/or distribution lines and transformers as described in Schedule 72.
- 1.33 **“Station Use”** – Electric energy that is used to operate equipment that is auxiliary or otherwise related to the production of electricity by the Facility. As this Facility is not located in the Idaho Power service territory, Idaho Power has no responsibility or ability to provide Station Use to this Facility.

- 1.34 **“Surplus Energy”** – Is (1) Net Energy produced by the Seller’s Facility and delivered to the Idaho Power electrical system during the month which exceeds 110% of the monthly Net Energy Amount for the corresponding month specified in paragraph 6.2, or (2) if the Net Energy produced by the Seller’s Facility and delivered to the Idaho Power electrical system during the month is less than 90% of the monthly Net Energy Amount for the corresponding month specified in paragraph 6.2, then all Net Energy delivered by the Facility to the Idaho Power electrical system for that given month, or (3) all Net Energy produced by the Seller’s Facility and delivered by the Facility to the Idaho Power electrical system prior to the Operation Date.
- 1.35 **“Total Cost of the Facility”** - The total cost of structures, equipment and appurtenances.

ARTICLE II: NO RELIANCE ON IDAHO POWER

- 2.1 **Seller Independent Investigation** - Seller warrants and represents to Idaho Power that in entering into this Agreement and the undertaking by Seller of the obligations set forth herein, Seller has investigated and determined that it is capable of performing hereunder and has not relied upon the advice, experience or expertise of Idaho Power in connection with the transactions contemplated by this Agreement.
- 2.2 **Seller Independent Experts** - All professionals or experts including, but not limited to, engineers, attorneys or accountants, that Seller may have consulted or relied on in undertaking the transactions contemplated by this Agreement have been solely those of Seller.

ARTICLE III: WARRANTIES

- 3.1 **No Warranty by Idaho Power** - Any review, acceptance or failure to review Seller’s design, specifications, equipment or facilities shall not be an endorsement or a confirmation by Idaho Power and Idaho Power makes no warranties, expressed or implied, regarding any aspect of Seller’s design, specifications, equipment or facilities, including, but not limited to, safety, durability, reliability, strength, capacity, adequacy or economic feasibility.
- 3.2 **Qualifying Facility Status** - Seller warrants that the Facility is a “Qualifying Facility,” as that term

is used and defined in 18 CFR 292.201 et seq. After initial qualification, Seller will take such steps as may be required to maintain the Facility's Qualifying Facility status during the term of this Agreement and Seller's failure to maintain Qualifying Facility status will be a Material Breach of this Agreement. Idaho Power reserves the right to review the Facility's Qualifying Facility status and associated support and compliance documents at anytime during the term of this Agreement.

- 3.3 FERC License (*only applies to hydro projects*) - Seller warrants that Seller possesses a valid license or exemption from licensing from the Federal Energy Regulatory Commission ("FERC") for the Facility. Seller recognizes that Seller's possession and retention of a valid FERC license or exemption is a material part of the consideration for Idaho Power's execution of this Agreement. Seller will take such steps as may be required to maintain a valid FERC license or exemption for the Facility during the term of this Agreement, and Seller's failure to maintain a valid FERC license or exemption will be a material breach of this Agreement.

ARTICLE IV: CONDITIONS TO ACCEPTANCE OF ENERGY

- 4.1 Prior to the First Energy Date and as a condition of Idaho Power's acceptance of deliveries of energy from the Seller under this Agreement, Seller shall:
- 4.1.1 Submit proof to Idaho Power that all licenses, permits or approvals necessary for Seller's operations have been obtained from applicable federal, state or local authorities, including, but not limited to, evidence of compliance with Subpart B, 18 CFR 292.201 et seq. as a certified Qualifying Facility.
- 4.1.2 Opinion of Counsel - Submit to Idaho Power an Opinion Letter signed by an attorney admitted to practice and in good standing in the State of Idaho providing an opinion that Seller's licenses, permits and approvals as set forth in paragraph 4.1.1 above are legally and validly issued, are held in the name of the Seller and, based on a reasonable independent review, counsel is of the opinion that Seller is in substantial compliance with said permits as of the date of the Opinion Letter. The Opinion Letter will be in a form

acceptable to Idaho Power and will acknowledge that the attorney rendering the opinion understands that Idaho Power is relying on said opinion. Idaho Power's acceptance of the form will not be unreasonably withheld. The Opinion Letter will be governed by and shall be interpreted in accordance with the legal opinion accord of the American Bar Association Section of Business Law (1991).

4.1.3 Initial Capacity Determination - Submit to Idaho Power such data as Idaho Power may reasonably require to perform the Initial Capacity Determination. Such data will include but not be limited to, Nameplate Capacity, equipment specifications, prime mover data, resource characteristics, normal and/or average operating design conditions and Station Use data. Upon receipt of this information, Idaho Power will review the provided data and if necessary, request additional data to complete the Initial Capacity Determination within a reasonable time.

4.1.3.1 If the Maximum Capacity specified in Appendix B of this Agreement and the cumulative manufacture Nameplate Capacity rating of the individual generation units at this Facility is less than 10 MW. The Seller shall submit detailed, manufacturer, verifiable data of the Nameplate Capacity ratings of the actual individual generation units to be installed at this Facility. Upon verification by Idaho Power that the data provided establishes the combined Nameplate Capacity rating of the generation units to be installed at this Facility is less than 10 MW, it will be deemed that the Seller has satisfied the Initial Capacity Determination for this Facility.

4.1.4 Nameplate Capacity - Submit to Idaho Power manufacturer's and engineering documentation that establishes the Nameplate Capacity of each individual generation unit that is included within this entire Facility. Upon receipt of this data, Idaho Power shall review the provided data and determine if the Nameplate Capacity specified is reasonable based upon the manufacturer's specified generation ratings for the specific generation units.

- 4.1.5 Engineer's Certifications - Submit an executed Engineer's Certification of Design & Construction Adequacy and an Engineer's Certification of Operations and Maintenance (O&M) Policy as described in Commission Order No. 21690. These certificates will be in the form specified in Appendix C but may be modified to the extent necessary to recognize the different engineering disciplines providing the certificates.
- 4.1.6 Insurance - Submit written proof to Idaho Power of all insurance required in Article XIII.
- 4.1.7 Interconnection – Provide written confirmation from Idaho Power's delivery business unit that Seller has satisfied all interconnection requirements.
- 4.1.8 Network Resource Designation – The Seller's Facility has been designated as an Idaho Power network resource capable of delivering firm energy up to the amount of the Maximum Capacity at the Point of Delivery.
- 4.1.9 Station Usage – The Seller shall provide evidence that arrangements have been made to provide electrical service to supply the Seller's Station Usage from an entity other than Idaho Power.
- 4.1.10 Written Acceptance – Request and obtain written confirmation from Idaho Power that all conditions to acceptance of energy have been fulfilled. Such written confirmation shall be provided within a commercially reasonable time following the Seller's request and will not be unreasonably withheld by Idaho Power.

ARTICLE V: TERM AND OPERATION DATE

- 5.1 Term - Subject to the provisions of paragraph 5.2 below, this Agreement shall become effective on the date first written and shall continue in full force and effect for a period of twenty (20) Contract Years from the Operation Date.
- 5.2 Operation Date - The Operation Date may occur only after the Facility has achieved all of the following:
- a) Achieved the First Energy Date.
 - b) Commission approval of this Agreement in a form acceptable to Idaho Power has

been received.

- c) Seller has demonstrated to Idaho Power's satisfaction that the Facility is complete and able to provide energy in a consistent, reliable and safe manner.
- d) Seller has requested an Operation Date from Idaho Power in a written format.
- e) Seller has received written confirmation from Idaho Power of the Operation Date.

This confirmation will not be unreasonably withheld by Idaho Power.

5.3 Operation Date Delay - Seller shall cause the Facility to achieve the Operation Date on or before the Scheduled Operation Date. Delays in the interconnection and transmission network upgrade study, design and construction process that **are not** Force Majeure events accepted by both Parties, **shall not** prevent Delay Liquidated Damages from being due and owing as calculated in accordance with this Agreement.

5.3.1 If the Operation Date occurs after the Scheduled Operation Date but on or prior to 90 days following the Scheduled Operation Date, Seller shall pay Idaho Power Delay Liquidated Damages calculated at the end of each calendar month after the Scheduled Operation Date as follows:

Delay Liquidated Damages are equal to ((Current month's Initial Year Net Energy Amount as specified in paragraph 6.2.1 divided by the number of days in the current month) multiplied by the number of days in the Delay Period in the current month) multiplied by the current month's Delay Price.

5.3.2 If the Operation Date does not occur within ninety (90) days following the Scheduled Operation Date the Seller shall pay Idaho Power Delay Liquidated Damages, in addition to those provided in paragraph 5.3.1, calculated as follows:

Forty five dollars (\$45) multiplied by the Maximum Capacity with the Maximum Capacity being measured in kW.

5.4 If Seller fails to achieve the Operation Date within ninety (90) days following the Scheduled Operation Date, such failure will be a Material Breach and Idaho Power may terminate this Agreement at any time until the Seller cures the Material Breach. Additional Delay Liquidated

Damages beyond those calculated in 5.3.1 and 5.3.2 will be calculated and payable using the Delay Liquidated Damage calculation described in 5.3.1 above for all days exceeding 90 days past the Scheduled Operation Date until such time as the Seller cures this Material Breach or Idaho Power terminates this Agreement.

5.5 Seller shall pay Idaho Power any calculated Delay Damages or Delay Liquidated Damages within 7 days of when Idaho Power calculates and presents any Delay Damages or Delay Liquidated Damages billings to the Seller. Seller's failure to pay these damages within the specified time will be a Material Breach of this Agreement and Idaho Power shall draw funds from the Delay Security provided by the Seller in an amount equal to the calculated Delay Damages or Delay Liquidated Damages.

5.6 The Parties agree that the damages Idaho Power would incur due to delay in the Facility achieving the Operation Date on or before the Scheduled Operation Date would be difficult or impossible to predict with certainty, and that the Delay Liquidated Damages are an appropriate approximation of such damages.

5.7 Prior to the Seller executing this Agreement, the Seller shall have:

- a) Filed for interconnection and is in compliance with all payments and requirements of the interconnection process
- b) Received and accepted an interconnection feasibility study for this Facility.
- c) Provided all information required to enable Idaho Power to file an initial transmission capacity request.
- d) Received the results of the initial transmission capacity request and have agreed they are acceptable to the Seller.
- e) Acknowledged responsibility for all interconnection costs and any costs associated with acquiring adequate firm transmission capacity to enable the project to be classified as an Idaho Power firm network resource.

5.8 Within thirty (30) days of the date of a final non-appealable order as specified in Article XXI approving this Agreement Seller shall post liquid security ("Delay Security") in a form as

described in Appendix D equal to or exceeding the amount calculated in paragraph 5.8.1. Failure to post this Delay Security in the time specified above will be a Material Breach of this Agreement and Idaho Power may terminate this Agreement.

5.8.1 Delay Security The greater of forty five (\$45) multiplied by the Maximum Capacity with the Maximum Capacity being measured in kW or the sum of three month's estimated revenue. Where the estimated three months of revenue is the estimated revenue associated with the first three full months following the estimated Scheduled Operation Date, the estimated kWh of energy production as specified in paragraph 6.2.1 for those three months multiplied by the All Hours Energy Price specified in paragraph 7.3 for each of those three months will be used.

5.8.1.1 In the event Seller provides Idaho Power with certification that, (1) a generation interconnection agreement specifying a schedule that will enable this Facility to achieve the Operation Date no later than the Scheduled Operation Date has been completed and the Seller has paid all required interconnection costs, or (2) a generation interconnection agreement is substantially complete and all material costs of interconnection have been identified and agreed upon and the Seller is in compliance with all terms and conditions of the generation interconnection agreement, the Delay Security calculated in accordance with paragraph 5.8.1 will be reduced by ten percent (10%).

5.8.1.2 If the Seller has received a reduction in the calculated Delay Security as specified in paragraph 5.8.1.1 and subsequently, (1) at Seller's request, the generation interconnection agreement specified in paragraph 5.8.1.1 is revised and as a result the Facility will not achieve its Operation Date by the Scheduled Operation Date, or (2) if the Seller does not maintain compliance with the generation interconnection agreement, the full amount of the Delay Security as calculated in paragraph 5.8.1 will be subject to reinstatement and will be due and owing within five (5) business days from the date Idaho Power requests reinstatement. Failure

to timely reinstate the Delay Security will be a Material Breach of this Agreement.

5.8.2 Idaho Power shall release any remaining security posted hereunder after all calculated Delay Damages and/or Delay Liquidated Damages are paid in full to Idaho Power and the earlier of, (1) 30 days after the Operation Date has been achieved, or (2) 60 days after the Agreement has been terminated.

ARTICLE VI: PURCHASE AND SALE OF NET ENERGY

6.1 Delivery and Acceptance of Net Energy - Except when either Party's performance is excused as provided herein, Idaho Power will purchase and Seller will sell all of the Net Energy to Idaho Power at the Point of Delivery. All Inadvertent Energy produced by the Facility will also be delivered by the Seller to Idaho Power at the Point of Delivery. At no time will the total amount of Net Energy and/or Inadvertent Energy produced by the Facility and delivered by the Seller to the Point of Delivery exceed the Maximum Capacity Amount.

6.2 Net Energy Amounts - Seller intends to produce and deliver Net Energy in the following monthly amounts:

6.2.1 Initial Year Monthly Net Energy Amounts:

	<u>Month</u>	<u>kWh</u>
Season 1	March	736,848
	April	840,000
	May	1,807,322
Season 2	July	2,613,464
	August	2,290,535
	November	1,009,517
Season 3	December	959,191
	June	2,460,261
	September	1,456,776
	October	1,099,227
	January	783,848
	February	696,290

6.2.2 Ongoing Monthly Net Energy Amounts - Seller shall initially provide Idaho Power with one year of monthly generation estimates (Initial Year Monthly Net Energy Amounts) and beginning at the end of month nine and every three months thereafter provide Idaho Power with an additional three months of forward generation estimates beyond those generation estimates previously provided. This information will be provided to Idaho Power by written notice in accordance with paragraph 25.1, no later than 5:00 PM of the 5th day following the end of the previous month. If the Seller does not provide the Ongoing Monthly Net Energy Amounts in a timely manner, Idaho Power will use the most recent three (3) months of the Initial Year Monthly Net Energy Amounts specified in paragraph 6.2.1 for the next three (3) months of monthly Net Energy amounts.

6.2.3 Seller's Adjustment of Net Energy Amount

6.2.3.1 No later than the Operation Date, by written notice given to Idaho Power in accordance with paragraph 25.1, the Seller may revise all of the previously provided Initial Year Monthly Net Energy Amounts.

