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IDAHO PUBLIC
UTILITIES COMMISSION
December 12, 2011



Via Overnight Mail

Jean Jewell
Idaho Public Utilities Commission
472 W. Washington Street
Boise, ID 93702

**Re: Answer of Avista Corporation to Motion for Summary Judgment
IPUC Case No. IPC-E-11-15**

Dear Ms. Jewell:

Please find enclosed for filing an original and seven copies of the Answer of Avista Corporation to Grand View Solar PV II, LLC's motion for summary judgment in the above-referenced proceeding. Please let me know if you have any questions regarding this filing.

Sincerely,

A handwritten signature in black ink, appearing to read "Michael G. Andrea". The signature is fluid and cursive, with a large loop at the end.

Michael G. Andrea
Senior Counsel

Enclosures

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Attorney for Avista Corporation

BEFORE THE IDAHO PUBLIC UTILITIES COMMISSION

GRAND VIEW SOLAR PV II, LLC)	
Complainant,)	
)	NO. IPC-E-11-15
v.)	
)	ANSWER OF AVISTA
IDAHO POWER COMPANY)	CORPORATION TO MOTION FOR
Defendant.)	SUMMARY JUDGMENT
)	
)	

Pursuant to the Idaho Public Utilities Commission's ("Commission") Rules of Procedure 57.03, intervenor Avista Corporation ("Avista") hereby submits its answer to Grand View Solar PV II, LLC's ("Grand View") motion for summary judgment ("Motion") filed on November 29, 2011, in the above-captioned proceeding.

In its Motion, Grand View challenges a provision, or the Commission's potential approval of a provision, in Idaho Power Company's ("Idaho Power") power purchase agreement ("PPA") that, in effect, states that ownership of environmental attributes (sometimes referred to as "renewable energy credits" or "RECs") will be determined in accordance with applicable law. Grand View further requests a declaratory order from the Commission requiring Idaho Power to expressly disclaim any ownership interest in RECs for Grand View's project.

The provision of the PPA that is at issue does not assign ownership to either Grand View or Idaho Power; rather, the provision states, in effect, that ownership of RECs will be determined in accordance with applicable law. Such language merely puts parties on notice of what would occur if a dispute arose regarding ownership of RECs even in the absence of such language—that is, if a dispute arises as to ownership of RECs during the term of the PPA resolution of that dispute will be governed by applicable law. Grand View also argues that Commission approval of the provision at issue would constitute a taking in violation of the United States and Idaho Constitutions and would violate the Dormant Commerce Clause of the United States Constitution. The Commission has not approved the PPA and, therefore, Grand View’s constitutional arguments are premature. In any event, the provision at issue is not preempted by PURPA and approval by the Commission would not violate any provision of the United States or Idaho constitutions.

In requesting as part of its Motion a declaratory order requiring Idaho Power to expressly disclaim ownership of RECs generated or associated with Grand View’s project, Grand View is attempting to resolve in favor of Qualifying Facilities the long-standing issue of ownership of RECs generated by or associated with Qualifying Facilities in Idaho. To the extent that Grand View seeks a declaratory order that may well resolve the issue of ownership of RECs generated by or associated with Qualifying Facilities in Idaho, resolution of that issue necessarily will necessarily require resolution of many issues that are not appropriately resolved on summary judgment.¹ To the extent

¹ Many of those issues were raised, but not resolved, in IPUC Case No. AVU-E-09-04. For example, developers of Qualifying Facilities have previously argued that the Commission lacks jurisdiction to determine that utilities own the RECs generated by or associated with Qualifying Facilities in Idaho. That issue remains unresolved. In this case, however, Grand View seeks an order from the Commission

that Grand View seeks a declaratory order from the Commission resolving the issue of ownership of RECs in the State of Idaho, such request for declaratory order should be properly made and noticed to ensure that there is a full and fair airing of the issues by all interested parties.²

As discussed herein, Grand View's Motion should be denied in its entirety. Even assuming, without conceding, that Grand View was correct that the language in the PPA that is at issue is in some way improper, Grand View's request for an order requiring Idaho Power to expressly disclaim ownership of RECs associated with Grand View's project is not properly raised and should be denied.

I. Background

A. Legal Background

The Federal Energy Regulatory Commission ("FERC") has determined that the ownership of RECs is not controlled by the Public Utility Regulatory Policy Act of 1978 ("PURPA").³ Rather, FERC has stated: "States, in creating RECs have the power to determine who owns the REC in the initial instance and how they may be sold or traded[.]"⁴ Finally, FERC has held 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."⁵

Ownership of RECs generated by or associated with Qualifying Facilities is not settled in Idaho. In 2004, Idaho Power filed a petition with the Commission requesting a

that effectively concludes that Qualifying Facilities own such RECs without any discussion of the Commission's jurisdiction to determine such ownership rights.

