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**JASON B. WILLIAMS**  
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July 30, 2012

**VIA HAND DELIVERY**

Jean D. Jewell, Secretary  
Idaho Public Utilities Commission  
472 West Washington Street  
Boise, Idaho 83702

Re: Case No. IPC-E-11-15  
Grand View PV Solar Two, LLC, vs. Idaho Power Company – Idaho Power  
Company's Answer to Petition for Clarification and Cross-Petition for  
Clarification

Dear Ms. Jewell:

Enclosed for filing in the above matter are an original and seven (7) copies of  
Idaho Power Company's Answer to Grand View PV Solar Two, LLC's Petition for  
Clarification and Cross-Petition for Clarification.

Very truly yours,



Jason B. Williams

JBW:csb  
Enclosures

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Attorneys for Idaho Power Company

BEFORE THE IDAHO PUBLIC UTILITIES COMMISSION

GRAND VIEW PV SOLAR TWO, LLC,	)	
	)	CASE NO. IPC-E-11-15
Complainant,	)	
	)	IDAHO POWER COMPANY'S
vs.	)	ANSWER TO GRAND VIEW PV
	)	SOLAR TWO, LLC'S PETITION
IDAHO POWER COMPANY,	)	FOR CLARIFICATION AND
	)	CROSS-PETITION FOR
Respondent.	)	CLARIFICATION
	)	

Pursuant to the Idaho Public Utilities Commission's ("Commission") RP 57 and RP 325, Idaho Power Company ("Idaho Power" or "Company"), by and through its attorneys of record, hereby submits its Answer to Grand View PV Solar Two, LLC's ("Grand View") Petition for Clarification and hereby files this Cross-Petition for Clarification.

**I. BACKGROUND**

On August 2, 2011, Grand View filed a Complaint against Idaho Power requesting that the Commission issue a declaratory judgment that it is entitled to a 20-

year, long-term, fixed rate Public Utility Regulatory Policies Act of 1978 ("PURPA") Power Purchase Agreement ("PPA") in which Idaho Power would explicitly disclaim any ownership of the environmental attributes, or Renewable Energy Certificates ("REC"), associated with the purchase of that energy. Complaint at 2. Grand View demanded that the Commission require Idaho Power to insert language into its PURPA PPA "to the effect that Idaho Power makes no claim to REC ownership." Complaint at 6. Grand View also demanded a declaration that Idaho Power is in violation of PURPA, Federal Energy Regulatory Commission's ("FERC") implementing regulation, and the Commission's orders for failing to do so. *Id.*

On September 6, 2011, Idaho Power filed its Answer to Grand View's Complaint. In its Answer, Idaho Power stated that neither 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. In fact, such a disclaimer has potentially costly consequences for Idaho Power's customers should the Idaho Legislature or other legal or regulatory 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.*

On November 29, 2011, Grand View filed a Motion for Summary Judgment ("Grand View SJ Motion") where it asked for a declaratory order from the Commission requiring Idaho Power to disclaim ownership of all environmental attributes in the PURPA PPA with Grand View. Grand View SJ Motion at 36. Additionally, Grand View asked the Commission to declare that it is entitled to a contract with rates that were in

effect on the date of the filing of the Complaint. *Id.* Grand View alleged that inclusion in the PPA of a provision that, in effect, states that ownership of environmental attributes, or RECs, will be determined in accordance with applicable law would violate Section 210(e) of PURPA, the Takings Clause of the U.S. and Idaho Constitutions, and the Dormant Commerce Clause of the U.S. Constitution.

On December 12, 2011, Avista Corporation filed an Answer to Grand View's SJ Motion, arguing that the ownership of RECs is currently an unsettled matter of Idaho law, that Idaho Power's proposed language in the PPA related to RECs is not a contract "reopener," and that neither the Takings Clause nor Dormant Commerce Clause applied because the Commission had yet to approve a PPA between Idaho Power and Grand View.

