

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

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IDAHO PUBLIC
UTILITIES COMMISSION

Attorneys for Complainant

**BEFORE THE
IDAHO PUBLIC UTILITIES COMMISSION**

Grand View PV Solar Two, LLC, Complainant,)	Case No. IPC-E-11-15
vs.)	PETITION FOR CLARIFICATION
IDAHO POWER COMPANY, Defendant.)	

1 **COMES NOW** Grand View PV Solar Two, LLC (“Grand View”) and pursuant to Rule
2 235 of the Idaho Public Utilities Commission’s (“Commission”) Rules of Procedure and hereby
3 respectfully lodges its Petition for Clarification of Order No. 32580. Rule 235 provides, in part,
4 that “Any person may petition to clarify any order, whether interlocutory or final.” For the
5 reasons set forth below, Grand View respectfully requests that the Commission clarify its Order
6 by requiring Idaho Power to modify Section 8.1 of Grand View’s power purchase agreement
7 (“PPA”) to be consistent with the Commission’s determination that the clause requires that
8 ownership of environmental attributes will be “governed by applicable state law *at the time the*
9 *contract is executed and approved.*” See Order No. 32580 at 14 (emphasis added). Grand View
10 also respectfully requests that the Commission clarify that it intended the terms “executed and

1 approved” to mean when a “legally enforceable obligation” is incurred, as used by the Federal
2 Energy Regulatory Commission’s (“FERC”) regulations implementing the Public Utility
3 Regulatory Policies Act of 1978 (“PURPA”). *See* 18 C.F.R. § 292.304(d)(2); *Cedar Creek Wind*
4 *LLC*, 137 FERC ¶ 61,006 (2011). Grand View also respectfully requests the Commission clarify
5 its Order by stating that the avoided cost rates in Grand View’s PPA will not compensate the
6 qualifying facility (“QF”) for more than the estimated value of the energy and capacity alone,
7 and at this time no Idaho law conveys non-energy, environmental attributes to a purchasing
8 utility without payment to the QF. *See Morgantown Energy Associates*, 139 FERC ¶ 61,066
9 (2012).

10 I. BACKGROUND¹

11 Grand View initiated this matter by requesting the Commission issue an order requiring
12 Idaho Power Company (“Idaho Power”) to return to the practice of disclaiming ownership of
13 non-energy, environmental attributes such as renewable energy credits (“RECs”) in PURPA
14 PPAs. The Commission issued Order No. 32580 denying Grand View’s Motion for Summary
15 Judgment on June 21, 2012. In that Order, the Commission correctly noted that Grand View and
16 Idaho Power were unable to agree on the appropriateness of including Section 8.1 in the power
17 purchase agreement. Section 8.1 provides:

18 Under this Agreement, ownership of Green Tags and Renewable Energy Certificate
19 (RECs), or the equivalent Environmental attributes, directly associated with the
20 production of energy from the Seller’s Facility sold to Idaho Power will be governed
21 by any and all applicable Federal or State laws and/or regulatory body or agency
22 deemed to have authority to regulate these Environmental Attributes or to implement
23 Federal and/or State laws regarding the same.
24

¹ Grand View provided extensive factual and legal background in its Motion for Summary Judgment filed November 29, 2011. Grand View incorporates all assertions from that Motion by reference into this Petition for Clarification as though set forth fully herein.

1 Grand View argued in its pleadings that this clause is an illegal “reopener” under Section 210(e) of
2 PURPA. *See Grand View’s Motion for Summary Judgment (“SJ Motion”)* at 16-20. The
3 Commission agreed with Grand View that reopeners are illegal under PURPA by stating, “we
4 generally agree in principle with Grand View that a contract provision that would require future
5 changes in the rates or terms of PPAs would be impermissible under PURPA” Order No.
6 32580 at 14. Yet the Commission concluded that Section 8.1 is not a reopener because:

7 As indicated above, § 8.1 of the March 2011 draft PPA merely reflects that REC
8 ownership will be ***determined by applicable law when the PPA is executed and***
9 ***approved. It does not subject Grand View to future changes in the ownership of***
10 ***RECs.*** Moreover, we note that the parties have not entered into a contractual
11 agreement and the Commission has not approved the PPA. Grand View attempts to
12 create ambiguity where none exists and has misconstrued this clause. ***The plain***
13 ***language of § 8.1 would not subject the PPA to changing conditions.***
14 Consequently, we find that § 8.1 is not preempted by PURPA.