6.2.3.2 Beginning with the end of the 9th month after the Operation Date and at the end of every third month thereafter: (1) the Seller may not revise the immediate next three (3) months of previously provided Net Energy Amounts, (2) but by written notice given to Idaho Power in accordance with paragraph 25.1, no later than 5:00 PM of the 5th day following the end of the previous month, the Seller may revise all other previously provided Net Energy Amounts. Failure to provide timely written notice of changed amounts will be deemed to be an election of no change.

6.2.4 Idaho Power Adjustment of Net Energy Amount - If Idaho Power is excused from accepting the Seller's Net Energy as specified in paragraph 12.2.1 or if the Seller declares a Suspension of Energy Deliveries as specified in paragraph 12.3.1 and the Seller's declared Suspension of Energy Deliveries is accepted by Idaho Power, the Net Energy

Amount as specified in paragraph 6.2 for the specific month in which the reduction or suspension under paragraph 12.2.1 or 12.3.1 occurs will be reduced in accordance with the following:

Where:

NEA = Current Month's Net Energy Amount (Paragraph 6.2)

SGU = a.) If Idaho Power is excused from accepting the Seller's Net Energy as specified in paragraph 12.2.1 this value will be equal to the percentage of curtailment as specified by Idaho Power multiplied by the TGU as defined below.

b.) If the Seller declares a Suspension of Energy Deliveries as specified in paragraph 12.3.1 this value will be the sum of the individual generation units size ratings as specified in Appendix B that are impacted by the circumstances causing the Seller to declare a Suspension of Energy Deliveries.

TGU = Sum of all of the individual generator ratings of the generation units at this Facility as specified in Appendix B of this agreement.

RSH = Actual hours the Facility's Net Energy deliveries were either reduced or suspended under paragraph 12.2.1 or 12.3.1

TH = Actual total hours in the current month

Resulting formula being:

$$\text{Adjusted Net Energy Amount} = \text{NEA} - \left(\left(\frac{\text{SGU}}{\text{TGU}} \times \text{NEA} \right) \times \left(\frac{\text{RSH}}{\text{TH}} \right) \right)$$

This Adjusted Net Energy Amount will be used in applicable Surplus Energy calculations for only the specific month in which Idaho Power was excused from accepting the Seller's Net Energy or the Seller declared a Suspension of Energy.

6.3 Unless excused by an event of Force Majeure, Seller's failure to deliver Net Energy in any Contract Year in an amount equal to at least ten percent (10%) of the sum of the Initial Year Net Energy Amounts as specified in paragraph 6.2 shall constitute an event of default.

ARTICLE VII: PURCHASE PRICE AND METHOD OF PAYMENT

7.1 **Base Energy Heavy Load Purchase Price** – For all Base Energy received during Heavy Load Hours, Idaho Power will pay the non-levelized energy price in accordance with Commission Order 31025 with seasonalization factors applied:

<u>Year</u>	Season 1 - (73.50 %)	Season 2 - (120.00 %)	Season 3 - (100.00 %)
	<u>Mills/kWh</u>	<u>Mills/kWh</u>	<u>Mills/kWh</u>
2012	49.26	80.43	67.02
2013	51.86	84.68	70.56
2014	54.66	89.24	74.37
2015	57.66	94.14	78.45
2016	59.39	96.96	80.80
2017	61.09	99.73	83.11
2018	62.93	102.75	85.62
2019	64.75	105.71	88.09
2020	66.62	108.77	90.64
2021	68.84	112.40	93.66
2022	71.15	116.17	96.81
2023	73.55	120.09	100.07
2024	76.05	124.16	103.47
2025	78.64	128.40	107.00
2026	80.85	131.99	109.99
2027	83.12	135.70	113.08
2028	85.46	139.53	116.27
2029	87.88	143.47	119.56
2030	90.37	147.54	122.95
2031	93.72	153.01	127.51
2032	96.65	157.80	131.50

7.2 **Base Energy Light Load Purchase Price** – For all Base Energy received during Light Load Hours, Idaho Power will pay the non-levelized energy price in accordance with Commission Order 31025 with seasonalization factors applied :

<u>Year</u>	Season 1 - (73.50 %)	Season 2 - (120.00 %)	Season 3 - (100.00 %)
	<u>Mills/kWh</u>	<u>Mills/kWh</u>	<u>Mills/kWh</u>
2012	43.91	71.69	59.74
2013	46.51	75.94	63.28
2014	49.31	80.50	67.09

2015	52.31	85.41	71.17
2016	54.04	88.23	73.52
2017	55.74	91.00	75.83
2018	57.58	94.01	78.34
2019	59.40	96.97	80.81
2020	61.27	100.03	83.36
2021	63.49	103.66	86.38
2022	65.80	107.43	89.53
2023	68.20	111.35	92.79
2024	70.70	115.42	96.19
2025	73.29	119.66	99.72
2026	75.49	123.26	102.71
2027	77.77	126.97	105.80
2028	80.11	130.79	108.99
2029	82.53	134.74	112.28
2030	85.02	138.81	115.67
2031	88.37	144.27	120.23
2032	91.30	149.06	124.22

7.3 All Hours Energy Price – The price to be used in the calculation of the Surplus Energy Price and Delay Damage Price shall be the non-levelized energy price in accordance with Commission Order 31025 with seasonalization factors applied:

<u>Year</u>	Season 1 - (73.50 %)	Season 2 - (120.00 %)	Season 3 - (100.00 %)
	<u>Mills/kWh</u>	<u>Mills/kWh</u>	<u>Mills/kWh</u>
2012	46.88	76.54	63.78
2013	49.48	80.79	67.32
2014	52.28	85.35	71.13
2015	55.28	90.25	75.21
2016	57.01	93.08	77.56
2017	58.71	95.85	79.87
2018	60.55	98.86	82.38
2019	62.36	101.82	84.85
2020	64.24	104.88	87.40
2021	66.46	108.51	90.42
2022	68.77	112.28	93.57
2023	71.17	116.20	96.83
2024	73.67	120.27	100.23
2025	76.26	124.51	103.76
2026	78.46	128.10	106.75
2027	80.74	131.81	109.85
2028	83.08	135.64	113.03
2029	85.50	139.59	116.32

2030	87.99	143.66	119.71
2031	91.34	149.12	124.27
2032	94.27	153.91	128.26

7.4 Surplus Energy Price - For all Surplus Energy, Idaho Power shall pay to the Seller the current month's Market Energy Reference Price or the All Hours Energy Price specified in paragraph 7.3, whichever is lower.

7.5 Inadvertent Energy -

7.5.1 Inadvertent Energy is electric energy produced by the Facility, expressed in kWh, which the Seller delivers to Idaho Power at the Point of Delivery that exceeds 10,000 kW multiplied by the hours in the specific month in which the energy was delivered. (For example January contains 744 hours. 744 hours times 10,000 kW = 7,440,000 kWh. Energy delivered in January in excess of 7,440, 000 kWh in this example would be Inadvertent Energy.)

7.5.2 Although Seller intends to design and operate the Facility to generate no more than 10 average MW and therefore does not intend to generate Inadvertent Energy, Idaho Power will accept Inadvertent Energy that does not exceed the Maximum Capacity Amount but will not purchase or pay for Inadvertent Energy.

7.6 Payment Due Date - Undisputed Energy payments, less any payments due to Idaho Power will be disbursed to the Seller within thirty (30) days of the date which Idaho Power receives and accepts the documentation of the monthly Net Energy actually delivered to Idaho Power as specified in Appendix A.

7.7 Continuing Jurisdiction of the Commission This Agreement is a special contract and, as such, the rates, terms and conditions contained in this Agreement will be construed in accordance with Idaho Power Company v. Idaho Public Utilities Commission and Afton Energy, Inc., 107 Idaho 781, 693 P.2d 427 (1984), Idaho Power Company v. Idaho Public Utilities Commission, 107 Idaho 1122, 695 P.2d 1 261 (1985), Afton Energy, Inc. v. Idaho Power Company, 111 Idaho 925, 729 P.2d 400 (1986), Section 210 of the Public Utility Regulatory Policies Act of 1978 and 18

ARTICLE VIII: ENVIRONMENTAL ATTRIBUTES

- 8.1 Ownership of Environmental Attributes is determined in a separate agreement between Idaho Power and the Seller.

ARTICLE IX: FACILITY AND INTERCONNECTION

- 9.1 Design of Facility - Seller will design, construct, install, own, operate and maintain the Facility and any Seller-owned Interconnection Facilities so as to allow safe and reliable generation and delivery of Net Energy and Inadvertent Energy to the Idaho Power Point of Delivery for the full term of the Agreement.

ARTICLE X: METERING AND TELEMETRY

- 10.1 Metering - Idaho Power shall, for the account of Seller, provide, install, and maintain Metering Equipment to be located at a mutually agreed upon location to record and measure power flows to Idaho Power in accordance with this Agreement and Schedule 72. The Metering Equipment will be at the location and the type required to measure, record and report the Facility's Net Energy, Station Use, Inadvertent Energy and maximum energy deliveries (kW) at the Point of Delivery in a manner to provide Idaho Power adequate energy measurement data to administer this Agreement and to integrate this Facility's energy production into the Idaho Power electrical system.
- 10.2 Telemetry - Idaho Power will install, operate and maintain at Seller's expense communications and telemetry equipment which will be capable of providing Idaho Power with continuous instantaneous telemetry of Seller's Net Energy and Inadvertent Energy produced and delivered to the Idaho Power Point of Delivery to Idaho Power's Designated Dispatch Facility.

ARTICLE XI - RECORDS

- 11.1 Maintenance of Records - Seller shall maintain at the Facility or such other location mutually

acceptable to the Parties adequate total generation, Net Energy, Station Use, Inadvertent Energy and maximum generation (kW) records in a form and content acceptable to Idaho Power.

- 11.2 Inspection - Either Party, after reasonable notice to the other Party, shall have the right, during normal business hours, to inspect and audit any or all generation, Net Energy, Station Use, Inadvertent Energy and maximum generation (kW) records pertaining to the Seller's Facility.

ARTICLE XII: OPERATIONS

- 12.1 Communications - Idaho Power and the Seller shall maintain appropriate operating communications through Idaho Power's Designated Dispatch Facility in accordance with Appendix A of this Agreement.

- 12.2 Energy Acceptance -

12.2.1 Idaho Power shall be excused from accepting and paying for Net Energy or accepting Inadvertent Energy which would have otherwise been produced by the Facility and delivered by the Seller to the Point of Delivery, if it is prevented from doing so by an event of Force Majeure, or temporary disconnection of the Facility in accordance with Schedule 72 or if Idaho Power determines that curtailment, interruption or reduction of Net Energy or Inadvertent Energy deliveries is necessary because of line construction, electrical system maintenance requirements, emergencies, electrical system operating conditions, or electrical system reliability emergencies on its system or as otherwise required by Prudent Electrical Practices. If, for reasons other than an event of Force Majeure, a temporary disconnection under Schedule 72 exceeds twenty (20) days, beginning with the twenty-first day of such interruption, curtailment or reduction, Seller will be deemed to be delivering Net Energy at a rate equivalent to the pro rata daily average of the amounts specified for the applicable month in paragraph 6.2. Idaho Power will notify Seller when the interruption, curtailment or reduction is terminated.

- 12.2.2 If, in the reasonable opinion of Idaho Power, Seller's operation of the Facility or Interconnection Facilities is unsafe or may otherwise adversely affect Idaho Power's

equipment, personnel or service to its customers, Idaho Power may temporarily disconnect the Facility from Idaho Power's transmission/distribution system as specified within Schedule 72 or take such other reasonable steps as Idaho Power deems appropriate.

12.2.3 Under no circumstances will the Seller deliver Net Energy and/or Inadvertent Energy from the Facility to the Point of Delivery in an amount that exceeds the Maximum Capacity Amount. Seller's failure to limit deliveries to the Maximum Capacity Amount will be a Material Breach of this Agreement.

12.2.4 If Idaho Power is unable to accept the energy from this Facility and is not excused from accepting the Facility's energy, Idaho Power's damages shall be limited to only the value of the estimated energy that Idaho Power was unable to accept. Idaho Power will have no responsibility to pay for any other costs, lost revenue or consequential damages the Facility may incur.

12.3 Seller Declared Suspension of Energy Deliveries

12.3.1 If the Seller's Facility experiences a forced outage due to equipment failure which is not caused by an event of Force Majeure or by neglect, disrepair or lack of adequate preventative maintenance of the Seller's Facility, Seller may, after giving notice as provided in paragraph 12.3.2 below, temporarily suspend all deliveries of Net Energy to Idaho Power from the Facility or from individual generation unit(s) within the Facility impacted by the forced outage for a period of not less than 48 hours to correct the forced outage condition ("Declared Suspension of Energy Deliveries"). The Seller's Declared Suspension of Energy Deliveries will begin at the start of the next full hour following the Seller's telephone notification as specified in paragraph 12.3.2 and will continue for the time as specified (not less than 48 hours) in the written notification provided by the Seller. In the month(s) in which the Declared Suspension of Energy occurred, the Net Energy Amount will be adjusted as specified in paragraph 6.2.4.

12.3.2 If the Seller desires to initiate a Declared Suspension of Energy Deliveries as provided in

paragraph 12.3.1, the Seller will notify the Designated Dispatch Facility by telephone. The beginning hour of the Declared Suspension of Energy Deliveries will be at the earliest the next full hour after making telephone contact with Idaho Power. The Seller will, within 24 hours after the telephone contact, provide Idaho Power a written notice in accordance with XXV that will contain the beginning hour and duration of the Declared Suspension of Energy Deliveries and a description of the conditions that caused the Seller to initiate a Declared Suspension of Energy Deliveries. Idaho Power will review the documentation provided by the Seller to determine Idaho Power's acceptance of the described forced outage as qualifying for a Declared Suspension of Energy Deliveries as specified in paragraph 12.3.1. Idaho Power's acceptance of the Seller's forced outage as an acceptable forced outage will be based upon the clear documentation provided by the Seller that the forced outage is not due to an event of Force Majeure or by neglect, disrepair or lack of adequate preventative maintenance of the Seller's Facility.

- 12.4 Scheduled Maintenance – On or before January 31st of each calendar year, Seller shall submit a written proposed maintenance schedule of significant Facility maintenance for that calendar year and Idaho Power and Seller shall mutually agree as to the acceptability of the proposed schedule. The Parties determination as to the acceptability of the Seller's timetable for scheduled maintenance will take into consideration Prudent Electrical Practices, Idaho Power system requirements and the Seller's preferred schedule. Neither Party shall unreasonably withhold acceptance of the proposed maintenance schedule.
- 12.5 Maintenance Coordination - The Seller and Idaho Power shall, to the extent practical, coordinate their respective line and Facility maintenance schedules such that they occur simultaneously.
- 12.6 Contact Prior to Curtailment - Idaho Power will make a reasonable attempt to contact the Seller prior to exercising its rights to interrupt interconnection or curtail deliveries from the Seller's Facility. Seller understands that in the case of emergency circumstances, real time operations of the electrical system, and/or unplanned events, Idaho Power may not be able to provide notice to the Seller prior to interruption, curtailment, or reduction of electrical energy deliveries to

Idaho Power.