² See Commission's Rules of Procedure 101-102 (setting forth procedure for petitions for declaratory order).

³ *American Ref-Fuel Co., et al.*, 105 FERC ¶ 61,004, P 23 (2003), *order on reh'g*, 107 FERC ¶ 61,016 (2004).

⁴ *Id.*

⁵ *Id.* at P 24.

declaratory order to determine the ownership of the marketable environmental attributes associated with a Qualifying Facility when Idaho Power entered into a long-term, fixed rate contract to purchase the energy produced by such project.⁶ In Order No. 29480, the Commission found that “the issue presented by Idaho Power in its Petition d[id] not present an actual or justiciable controversy in Idaho and [wa]s not ripe for a declaratory judgment by this Commission.”⁷

After the Commission issued Order No. 29480, Idaho Power filed an application with the Commission in Case No. IPC-E-04-16 requesting approval of a Firm Energy Sales Agreement between Idaho Power and J.R. Simplot Company (“Simplot Agreement”).⁸ Idaho Power argued that by filing the Simplot Agreement it had presented the Commission with a real case or controversy and, therefore, the issue of ownership of RECs that the Commission declined to address in Order No. 29480 was now ripe.⁹ In Order No. 29577, the Commission found that the regulatory landscape had not changed and again declined to address the issue of ownership of RECs associated with Qualifying Facilities.¹⁰

In Case No. AVU-E-09-04, Avista filed a petition for a declaratory order to resolve the issue of REC ownership in Idaho. However, that petition was withdrawn and, therefore, the issue was not resolved in that proceeding. Accordingly, the issue of ownership of RECs associated with Qualifying Facilities remains unsettled in the State of Idaho.

⁶ IPUC Case No. IPC-E-04-02.

⁷ Order No. 29480 at 16. The Commission did note that Idaho Power could negotiate the sale and purchase of RECs, but the cost of such RECs could not be recovered as PURPA costs. *Id.* at 16-17. Nevertheless, the Commission declined to directly address the issue of ownership of RECs raised by Idaho Power’s petition. *See id.*

⁸ Order No. 29577 at 1.

⁹ *Id.* at 3.

¹⁰ *Id.* at 5-6.

B. Summary of Current Proceeding

On August 2, 2011, Grand View filed a complaint against Idaho Power in which it alleges that Idaho Power violated PURPA, FERC's regulations and orders, and the Commission's orders by, among other things, insisting on "language in the PPA that it may be amended to account for subsequent changes in law relating to REC ownership." Complaint ¶ 19; *see also* ¶¶ 15-28, Prayer ¶ 1. It appears that Grand View is specifically taking issue with the following language in the PPA with Grand View:

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

See Motion at 5-6.

In its Complaint, Grand View further requested that the Commission issue a declaratory judgment that Grand View "is entitled to a PPA with a clause in which Idaho Power explicitly disclaims ownership of the environmental attributes." Complaint at 2, Prayer ¶ 2.

On September 6, 2011, Idaho Power filed an answer ("Answer") to Grand View's Complaint. In its Answer, Idaho Power stated:

Contrary to Grand View's allegations, Idaho Power has not proposed language for the PURPA contract that purports to allocate ownership to either the QF or the utility and its customers. Instead, Idaho Power has proposed language that states the ownership of environmental attributes will be determined by the applicable federal or state laws and/or the appropriate regulatory body or agency deemed to have authority to regulate environmental attributes or to implement federal and/or state laws regarding the same.

Answer at 2.

Idaho Power further stated:

Idaho Power does not believe 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. In fact, such a disclaimer has 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.

Answer at 1.

Avista's petition to intervene ("Petition") was filed on September 12, 2011. On September 22, 2011, the Commission issued Order No. 32362 granting Avista's Petition.

On November 29, 2011, Grand View filed its Motion. In its Motion, Grand View argues: (1) Grand View retains the RECs associated with its Qualifying Facility because it is not compensated for those RECs; (2) the provision at issue is a reopener clause that violates section 210(e) of PURPA and FERC's implementing regulations and orders; (3) Commission approval of the provision at issue would constitute a taking; (4) Commission approval of the provision would violate the Dormant Commerce Clause of the United States Constitution; and (5) Grand View is being coerced into giving Idaho Power its RECs. Grand View further requests that the Commission issue a declaratory judgment that requires Idaho Power to disclaim ownership of all RECs associated with Grand View's project. As discussed herein, Grand View's Motion should be denied.