15
16 Order 32580 at 14-15 (emphasis provided).

17
18 Although the phrase “determined by applicable law when the PPA is executed and approved” does
19 not appear in Section 8.1, or anywhere in the PPA, the Commission stated that the “plain language
20 of § 8.1 would not subject the PPA to changing conditions.”

21 Additionally, Grand View provided extensive argument that Idaho Power will not
22 compensate Grand View for more than energy and capacity, and no law transfers the RECs to
23 Idaho Power without payment. *See Grand View’s SJ Motion* at 10-16. Thus, Grand View
24 argued that Grand View owns the RECs under existing law. *Id.* The Commission acknowledged
25 that “PURPA avoided cost rates are intended to compensate the QF for the purchased power –
26 avoided cost rates ‘are not intended to compensate the QF for [RECs].’” Order No. 32580 at 8
27 (quoting *Morgantown Energy Associates*, 139 FERC ¶ 61,066 at ¶ 31 n.62). The Commission
28 also stated that it could find “no specific federal or state laws governing the ownership of RECs .
29” *Id.* at 9. Although the Commission appeared to acknowledge that RECs will be created by

1 Grand View's QF, the Commission failed to directly accept or reject Grand View's argument
2 that Idaho Power will not pay for the RECs under Grand View's PPA, and no existing law
3 conveys those RECs to Idaho Power.

4 II. ARGUMENT²

5 A. The Commission Should Clarify that Section 8.1 of the PPA Must be Modified or 6 Construed to Require that Ownership of RECs Be Determined By Applicable Law In 7 Effect at the Time the Contract Becomes Effective, And Such Ownership Will Not Be 8 Subject to Changes in the Law that Might Occur at Some Later Time.

9
10 In concluding that Idaho Power's Section 8.1 does not violate Section 210(e) of PURPA, the
11 Commission construed the clause to require that REC ownership be determined based upon
12 applicable law in existence at the time the contract becomes effective. The Commission correctly
13 agreed with Grand View that "a contract provision that would require future changes in the rates or
14 terms of PPAs would be impermissible under PURPA" Order No. 32580 at 14. The
15 Commission's reasoning does not allow for Section 8.1 to operate in a manner such that it "would
16 require future changes in the rates or terms" – such as ownership of RECs. "It does not subject
17 Grand View to future changes in the ownership of RECs." *Id.* The Commission's Order implicitly
18 acknowledged therefore that once ownership is determined based upon applicable law at the time
19 the contract becomes effective, such ownership cannot change at some future date when a new law,
20 regulation, or order on the topic is issued.

21 However as Section 8.1 is currently written, it does not include the limiting term relied upon
22 by the Commission that would require ownership be "determined by applicable law *when the PPA*
23 *is executed and approved.*" That is, instead, Section 8.1 provides that "ownership of Green Tags . .

² In addition to the arguments set forth herein, Grand View also argued in its Motion for Summary Judgment that allowing inclusion of Idaho Power's REC clause would violate the Takings Clause of the U.S. and Idaho Constitutions, and would violate the Dormant Commerce Clause of the U.S. Constitution. *See Grand View's Motion for Summary Judgment* at 22-33. Grand View stands by those arguments, although not fully set forth and repeated herein. Grand View does not waive any assertions or arguments raised earlier in this proceeding.

1 . will be governed by any and all applicable...laws.” The phrase “will be” has no modifier. As
2 written, it is open ended as to what laws and regulations may apply – and when.