ARTICLE XIII: INDEMNIFICATION AND INSURANCE

- 13.1 Indemnification - Each Party shall agree to hold harmless and to indemnify the other Party, its officers, agents, affiliates, subsidiaries, parent company and employees against all loss, damage, expense and liability to third persons for injury to or death of person or injury to property, proximately caused by the indemnifying Party's, (a) construction, ownership, operation or maintenance of, or by failure of, any of such Party's works or facilities used in connection with this Agreement, or (b) negligent or intentional acts, errors or omissions. The indemnifying Party shall, on the other Party's request, defend any suit asserting a claim covered by this indemnity. The indemnifying Party shall pay all documented costs, including reasonable attorney fees that may be incurred by the other Party in enforcing this indemnity.
- 13.2 Insurance - During the term of this Agreement, Seller shall secure and continuously carry the following insurance coverage:
- 13.2.1 Comprehensive General Liability Insurance for both bodily injury and property damage with limits equal to \$1,000,000, each occurrence, combined single limit. The deductible for such insurance shall be consistent with current Insurance Industry Utility practices for similar property.
- 13.2.2 The above insurance coverage shall be placed with an insurance company with an A.M. Best Company rating of A- or better and shall include:
- (a) An endorsement naming Idaho Power as an additional insured and loss payee as applicable; and
 - (b) A provision stating that such policy shall not be canceled or the limits of liability reduced without sixty (60) days' prior written notice to Idaho Power.
- 13.3 Seller to Provide Certificate of Insurance - As required in paragraph 4.1.5 herein and annually thereafter, Seller shall furnish Idaho Power a certificate of insurance, together with the endorsements required therein, evidencing the coverage as set forth above.

13.4 Seller to Notify Idaho Power of Loss of Coverage - If the insurance coverage required by paragraph 13.2 shall lapse for any reason, Seller will immediately notify Idaho Power in writing. The notice will advise Idaho Power of the specific reason for the lapse and the steps Seller is taking to reinstate the coverage. Failure to provide this notice and to expeditiously reinstate or replace the coverage will constitute a Material Breach of this Agreement.

ARTICLE XIV: FORCE MAJEURE

14.1 As used in this Agreement, "Force Majeure" or "an event of Force Majeure" means any cause beyond the control of the Seller or of Idaho Power which, despite the exercise of due diligence, such Party is unable to prevent or overcome. Force Majeure includes, but is not limited to, acts of God, fire, flood, storms, wars, hostilities, civil strife, strikes and other labor disturbances, earthquakes, fires, lightning, epidemics, sabotage, or changes in law or regulation occurring after the effective date, which, by the exercise of reasonable foresight such party could not reasonably have been expected to avoid and by the exercise of due diligence, it shall be unable to overcome. If either Party is rendered wholly or in part unable to perform its obligations under this Agreement because of an event of Force Majeure, both Parties shall be excused from whatever performance is affected by the event of Force Majeure, provided that:

- (1) The non-performing Party shall, as soon as is reasonably possible after the occurrence of the Force Majeure, give the other Party written notice describing the particulars of the occurrence.
- (2) The suspension of performance shall be of no greater scope and of no longer duration than is required by the event of Force Majeure.
- (3) No obligations of either Party which arose before the occurrence causing the suspension of performance and which could and should have been fully performed before such occurrence shall be excused as a result of such occurrence.

ARTICLE XV: LIABILITY; DEDICATION

- 15.1 Limitation of Liability. Nothing in this Agreement shall be construed to create any duty to, any standard of care with reference to, or any liability to any person not a Party to this Agreement. Neither party shall be liable to the other for any indirect, special, consequential, nor punitive damages, except as expressly authorized by this Agreement.
- 15.2 Dedication. No undertaking by one Party to the other under any provision of this Agreement shall constitute the dedication of that Party's system or any portion thereof to the Party or the public or affect the status of Idaho Power as an independent public utility corporation or Seller as an independent individual or entity.

ARTICLE XVI: SEVERAL OBLIGATIONS

- 16.1 Except where specifically stated in this Agreement to be otherwise, the duties, obligations and liabilities of the Parties are intended to be several and not joint or collective. Nothing contained in this Agreement shall ever be construed to create an association, trust, partnership or joint venture or impose a trust or partnership duty, obligation or liability on or with regard to either Party. Each Party shall be individually and severally liable for its own obligations under this Agreement.

ARTICLE XVII: WAIVER

- 17.1 Any waiver at any time by either Party of its rights with respect to a default under this Agreement or with respect to any other matters arising in connection with this Agreement shall not be deemed a waiver with respect to any subsequent default or other matter.

ARTICLE XVIII: CHOICE OF LAWS AND VENUE

- 18.1 This Agreement shall be construed and interpreted in accordance with the laws of the State of Idaho without reference to its choice of law provisions.
- 18.2 Venue for any litigation arising out of or related to this Agreement will lie in the District Court of

the Fourth Judicial District of Idaho in and for the County of Ada.

ARTICLE XIX: DISPUTES AND DEFAULT

- 19.1 Disputes - All disputes related to or arising under this Agreement, including, but not limited to, the interpretation of the terms and conditions of this Agreement, will be submitted to the Commission for resolution.
- 19.2 Notice of Default
- 19.2.1 Defaults. If either Party fails to perform any of the terms or conditions of this Agreement (an "event of default"), the nondefaulting Party shall cause notice in writing to be given to the defaulting Party, specifying the manner in which such default occurred. If the defaulting Party shall fail to cure such default within the sixty (60) days after service of such notice, or if the defaulting Party reasonably demonstrates to the other Party that the default can be cured within a commercially reasonable time but not within such sixty (60) day period and then fails to diligently pursue such cure, then the nondefaulting Party may, at its option, terminate this Agreement and/or pursue its legal or equitable remedies.
- 19.2.2 Material Breaches - The notice and cure provisions in paragraph 19.2.1 do not apply to defaults identified in this Agreement as Material Breaches. Material Breaches must be cured as expeditiously as possible following occurrence of the breach.
- 19.3 Security for Performance - Prior to the Operation Date and thereafter for the full term of this Agreement, Seller will provide Idaho Power with the following:
- 19.3.1 Insurance - Evidence of compliance with the provisions of paragraph 13.2. If Seller fails to comply, such failure will be a Material Breach and may only be cured by Seller supplying evidence that the required insurance coverage has been replaced or reinstated.
- 19.3.2 Engineer's Certifications - Every three (3) years after the Operation Date, Seller will supply Idaho Power with a Certification of Ongoing Operations and Maintenance

(O&M) from a Registered Professional Engineer licensed in the State of Idaho, which Certification of Ongoing O & M shall be in the form specified in Appendix C. Seller's failure to supply the required certificate will be an event of default. Such a default may only be cured by Seller providing the required certificate; and

- 19.3.3 Licenses and Permits - During the full term of this Agreement, Seller shall maintain compliance with all permits and licenses described in paragraph 4.1.1 of this Agreement. In addition, Seller will supply Idaho Power with copies of any new or additional permits or licenses. At least every fifth Contract Year, Seller will update the documentation described in Paragraph 4.1.1. If at any time Seller fails to maintain compliance with the permits and licenses described in paragraph 4.1.1 or to provide the documentation required by this paragraph, such failure will be an event of default and may only be cured by Seller submitting to Idaho Power evidence of compliance from the permitting agency.

ARTICLE XX: GOVERNMENTAL AUTHORIZATION

- 20.1 This Agreement is subject to the jurisdiction of those governmental agencies having control over either Party of this Agreement.

ARTICLE XXI: COMMISSION ORDER

- 21.1 This Agreement shall become finally effective upon the Commission's approval of all terms and provisions hereof without change or condition and declaration that all payments to be made to Seller hereunder shall be allowed as prudently incurred expenses for ratemaking purposes.

ARTICLE XXII: SUCCESSORS AND ASSIGNS

- 22.1 This Agreement and all of the terms and provisions hereof shall be binding upon and inure to the benefit of the respective successors and assigns of the Parties hereto, except that no assignment hereof by either Party shall become effective without the written consent of both Parties being first obtained. Such consent shall not be unreasonably withheld. Notwithstanding the foregoing,

any party which Idaho Power may consolidate, or into which it may merge, or to which it may convey or transfer substantially all of its electric utility assets, shall automatically, without further act, and without need of consent or approval by the Seller, succeed to all of Idaho Power's rights, obligations and interests under this Agreement. This article shall not prevent a financing entity with recorded or secured rights from exercising all rights and remedies available to it under law or contract. Idaho Power shall have the right to be notified by the financing entity that it is exercising such rights or remedies.

ARTICLE XXIII: MODIFICATION

- 23.1 No modification to this Agreement shall be valid unless it is in writing and signed by both Parties and subsequently approved by the Commission.

ARTICLE XXIV: TAXES

- 24.1 Each Party shall pay before delinquency all taxes and other governmental charges which, if failed to be paid when due, could result in a lien upon the Facility or the Interconnection Facilities.

ARTICLE XXV: NOTICES

- 25.1 All written notices under this Agreement shall be directed as follows and shall be considered delivered when faxed, e-mailed and confirmed with deposit in the U.S. Mail, first-class, postage prepaid, as follows:

To Seller:

Original document to:

Clark Canyon Hydro, LLC
C/O Symbiotics LLC
Kim Johnson
2000 S. Ocean Blvd # 703
DelRay Beach, Florida 33438

Telephone: (561) 330-7974
Mobile (816) 728-3533

E-mail: vince.lamarra@symbioticsenergy.com

E-mail Copy to: kim.johnson@riverbankpower.com
Elizabeth.evans@symbioticsenergy.com

To Idaho Power:

Original document to:

Vice President, Power Supply
Idaho Power Company
PO Box 70
Boise, Idaho 83707
Email: Lgrow@idahopower.com

Copy of document to:

Cogeneration and Small Power Production
Idaho Power Company
PO Box 70
Boise, Idaho 83707
E-mail: rallphin@idahopower.com

Either Party may change the contact person and/or address information listed above, by providing written notice from an authorized person representing the Party.

ARTICLE XXVI: ADDITIONAL TERMS AND CONDITIONS

26.1 This Agreement includes the following appendices, which are attached hereto and included by reference:

Appendix A	-	Generation Scheduling and Reporting
Appendix B	-	Facility and Point of Delivery
Appendix C	-	Engineer's Certifications

ARTICLE XXVII: SEVERABILITY

- 27.1 The invalidity or unenforceability of any term or provision of this Agreement shall not affect the validity or enforceability of any other terms or provisions and this Agreement shall be construed in all other respects as if the invalid or unenforceable term or provision were omitted.

ARTICLE XXVIII: COUNTERPARTS

- 28.1 This Agreement may be executed in two or more counterparts, each of which shall be deemed an original but all of which together shall constitute one and the same instrument.

ARTICLE XXIX: ENTIRE AGREEMENT

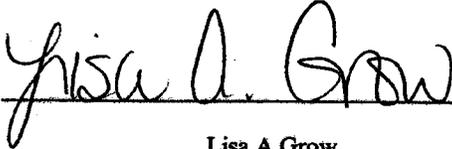
- 29.1 This Agreement constitutes the entire Agreement of the Parties concerning the subject matter hereof and supersedes all prior or contemporaneous oral or written agreements between the Parties concerning the subject matter hereof.

IN WITNESS WHEREOF, The Parties hereto have caused this Agreement to be executed
in their respective names on the dates set forth below:

Idaho Power Company

Clark Canyon, LLC

By



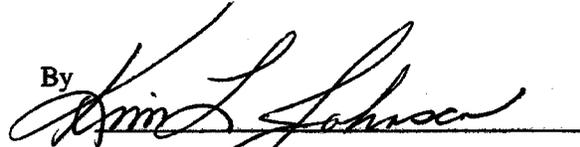
Lisa A Grow
Sr. Vice President, Power Supply

Dated

5.20.11

"Idaho Power"

By



Kim L Johnson
Executive Vice President Business
Development

Dated

5-18-11

"Seller"

APPENDIX A

A-1 MONTHLY POWER PRODUCTION AND SWITCHING REPORT

At the end of each month the following required documentation will be submitted to:

Idaho Power Company
Attn: Cogeneration and Small Power Production
PO Box 70
Boise, Idaho 83707

The meter readings required on this report will be the readings on the Idaho Power Meter Equipment measuring the Facility's total energy production and Station Usage delivered to Idaho Power and the maximum generated energy (kW) as recorded on the Metering Equipment and/or any other required energy measurements to adequately administer this Agreement. This document shall be the document to enable Idaho Power to begin the energy payment calculation and payment process. The meter readings on this report shall not be used to calculate the actual payment, but instead will be a check of the automated meter reading information that will be gathered as described in item A-2 below:

Idaho Power Company

Cogeneration and Small Power Production

MONTHLY POWER PRODUCTION AND SWITCHING REPORT

Month _____ Year _____

Project Name _____ Project Number: _____
 Address _____ Phone Number: _____
 City _____ State _____ Zip _____

	<u>Facility Output</u>	<u>Station Usage</u>	<u>Station Usage</u>	<u>Metered Maximum Generation</u>
Meter Number:	_____	_____	_____	kW
End of Month kWh Meter Reading:	_____	_____	_____	
Beginning of Month kWh Meter:	_____	_____	_____	
Difference:	_____	_____	_____	<u>Net Generation</u>
Times Meter Constant:	_____	_____	_____	
kWh for the Month:	_____	-	_____	
Metered Demand:	_____	_____	_____	

Breaker Opening Record

<u>Date</u>	<u>Time</u>	<u>Meter</u>

Breaker Closing Record

<u>Date</u>	<u>Time</u>	<u>Meter</u>

* <u>Reason</u>

- * **Breaker Opening Reason Codes**
- 1 Lack of Adequate Prime Mover
 - 2 Forced Outage of Facility
 - 3 Disturbance of IPCo System
 - 4 Scheduled Maintenance
 - 5 Testing of Protection Systems
 - 6 Cause Unknown
 - 7 Other (Explain)

I hereby certify that the above meter readings are true and correct as of Midnight on the last day of the above month and that the switching record is accurate and complete as required by the Firm Energy Sales Agreement to which I am a Party.

Signature Date

A-2 AUTOMATED METER READING COLLECTION PROCESS

Monthly, Idaho Power will use the provided Metering and Telemetry equipment and processes to collect the meter reading information from the Idaho Power provided Metering Equipment that measures the Net Energy and energy delivered to supply Station Use for the Facility recorded at 12:00 AM (Midnight) of the last day of the month..

The meter information collected will include but not be limited to energy production, Station Use, the maximum generated power (kW) and any other required energy measurements to adequately administer this Agreement.

A-3 ROUTINE REPORTING

Once the Facility has achieved its Operation Date and has operated in a reliable and consistent manner for a reasonable period of time, the Parties may mutually agree to modify this Routine Reporting requirement.

