

1 The premise of Idaho Power's Answer is summed up in its opening paragraph in the
2 section entitled "Argument:"

3 A legally enforceable obligation cannot be created when a QF refuses to contract with a
4 utility. Idaho Power was willing to enter into a contract with Grand View yet Grand
5 View chose not to obligate itself to deliver power to Idaho Power. No construction of a
6 legally enforceable obligation can be used to find that a QF obligated itself by refusing to
7 contract with a utility. Grand View cannot now allege that a complaint on a different
8 issue in the same series of negotiations somehow entitles it to earlier avoided cost rates.¹
9

10 Idaho Power refuses to accept the fact that *there is a difference between a contract and a*
11 *legally enforceable obligation pursuant to PURPA*. That Grand View obligated itself to sell its
12 output to Idaho Power is not in question: even Idaho Power *admits* that it "agreed to submit a
13 signed ESA to the Commission, obligating both parties to all other terms, which would allow
14 both parties to argue for or against inclusion of the REC clause and be bound by the decision of
15 the Commission."² That an ancillary contract term was still subject to negotiation is irrelevant to
16 the creation of a legally enforceable obligation.

17 A utility's reluctance to sign a contract with a QF is irrelevant to whether or not a legally
18 enforceable obligation has been created. A QF may create such an obligation *unilaterally* in the
19 face of a utility that is reluctant to execute a formal contract:

20 [QF's] are thus entitled to a legally enforceable obligation in those situations where, for
21 example, a utility has refused to negotiate a contract. In order to protect the rights of a
22 QF, once a QF makes itself available to sell to a utility, a legally enforceable obligation
23 may exist prior to the formation of a contract. A contract serves to limit and/or define
24 bilaterally the specifics of the relationship between the QF and the utility. A contract
25 may also limit and/or define bilaterally the specifics of the legally enforceable obligation
26 at the heart of the relationship. But the obligation can predate the signing of the
27 contract.³
28

29 Here Idaho Power and Grand View were unable to agree on a "specific... of the relationship
30 between ...[it] and the utility;" namely the ownership of renewable energy credits ("RECs").

¹ Answer at pp. 5 – 6.

² Answer at p. 3.

³ *Grouse Creek Wind Park, LLC* 142 FERC ¶ 61,187 at PP 16-17, emphasis provided. ("*Grouse Creek*")

1 Indeed, every other specific of the relationship had been agreed to, and Idaho Power and the QF
2 had expressed an intent to be bound by all other specifics of the relationship but for the question
3 of REC ownership. Idaho Power openly concedes as much,

4 Grand View then proposed and **Idaho Power agreed** to submit a signed ESA to the
5 Commissions, **obligating both parties to all other terms**, which would allow both
6 parties to argue for or against inclusion of the REC clause and be bound by the decision
7 of the Commission.
8

9 Thus it is indisputable that both parties agreed to obligate themselves to all of the terms of the
10 contact. The sole remaining term (REC ownership) is unrelated to PURPA or the QF's
11 obligation.

12 Idaho Power blatantly ignores the Federal Energy Regulatory Commission's ("FERC")
13 explanation of the distinction between a contract and a legally enforceable obligation. According
14 to Idaho Power "A legally enforceable obligation cannot be created when a QF refuses to
15 contract with a utility."⁴ But FERC has unequivocally ruled that "a legally enforceable
16 obligation may exist prior to the formation of a contract."⁵ Grand View may have refused to sign
17 a contract that contained a term it found objectionable, but the question before this Commission
18 is not whether the contract was signed, but whether and when a legally enforceable obligation
19 was created.

20 Idaho Power characterizes Grand View's refusal to sign a contract containing the
21 objectionable REC language as a situation "where a QF consistently and repeatedly refused to
22 obligate itself or sign with a willing utility" and from this misleading premise, contends "it is
23 unconscionable to use the concept of a legally enforceable obligation solely so that a QF can

⁴ Answer at p. 5.

⁵ *Grouse Creek* at 17. Emphasis provided.

1 obtain its preferred avoided cost rates.”⁶ Quite to the contrary, as evidenced by the fact that on
2 August 2, 2011, Grand View filed the complaint initiating this case asking that Idaho Power be
3 ordered to execute a contract and to resolve the dispute over REC ownership. Idaho Power’s
4 assertion that “Grand View had many opportunities to obligate itself to a price, and chose not
5 to”⁷ is blatantly false. All terms of the legally enforceable obligation had been agreed to at the
6 time the complaint was filed, including price, delivery date, term and penalties for non
7 performance. The written agreement was complete in every respect and was agreed to by both
8 Idaho Power and Grand View -- but for the single term relating to REC ownership.