II. Argument

In its Motion, Grand View challenges a provision, or the Commission's approval of a provision, in Idaho Power's PPA that, in effect, states that ownership of RECs will be determined in accordance with applicable law. In its Motion, Grand View further

requests a Commission order requiring Idaho Power to expressly disclaim any ownership interest in RECs for Grand View's project.

The provision of the PPA that is at issue does not assign ownership to either Grand View or Idaho Power; rather, it merely states, in effect, the unremarkable proposition that ownership of RECs will be determined in accordance with applicable law. The language at issue is not a reopener, is not preempted by PURPA, and does not violate any provision of the United States or Idaho constitutions. Finally, the fact that applicable law will be applied to determine ownership of RECs clearly does not constitute coercion and, therefore, Grand View's coercion argument does not merit further discussion herein.

A. Contrary to Grand View's Motion, Ownership of RECs is Currently Unsettled in Idaho.

Grand View's first argument, and an underlying premise throughout its Motion, is that Grand View is the default owner of RECs generated or associated with Grand View's project. *E.g.*, Motion at 22 (stating, without authority, "Grand View clearly owns the RECs for which Idaho Power will not pay and which no law transfers to Idaho Power."). Grand View is incorrect. As discussed above, ownership of RECs generated by or associated with Qualifying Facilities is currently unsettled in Idaho and, therefore, it is not at all clear that Qualifying Facilities are necessarily the default owners of any or all RECs that are or may be generated or associated with such Qualifying Facilities.¹¹

¹¹ Although there are several potential outcomes to the issue of ownership of RECs in Idaho, one possible outcome that cannot be discounted is that at some point the State of Idaho, by legislative action for example, could create RECs and clarify that all RECs generated by or associated with Qualifying Facilities are automatically transferred to the utilities that purchase the energy from such Qualifying Facilities—even where utilities already have power purchase agreements with the Qualifying Facilities. This is precisely what occurred in Connecticut. See *In re Riley Energy Corp.*, 2004 WL 3160409 (Conn. DPUC 2004).

As noted above, FERC has held 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.”¹² States therefore are empowered to determine that RECs generated by or associated with Qualifying Facilities transfer—at no cost in addition to the price paid for energy and capacity—to the utilities that purchase the energy and capacity from such Qualifying Facilities.¹³

Grand View argues that, because Qualifying Facilities are not compensated for RECs and no law conveys them to Idaho utilities free of additional charge, Qualifying Facilities retain legal title to their project’s RECs. Grand View selectively cites decisions of the Oregon and Montana public utility commissions for the proposition that Qualifying Facilities are entitled to be compensated for RECs separately from capacity and energy.¹⁴ To the extent that Grand View is arguing that states do not have the authority to determine that RECs generated by or associated with Qualifying Facilities transfer to utilities automatically, and without additional separate compensation above the avoided cost rates, with the sale of energy to such utilities, Grand View is demonstrably incorrect.¹⁵ Moreover, it is clear that states that have not yet determined the appropriate

¹² *American Ref-Fuel Co., et al.*, 105 FERC ¶ 61,004, PP 23-24 (2003).

¹³ *Id.*

¹⁴ See generally Motion at 13-16.

¹⁵ See, e.g., *Id.*; *In re The Riley Energy Corp.*, 2004 WL 3160409 (Conn. DPUC 2004); *Wheelabrator Lisbon, Inc. v. Connecticut Dep’t of Pub. Util. Control*, 531 F.3d 183, 186 (2d Cir. 2008). It is worth noting that Grand View misstates the issues raised by Avista’s rehearing in *Idaho Wind Partners I, LLC*, 136 FERC ¶ 61,174 (2011). Specifically, Grand View states in the “Legal Background” section of its Motion that in that case “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.” Motion at 9. Grand View reiterates this misstatement in a parenthetical following its citation to the Idaho Wind Partners proceeding on page 15 which mischaracterizes the FERC order as: “(rejecting Avista’s attempt to have FERC deem the utility the default owner of RECs in PURPA contracts entered into in state’s [sic] without an express ownership rule).” That is patently incorrect. In its rehearing in that case, Avista noted that the issue of ownership of RECs is an issue for the States to decide in the first instance and requested that FERC clarify that it did not preempt any such State determination. Avista DID NOT in any way request in that proceeding that utilities be deemed the default owner of RECs or that FERC decide the issue of ownership

disposition of RECs may later determine that, even under preexisting contracts with Qualifying Facilities that were entered before RECs were created by the State, the utilities own the RECs generated or associated with such Qualifying Facilities.¹⁶