Idaho Power Contact Information

Daily Energy Production Reporting

Call daily by 10 a.m., 1-800-356-4328 or 1-800-635-1093 and leave the following information:

- Project Identification - Project Name and Project Number
- Current Meter Reading
- Estimated Generation for the current day
- Estimated Generation for the next day

Planned and Unplanned Project outages

Call 1-800-345-1319 and leave the following information:

- Project Identification - Project Name and Project Number
- Approximate time outage occurred
- Estimated day and time of project coming back online

Seller's Contact Information

24-Hour Project Operational Contact

Name: Brent Smith
Telephone Number: (541) 330-8779
Cell Phone: (208) 521-2473

Project On-site Contact information

Name: Brent Smith
Telephone Number: (208) 521-2473

APPENDIX B

FACILITY AND POINT OF DELIVERY

Project Name: Clark Canyon Hydroelectric

Project Number: 41455600

B-1 DESCRIPTION OF FACILITY

(Must include the Nameplate Capacity rating and VAR capability (both leading and lagging) of all generation units to be included in the Facility.)

The 4.7 MW Clark Canyon Hydro LLC project is located at the Clark Canyon dam on the Beaverhead River in Beaverhead County near the town of Dillon, MT. Long:44.99, Lat:-112.85. Clark Canyon Hydro to build a line to deliver power directly to Idaho Power at the Peterson Substation located in Southwestern Montana south of the town of Dillon, MT.

Var Capability (Both leading and lagging) Leading is .95 Lagging is .96

B-2 LOCATION OF FACILITY

Near: Dillon, MT

Geographic Coordinates: Long 44.99, Lat -112.85 County: Beaverhead

Description of Interconnection Location: Connect directly to the Idaho Power Peterson Substation

B-3 SCHEDULED FIRST ENERGY AND OPERATION DATE

Seller has selected November 1, 2012 as the Scheduled First Energy Date.

Seller has selected March 31, 2013 as the Scheduled Operation Date.

In making these selections, Seller recognizes that adequate testing of the Facility and completion of all requirements in paragraph 5.2 of this Agreement must be completed prior to the project being granted an Operation Date.

B-4 MAXIMUM CAPACITY AMOUNT:

This value will be 4.7 MW which is consistent with the value provided by the Seller to Idaho Power in accordance with Schedule 72. This value is the maximum energy (MW) that potentially

could be delivered by the Seller's Facility to the Idaho Power electrical system at any moment in time.

B-5 POINT OF DELIVERY

"Point of Delivery" means, unless otherwise agreed by both Parties, the point of where the Seller's Facility energy is delivered to the Idaho Power electrical system. Schedule 72 will determine the specific Point of Delivery for this Facility. The Point of Delivery identified by Schedule 72 will become an integral part of this Agreement.

B-6 LOSSES

If the Idaho Power Metering equipment is capable of measuring the exact energy deliveries by the Seller to the Idaho Power electrical system at the Point of Delivery, no Losses will be calculated for this Facility. If the Idaho Power Metering is unable to measure the exact energy deliveries by the Seller to the Idaho Power electrical system at the Point of Delivery, a Losses calculation will be established to measure the energy losses (kWh) between the Seller's Facility and the Idaho Power Point of Delivery. This loss calculation will be initially set at 2% of the kWh energy production recorded on the Facility generation metering equipment. At such time as Seller provides Idaho Power with the electrical equipment specifications (transformer loss specifications, conductor sizes, etc.) of all of the electrical equipment between the Facility and the Idaho Power electrical system, Idaho Power will configure a revised loss calculation formula to be agreed to by both parties and used to calculate the kWh Losses for the remaining term of the Agreement. If at any time during the term of this Agreement, Idaho Power determines that the loss calculation does not correctly reflect the actual kWh losses attributed to the electrical equipment between the Facility and the Idaho Power electrical system, Idaho Power may adjust the calculation and retroactively adjust the previous month's kWh loss calculations.

B-7 METERING AND TELEMETRY

Schedule 72 will determine the specific metering and telemetry requirements for this Facility. At the minimum the Metering Equipment and Telemetry equipment must be able to provide and

record hourly energy deliveries to the Point of Delivery and any other energy measurements required to administer this Agreement. These specifications will include but not be limited to equipment specifications, equipment location, Idaho Power provided equipment, Seller provided equipment, and all costs associated with the equipment, design and installation of the Idaho Power provided equipment. Seller will arrange for and make available at Seller's cost communication circuit(s) compatible with Idaho Power's communications equipment and dedicated to Idaho Power's use, terminating at Idaho Power's facility capable of providing Idaho Power with continuous instantaneous information on the Facility's energy production. Idaho Power provided equipment will be owned and maintained by Idaho Power, with total cost of purchase, installation, operation, and maintenance, including administrative cost to be reimbursed to Idaho Power by the Seller. Payment of these costs will be in accordance with Schedule 72 and the total metering cost will be included in the calculation of the Monthly Operation and Maintenance Charges specified in Schedule 72.

B-8 NETWORK RESOURCE DESIGNATION

Idaho Power cannot accept or pay for generation from this Facility until a Network Resource Designation ("NRD") application has been accepted by Idaho Power's delivery business unit. Federal Energy Regulatory Commission ("FERC") Rules require Idaho Power to prepare and submit the NRD. Because much of the information Idaho Power needs to prepare the NRD is specific to the Seller's Facility, Idaho Power's ability to file the NRD in a timely manner is contingent upon timely receipt of the required information from the Seller. Prior to Idaho Power beginning the process to enable Idaho Power to submit a request for NRD status for this Facility, the Seller shall have completed all requirements as specified in Paragraph 5.7 of this Agreement. **Seller's failure to provide complete and accurate information in a timely manner can significantly impact Idaho Power's ability and cost to attain the NRD designation for the Seller's Facility and the Seller shall bear the costs of any of these delays that are a result of any action or inaction by the Seller.**

APPENDIX C

ENGINEER'S CERTIFICATION

OF

OPERATIONS & MAINTENANCE POLICY

The undersigned _____, on behalf of himself and _____, hereinafter collectively referred to as "Engineer," hereby states and certifies to the Seller as follows:

1. That Engineer is a Licensed Professional Engineer in good standing in the State of Idaho.
2. That Engineer has reviewed the Energy Sales Agreement, hereinafter "Agreement," between Idaho Power as Buyer, and _____ as Seller, dated _____.
3. That the cogeneration or small power production project which is the subject of the Agreement and this Statement is identified as IPCo Facility No. _____ and is hereinafter referred to as the "Project."
4. That the Project, which is commonly known as the _____ Project, is located in Section _____ Township _____ Range _____, Boise Meridian, _____ County, Idaho.
5. That Engineer recognizes that the Agreement provides for the Project to furnish electrical energy to Idaho Power for a _____ year period.
6. That Engineer has substantial experience in the design, construction and operation of electric power plants of the same type as this Project.
7. That Engineer has no economic relationship to the Design Engineer of this Project.
8. That Engineer has reviewed and/or supervised the review of the Policy for Operation and Maintenance ("O&M") for this Project and it is his professional opinion that, provided said Project has been designed and built to appropriate standards, adherence to said O&M Policy will result in the Project's producing at or near the design electrical output, efficiency and plant factor for a fifteen (15) year period.

9. That Engineer recognizes that Idaho Power, in accordance with paragraph 5.2 of the Agreement, is relying on Engineer's representations and opinions contained in this Statement.

10. That Engineer certifies that the above statements are complete, true and accurate to the best of his knowledge and therefore sets his hand and seal below.

By _____

(P.E. Stamp)

Date _____

APPENDIX C

ENGINEER'S CERTIFICATION

OF

ONGOING OPERATIONS AND MAINTENANCE

The undersigned _____, on behalf of himself and _____ hereinafter collectively referred to as "Engineer," hereby states and certifies to the Seller as follows:

1. That Engineer is a Licensed Professional Engineer in good standing in the State of Idaho.
2. That Engineer has reviewed the Energy Sales Agreement, hereinafter "Agreement," between Idaho Power as Buyer, and _____ as Seller, dated _____.
3. That the cogeneration or small power production project which is the subject of the Agreement and this Statement is identified as IPCo Facility No. _____ and hereinafter referred to as the "Project".
4. That the Project, which is commonly known as the _____ Project, is located in Section _____ Township _____ Range _____, Boise Meridian, _____ County, Idaho.
5. That Engineer recognizes that the Agreement provides for the Project to furnish electrical energy to Idaho Power for a twenty (20) year period.
6. That Engineer has substantial experience in the design, construction and operation of electric power plants of the same type as this Project.
7. That Engineer has no economic relationship to the Design Engineer of this Project.

8. That Engineer has made a physical inspection of said Project, its operations and maintenance records since the last previous certified inspection. It is Engineer's professional opinion, based on the Project's appearance, that its ongoing O&M has been substantially in accordance with said O&M Policy; that it is in reasonably good operating condition; and that if adherence to said O&M Policy continues, the Project will continue producing at or near its design electrical output, efficiency and plant factor for the remaining _____ years of the Agreement.

9. That Engineer recognizes that Idaho Power, in accordance with paragraph 5.2 of the Agreement, is relying on Engineer's representations and opinions contained in this Statement.

10. That Engineer certifies that the above statements are complete, true and accurate to the best of his knowledge and therefore sets his hand and seal below.

By _____

(P.E. Stamp)

Date _____

APPENDIX C

ENGINEER'S CERTIFICATION
OF
DESIGN & CONSTRUCTION ADEQUACY

The undersigned _____, on behalf of himself and _____ hereinafter collectively referred to as "Engineer", hereby states and certifies to Idaho Power as follows:

1. That Engineer is a Licensed Professional Engineer in good standing in the State of Idaho.
2. That Engineer has reviewed the Firm Energy Sales Agreement, hereinafter "Agreement", between Idaho Power as Buyer, and _____ as Seller, dated _____.
3. That the cogeneration or small power production project, which is the subject of the Agreement and this Statement, is identified as IPCo Facility No _____ and is hereinafter referred to as the "Project".
4. That the Project, which is commonly known as the _____ Project, is located in Section _____ Township _____ Range _____, Boise Meridian, _____ County, Idaho.
5. That Engineer recognizes that the Agreement provides for the Project to furnish electrical energy to Idaho Power for a twenty (20) year period.
6. That Engineer has substantial experience in the design, construction and operation of electric power plants of the same type as this Project.
7. That Engineer has no economic relationship to the Design Engineer of this Project and has made the analysis of the plans and specifications independently.
8. That Engineer has reviewed the engineering design and construction of the Project, including the civil work, electrical work, generating equipment, prime mover conveyance system, Seller furnished Interconnection Facilities and other Project facilities and equipment.

9. That the Project has been constructed in accordance with said plans and specifications, all applicable codes and consistent with Prudent Electrical Practices as that term is described in the Agreement.

10. That the design and construction of the Project is such that with reasonable and prudent operation and maintenance practices by Seller, the Project is capable of performing in accordance with the terms of the Agreement and with Prudent Electrical Practices for a _____ year period.

11. That Engineer recognizes that Idaho Power, in accordance with paragraph 5.2 of the Agreement, in interconnecting the Project with its system, is relying on Engineer's representations and opinions contained in this Statement.

12. That Engineer certifies that the above statements are complete, true and accurate to the best of his knowledge and therefore sets his hand and seal below.

By _____
(P.E. Stamp)

Date _____

APPENDIX D

FORMS OF LIQUID SECURITY

The Seller shall provide Idaho Power with commercially reasonable security instruments such as Cash Escrow Security, Guarantee or Letter of Credit as those terms are defined below or other forms of liquid financial security that would provide readily available cash to Idaho Power to satisfy the Delay Security requirement within this Agreement.

For the purpose of this Appendix D, the term "Credit Requirements" shall mean acceptable financial creditworthiness of the entity providing the security instrument in relation to the term of the obligation in the reasonable judgment of Idaho Power, provided that any guarantee and/or letter of credit issued by any other entity with a short-term or long-term investment grade credit rating by Standard & Poor's Corporation or Moody's Investor Services, Inc. shall be deemed to have acceptable financial creditworthiness.

1. Cash Escrow Security – Seller shall deposit funds in an escrow account established by the Seller in a banking institution acceptable to both Parties equal to the Delay Security.
2. Guarantee or Letter of Credit Security – Seller shall post and maintain in an amount equal to the Delay Security: (a) a guaranty from a party that satisfies the Credit Requirements, in a form acceptable to Idaho Power at its discretion, or (b) a Letter of Credit in a form acceptable to Idaho Power, in favor of Idaho Power. The Letter of Credit will be issued by a financial institution acceptable to both parties.

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Attorneys for Complainant

BEFORE THE
IDAHO PUBLIC UTILITIES COMMISSION

GRAND VIEW PV SOLAR II, LLC, Complainant,	)	Case No. IPC-E-11-15
vs.)	
IDAHO POWER COMPANY, Defendant.	)	AFFIDAVIT OF ROBERT A. PAUL
_____)

EXHIBIT 5.2
COMMENTS OF THE COMMISSION STAFF
IPC-E-11-09

KRISTINE A. SASSER
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IDAHO PUBLIC UTILITIES COMMISSION
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IDAHO PUBLIC
UTILITIES COMMISSION

Street Address for Express Mail:
472 W. WASHINGTON
BOISE, IDAHO 83702-5918

Attorney for the Commission Staff

BEFORE THE IDAHO PUBLIC UTILITIES COMMISSION

IN THE MATTER OF THE APPLICATION OF)
IDAHO POWER COMPANY FOR A) CASE NO. IPC-E-11-09
DETERMINATION REGARDING THE FIRM)
ENERGY SALES AGREEMENT WITH CLARK) COMMENTS OF THE
CANYON, LLC FOR THE SALE AND) COMMISSION STAFF
PURCHASE OF ELECTRIC ENERGY.)

COMES NOW the Staff of the Idaho Public Utilities Commission, by and through its Attorney of record, Kristine A. Sasser, Deputy Attorney General, and in response to the Notice of Application and Notice of Modified Procedure issued in Order No. 32252 on June 1, 2011, in Case No. IPC-E-11-09, submits the following comments.

BACKGROUND

On May 24, 2011, Idaho Power Company filed an Application with the Commission requesting acceptance or rejection of a 20-year Firm Energy Sales Agreement (Agreement) between Idaho Power and Clark Canyon, LLC (Clark Canyon) dated May 20, 2011. The Application states that Clark Canyon would sell and Idaho Power would purchase electric energy generated by the Clark Canyon hydroelectric project (Facility) located near Dillon, Montana. The Application states that Clark Canyon proposes to own, operate and maintain a 4.7 MW (maximum capacity, nameplate) hydroelectric generating facility. Application at 2. The Facility will be a QF under the applicable provisions of PURPA. The Agreement is for a term of 20 years and contains

the current non-levelized published avoided cost rates established by the Commission in Order No. 31025 for energy deliveries of less than 10 average megawatts (“aMW”).