3 Furthermore, Idaho Power intends for Section 8.1 to allow for ownership of RECs to be
4 subject to change based upon any changes in law throughout the term of the contract. *See Idaho*
5 *Power’s Answer* at 1 (arguing that Grand View’s proposed disclaimer “has potentially costly
6 consequences for Idaho Power’s customers should the legislature or other legal body determine
7 some time during the proposed 20-year term of the contract that the environmental attributes from
8 the purchase of the QF power in Idaho are in fact owned by the purchasing utility and its
9 customers”); *Idaho Power’s Answer to Summary Judgment* (“*Idaho Power’s SJ Answer*”) at 5
10 (“The PPA language is merely a **change in law provision** stating that if applicable law
11 determines REC ownership then that applicable law governs.” (emphasis added)); *id.* at 8-9 (“The
12 important issue is that the State of Idaho may someday determine that the ownership of RECs
13 generated by a QF flows to the utility and its customers who purchase the energy and capacity from
14 such QF.”); *id.* at 9-10 (“The PPA proposed a **straight forward change of law provision** that merely
15 states REC ownership will be determined by the applicable law.”); *id.* at (“Here, Idaho Power’s
16 proposed contract term simply states that the ownership of RECs shall be determined by
17 applicable law, if that law determines the issue during the life of the contract.”).

18 Avista also made clear that it understood the clause to work as a change in law provision,
19 allowing for ownership of RECs to change throughout the term of the PPA. *Avista’s Summary*
20 *Judgment Answer* at 2 (“if a dispute arises as to ownership of RECs **during the term of the PPA**
21 resolution of that dispute will be governed by applicable law.” (emphasis added)). In short, neither
22 of the two utilities participating in this docket understand Section 8.1 to state REC ownership will
23 be determined by applicable law at the time when the parties become obligated to the PPA.

1 Grand View has demonstrated that courts will enforce a contract reopener or change in
2 law clause in a utility contract – if agreed to by the contracting parties – as subjecting the
3 contract to ongoing regulation or change in law. *See Grand View SJ Motion* at 16-17 (citing
4 *Energy Reserves Group, Inc. v. Kan. Power & Light Co.*, 459 U.S. 400, 416 (1983)). Despite
5 Idaho Power’s clearly expressed intent to implement the REC clause as a change in law
6 provision, the Commission agreed with Grand View that a change in law provision acting to
7 “subject Grand View to future changes in the ownership of RECs” would violate Section 210(e) of
8 PURPA. *See Order No. 32580* at 14-15. And the Commission appears to have construed Section
9 8.1 in a manner that would avoid such a violation by construing the clause to allow for
10 determination of REC ownership based only upon the law in existence when the contract
11 becomes effective, not at some later time. *Id.* Without such a construction of Section 8.1, the
12 Commission’s reasoning is flawed because the clause would “subject Grand View to future
13 changes in the ownership of RECs,” which the Commission recognized would violate PURPA. *Id.*
14 at 14.

15 Therefore, Grand View seeks clarification as to how the Commission intends the parties to
16 effectuate its finding that Section 8.1 requires REC ownership will be ***determined by applicable law***
17 ***when the PPA is executed and approved.*** Grand View submits that it would be preferable for the
18 Commission to order modification of Section 8.1, such that it expressly includes a requirement that
19 REC ownership be determined at the time the contract becomes effective. Without inclusion of
20 such language in the PPA, Idaho Power may misunderstand the Commission’s intent and attempt to
21 implement the PPA in a manner that would impermissibly “subject Grand View to future changes in
22 the ownership of RECs” and “subject the PPA to changing conditions.” *Order No. 32580* at 14-15.³

³ Grand View has included a suggested modification to Section 8.1 incorporating all of Grand View’s suggested modifications in the next section of this Petition.

1 Because Idaho Power unequivocally argued that Section 8.1 is a change in law provision, Grand
2 View submits that the Commission should clarify its Order and require modification of the PPA
3 clause consistent with its Order.