9 Idaho Power incorrectly conflates the reciprocal nature of a legally enforceable obligation
10 under PURPA with common law contract precepts. As much as Idaho Power might wish it were
11 otherwise, a legally enforceable obligation, while reciprocally enforceable, is not created using
12 common law contract concepts. Idaho Power asserts:

13 Fundamental concepts in contract law which require offer, acceptance, and consideration
14 to create *mutual obligations* have developed in order to ensure that a party cannot
15 unilaterally force or bind another against its will.⁸
16

17 Instructing the Commission on black letter common law regarding contract formation is to no
18 avail because PURPA’s legally enforceable obligation provisions do not rely upon or require
19 reference to common law notions of contract formation. Hence, the phrase “legally enforceable
20 obligation” is used in FERC’s implementing regulations *in addition* to the word “contract.”
21 Idaho Power refers to this well-established concept as, “a gross overstatement of the concepts
22 surrounding a legally enforceable obligation.”⁹ Throughout its answer Idaho Power persists in

⁶ Answer at p. 10.

⁷ Answer at p. 6.

⁸ Id at p. 9. Emphasis in original.

⁹ Id.

1 discussing a legally enforceable obligation as if it is the same concept as that of a contract. It is
2 not. For instance, Idaho Power states:

3 These facts demonstrate the need to adhere to the purpose for which FERC created the
4 concept of a legally enforceable obligation, to prevent a utility from improperly refusing
5 to contract with a QF, and the need to demonstrate some refusal to contract on the part of
6 the utility before the analysis of a legally enforceable obligation can come into play. It is
7 not intended to be used in a situation where a QF refuses to contract with a utility. It is
8 not intended to be used to allow a QF to selectively choose which date a legally
9 enforceable obligation may have occurred in order to game the system to gain a higher
10 price to the detriment of ratepayers.¹⁰
11

12 As noted in the *Grouse Creek* case, a contract is *not a prerequisite* for a QF to create a legally
13 enforceable obligation for the utility to purchase the QFs electric output. Grand View did
14 obligate Idaho Power, at a minimum when it filed its complaint asking the Commission to order
15 Idaho Power to execute the contract disclaiming REC ownership. If Idaho Power prevails in its
16 argument, all any utility would need to do to avoid a legally enforceable obligation to purchase a
17 QFs power would be to insist on including in the PPA itself a provision it knew to be
18 unacceptable to the QF. The unresolved term had nothing to do with the purpose of the contract
19 and its lack of resolution cannot be used by the utility as a ruse to claim there was no legally
20 enforceable obligation.

21 Idaho Power cites to no precedent holding, or even suggesting, that a disagreement over
22 an issue that is unrelated to the PURPA transaction prohibits the creation of a legally enforceable
23 obligation under PURPA. Idaho Power cites to two Idaho Supreme Court cases addressing the
24 creation of a legally enforceable obligation. However, neither case supports Idaho Power's
25 argument.

¹⁰ Id.

1 In *A.W. Brown Co. v. Idaho Power Company* 121 Idaho 812 (1982), the Idaho Supreme
2 Court recounted the requirements for creating a legally enforceable obligation under the Idaho
3 PUC's implementation of PURPA:

4 The QF must be able to exhibit that it has laid a proper foundation entitling it to contract
5 consideration and the current avoided cost rates. There must be an indication that the QF
6 pursued a power contract with some diligence...Indeed, this Commission has stated a
7 CSPP is not entitled to contract rates until it is ready, willing and able to sign a contract.
8 In most cases this will entail making a comprehensive binding offer showing with
9 reasonable specificity, design and size characteristics and indicate a willingness to rely on
10 proposed contract terms thereunder.¹¹

11
12 Grand View met these guidelines. Idaho Power does not claim otherwise, rather it stated:

13 In upholding the Commission's decision, the Court emphasized that Brown never
14 pursued a power contract with diligence, never made "a comprehensive binding offer,"
15 "never made a reciprocal commitment to sell," and ultimately, never "obligated himself
16 to do anything." [citation omitted]¹²

17
18
19 Idaho Power does not contend that there are any similarities between the facts of the *Brown*
20 decision and Grand View. Indeed *it cannot* -- every criteria that Brown failed to meet, Grand
21 View has met. The only comparison Idaho Power attempts to make between *Brown* and Grand
22 View is nonsensical:

23 The QF, Brown, had not engaged in negotiations with the utility. While Brown's lack of
24 communication with Idaho Power was certainly greater than Grand View's, the Court's
25 decision is instructive.