Clark Canyon selected November 1, 2012, as its Scheduled First Energy Date and March 31, 2013, as its Scheduled Operation Date. Application at 3. Idaho Power asserts that various requirements have been placed upon the Clark Canyon facility in order for Idaho Power to accept the Facility’s energy deliveries. Idaho Power states that it will monitor the Facility’s compliance with initial and ongoing requirements through the term of the Agreement.

The Application maintains that all applicable interconnection charges and monthly operation or maintenance charges under Schedule 72 will be assessed to Clark Canyon. Idaho Power states that the Facility is currently in the generator interconnection process. “Upon resolution of any and all upgrades required to acquire transmission capacity for this Facility’s generation, and upon execution of the FESA and the GIA, this Facility may then be designated as a network resource.” *Id.* at 4.

Clark Canyon and Idaho Power have agreed to liquidated damage and security provisions of \$45 per kW of nameplate capacity or the sum of three months’ estimated revenue. Agreement ¶¶ 5.3.2, 5.8.1.

Ownership of environmental attributes (i.e., Green Tags, Renewable Energy Credits/RECs) associated with this Facility are addressed in a separate agreement. Application at 3.

Idaho Power states that the Facility has also been made aware of and accepted the provisions in the Agreement and Idaho Power’s approved Schedule 72 regarding non-compensated curtailment or disconnection of its Facility should certain operating conditions develop on Idaho Power’s system. The Application notes that the parties’ intent and understanding is that “non-compensated curtailment would be exercised when the generation being provided by the Facility in certain operating conditions exceeds or approaches the minimum load levels of [Idaho Power’s] system such that it may have a detrimental effect upon [Idaho Power’s] ability to manage its thermal, hydro, and other resources in order to meet its obligation to reliably serve loads on its system.” *Id.* at 5.

By its own terms, the Agreement will not become effective until the Commission has approved all of the Agreement’s terms and conditions and declares that all payments made by Idaho Power to Clark Canyon for purchases of energy will be allowed as prudently incurred expenses for ratemaking purposes. Agreement ¶ 21.1.

STAFF ANALYSIS

With few exceptions, the rates, terms and conditions contained in the Agreement are identical to those contained in other recently approved PURPA contracts. Consequently, Staff's comments will not address the standard rates, terms and conditions, and instead will focus only on those things that make this Agreement unique.

One unique feature of this Agreement is that ownership of environmental attributes is determined in a separate agreement between Idaho Power and Clark Canyon. Another unique feature of this project is that the Facility is not located in Idaho but is seeking a contract containing Idaho's published avoided cost rates. Both issues are discussed in more detail below.

Environmental Attribute Ownership

As the Commission is aware, there is currently no renewable portfolio standard in Idaho or requirement that utilities possess environmental attributes. Furthermore, neither the Commission nor the Idaho State Legislature has issued orders or passed legislation specifying who—the utility or the project owner—owns the RECs and is entitled to sell them. Nevertheless, RECs are produced by PURPA projects in Idaho and they undeniably have value if sold.

The Commission has previously stated, “The utility and the QFs are free to voluntarily contract and negotiate the sale and purchase of such green tags should environmental attributes be perceived by the contracting parties to have value. The price of the same we find, however, is not a PURPA cost and is not recoverable as such by the Company.” Case No. IPC-E-04-16, Order No. 29577, p. 6. In all prior Idaho Power PURPA contracts in which RECs are produced by a project, Idaho Power has voluntarily waived any right or claim to ownership of RECs and 100 percent of the RECs have been claimed by project owners. In the Clark Canyon contract, however, the parties have negotiated a 50/50 sharing of RECs.

Idaho Power informed Staff that it initially proposed reservation of rights language for the contract that would preserve for Idaho Power and its customers the right to RECs in this contract should the rules, regulations, laws, or legal status as to the ownership of RECs in PURPA contracts be clarified or changed to abide by such change in law. Ultimately, the parties saw a mutual value to both the project and to Idaho Power and its customers in clarifying the ownership of RECs and negotiated the separate agreement whereby the project retains all RECs for the first ten years of the contract and Idaho Power owns all RECs for the last ten years of the contract. There is no monetary payment for RECs in the Agreement. The project receives clarification as to

ownership and retains RECs for the first ten years to obtain what value it can to help offset project costs. Furthermore, Idaho Power and its customers receive clarification as to the ownership and get ownership of all RECs for the last ten years to either obtain what value it can for the RECs, which flows back to customers, or retire such RECs in order to claim the environment attributes of the energy on its system or to meet possible future renewable portfolio standards.

Staff recognizes that agreement between the parties regarding REC ownership seems to be exactly the type of negotiation contemplated by the Commission when it issued Order No. 29577. Nevertheless, the sharing arrangement negotiated in this case is a clear departure from the REC ownership arrangements Idaho Power has agreed to in prior PURPA contracts. In a separate PURPA agreement recently filed by Idaho Power (IPC-E-11-10, Interconnect Solar Development LLC.)¹, Idaho Power and the project owner have negotiated an agreement in which REC ownership is split 50/50 throughout the entire 25-year term of the contract rather than ownership being split 50/50 between the first and last halves of the contract terms as in this Agreement with Clark Canyon. Although Staff has no objection to the REC ownership arrangements agreed to between Clark Canyon and Idaho Power in this case, the variety of ownership arrangements demonstrated in recent Idaho Power contracts may be an indication that consistent ownership rules or laws need to be established in the future.

The Clark Canyon Facility is Located in Montana

The Clark Canyon Facility is not located in Idaho but is seeking a contract containing Idaho's published avoided cost rates. The Facility will be directly connected to Idaho Power's Peterson substation which is also located in Montana. A relevant question is whether Clark Canyon should be entitled to receive Idaho's avoided cost rates under Idaho's rules and regulations, or whether the project should be subject to Montana's rates and rules because the point of delivery is in Montana. In general, in order for a facility located outside Idaho to be eligible for an Idaho QF contract, the Commission's policy has been that the QF must either deliver power directly to a substation located within Idaho, or alternatively, that the QF must pay wheeling charges to have the power delivered to an Idaho substation. Currently, there are six facilities located outside Idaho that have PURPA contracts with Idaho utilities at Idaho avoided cost rates, and several others have been proposed.

¹ An application was filed in Case No. IPC-E-11-10 on June 17, 2011.

There are three prior cases which are instructive of the Commission's position on this matter. In the first case, *Earth Power Energy and Minerals, Inc. vs. Idaho Power Company*, Case No. IPC-E-92-29, Earth Power proposed to develop a 9.9 MW geothermal project in Nevada that would deliver power to Idaho Power's Humboldt substation in Nevada. Earth Power had requested Idaho avoided cost rates and contended that Idaho Power was obliged to negotiate a contract with it in accordance with Idaho Commission rules and requirements. At the time of the complaint, Idaho Power still served 1200 retail customers in Nevada; consequently, Idaho Power was subject to the regulatory authority and jurisdiction of both the Idaho Commission and the Nevada Commission. Idaho Power argued, however, that the Idaho Commission lacked jurisdiction over this particular contract because both the facility and the point of interconnection were located in Nevada. Initially, the Idaho Commission dismissed the complaint and declined to exercise its jurisdiction because it appeared that the Nevada Commission intended to do so. Reference Order No. 25174. However, shortly thereafter, the Nevada Commission dismissed the complaint because it believed that the Idaho Commission was most capable of setting avoided cost rates for Idaho Power. Subsequently, the Idaho Commission authorized Earth Power, at its discretion, to file a new complaint. However, no complaint was ever filed, so the matter was never fully resolved. Nevertheless, what was made clear was that jurisdiction under PURPA is shared by all state regulatory authorities who exercise "ratemaking authority" over multijurisdictional utilities. Reference PURPA Section 210.

A second relevant case was *Island Power Company, Inc. vs. PacifiCorp*, Case No. UPL-E-93-04. Island Power proposed to develop a 4.4 MW hydro project at the Clark Canyon Dam, coincidentally, a nearly identical facility at the same exact location as is being proposed in this case. One significant difference, however, was that Island Power proposed to wheel the power from Montana to Idaho and deliver to either the Goshen or Jefferson substations both located in Idaho. At the time of the complaint, PacifiCorp was providing retail electric service both in Montana and Idaho. Island Power alleged that PacifiCorp was refusing to accept delivery of power in Idaho and was refusing to pay Idaho avoided cost rates. PacifiCorp indicated that it was willing to purchase the power only if it was wheeled north to a PacifiCorp substation in Montana, and alleged that the Idaho Commission had no jurisdiction because the project was to be sited in Montana. In its decision in the case, the Commission, as in the *Earth Power* case, stated that jurisdiction was shared by all state regulatory authorities who exercise "ratemaking authority" over the utility. The Commission noted that although the project was to be sited in Montana, the

proposed point of delivery to PacifiCorp was in Idaho. The Commission denied a motion to dismiss filed by PacifiCorp to the complaint filed by Island Power for failure to negotiate a contract. Shortly after the Commission issued its decision, an avoided cost case was opened that resulted in a lowering of avoided cost rates. Island Power's initial complaint then transformed into a dispute over whether Island Power was entitled to grandfathered rates. The Commission ruled that PacifiCorp was required to purchase the output of the Clark Canyon project at an Idaho delivery point, but that Island Power was not entitled to grandfathered rates. Reference Order No. 25245. Island Power, however, never chose to pursue a contract.

A third relevant case was *Vaagen Bros. Lumber, Inc. vs. The Washington Water Power Company*, Case No. WWP-E-94-6. In this case, Vaagen Brothers had a 1979 power sales agreement with Washington Water Power (WWP) that had expired in 1994. Vaagen Brothers was seeking a new contract with WWP as a PURPA QF pursuant to the Idaho avoided cost methodology and rates. The facility was located in WWP's service territory in the state of Washington, with a point of interconnection also in Washington. Vaagen Brothers filed a complaint with the Idaho Commission seeking to force WWP to enter into a contract. WWP had retail electric service territory in both the state of Washington and Idaho, just as it does now, and was therefore under the regulatory jurisdiction of both the Idaho and Washington Commissions. Under the facts of this case, the Commission found that it had concurrent jurisdiction with Washington, but believed that the Washington avoided cost rates and rules should apply, subject to the jurisdiction of the Washington Commission. The Commission distinguished this case from the Earth Power and Island Power cases stating, "Vaagen is an existing facility sited in the Washington service territory of the utility that it wishes to sell to, the Washington Water Power Company. The established point of delivery is in the state of Washington." The Commission further stated that the Washington Commission had established a regulatory framework for PURPA in Washington, and that although Idaho did have concurrent jurisdiction with the Washington Commission, "common sense dictates that there are some instances when we should elect not to exercise our jurisdiction." Subsequent to the Commission's decision, Vaagen Brothers negotiated a PURPA contract with Idaho Power at Idaho's avoided cost rates; however, Vaagen Brothers pays a wheeling charge to deliver the power to Idaho Power's system in Idaho.

Clark Canyon is slightly different than the other three cases discussed above. Clark Canyon is a QF located in the state of Montana with a proposed point of interconnection directly to Idaho Power's Peterson substation in the state of Montana. There would be no different

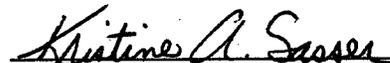
interconnecting utility and subsequent wheel of the power in order to reach Idaho Power. A significant distinguishing feature in this case, however, is that Idaho Power has no retail electric service territory in the state of Montana; therefore, the Montana Commission has no regulatory framework for PURPA that is applicable to Idaho Power. NorthWestern Energy owns transmission lines that are immediately adjacent to the proposed Clark Canyon facility, and PacifiCorp jointly owns transmission facilities that are equidistant to Idaho Power's transmission facilities (approximately 11.5 miles away). Nonetheless, as long as it is willing to pay the necessary interconnection costs, there is nothing that prevents Clark Canyon from choosing which utility's transmission system it wishes to interconnect.

Under these facts, and pursuant to the direction provided by the previously discussed Commission Orders above, Staff believes that that the Idaho Commission does, in fact, have sole jurisdiction in this matter, and that Idaho Power has an obligation to enter into a PURPA contract under Idaho's rules, regulations and rates.

RECOMMENDATIONS

Staff recommends that the Firm Energy Sales Agreement between Clark Canyon LLC and Idaho Power be approved as filed. Staff further recommends that the Commission declare that all payments for purchases of energy under the Agreement be allowed as prudently incurred expenses for ratemaking purposes.

Respectfully submitted this 29TH day of June 2011.


Kristine A. Sasser
Deputy Attorney General

Technical Staff: Rick Sterling

i:\umisc:comments\ipce11.9ksrps comments

CERTIFICATE OF SERVICE

I HEREBY CERTIFY THAT I HAVE THIS 29TH DAY OF JUNE 2011, SERVED THE FOREGOING **COMMENTS OF THE COMMISSION STAFF**, IN CASE NO. IPC-E-11-09, BY MAILING A COPY THEREOF, POSTAGE PREPAID, TO THE FOLLOWING:

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LEAD COUNSEL
IDAHO POWER COMPANY
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BOISE ID 83707-0070
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RANDY C ALLPHIN
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SECRETARY

CERTIFICATE OF SERVICE

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Attorneys for Clark Canyon Hydro

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IDAHO PUBLIC
UTILITIES COMMISSION

BEFORE THE
IDAHO PUBLIC UTILITIES COMMISSION

IN THE MATTER OF THE APPLICATION OF)
IDAHO POWER COMPANY FOR A)
DETERMINATION REGARDING THE FIRM)
ENERGY SALES AGREEMENT WITH)
CLARK CANYON, LLC FOR THE SALE AND)
PURCHASE OF ELECTRIC ENERGY)

CASE NO. IPC-E-11-09
REPLY COMMENTS
OF CLARK CANYON, LLC

COMES NOW, Clark Canyon, LLC ("Clark Canyon") and provides it's Reply Comments to the Comments of the Staff of the Idaho Public Utilities Commission ("Staff") in the above captioned matter dealing with the Application of the Idaho Power Company ("Company" or "Idaho Power") for approval of a PURPA agreement with Clark Canyon.

I.
SUMMARY

Clark Canyon is appreciative of Staff's review of the Agreement between it and Idaho Power and respects Staff's duty to thoroughly review the terms and conditions of such agreements. Nevertheless, Clark Canyon is concerned that Staff's Comments addressing the separate REC ownership agreement it entered into with Idaho Power may reflect a

misunderstanding relative to the Commission's role with respect to RECs. The purpose of these Reply Comments is to provide some context as to why Clark entered a separate REC agreement and express concern relative to Staff's conclusion that "the variety of ownership arrangements demonstrated in recent Idaho Power contracts may be an indication that consistent ownership rules or laws need to be established in the future." Staff Comments at p. 4.