In fact, some states have determined that RECs generated by or associated with Qualifying Facilities transfer automatically to the utilities that purchase the energy and capacity from such Qualifying Facilities.¹⁷ For example, in *In re The Riley Energy Corp.*,¹⁸ the Connecticut Light and Power Company (“CL&P”) requested that the Connecticut Department of Public Utility Control (“DPUC”) issue a declaratory ruling regarding the ownership of RECs under a pre-existing power purchase agreement entered under PURPA. The power purchase agreement predated and therefore did not contemplate ownership of RECs, but provided for the sale of the entire net electric output of the facility. Importantly, in reaching its conclusion that the RECs transferred to the utility under the applicable state law, the DPUC expressly noted that “the environmental attributes of renewable energy are not properly part of avoided costs set pursuant to PURPA.”¹⁹ Notwithstanding the fact that the Qualifying Facility was not separately

of RECs. Grand View’s characterization of Avista’s rehearing in *Idaho Wind Partners 1, LLC*, 136 FERC ¶ 61,174 (2011), and citations to that case in its Motion are incorrect and misleading.

¹⁶ See, e.g., *In re The Riley Energy Corp.*, 2004 WL 3160409 (Conn. DPUC 2004) (holding that, under Connecticut law, the RECs generated or associated with a Qualifying Facility transferred to the utility that purchased the energy under a preexisting contract that did not contemplate the existence of RECs).

¹⁷ E.g., *In re The Riley Energy Corp.*, 2004 WL 3160409 (Conn. DPUC 2004); *Wheelabrator Lisbon, Inc. v. Connecticut Dep’t of Pub. Util. Control*, 531 F.3d 183, 186 (2d Cir. 2008) (affirming decision of Connecticut Department of Public Utility Control requiring transfer of RECs to electric utility under electricity purchase agreements and noting that “[t]he energy conveyed in the [PURPA] Agreement possesses certain renewable energy attributes that, since the signing of the Agreement, have become independently tradable commodities known as ‘renewable energy credits’ (‘RECs’).”); *In re the Ownership of Renewable Energy Certificates (“RECs”)*, 389 N.J.Super. 481, 484, 913 A.2d 825, 826 (2007) (affirming Board of Public Utilities’ decision that renewable energy certificates issued on pre-existing contracts for the sale of electricity to public electric utility belonged to utility rather than the producer and stating that RECs are a commodity).

¹⁸ 2004 WL 3160409 (Conn. DPUC 2004).

¹⁹ *Id.*

compensated for the RECs, the DPUC found that, under the power purchase agreement and state law, the RECs transferred to the utility as part of the electrical output purchased by the utility.²⁰ The DPUC ordered the Qualifying Facility to provide the utility not only all future RECs, but also any existing RECs and the proceeds from any prior REC sales made by the Qualifying Facility.²¹ It follows that, contrary to Grand View's underlying premise, Qualifying Facilities are not necessarily the default owners of any and all RECs generated by or associated with their projects.

Whether the State of Idaho does or does not currently have law that vests ownership of environmental attributes to a utility in an Idaho PURPA contract (*see* Motion at 15-16) is of no moment. What is important is that the State of Idaho may determine that ownership of RECs generated by or associated with a Qualifying Facility vests with the utility that purchases the energy and capacity from such Qualifying Facility.

B. The Provision of the PPA Providing that Ownership of RECs Will Be Determined In Accordance With Applicable Law Is Not a Reopener and Is Not Preempted by PURPA.

Grand View argues that the provision in the PPA that states that ownership of RECs will be determined in accordance with applicable law is a reopener clause that subjects Grand View to ongoing regulation and changed circumstances and, therefore, approval of such provision by the Commission is preempted by section 210(e) of PURPA. Motion at 16-20. Grand View's characterization of the provision at issue as a reopener clause is incorrect. To be sure, if the ownership of RECs generated or associated with Grand View's project is disputed, even in the absence of such provision,

²⁰ *Id.*

²¹ *Id.*

the ownership of such RECs will be governed by and determined in accordance with applicable federal or state laws and/or any regulatory body or agency deemed to have authority to regulate such RECs or to implement federal or state laws regarding same. The provision of the PPA at issue does nothing more than put all parties on notice of that fact.

As discussed above, ownership of RECs generated by or associated with Qualifying Facilities is not settled in Idaho. If and to the extent new law or orders clarify current law or otherwise settle the issue of ownership of RECs, ownership of RECs will be governed by such applicable law. That fact, however, does not constitute a reopener that is in any way prohibited or preempted by PURPA.