26
27 Idaho Power is the party that went dark in the negotiations with Grand View, not the other way
28 around. There are no suggestions that Grand View's communication attempts with Idaho Power
29 were lacking; such an insinuation misleading at best.

¹¹ Id. at p. 818.

¹² Answer at p. 11.

1 Idaho Power next tries to taint Grand View with a similarly faulty comparison. It cites
2 the Commission to *Rosebud Enterprises v. Idaho Public Utilities Commission*¹³ as controlling.

3 Idaho Power observes:

4 The Court held that the QF never legally obligated itself to deliver power to Idaho Power.
5 The QF had “neither a signed contract nor established that Idaho power will not negotiate
6 with it” and made its willingness to commit expressly conditional on obtaining
7 concessions from vendors, financiers, and suppliers. Similarly, Grand View does not
8 have a signed contract and as in *Rosebud II*, Idaho Power was actively negotiating with
9 the QF.¹⁴

10
11 The similarities between Grand View and *Rosebud II* began, and ended, with the fact that neither
12 has, or had, a signed contract. There is no other comparison to be had. Grand View, unlike
13 *Rosebud*, unconditionally committed to sell its electric output for a specified term and for a
14 specified price. Grand View, unlike *Rosebud*, was ready willing and able to perform. Its
15 performance was not conditioned upon vendor, supplier or financier approval. Grand View was
16 obligated.

17 Idaho Power attempts to make one other comparison between Grand View and *Rosebud*
18 *II*: “As in *Rosebud II*, Grand View chose to reject terms and refuse to obligate itself to deliver
19 power to Idaho Power.”¹⁵ *Rosebud* rejected Idaho Power’s entire offer. Grand View did not
20 reject “terms.” To be sure, it rejected the single contract term relating to REC ownership -- a
21 term unrelated to the purpose of the contract, a term not included in, or even contemplated by,
22 PURPA and a term that Idaho Power wrongfully insisted on including in the contract. Idaho
23 Power cannot rely on its insistence on a contract term harmful to the QF, knowing that the QF
24 found it objectionable, to support its claim that the QF failed to obligate itself to deliver power
25 from its project. As noted above, such a concept eviscerates the “must buy” provisions of

¹³ 131 Idaho 1 (1998).

¹⁴ Answer at p. 12, citations omitted.

¹⁵ *Id.*

1 PURPA by allowing the utility to insist on a contract term it knows to be objectionable to defeat
2 the creation of a legally enforceable obligation.

3 Idaho Power blithely skirts over the fact that Grand View filed a meritorious complaint in
4 August of 2011, instead making the incredible claim that:

5 Idaho Power did not and Grand View made no allegations that Idaho Power refused to
6 contract, unreasonably delayed, or hindered the negotiations process. Grand View simply
7 chose not to obligate itself to sell energy to Idaho Power at that price.¹⁶
8
9

10 One wonders whether Idaho Power actually read Grand View's Complaint. The Complaint sets
11 forth the following allegations:

12 Grand View PV Solar Two, LLC ("Grand View") requested that Idaho Power Company
13 ("Idaho Power") execute a standard Public Utilities Regulatory Policies Act of 1978
14 ("PURPA") power purchase agreement ("PPA") for qualifying facilities ("QFs"). Grand
15 View is proposing a twenty megawatt solar project located in Elmore County, Idaho. It
16 has pricing according to Idaho Power's IRP methodology. It has an anticipated on line
17 date in the summer of 2012. Idaho Power has not negotiated in good faith in response to
18 Grand View's attempt to include terms in the standard PPA to the effect that Idaho Power
19 does not own the environmental attributes associated with the electrical production from
20 Grand View's proposed solar electric PURPA project. Grand View respectfully requests
21 the Commission issue a declaratory judgment that it is entitled to a PPA with a clause in
22 which Idaho Power explicitly disclaims ownership of the environmental attributes.¹⁷
23

24 Grand View has the rights to develop and dispose of the output of the Grand View PV
25 Solar Two project...¹⁸
26

27 Grand View PV Solar Two, LLC has made substantial investments in development of the
28 project. The project is mature and entitled to obligate itself to a long-term PPA for a
29 PURPA QF pursuant to Idaho Power's IRP calculated avoided cost rates.¹⁹
30

31 Grand View PV Solar Two is ready and willing to enter into the standard PURPA PPA
32 with IRP calculated rates that disclaims REC ownership by Idaho Power.²⁰
33

¹⁶ Id at p. 13.