II

DISCUSSION – THE IDAHO PUBLIC UTILITIES COMMISSION HAS NO JURISDICTION OVER REC OWNERSHIP

The question of ownership of RECs was addressed by the Commission in 2004 in a docket in which it was asked by Idaho Power to determine the ownership of marketable environmental attributes associated with the sale of renewable energy from a PURPA qualifying facility to Idaho Power. *See* Case No. IPC-E-04-2. In that docket, the Staff filed Comments that contained an extensive legal analysis of the question of the Commission's jurisdiction to even address that question, let alone rule in favor of one of the parties to the PURPA agreement then pending before the Commission for approval. *See Comments of the Commission Staff* IPC-E-04-2 Id. (March 19, 2004).

Staff began its legal analysis by asking a series of relevant questions:

Staff contends that the initial question before the Commission is one of jurisdiction. Does the Commission have the statutory authority and jurisdiction to determine who owns the "environmental attributes" associated with a QF project that requests a PURPA contract and proposes to sell capacity and energy to a regulated utility? If PURPA and FERC rules do not address and do not require a QF developer to sell "environmental attributes," to the purchasing utility can the Commission in its implementation of PURPA restrict their sale to other parties? If the Commission has the authority under PURPA, should it restrict their sale? Can the Commission require as a PURPA contract condition that a QF grant a purchasing utility a "right of first refusal" to purchase the "Green Tags" associated with the QF facility?

Id. at pp. 5 – 6.

Staff properly began its analysis of the questions posed by addressing the basic jurisdictional issue:

It is well settled that the Idaho Commission is a creature of statute and derives its general authority vis-à-vis electric utilities from Title 61, Idaho Code. Under State Law, the Commission has authority over retail service. Wholesale power transactions are regulated by the Federal Energy Regulatory Commission (FERC). The Federal Power Act defines "sale at wholesale" as any sale to a person for resale. 16 U.S.C. § 824(d). Therefore, all QF sales to an electric utility are wholesale transactions.

Id. at p. 6.

Having reached the basic conclusion that PURPA sales are not subject to this Commission's jurisdiction, but are in fact subject to the exclusive jurisdiction of FERC, the Staff's analysis next turned to what powers federal law, through FERC, has delegated to this Commission relative to PURPA:

Under federal authority, i.e., PURPA and the implementing regulations of FERC, the Idaho Commission has the authority to set avoided costs, to order electric utilities to enter into fixed term obligations for the wholesale purchase of energy from qualifying facilities and to implement FERC rules regarding such purchases.

Id. Emphasis provided.

The next question addressed by the Staff in their Comments is the relationship between RECs and PURPA and the relevant FERC rulings addressing that relationship:

FERC in the Order cited by Idaho Power in its Petition (105 FERC ¶ 61,004) states that the contract sale of QF capacity and energy entered into pursuant to PURPA does not convey renewable energy credits (RECs) to the purchasing utility (absent an express provision in the contract to the contrary). FERC notes that RECs are relatively recent creations of the States and suggested that "States, in creating RECs, have the power to determine who owns the REC in the initial instance, and how they may be sold and traded." "It is not" FERC states, "an issue controlled by PURPA."

Id.

Consistent with Staff's recommendations in that case, the Commission rejected Idaho Power's request for a right of first refusal and rejected PacifiCorp's and Avista's arguments in that case

that the utilities owned the RECs in an Idaho PURPA contract. Specifically the Commission stated:

While this Commission will not permit [Idaho Power] in its contracting practice to condition QF contracts on inclusion of such a right-of-first refusal term, neither do we preclude the parties from voluntarily negotiating the sale and purchase of such a green tag should it be perceived to have value. The price of the same we find, however, is not a PURPA cost and is not recoverable as such by the Company.

Order No. 29480, at pp. 16 – 17 (emphasis provided). The QF's logically own the RECs because the rates on the avoided costs of a gas-fired power plant do not include compensation for any social or environmental benefits that may be associated with a particular facility's generation of electricity.

It is clear from Staff's analysis that there are no RECs created in a PURPA contract with an investor owned utility in Idaho. It is also clear that if RECs exist at all, one must turn to state law to discern how and whether they exist and who owns them. Staff's analysis of the status of RECs in Idaho was directly on point:

Staff notes that Idaho is not a State that has established a renewable energy portfolio standard for electric utilities. Nor is it a State that has by legislation created green certificates, green tags, renewable energy credits (RECs) or tradable renewable certificates (TRCs) or established a market for the same. Nor also is Idaho presently a state that has provided tax incentives or credits for the development of renewable energy. [footnote on pending tax legislation omitted] In short, there appears to Staff to be no hook that gives the Commission jurisdiction over "environmental attributes," not under PURPA or federal law (including the Energy Policies Act of 1992), and not under Title 61 of the Idaho Code.

Id. at pp 6 – 7. Emphasis provided.

Staff was unequivocal in its conclusion that the Commission has no subject matter jurisdiction over the question of REC ownership. Instructive to the Commission as it contemplates Staff's current comments on REC ownership is Staff's 2004 observation on Idaho

Power's attempt to build a right of first refusal to REC ownership in PURPA contracts approved by this Commission:

Arguably what Idaho Power proposes is an impermissible "taking" of property. The Fifth Amendment of the U.S. Constitution states, "nor shall private property be taken for public use without just compensation." This provision is called the "takings clause." Idaho Power requests a Commission Order granting the utility by regulatory fiat a "right of first refusal." It proposes no compensation to the QF for the right. Electric utility purchases of energy and capacity from PURPA QFs are mandatory. [citation omitted] The environmental attributes associated with renewable QF projects are currently separate from the capacity and energy sold to Idaho utilities. They are not bundled together as a matter of law. Nor is the cost to purchase environmental attributes included in an Idaho utility's avoided cost. To the extent those attributes have value and provide additional developer incentive, Staff believes they should remain with the developer. At this time, no argument has been advanced nor authority cited to justify or require placing any regulatory restriction by this Commission on their ownership.

Id. at p. 8.

Staff's comments are as apropos today as they were in 2004. Indeed, the Idaho Legislature has clearly established a state policy against the concept of a mandatory renewable portfolio standard – which is arguably the only state policy upon which one could conjure up an argument that RECs belong to the utilities in the PURPA context. In 2007, the Idaho Legislature adopted the Idaho State Energy Plan which unequivocally rejects the concept of a mandate that utilities acquire renewable energy sources:

While the Committee endorses renewable resources in general because of the many benefits they provide, it declines to adopt specific targets or standards out of concern that setting arbitrary targets could conflict with the goals of maintaining Idaho's low-cost energy supply and ensuring access to affordable energy for all Idahoans. The Committee is also concerned that adopting firm targets may not provide sufficient flexibility for Idaho energy providers given the rapid development of new energy technologies.

2007 Idaho Energy Plan, (January 19, 2007).

Thus, the Idaho Legislature has provided the Commission with policy guidance to the effect that there be no mandated renewable portfolio standard and that Idaho's utilities have no obligation to, per se, acquire renewable energy.

CLARK CANYON, LLC'S REC EXPERIENCE WITH IDAHO POWER

Clark Canyon voluntarily gave up ownership of its RECs during the last ten years of the currently pending power purchase agreement for the sole reason that it was under extreme time pressure to execute the agreement for financing and other external reasons. It has been Clark Canyon's position, consistent with the Staff's comments cited above, that it owned and will own all RECs associated with renewable projects it develops in Idaho unless it voluntarily gives or sells those RECs to another party. Idaho Power improperly insisted on contract language that would have put a cloud on the marketability of RECs. Clark Canyon did not have the resources or the luxury of time to engage in protracted negotiations and possible litigation against Idaho Power to prevent the power company's "taking" of the value of Clark Canyon's RECs. As a result of a compromise, and in exchange for removing the offending language, Clark Canyon agreed to give Idaho power clear title to all RECs beginning in year eleven of this twenty year contract while retaining clear title in years one through ten.

Staff's comments that perhaps, "ownership rules or laws need to be established in the future" are, for all of the foregoing reasons, off the mark. Ownership rules and laws are unnecessary in light of the fact that REC ownership unequivocally and legally lies with the renewable energy developer. Frankly, what is needed is for Idaho Power to cease flexing its unequal bargaining strength vis-a-vis QF developers and stop insisting on a cut of the action for which it refuses to pay and for which it has no legal claim.

CONCLUSION

Clark Canyon, LLC urges the Commission to approve its Power Purchase Agreement with Idaho Power as quickly as possible and without reservation. While appreciative of Staff's concern with regard to Idaho Power's having engaged in a "variety of [REC] ownership

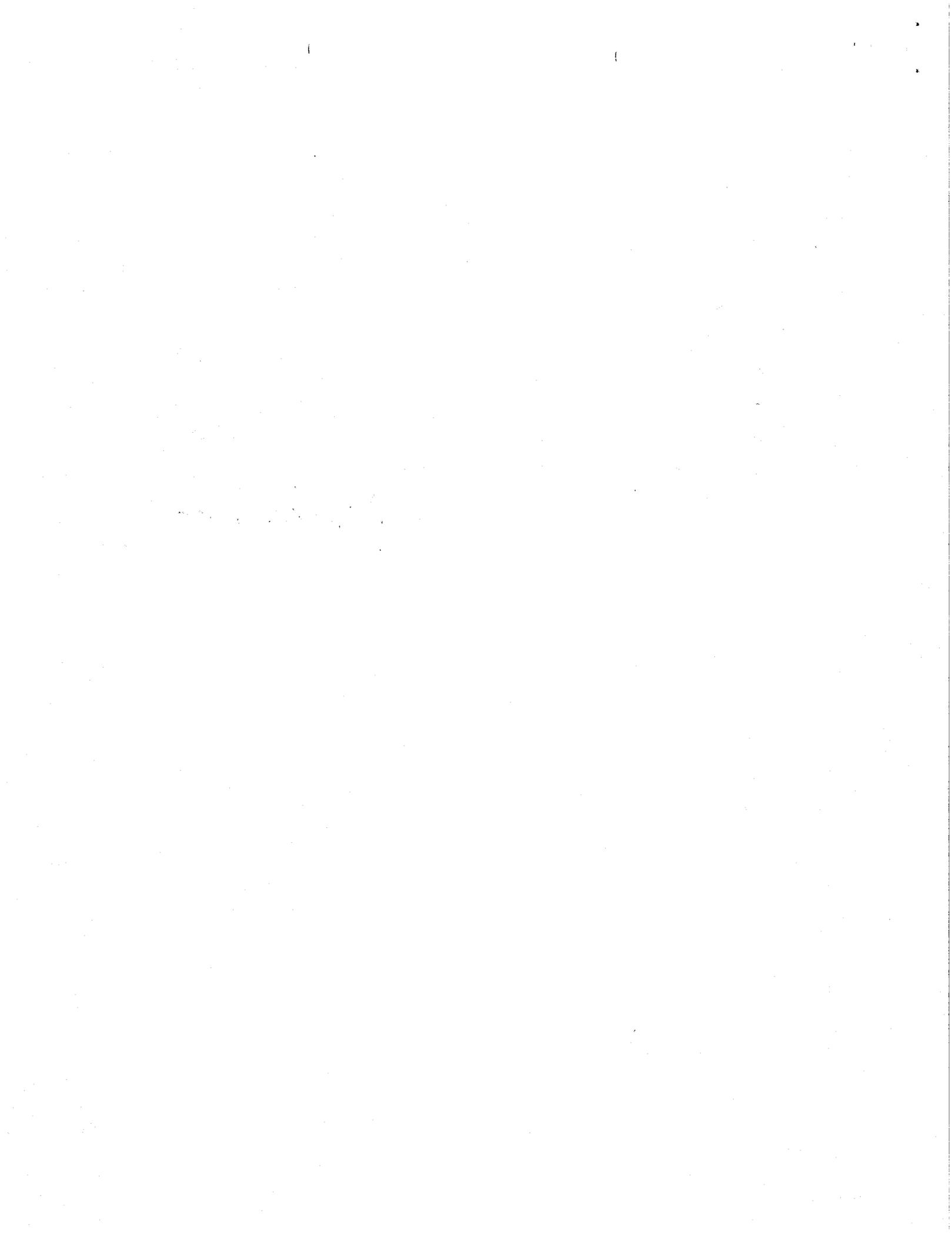
arrangements,” the solution is for the Commission to direct Idaho Power to return to the status quo ante in which “in all prior Idaho Power PURPA contracts in which RECs are produced by a project, Idaho power has voluntarily waived any right or claim to ownership of RECs and 100 percent of the RECs have been claimed by project owners.” Staff Comments at p. 3; *see* Order No. 29577.

RESPECTFULLY SUBMITTED THIS 6th day of July 2011.

Richardson & O’Leary, LLP

By 

Peter J. Richardson
Clark Canyon, LLC



CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 7th day of June, 2011, a true and correct copy of the within and foregoing REPLY COMMENTS OF CLARK COUNTY HYDRO, LLC, was served in the manner shown to:

Ms. Jean Jewell

Commission Secretary
Idaho Public Utilities Commission
P O Box 83720
Boise, ID 83720-0074

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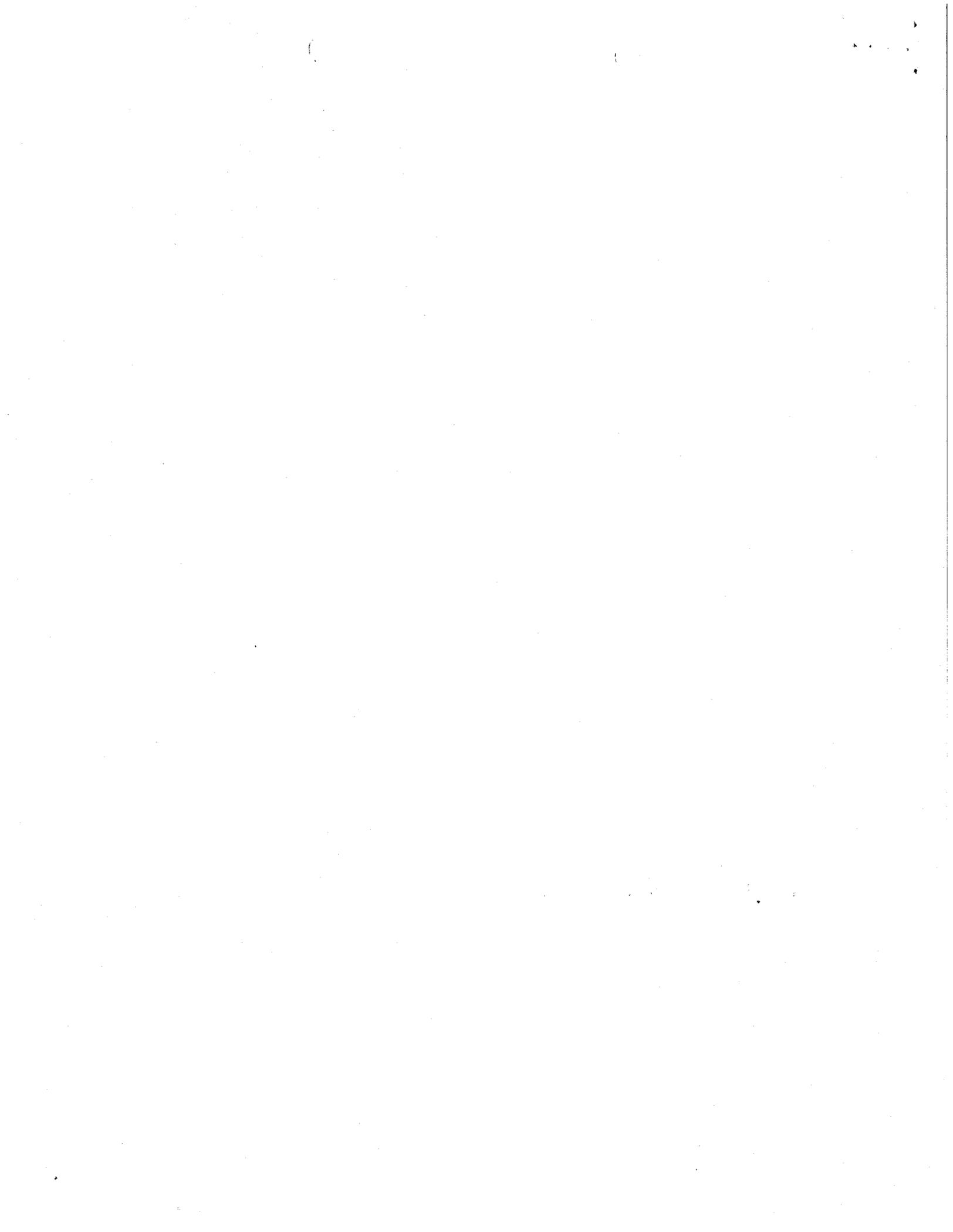
Randy Allphin