On December 13, 2011, Idaho Power filed an Answer to Grand View's Motion for Summary Judgment ("Idaho Power's SJ Answer"). Idaho Power's SJ Answer argued that the Grand View SJ Motion should be denied in its entirety as ownership of RECs is an unsettled issue of Idaho law. In addition, Idaho Power argued that the language proposed by Idaho Power did not violate Section 210(e) of PURPA, was not a contract "reopener," and that the Takings Clause and Dormant Commerce Clause did not apply.

On June 21, 2012, the Commission issued Order No. 32580 denying Grand View's SJ Motion. In reaching its decision, the Commission held "that it cannot find as a matter of law that ownership of RECs vests solely with Grand View." Order No. 32580 at 13. Instead, the Commission found that the language related to RECs as proposed by Idaho Power did "not definitively confer REC ownership on either Grand View or Idaho Power. It merely states that REC ownership will be governed by applicable state law at the time the contract is executed and approved." Order No. 32580 at 14.

Accordingly, the Commission held Idaho Power's proposed language in Section 8.1 of the PPA was "not a reopener." *Id.* In addition, the Commission found that the proposed language in Section 8.1 of the PPA did "not constitute a taking under either the Idaho or U.S. Constitutions." Order No. 32580 at 15.

On July 10, 2012, Grand View filed a Petition for Clarification on Order No. 32580 ("Grand View Petition"). In its filing, Grand View asks the Commission to modify Section 8.1 of the PPA to require the additional language that the ownership of environmental attributes would be "governed by the applicable state law *at the time the contract is executed and approved.*" Grand View Petition at 1 (emphasis in original). Further, Grand View argues that the phrase "'executed and approved' to mean when a 'legally enforceable obligation' is incurred, as used by the Federal Energy Regulatory Commission's ('FERC') regulations implementing the Public Utility Regulatory Policies Act of 1978 ('PURPA')." Grand View Petition 1-2. The Grand View Petition also seeks a Commission finding "that the avoided cost rates in Grand View's PPA will not compensate the qualifying facility ('QF') for more than the estimated value of energy and capacity alone, and that at this time no Idaho law conveys non-energy, environmental attributes to a purchasing utility without payment to the QF." Grand View Petition at 2.

Idaho Power now timely files this Answer and Cross-Petition.

## **II. ARGUMENT**

The Commission should deny the relief requested in the Grand View Petition. Instead, the Commission should clarify that Idaho Power's proposed language related to the treatment of environmental attributes—i.e., the exact language contained in Section 8.1 of the PPA tendered to Grand View—is allowable under the Commission's rules

implementing PURPA, does not violate Section 210(e) of PURPA, and is not a contract “reopener.” Moreover, the Commission should reject Grand View’s attempt to expand the scope of the issues raised in the Grand View Motion by denying the Grand View Petition’s request to find: (1) that the ownership of environmental attributes is somehow determined at the time a QF has a legally enforceable obligation and (2) that the avoided cost rates in Grand View’s PPA will not compensate it for more than the estimated value of energy and capacity alone.

**A. The Commission Should Not Modify the Language of Section 8.1.**

Idaho Power’s proposed language in Section 8.1 of Grand View’s PPA is as follows:

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

The Commission found that this language is not a contract “reopener.” Order No. 32580 at 14. In making this finding, the Commission also found that the “plain language of § 8.1 would not subject the PPA to changing conditions. Consequently, we find that § 8.1 is not preempted by PURPA.” Order No 32580 at 15. This is the crux of the Commission’s finding. It is clear and unambiguous.

Grand View, however, latches onto an additional sentence in Order No. 32580 and attempts to extrapolate its meaning into requiring the Commission to add language to Section 8.1. Specifically, Grand View focuses on the sentence stating, “As indicated above, § 8.1 of the March 2011 draft PPA merely reflects that REC ownership will be

determined by applicable law when the PPA is executed and approved.” Order No. 32580 at 14. Grand View reads this sentence to mean that the “Commission’s Order implicitly acknowledged therefore that once ownership is determined based upon applicable law at the time the contract becomes effective, such ownership cannot change at some future date when a new law, regulation, or order on the topic is issued.” Grand View Petition at 4. Idaho Power disagrees that this was the Commission’s intent.