4 **B. The Commission Should Clarify its Order By Stating That it Intended the Terms**
5 **“Executed and Approved” to Mean When a “Legally Enforceable Obligation” Is**
6 **Incurred.**

7
8 As noted above, the Commission construed Section 8.1 to state “that REC ownership will be
9 determined by applicable law *when the PPA is executed and approved.*” Order No. 32580 at 14
10 (emphasis added). The Commission appears to have intended that the ownership of RECs be
11 determined at the time the parties become obligated to the PPA. However, use of the term “when
12 the PPA is executed and approved” could be misconstrued as requiring that a QF must secure a fully
13 executed agreement to establish the date on which all of the rates and terms in its PPA would be
14 determined.

15 QFs can create a legally enforceable obligation without a fully executed and approved
16 agreement. *See* 18 C.F.R. § 292.304(d)(2); *Cedar Creek Wind LLC*, 137 FERC ¶ 61,006 (2011).
17 The Commission has determined that QFs can create a legally enforceable obligation without
18 obtaining a fully executed agreement. *See In Re Cedar Creek Wind*, IPUC Order No. 32419 at
19 8-9, Case Nos. PAC-E-11-01, -02, -03, -04, -05 (2011). Grand View submits that the date at
20 which all rates and terms of the contract – including REC ownership – should be determined is
21 the date that the QF creates a legally enforceable obligation, whether by fully executed
22 agreement or otherwise.

23 Grand View therefore submits that the Commission should clarify Order No. 32580 on
24 this point. Grand View requests that the Commission clarify its Order by requiring Idaho Power
25 to modify Section 8.1 to state:

1 Under this Agreement, ownership of Green Tags and Renewable Energy
2 Certificates (RECs), or the equivalent environmental attributes, directly associated
3 with the production of energy from the Seller's Facility sold to Idaho Power will
4 be governed by any and all applicable Federal or State laws and/or any regulatory
5 body or agency deemed to have authority to regulate these Environmental
6 Attributes or to implement Federal and/or State laws regarding same. **Such**
7 **ownership will be determined by applicable law in effect at the time when the**
8 **legally enforceable obligation is incurred.**

9
10 (alteration in bold).

11
12 This proposed modification of the PPA will provide the clarity necessary to ensure that the
13 PPA does not subject Grand View to changed circumstances after the time that it obligated
14 itself to a legally enforceable obligation to deliver energy and capacity.

15 **C. The Commission Should Clarify Its Order By Expressly Stating That The Avoided**
16 **Cost Rates in Grand View's PPA Will Not Compensate the QF for More Than the**
17 **Estimated Value of the Energy and Capacity, And No Existing Law Conveys Non-**
18 **Energy, Environmental Attributes to an Idaho Purchasing Utility Without Payment**
19 **to the QF for those Non-Energy Attributes.**

20
21 Grand View provided extensive argument that Idaho Power will not compensate Grand
22 View for more than energy and capacity, and no law transfers the RECs to Idaho Power without
23 payment. *See Grand View's SJ Motion* at 10-16. Thus, Grand View argued that Grand View
24 owns the RECs under existing law. *Id.* The Commission acknowledged that "PURPA avoided
25 cost rates are intended to compensate the QF for the purchased power – avoided cost rates 'are
26 not intended to compensate the QF for [RECs].'" Order No. 32580 at 8 (quoting *Morgantown*
27 *Energy Associates*, 139 FERC ¶ 61,066 at ¶ 31 n.62). The Commission also stated that it could
28 find "no specific federal or state laws governing the ownership of RECs . . ." *Id.* at 9.

29 The Commission's Order is problematic because it could be construed to conclude that –
30 although REC ownership must be determined at the time the parties become obligated to the PPA –
31 at this time, nobody owns the RECs that will be created by Grand View's QF. As Grand View
32 demonstrated and Idaho Power failed to refute, QF projects located in Idaho can create valuable

1 RECs which may be sold into markets created by nearby States' renewable portfolio standards or
2 markets created by voluntary REC programs. *See Grand SJ Motion* at 2-4. The Commission
3 appeared to acknowledge the irrefutable proposition that RECs are created by Idaho QFs, and
4 that Grand View's QF may indeed create RECs. The Commission even determined that Section
5 210(e) of PURPA requires that ownership of such RECs be determined by applicable law at the
6 time the PPA becomes effective. Yet the Commission did not directly accept or reject Grand
7 View's argument that Idaho Power will not pay for the RECs and no existing law conveys those
8 RECs to Idaho Power.