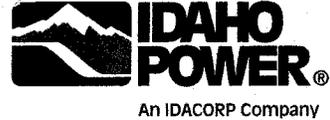
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Nina Curtis
Administrative Assistant





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IDAHO PUBLIC
UTILITIES COMMISSION

DONOVAN E. WALKER
Lead Counsel
dwalker@idahopower.com

June 23, 2011

VIA HAND DELIVERY

Jean D. Jewell, Secretary
Idaho Public Utilities Commission
472 West Washington Street
P.O. Box 83720
Boise, Idaho 83720-0074

Re: Case No. IPC-E-11-09
*IN THE MATTER OF THE APPLICATION OF IDAHO POWER COMPANY
FOR A DETERMINATION REGARDING THE FIRM ENERGY SALES
AGREEMENT WITH CLARK CANYON, LLC, FOR THE SALE AND
PURCHASE OF ELECTRIC ENERGY*

Dear Ms. Jewell:

Enclosed for filing please find an original and three (3) copies of Idaho Power Company's Response to the First Production Request of the Commission Staff to Idaho Power Company in the above matter.

Very truly yours,

Donovan E. Walker

DEW:csb
Enclosures



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Attorneys for Idaho Power Company

RECEIVED

2011 JUN 23 PM 4: 52

IDAHO PUBLIC
UTILITIES COMMISSION

BEFORE THE IDAHO PUBLIC UTILITIES COMMISSION

IN THE MATTER OF THE APPLICATION)	
OF IDAHO POWER COMPANY FOR	)	CASE NO. IPC-E-11-09
A DETERMINATION REGARDING THE)	
FIRM ENERGY SALES AGREEMENT WITH	)	IDAHO POWER COMPANY'S
CLARK CANYON, LLC, FOR THE SALE	)	RESPONSE TO THE FIRST
AND PURCHASE OF ELECTRIC ENERGY.	)	PRODUCTION REQUEST OF
	)	THE COMMISSION STAFF TO
	)	IDAHO POWER COMPANY
)	

COMES NOW, Idaho Power Company ("Idaho Power" or "Company"), and in response to the First Production Request of the Commission Staff to Idaho Power Company dated June 2, 2011, herewith submits the following information:

REQUEST NO. 1: Please provide a copy of the Environmental Attributes agreement between Idaho Power and Clark Canyon LLC referred to in Section 8.1 of the Firm Energy Sales Agreement.

RESPONSE TO REQUEST NO. 1: Please see the attached Agreement for Transfer of Ownership of Environmental Attributes.

The response to this Request was prepared by Donovan E. Walker, Lead Counsel, Idaho Power Company.

REQUEST NO. 2: This Firm Energy Sales Agreement appears to be the first for Idaho Power in which a separate agreement has been executed concerning Environmental Attributes. Please explain why a separate agreement for Environmental Attributes was executed. Please generally describe the ownership arrangement and financial considerations between the parties as reflected in the Environmental Attributes agreement.

RESPONSE TO REQUEST NO. 2: With regard to Environmental Attributes, or Renewable Energy Certificates ("RECs"), and Public Utility Regulatory Policies Act of 1978 ("PURPA") contracts, the Commission has stated, "The utility and the QFs are free to voluntarily contract and negotiate the sale and purchase of such green tags should environmental attributes be perceived by the contracting parties to have value. The price of the same we find, however, is not a PURPA cost and is not recoverable as such by the Company." Case No. IPC-E-04-16, Order No. 29577, p. 6. Idaho Power initially proposed reservation of rights language for the contract that would preserve for Idaho Power and its customers the right in this contract should the rules, regulations, laws, or legal status as to the ownership of RECs in PURPA contracts be clarified or changed to abide by such change in law. As an alternative to this reservation of rights, the parties saw a mutual value to both the project and to Idaho Power and its customers in clarifying the ownership of RECs and negotiated the separate agreement whereby the project retains all RECs for the first ten years of the contract and Idaho Power owns all RECs for the last ten years of the contract. There is no monetary payment for RECs in the agreement. The project receives clarification as to ownership and retains RECs for the first ten years to obtain what value it can to help offset development costs, etc.

Furthermore, Idaho Power and its customers receive clarification as to the ownership and get ownership of all RECs for the last ten years to either obtain what value it can for the RECs, which flows back to customers, or retire such RECs in order to claim the environment attributes of the energy on its system or to meet possible future renewable portfolio standards. A separate agreement was executed, as opposed to including all terms and conditions within the PURPA agreement, because that was the preference of the project.

The response to this Request was prepared by Donovan E. Walker, Lead Counsel, Idaho Power Company.

REQUEST NO. 3: Please provide a map showing the location of the proposed point of interconnection (Peterson substation) in relation to the location of the Clark Canyon facility and any other utility substations and transmission facilities of 69 kV and higher. Please clearly identify those facilities owned by Idaho Power and those owned by other utilities.

RESPONSE TO REQUEST NO. 3: The requested map is attached hereto. Please note that north is to the top of the map. The solid colored lines running off the map to the west from Bannock and Peterson are Idaho Power lines. The dashed lines are owned by other utilities. The purple dashed line, furthest to the east, as well as the dashed pink line running between Bannock and the purple dashed line on this map are Northwestern lines. The orange dashed line is the AMPS line, owned by Northwestern and PacifiCorp. Clark Canyon has proposed to build its own line from its project to interconnect with Idaho Power at Idaho Power's Peterson substation.

The information in the response to this Request was prepared by Jared Hansen, Engineer II, T&D Planning, Idaho Power Company, in consultation with Donovan E. Walker, Lead Counsel, Idaho Power Company.

REQUEST NO. 4: Please provide a copy of the transmission feasibility study and any other transmission studies completed for this project.

RESPONSE TO REQUEST NO. 4: A copy of the Feasibility Study Report is attached hereto. No System Impact Study was needed. The Facility Study is underway and is due from Idaho Power by July 22, 2011.

The response to this Request was prepared by Donovan E. Walker, Lead Counsel, Idaho Power Company.

REQUEST NO. 5: Reference the following prior Commission Cases and associated Orders:

IPC-E-92-29 Earth Power Energy and Minerals, Inc. vs. Idaho Power Company; Order Nos. 25174, 25249

UPL-E-93-4 Island Power Company, Inc. vs. PacifiCorp, dba Utah Power & Light Company; Order Nos. 25245, 25528

WWP-E-94-6 Vaagen Bros. Lumber, Inc. vs. The Washington Water Power Company; Order No. 25176

Please discuss whether Idaho Power considered any of these cases and orders in determining whether:

a. The Idaho Commission has jurisdictional authority to approve a PURPA agreement for a facility not located in Idaho and not delivering power to a substation located in Idaho, and

b. Whether Clark Canyon is entitled to published avoided cost rates in Idaho when the facility is not located in Idaho and does not deliver power to a substation located in Idaho.

RESPONSE TO REQUEST NO. 5: The cases cited above establish that the Idaho Public Utilities Commission ("Commission") has jurisdictional authority over PURPA matters beyond the borders of the state of Idaho. The Commission has established that it has federally derived jurisdiction pursuant to PURPA over any utility that it has ratemaking authority over. Additionally, the Commission has stated that this federally derived jurisdiction over a multi-state utility may exist concurrently with other state regulatory authorities that also have ratemaking authority over the utility. Through the cases cited above, the Commission has discussed certain circumstances where it

determines whether it will elect to exercise that jurisdiction or not. Idaho Power believes these cases result in the simplest answer to both a. and b. above being "yes."

The Earth Power case, IPC-E-92-29, Order Nos. 25174 and 25249, concerned a project and interconnection located in the state of Nevada attempting to enter into a PURPA contract with Idaho Power pursuant to the Idaho Commission's rules, regulations, and rates for PURPA Qualifying Facilities ("QFs"). At that time, Idaho Power had retail electric service territory in both the state of Idaho and Nevada, and was under the regulatory jurisdiction of both the Idaho and Nevada Commissions. The Idaho Commission stated that it had concurrent jurisdiction with the Nevada Commission, and initially declined to exercise such jurisdiction and deferred to the Nevada Commission. The Commission discussed that its PURPA jurisdiction is derived from federal law, which is not bounded by geographic limits. The Commission also referenced the series of four different Idaho Supreme Court Afton Energy cases as support for its decision. Order No. 25174 at p. 7, citing *Afton Energy, Inc., v. Idaho Power Co.*, 107 Idaho 781, 693 P.2d 427 (1984); 111 Idaho 925, 729 P.2d 400 (1986); 114 Idaho 852, 761 P.2d 1204 (1988); 122 Idaho 333, 834, P.2d 850 (1992). Noting Afton's location in the state of Wyoming, the Commission stated:

The circumstances were different in Afton as compared to Earth Power because Idaho Power Company did not have a service territory in Wyoming that was regulated by the Wyoming Public Service Commission. Therefore, the Wyoming Commission did not have the jurisdiction conferred by PURPA. This distinction does not relate to the question whether we have jurisdiction. However, it did mean that there could be no issue of whether we should exercise our jurisdiction in that case.

Both parties agree, and we concur, that the Nevada Public Service Commission has jurisdiction concurrent with ours to determine the rates for the Earth Power project and to resolve disputes between the parties. Our record shows that the Nevada PSC is actively asserting its jurisdiction. In this circumstance, when a project is located within another state and when the commission in that state is exercising the jurisdiction conferred upon it by PURPA, we find that we should decline to assert our jurisdiction. In circumstances such as these we will assert our jurisdiction only if the commission of the other state declined for some reason to exercise its jurisdiction. We also emphasize that we will not be a forum for relitigation of issues ultimately decided by the Nevada PSC. We will not entertain requests that we second-guess the decision of another commission.

Order No. 25174, pp. 7-8 (emphasis in original). Upon the Nevada Commission's subsequent dismissal of Earth Power's pending case before it and its deferral to the Idaho Commission, Idaho chose to then exercise its jurisdiction.

The Island Power case, UPL-E-93-4, Order Nos. 25245 and 25528, concerned a Montana QF proposing to sell its output to PacifiCorp ("UP&L") pursuant to the Idaho Commission's rules, regulations, and rates for PURPA QFs. Similar to the facts in Earth Power, UP&L had retail electric service territory in both the state of Montana and Idaho, and was under the regulatory jurisdiction of both the Idaho and Montana Commissions. However, unlike Earth Power, Island Power proposed to wheel its output from Montana to either the Jefferson or Goshen substations, and make delivery to UP&L inside the state of Idaho. The Idaho Commission found that it had jurisdiction, and under these facts, that it would exercise such jurisdiction to require UP&L to contract with the QF pursuant to Idaho rules, regulations, and rates. The Commission stated that it found it reasonable to exercise its jurisdiction in this matter because, although the project is

sited in Montana, the proposed point of delivery to UP&L is in Idaho where the Idaho Commission has established avoided cost rates for UP&L.

The Vaagen Brothers case, WWP-E-94-6, concerned a QF project located in the state of Washington, with an interconnection to Washington Water Power ("WWP") in the state of Washington. Vaagen Brothers had a 1979 power sales agreement with WWP that had expired in 1994. Vaagen Brothers filed a complaint with the Idaho Commission seeking a contract with WWP pursuant to the Idaho avoided cost methodology and rates. WWP had retail electric service territory in both the state of Washington and Idaho, and was under the regulatory jurisdiction of both the Idaho and Washington Commissions. Under the facts of this case, the Commission found that it had concurrent jurisdiction with Washington, but that it would decline to exercise such jurisdiction and defer to Washington. The Commission distinguished this case from the Earth Power and Island Power cases stating, "Vaagen is an existing facility sited in the Washington service territory of the utility that it wishes to sell to, the Washington Water Power Company. The established point of delivery is in the state of Washington." The Commission further stated that the Washington Commission had established a regulatory framework for PURPA in Washington, and that although Idaho did have concurrent jurisdiction with the Washington Commission, "common sense dictates that there are some instances when we should elect not to exercise our jurisdiction."

Clark Canyon is somewhat different than the other three cases discussed above. Clark Canyon is a QF located in the state of Montana with a point of interconnection to Idaho Power's facilities in the state of Montana. However, Idaho Power has no retail electric service territory in the state of Montana and therefore the Montana Commission

has no regulatory framework for PURPA that is applicable to Idaho Power. Clark Canyon is delivering its power to Idaho Power's facility at Idaho Power's Peterson substation, where it directly interconnects with Idaho Power. Although Idaho Power's Peterson substation is located in the state of Montana, there is not a different interconnecting utility and subsequent wheel of the power in order to reach Idaho Power. Under these facts, and pursuant to the direction provided by the previously discussed Commission Orders above, Idaho Power is of the opinion that the Idaho Commission would find that it has jurisdiction in this matter and, additionally, that it would choose to exercise that jurisdiction to require a PURPA contract under Idaho's rules, regulations, and rates applicable to PURPA.

The response to this Request was prepared by Donovan E. Walker, Lead Counsel, Idaho Power Company.

DATED at Boise, Idaho, this 23rd day of June 2011.

A handwritten signature in black ink, appearing to read "Don Walker", written over a horizontal line.