C. Grand View's Arguments that Commission Approval of the Provision of the PPA that States that Ownership of RECs Will Be Determined in Accordance With Applicable Law Would Violate the United States and Idaho Constitutions Are Premature and Are Not Properly Raised in this Proceeding.

Grand view argues that Commission approval of the provision of the PPA that states that ownership of RECs will be determined in accordance with applicable law would (i) constitute a takings under the Fifth Amendment of the United States Constitution and Article 1 Section 14 of the Idaho Constitution, and (ii) would violate the Dormant Commerce Clause of the United States Constitution. Motion at 20-30. The Commission has not yet approved the provision of the PPA. Moreover, this proceeding is a complaint proceeding against Idaho Power. Grand View's arguments that Commission approval of the PPA *would* constitute a taking or *would* violate the Dormant Commerce

Clause are premature and are not appropriately raised in this proceeding.²² To the extent that Grand View seeks a declaratory order from this Commission, such request should be properly requested and noticed.²³

Even assuming *arguendo* that such arguments are appropriately raised by Grand View, such arguments are without merit. As a threshold matter, Grand View's constitutional arguments are based on the premise that Grand View is necessarily the default owner of the RECs generated by or associated with its Qualifying Facility. As discussed above, that premise is incorrect—ownership of such RECs is currently unsettled in Idaho. To be sure, to the extent that there are RECs generated by or associated with Qualifying Facilities in Idaho, or the State of Idaho at some point creates such RECs, the State has the power to also determine that utilities will own such RECs.²⁴ Such determination would not constitute a taking.²⁵

Commission approval of a provision of a PPA that merely states that ownership of RECs will be determined in accordance with applicable law does not constitute a taking.²⁶ In any event, a determination of a taking in this case necessarily involves a fact-specific inquiry that makes such a determination inappropriate on a motion for summary

²² See *Re Alternative Operator Services*, 95 P.U.R. 4th 411 (1988) (Commission finding that it had not been presented with a controversy that would necessitate discuss and, therefore, declining to render an advisory opinion).

²³ See Commission Rules of Procedure 101-102 (providing for petitions for declaratory orders).

²⁴ See *American Ref-Fuel Co., et al.*, 105 FERC ¶ 61,004, PP 23-24 (2003); *In re The Riley Energy Corp.*, 2004 WL 3160409 (Conn. DPUC 2004); *Wheelabrator Lisbon, Inc. v. Connecticut Dep't of Pub. Util. Control*, 531 F.3d 183, 186 (2d Cir. 2008).

²⁵ See *Wheelabrator Lisbon, Inc. v. Dep't of Pub. Util. Control*, 283 Conn. 672, 699-700, 931 A.2d 159 (2007) (stating: "The trial court concluded in the present case that the transfer of the certificates to the utility did not constitute an unconstitutional taking of property from the plaintiff because the certificates were not the plaintiff's property. We have concluded that the trial court correctly determined that it was within the jurisdiction of the department to determine the ownership of the certificates and that the department reasonably concluded that the utility owned them. Accordingly, we agree with the trial court that the department's decision could not constitute an unconstitutional taking under the state constitution because no property owned by the plaintiff had been taken." (Emphasis added.).

²⁶ See generally *Id.*; *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528 (2005) (discussing takings and in particular regulatory takings).

judgment.²⁷ Finally, such provision does not discriminate against interstate commerce and, therefore, Grand View's Dormant Commerce Clause argument is without merit.²⁸

III. Conclusion

For the forgoing reasons, Avista respectfully requests that the Commission deny Grand View's Motion.

Respectfully submitted this 12th day of December 2011.

AVISTA CORPORATION



Michael G. Andrea
Senior Counsel

²⁷ See *Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency*, 535 U.S. 302, 332 (2002) (stating that a takings claim in the regulatory context requires a fact specific inquiry); see also *Beus v. Beus*, 151 Idaho 235, 254 P.3d 1231 (2011) (quoting *J.R. Simplot Co. v. Bosen*, 144 Idaho 611, 613, 167 P.3d 748, 750 (2006), for proposition that “Summary judgment can only be granted when there are no genuine issues of material fact.”).

²⁸ See, e.g., *Dep't of Revenue of Ky. v. Davis*, 543 U.S. 328, 338-39 (2008) (setting forth protocol for Dormant Commerce Clause analysis).

CERTIFICATE OF SERVICE

I hereby certify that on this 12th day of December 2011, true and correct copies of the foregoing Answer were delivered to the following persons via E-mail, postage prepaid regular, or postage prepaid overnight mail.

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