9 It is true – as the Commission noted – that FERC has ruled that “States, in creating RECs,
10 have the power to determine who owns the RECs in the initial instance and how they will be sold or
11 traded; it is not controlled by PURPA.” *American Ref-Fuel Co.*, 105 FERC ¶ 61,004, ¶ 23 (2003).
12 However, Idaho has not created RECs. The RECs at issue in this case and in Section 8.1 of the
13 PPA are RECs created by other States' renewable portfolio requirements and voluntary REC
14 markets. Those RECs exist and have value at the time Grand View alleges it created a legally
15 enforceable obligation. Idaho Power will not pay for them. It will pay only for energy and
16 capacity. In that sense, the RECs are no different from other non-energy attributes or
17 commodities that may or may not be produced along with QF generation – such as steam from a
18 co-generation QF or fiber bi-products produced and sold separately from the generation at dairy
19 digester QF.

20 In one problematic passage, the Commission appeared to express support for a
21 conclusion that a purchasing utility in Idaho may be entitled to a QF's RECs as a bundled
22 product with the QF energy and capacity. *See Order No. 32580* at 10. The Commission stated,
23 “but for the ‘must purchase’ provision of PURPA, there might be no PPA and RECs would not

1 exist or be created.” *Id.* The same is true, however, for a multitude of other beneficial and
2 detrimental attributes that might be associated with QF generation, such as economically
3 beneficial steam and fiber bi-products as well as economically detrimental air pollutants
4 produced with certain QF generation. That a QF produces tangible and intangible bi-products
5 associated with each unit of electrical energy or capacity does not forever bundle those bi-
6 products with the energy and capacity such that there is any basis to conclude that the benefits or
7 burdens of those bi-products automatically vest in the purchasing utility. No Idaho law bundles
8 beneficial environmental attributes of QF generation for sale to the purchasing utility. The
9 Commission should not endeavor to itself create such an Idaho law.⁴

10 Although there is no Idaho law creating Idaho RECs, the Commission clearly has the
11 jurisdiction to determine that Idaho Power will not pay for more than the QF energy and
12 capacity. In fact, the Commission has no authority to order Idaho Power to pay for more than the
13 estimated avoided costs of the energy and capacity as calculated at the time that Grand View
14 created a legally enforceable obligation. *See Orange and Rockland Utilities, Inc. et al.*, 43
15 F.E.R.C. 61,067 (1988).⁵ The Commission should clarify its Order by stating that the PPA will
16 not compensate Grand View for more than the estimated value of the energy and capacity, and
17 will not compensate Grand View for RECs. Such a determination would be consistent with the
18 current Idaho law and with FERC’s most recent ruling on the REC issue.

⁴ Notably, in the last legislative session, the Idaho investor-owned utilities proposed such a law that would transfer environmental attributes to Idaho utilities purchasing QF output without any additional compensation to the QFs. The utilities’ proposed law failed. The Commission should not itself enact such a policy gifting RECs free of charge to the utilities after the utilities were unable to obtain such an unfair policy legislatively.

⁵ In addition to the avoided cost of the energy and capacity, avoided cost rates may take into consideration the avoided costs of environmental compliance such as compliance with a State’s renewable procurement requirements. *Cal. Pub. Util. Commn.*, 133 FERC ¶ 61,059 (2010). But Idaho law contains no such procurement requirements, and the Idaho Commission has not implemented any mechanisms to provide QFs with compensation for anything other than the value of the energy and capacity supplied.

1 Specifically, FERC recently addressed a determination by the West Virginia Public
2 Service Commission (“PSC”) that purchasing utilities owned RECs in QF PPAs predating that
3 state’s renewable portfolio standard. The West Virginia PSC had based its determination on its
4 finding, in part, that “the avoided cost rate contracts under PURPA provide a substantial
5 consideration to the QF, an amount of consideration that generally is not available to merchant
6 power generators, and no additional consideration is contemplated or needed for the generation
7 of RECs.” *Morgantown Energy Associates*, 139 FERC ¶ 61,066 at ¶ 9 (internal quotation
8 omitted). FERC concluded, however, that “certain statements in the West Virginia Order are
9 inconsistent with PURPA. *Id.* at ¶ 45.