¹⁷ Formal Complaint of Grand View PV Solar Two, IPC-E-11-15 at 1 – 2.

¹⁸ Id. at p. 2 – 3.

¹⁹ Id. at p. 3.

²⁰ Id.

1 Grand View PV Solar Two seeks a contract in which REC ownership is disclaimed by
2 Idaho Power.²¹
3

4 Idaho Power had routinely included such requested language in past PURPA contracts. It had no
5 legal basis for making a claim to the environmental attributes. Idaho Power was, and is, acting in
6 bad faith by continuing to resist the obvious – that Grand View had obligated itself under
7 PURPA to a legally enforceable obligation to sell its electrical output (not its RECs) to Idaho
8 Power. This is all that PURPA requires.

9 Were it not for Idaho Power's insistence on the REC language, Grand View and Idaho
10 Power would have executed a PPA back in the summer of 2011. The Commission's ruling on
11 the ownership of REC in this case further supports this conclusion. In Order No. 32580, issued
12 in this docket, the Commission observed:

13 What is clear in our review of these two Orders is the Commission did not squarely
14 decide the ownership of RECs, nor did we implicitly indicate that RECs are the sole
15 property of QFs. As the finder of fact, we do not infer from these Orders that Idaho
16 Power has permanently waived its rights to RECs, or that a utility does not have a right to
17 RECs, or that this Commission had determined that RECs ownership vests entirely with
18 QFs.
19

20 As the Commission has consistently observed, Idaho has no renewable portfolio standard,
21 nor does it have a REC program.
22

23 What this Commission has said is that **QFs and utilities may voluntarily negotiate**
24 **RECs.**²²
25

26 At the time this PPA was being negotiated then, RECs were a commodity that could be
27 voluntarily surrendered -- or voluntarily not surrendered. Grand View voluntarily chose to not
28 surrender this commodity, a commodity that the Commission found was unrelated to PURPA.
29 Hence, Idaho Power's insistence on REC language in the contract, as a condition for signing was
30 an act of bad faith. It attempted to condition a federally bestowed right to the creation of a legally

²¹ Id. at p. 4.

²² Order No. 32580 at p. 12. Emphasis provided.

1 enforceable obligation on Grand View's compulsory surrender of its RECs. Because the
2 Commission ruled that Grand View could voluntarily negotiate ownership of RECs, Idaho
3 Power's coercive attempt at ownership was the sole impediment to Grand View and Idaho Power
4 executing a contract. Such a contract would have memorialized the legally enforceable
5 obligation that Grand View created in the summer of 2011.

6 WHEREFORE, Grand View PV Solar Two, LLC respectfully requests the Commission
7 issue its order declaring that Grand View created a legally enforceable obligation in the summer
8 of 2011 and order Idaho Power to honor that obligation by tendering a contract with the terms
9 and conditions and rates apropos to that time.

Respectfully submitted this 8th day of April 2013.

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 8th day of April, 2013, a true and correct copy of the within and foregoing REPLY TO IDAHO POWER'S ANSWER TO GRAND VIEW'S MOTION FOR DECLARATORY ORDER in Case No. IPC-E-11-15 was served in the manner shown to:

Jean D. Jewell, Secretary
Idaho Public Utilities Commission
472 West Washington
Boise, Idaho 83702
jean.jewell@puc.idaho.gov

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

Donovan E. Walker
Jason B. Williams
Idaho Power Company
PO Box 70
Boise, Idaho 83707-0070
dwalker@idahopower.com
jwilliams@idahopower.com

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

Kristin A. Sasser
Deputy Attorneys General
Idaho Public Utilities Commission
472 West Washington
Boise, Idaho 83702
kris.sasser@puc.idaho.gov

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

Michael G. Andrea
Avista Corporation
1411 East Mission Ave – MSC-23
PO Box 3727
Spokane, WA 99220-3727
michael.andrea@avistacorp.com

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

Clint Kalich
Avista Corporation
1411 East Mission Ave – MSC-7
PO Box 3727
Spokane, WA 99220-3727
clint.kalich@avistacorp.com

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

Signed: 
Nina Curtis