The plain language of Section 8.1 does not include the modifier “at the time the contract is executed and approved” which is found in the Order. While the Commission’s Order suggests, on two different occasions, that this modifier is included in the language proposed in Section 8.1, the Commission’s Order also specifically finds that Section 8.1, as proposed by Idaho Power, is not a contract reopener, would not subject the PPA to changing conditions, and is not preempted by PURPA. Grand View has focused on this conflicting language and asks the Commission to modify the language of Section 8.1 to add the following sentence at the end of the provision: “Such ownership will be determined by applicable law in effect at the time when the legally enforceable obligation is incurred.” Grand View Petition at 8.

In drafting Section 8.1, Idaho Power did not intend that ownership of environmental attributes would occur at the time the parties executed and the Commission approved a PPA, let alone when a legally enforceable obligation occurs. Idaho Power did not make any arguments to this effect in responding to the Grand View SJ Motion. Instead, Idaho Power has consistently argued that the language of Section 8.1 is merely a change of law provision, which the Commission found neither violates nor is preempted by PURPA. See, Idaho Power’s SJ Answer at 5, 8-9, and 9-10; Order No. 32850 at 14-15. As a change of law provision, Section 8.1 simply states that if a

change of law related to environmental attributes occurs, then that applicable law governs. In Idaho Power's SJ Answer, Idaho Power provided arguments with supporting law demonstrating how such change of law provisions neither violate Section 210(e) of PURPA nor are they preempted by PURPA. See, Idaho Power's Answer at 10-16 (providing authority that the proposed PPA language is not a contract reopener; Section 210(e) of PURPA does not preempt or prohibit this provision; the PPA language does not reopen the contract to require future negotiations; that state law, not PURPA, governs RECs; and that the proposed language has no impact on the avoided cost rate, does not require renegotiation, and does not modify the contract). There is nothing in PURPA, case law interpreting PURPA, nor in Commission Order No. 32580 requiring that ownership of environmental attributes must be determined at the time the QF and purchasing utility execute a PPA or when the QF incurs a legally enforceable obligation. Accordingly, the Commission should clarify that the modifying language found in Order No. 32580 and advocated by Grand View (e.g., that ownership of environmental attributes will be determined by applicable law in effect at the time when the PPA is executed and approved and/or at the time the QF incurs a legally enforceable obligation) is not applicable to the change of law provision Idaho Power offered in Section 8.1 of the draft PPA tendered to Grand View.

**B. The Commission Should Deny Grand View's Request to Expand the Scope of the Issues Raised by Grand View's Motion for Summary Judgment.**

The Grand View SJ Motion sought resolution of a very narrow issue—that the Commission order Idaho Power to affirmatively disclaim ownership of environmental attributes in the Grand View PPA. As described above, the Commission denied this request, and in so doing, found that Idaho Power's proposed language in Section 8.1 of the PPA neither violated nor was preempted by PURPA. In the Grand View Petition,

Grand View seeks not only that the Commission add language to Section 8.1, but also that the Commission expand the scope of what was requested by the Grand View SJ Motion and find that the ownership of environmental attributes is determined by applicable law at the time Grand View incurred a legally enforceable obligation. Grand View Petition at 7-8. The Commission should reject this request because it is beyond the scope of the issues briefed in the Grand View SJ Motion and responded to by the answering parties, Idaho Power included.