10 FERC elaborated as follows:

11 46. The Commission has recognized that PURPA does not address the
12 ownership of RECs and that states have the authority to determine ownership of
13 RECs in the initial instance, as well as how they are transferred from one entity to
14 another. In *American Ref-Fuel*, the Commission stated that “[C]ontracts for the
15 sale of QF capacity and energy entered into pursuant to PURPA do not convey
16 RECs to the purchasing utility (absent express provision in a contract to the
17 contrary). While a state may decide that a sale of power at wholesale
18 automatically transfers the ownership of the state-created RECs, that requirement
19 must find its authority in state law, not PURPA.”
20

21 47. In making this statement, the Commission reasoned that, under PURPA
22 and the Commission’s regulations, electric utilities must purchase energy and
23 capacity made available by QFs, and that rates for these purchases must be just
24 and reasonable to the electric customer of the electric utility and in the public
25 interest, and not discriminate against QFs. Additionally, an electric utility is not
26 required to pay the QF more than the avoided costs of generating the power itself
27 or of purchasing from another source. The Commission stated that these avoided
28 cost rates, “in short, are not intended to compensate the QF for more than capacity
29 and energy.” *To the extent that the West Virginia Order finds that avoided-cost*
30 *rates under PURPA also compensate for RECs, the West Virginia Order is*
31 *inconsistent with PURPA.*
32

33 *Id.* at ¶¶ 46-47 (emphasis added) (footnotes omitted).⁶

⁶ FERC recently granted rehearing in this case in response to the West Virginia PSC’s request that it clarify precisely which statements in its order were inconsistent with PURPA. At the time of filing this Petition, FERC has not yet issued a final determination on rehearing.

1
2 Thus, the Idaho Commission has authority, and indeed a duty, to expressly clarify that the
3 avoided cost rates in Grand View's PPA will not compensate Grand View for more than the
4 avoided costs of the energy and capacity alone. And the Commission should also clarify its
5 Order by expressly stating that no law or regulation in existence at this time would convey Grand
6 View's RECs to Idaho Power without payment.

7
8 **III. CONCLUSION**

9 Grand View respectfully requests that the Commission clarify Order No. 32580 to
10 expressly state that Section 8.1 of Grand View's power purchase agreement is modified to state
11 that ownership of environmental attributes will be governed by applicable state law in effect at
12 the time a legally enforceable obligation is incurred. Grand View also requests clarification that
13 the avoided cost rates in Grand View's PPA will not compensate the QF for more than the
14 estimated value of the energy and capacity alone, and no Idaho law conveys non-energy,
15 environmental attributes to a purchasing utility without payment to the QF.

Respectfully submitted this 9th day of July, 2012.

RICHARDSON AND O'LEARY, PLLC



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

CERTIFICATE OF SERVICE

I hereby certify that on this 9th day of July 2012, true and correct copies of the foregoing Petition for Clarification by Grand View PV Solar Two, LLC was sent to the following persons via regular mail and email.

Kris Sasser
Deputy Attorney General
Idaho Public Utilities Commission
472 West Washington Street
Boise, Idaho 8702
Kris.sasser@pub.idaho.gov

Donovan Walker
Senior Counsel
Idaho Power Company
1221 West Idaho Street
Boise, Idaho 83702
dwalker@idahopower.com

Clint Kalich
Manager, Resource Planning & Analysis
Avista Corporation
1411 E. Mission Ave., MSC-7
Spokane, WA 99202
Clint.kalich@avistacorp.com

Michael G. Andrea
Senior Counsel
Avista Corporation
1411 E. Mission Ave., MSC-23
Spokane, WA 99202
michael.andrea@avistacorp.com



Peter Richardson ISB # 3195
RICHARDSON & O'LEARY, PLLC