DONOVAN E. WALKER
Attorney for Idaho Power Company

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 23rd day of June 2011 I served a true and correct copy of the within and foregoing IDAHO POWER COMPANY'S RESPONSE TO THE FIRST PRODUCTION REQUEST OF THE COMMISSION STAFF TO IDAHO POWER COMPANY upon the following named parties by the method indicated below, and addressed to the following:

Commission Staff

Kristine A. Sasser
Deputy Attorney General
Idaho Public Utilities Commission
472 West Washington
P.O. Box 83720
Boise, Idaho 83720-0074

Hand Delivered
 U.S. Mail
 Overnight Mail
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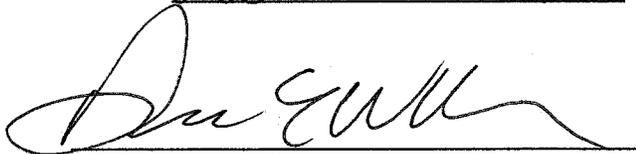
Clark Canyon, LLC

Kim L. Johnson
Executive Vice President, Business
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P.O. Box 7218
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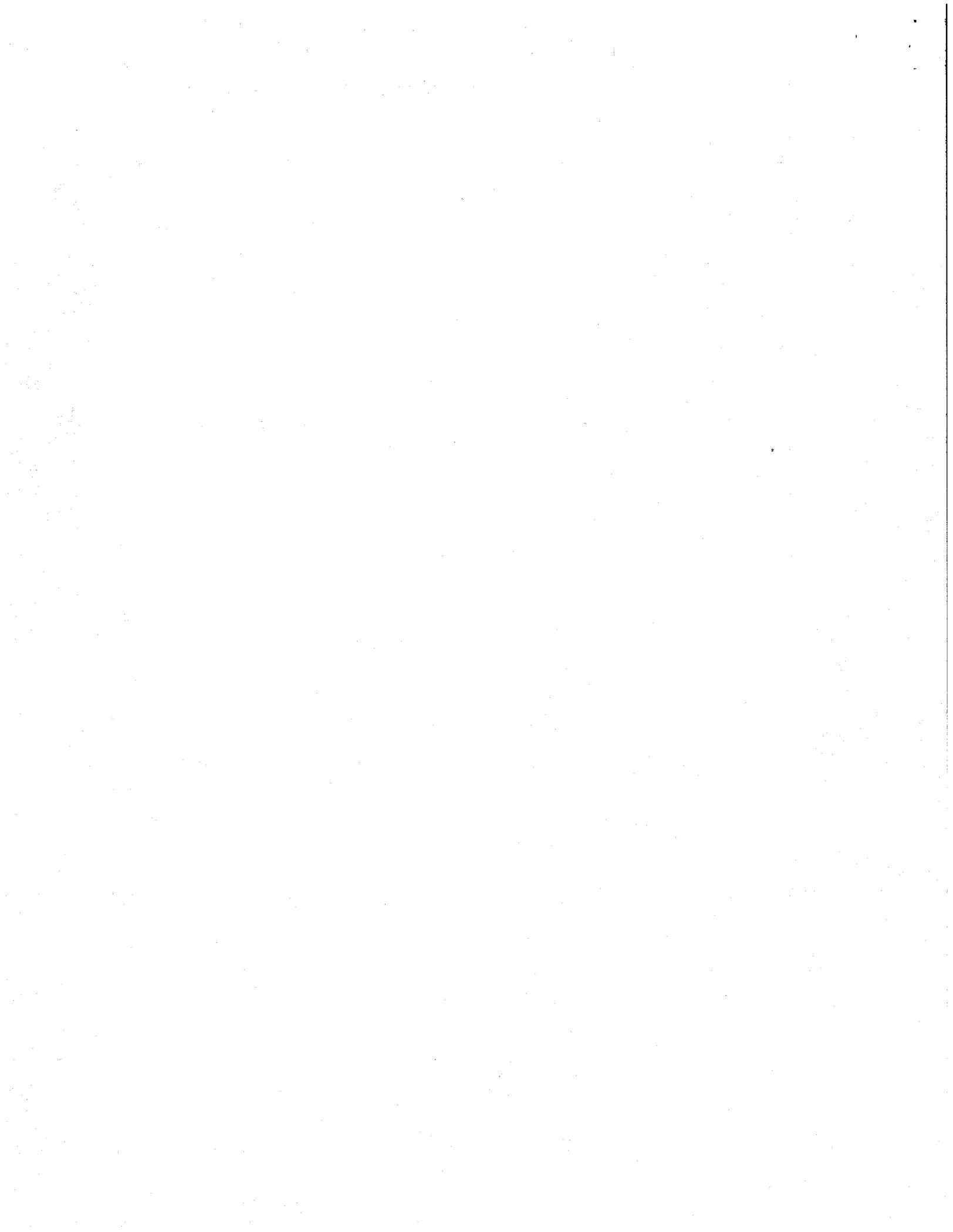
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greg@richardsonandoleary.com



Donovan E. Walker

BEFORE THE
IDAHO PUBLIC UTILITIES COMMISSION
CASE NO. IPC-E-11-09
IDAHO POWER COMPANY

**RESPONSE TO STAFF'S PRODUCTION
REQUEST NO. 1**



AGREEMENT FOR TRANSFER OF OWNERSHIP OF ENVIRONMENTAL ATTRIBUTES

This Agreement for Transfer of Ownership of Environmental Attributes ("Agreement") is entered into this 20th day of May, 2011, between Clark Canyon, LLC, an Idaho Limited Liability Company, ("Clark Canyon") and Idaho Power Company, an Idaho corporation ("Idaho Power" or "Company"), hereinafter sometimes referred to collectively as the "Parties" or individually as a "Party."

WITNESSETH:

WHEREAS, Clark Canyon is the owner and operator of a to-be-built 4.7 megawatt ("MW") small hydro generation project.

WHEREAS, the Parties entered into that certain Firm Energy Sales Agreement between Clark Canyon, LLC and Idaho Power Company dated May 20, 2011 whereby Idaho Power would purchase the energy output of the Facility.

WHEREAS, the FESA Article 8 specifies that ownership of Environmental Attributes is determined by a separate agreement;

WHEREAS, the Parties desire to enter into this Agreement to transfer the ownership of the Environmental Attributes that result from electric generation at the Facility beginning in Contract Year eleven (11) of the FESA.

NOW, THEREFORE, in consideration of the mutual covenants contained herein, the Parties agree as follows:

1. Definitions. The following term as used in this Agreement shall be defined as follows:

1.1. “Environmental Attributes” means any and all credits, benefits, emissions reductions, offsets, and allowances, howsoever entitled, attributable to the generation from the Facility, and its avoided emission of pollutants. Environmental Attributes include but are not limited to: (1) any avoided emission of pollutants to the air, soil or water such as sulfur oxides (SOx), nitrogen oxides (NOx), carbon monoxide (CO) and other pollutants; (2) any avoided emissions of carbon dioxide (CO₂), methane (CH₄), nitrous oxide, hydrofluorocarbons, perfluorocarbons, sulfur hexafluoride and other greenhouse gases (GHGs) that have been determined by the United Nations Intergovernmental Panel on Climate Change, or otherwise by law, to contribute to the actual or potential threat of altering the Earth’s climate by trapping heat in the atmosphere; (3) the reporting rights to these avoided emissions, such as and without limitation, REC (as that term is defined herein) reporting rights. REC reporting rights are the right of a REC owner or purchaser to report the ownership of accumulated RECs in compliance with federal or state law, if applicable, and to a federal or state agency or any other party at the REC owner’s/purchaser’s discretion, and includes, without limitation, those REC reporting rights accruing under Section 1605(b) of The Energy Policy Act of 1992 and any present or future federal, state, or local law, regulation or bill, and international or foreign emissions trading program. Environmental Attributes are accumulated on a MWh basis and one REC represents the Environmental Attributes associated with one (1) megawatt hour (“MWh) of energy. Environmental Attributes do not include (i) any energy, capacity, reliability or other power attributes from the Facility, (ii) production tax credits associated with the construction or operation of the Facility and other financial incentives in the form of credits, reductions, or allowances associated with

the Facility that are applicable to a state or federal income taxation obligation, (iii) the cash grant in lieu of the investment tax credit pursuant to Section 1603 of the American Recovery and Reinvestment Act of 2009, or (iv) emission reduction credits encumbered or used by the Facility for compliance with local, state, or federal operating and/or air quality permits.

1.2. “Contract Year” shall have the same meaning as defined in the FESA.

1.3. “Facility” shall have the same meaning as defined in the FESA.

1.4. “Renewable Energy Certificate” or “REC” means a certificate, renewable energy credit or any other credit, allowance, Green Tag, or other transferable indicia, howsoever entitled, indicating generation of all renewable energy by the Facility, as determined by any and all federal and/or state law or regulation, and includes all Environmental Attributes arising as a result of the generation of electricity by the Facility. One REC represents the Environmental Attributes associated with the generation of one thousand (1,000) kWh of Net Energy (as that term is defined in the FESA).

2. For good and valuable consideration receipt of which the Parties hereby acknowledge, Clark Canyon agrees to transfer to Idaho Power ownership of all Environmental Attributes associated with the Facility beginning with the first hour of the first day of the 11th Contract Year and for the remaining term of the FESA.

3. Environmental Attribute Accounting and Transfers. The Parties shall cooperate to ensure that all Environmental Attribute certifications, rights and reporting requirements are created, maintained and completed by the responsible Parties.

3.1. Accounting for Environmental Attributes. Each Party, at its sole expense, will be responsible to establish and maintain a Western Renewable Energy Generation Information System ("WREGIS") account or other Environmental Attribute account and/or tracking and reporting system that enables the Environmental Attributes associated with the Facility to be created, certified, validated, transferred and reported.

3.2. Transfer of Ownership Rights to Idaho Power. For the term of the FESA, the Parties shall cooperate, provide further assurances, and take all necessary commercially reasonable actions to document, record, create, effect and enable the transfer of the Environmental Attributes associated with the Facility to Idaho Power's WREGIS account or any other Environment Attribute accounting and tracking system selected by the Parties.

3.3. Ownership Rights. Each Party shall report under Section 1605(b) of the Energy Policy Act of 1992 or under any applicable program only the Environmental Attributes that such Party owns, and shall at all other times refrain from reporting the Environmental Attributes owned by the other Party.

3.4. Right of Peaceful Ownership: Neither Party will cause or suffer to be caused any petition, litigation, action, proceeding or cause, whether before courts, commissions, legislative bodies, tribunals, councils or any other place that would have the effect or purpose to take away or diminish the value of the other's ownership of the Environmental Attributes.

4. Facility Operation. Clark Canyon shall operate the Facility pursuant to commercially reasonable business practices and prudent utility practice so as to not jeopardize the current or future Environmental Attributes created by the Facility.

5. Miscellaneous.

5.1. Several Obligations. Except where specifically stated in this Agreement to be otherwise, the duties, obligations and liabilities of the Parties are to be several and not joint or collective. Nothing contained in this Agreement shall ever be construed to create an association, trust, partnership or joint venture or impose a trust or partnership duty, obligation or liability on or with regard to either Party. Each Party shall be individually and severally liable for its own obligations under this Agreement.

5.2. Waiver. Any waiver at any time by either Party of its right with respect to a default under this Agreement or with respect to any other matters arising in connection with this Agreement shall not be deemed a waiver with respect to any subsequent default or other matter.

5.3. Choice of Law and Venue. This Agreement shall be construed and interpreted in accordance with the laws of the State of Idaho without reference to its choice of law provisions. Venue for any litigation arising out of or related to this Agreement will be in the District Court of The Fourth Judicial District of Idaho in and for the County of Ada.

5.4. Default. If either Party fails to perform any of the terms or conditions of this Agreement (an "Event of Default"), the non-defaulting Party shall cause notice in writing to be given to the defaulting Party, specifying the manner in which such default occurred. If the defaulting Party shall fail to cure such default within sixty (60) days after service of such notice, or if the defaulting Party reasonably demonstrates to the other party the default can be cured within a commercially reasonable time but not within such sixty (60) day period and then fails to diligently pursue such cure, then, the

non-defaulting Party may, at its option, terminate this Agreement and/or pursue its legal or equitable remedies.

5.5. Successors and Assigns. This Agreement and all of the terms and provision hereof shall be binding upon and inure to the benefit of the respective successors and assigns of the Parties hereto, except that no assignment hereof by either party shall become effective without the written consent of both Parties being first obtained. Such consent shall not be unreasonably withheld. Notwithstanding the foregoing, any party which Idaho Power may consolidate, or into which it may merge, or to which it may convey or transfer substantially all of its electric utility assets, shall automatically, without further act, and without need of consent or approval by Clark Canyon, succeed to all of Idaho Power's rights, obligations and interests under this Agreement.

5.6. Modification. No modification to this Agreement shall be valid unless it is in writing and signed by both Parties and subsequently approved by the Commission.

5.7. Notices. All written notices under this Agreement will be directed as follows and shall be considered delivered when faxed, emailed and confirmed with deposit in the U. S. Mail, first class, postage prepaid, as follows:

To Clark Canyon:

Original document to:

Clark Canyon Hydro, LLC
C/O Symbiotics, LLC
Kim Johnson
2000 S. Ocean Blvd #703
DelRay Beach, Florida 33438

Telephone: (435) 752-2580

E-mail: vince.lamarra@symbioticsenergy.com
E-mail copy: kim.johnson@riverbankpower.com

To Idaho Power:

Original document to:

Vice President, Power Supply
Idaho Power Company
PO Box 70
Boise, Idaho 83707
Email: Lgrow@idahopower.com

Copy of document to:

Cogeneration and Small Power Production
Idaho Power Company
PO Box 70
Boise, Idaho 83707
E-mail: rallphin@idahopower.com

5.8. Severability. The invalidity or unenforceability of any term or provision of this Agreement shall not affect the validity or enforceability of any other terms or provision and this Agreement shall be construed in all other respects as if the invalid or unenforceable term or provision were omitted.

5.9. Counterparts. This Agreement may be executed in two or more counterparts, each of which shall be deemed an original but all of which together shall constitute one and the same instrument.

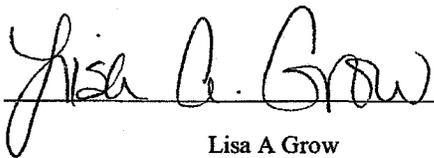
5.10. Entire Agreement. Unless otherwise provided for herein, this Agreement constitutes the entire Agreement of the Parties concerning the subject matter hereof and supersedes all prior or contemporaneous oral or written agreements between the Parties concerning the subject matter hereof.

IN WITNESS WHEREOF, The Parties hereto have caused this Agreement to be executed in their respective names on the dates set forth below:

Idaho Power Company

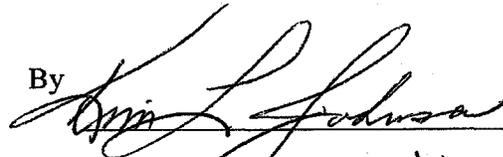
Clark Canyon, LLC.

By



Lisa A Grow
Sr. Vice President, Power Supply

By



Kim L Johnson
Executive Vice Pres Opt
Business Development

Dated

5.20.11

"Idaho Power"

Dated

5-18-11

"Seller"