Importantly, Grand View amended its original complaint on December 20, 2011, nearly one month after it filed its Summary Judgment Motion with the Commission. While not explicitly using the phrase "legally enforceable obligation," the Amended Complaint adds a claim alleging "grandfathering" and asking the Commission to require "Idaho Power to execute the March 10, 2011 tendered contract at the rates contained therein as offered by Idaho Power and with the addition of language disclaiming ownership of the RECs generating by the operation of Grand View Two's solar project." Amended Complaint at 3 (emphasis added). Thus, while the Commission has now ruled on the REC issue, the issue of whether Grand View incurred a legally enforceable obligation as of March 10, 2011, appears to still be a live controversy before this Commission. Grand View's request in the Grand View Petition, asking that the Commission add language stating that the ownership of environmental attributes will be determined by applicable law in effect at the time when the legally enforceable obligation is incurred, appears to be a thinly veiled attempt to somehow have the Commission predetermine or set precedent for Grand View's pending claim that it had a legally enforceable obligation as of March 10, 2011. The Commission should reject Grand View's attempt to skew the record for its own benefit in this proceeding and deny

its request to make any finding related to legally enforceable obligation until such time as that issue is briefed by the parties in this case.

In addition, the Grand View Petition asks the Commission to make a finding that the avoided cost rates in Grand View's PPA will not compensate Grand View for more than the estimated value of the energy and capacity and that no existing law conveys non-energy, environmental attributes to an Idaho purchasing utility without payment to the QF for those non-energy attributes. Grand View Petition at 8-12. Similar to its argument related to whether a legally enforceable obligation existed as of March 10, 2011, Grand View again attempts to generate evidence to use either in this or other proceedings by asking the Commission to make findings on issues that are beyond the scope of the narrow issues briefed on summary judgment.

Specifically, the issue of REC ownership in relation to PURPA contracts is currently teed-up in Commission Case No. GNR-E-11-03. Hundreds of pages of legal briefs were submitted in that case on July 20, 2012, and a three-day hearing is scheduled for August 7-9. Grand View is a party to that proceeding and may be attempting to generate findings from the Commission in this case to use in Case No. GNR-E-11-03.

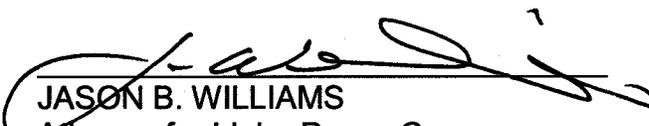
Even if this is not Grand View's intent, Grand View has failed to demonstrate the need for the Commission to make this requested finding. Grand View argues that "the Commission's Order is problematic because it could be construed to conclude that—although REC ownership must be determined at the time the parties become obligated to the PPA—at this time, nobody owns the RECS that will be created by Grand View's QF." Grand View Petition at 8 (emphasis added). As described above, Idaho Power hereby asks the Commission to confirm that Section 8.1 of the PPA does not require

that a determination related to RECs be made at the time the PPA is executed and approved by the Commission. If this is indeed the outcome, then there is no need to make additional findings related to Grand View's request as the issue will be moot. Accordingly, the Commission should deny Grand View's request.

### **III. CONCLUSION**

The Commission should reject the additional findings requested by the Grand View Petition. Instead, the Commission should clarify that Section 8.1 of the draft PPA, as tendered by Idaho Power to Grand View, need not be modified to require language stating that ownership of environmental attributes is based upon the applicable law when the PPA is executed and approved or when a QF has a legally enforceable obligation. The Commission should also reiterate that the change of law provision of Section 8.1 neither violates PURPA nor this Commission's rules. Lastly, the Commission should reject Grand View's request for additional findings on issues that are beyond the scope of the issues raised on summary judgment.

Respectfully submitted this 30<sup>th</sup> day of July 2012.

  
JASON B. WILLIAMS  
Attorney for Idaho Power Company

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 30<sup>th</sup> day of July I served a true and correct copy of IDAHO POWER COMPANY'S ANSWER TO GRAND VIEW PV SOLAR TWO, LLC'S PETITION FOR CLARIFICATION AND CROSS-PETITION FOR CLARIFICATION upon the following named parties by the method indicated below, and addressed to the following:

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