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IDAHO PUBLIC
UTILITIES COMMISSION

24 September 2012

Ms. Jean Jewell
Commission Secretary
Idaho Public Utilities Commission
472 W. Washington
Boise, ID 83702

RE: IPC-E-11-23

Dear Ms. Jewell:

Enclosed please find **Kootenai Electric Cooperative, Inc.'s Reply in Support of Motion to Supplement the Record** submitted for filing in the above-referenced docket. We have enclosed seven (7) copies, as well as an additional copy for you to stamp for our records.

Sincerely,

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

encl.

Commission's ("FERC") decision regarding point-to-point transmission service across the Oregon-Idaho state line that will occur prior to the sale of electricity to Idaho Power is irrelevant to this matter. Then, Idaho Power misconstrues the FERC decision as somehow endorsing Idaho Power's view that Kootenai cannot secure point-to-point transmission service beyond Avista's Lolo Substation. In essence, Idaho Power proposes a rule whereby Idaho qualifying facilities ("QFs") cannot sell to Idaho Power in Oregon if their electricity first enters Idaho Power's control area at a location in Idaho— or worse yet prohibits an out-of-state sale to Idaho Power by any QF located in Idaho. The IPUC should not adopt such a rule because inserting itself as a barrier to an Idaho QF's access to rates, terms and conditions available for QFs in a neighboring state would violate the Dormant Commerce Clause of the U.S. Constitution.

II. ARGUMENT

The Dormant Commerce Clause prohibits states from impeding the free flow of interstate commerce and prohibits states from hoarding resources by prohibiting the sale of goods out-of-state. See *Kootenai's Answer and Motion to Dismiss* at 19-22 (Nov. 25, 2011) (citing *C&A Carbone, Inc. v. Town of Clarkstown, New York*, 511 U.S. 383, 390-95 (1994); *South Central Timber Development, Inc. v. Wunnicke*, 467 U.S. 82, 100 (1984); *New England Power Co. v. New Hampshire*, 455 U.S. 331, 339 (1982)). In yet another case decided since the filing of Kootenai's Answer, a federal court held that California improperly implemented a regulatory scheme for carbon intensity of fuels that regulated activities beyond its borders. *Rocky Mountain Farmer's Union v. Goldstene*, -- F.Supp. ----, 2011 WL 6934797 at ** 12-14 (E.D. Cal., Dec. 29, 2011). The Commerce Clause precludes a state from regulating commerce that takes place outside of

the state's borders, whether or not the commerce has effects within the state. *Id.* (citing cases). A state may not “force a merchant to seek regulatory approval in one State before undertaking a transaction in another.” *Id.* at * 14 (quoting *Brown–Forman Distillers Corp. v. New York State Liquor Auth.*, 476 U.S. 573, 579 (1986)).

In this case, Idaho Power openly acknowledges that the issue is “whether the Idaho Commission has primary jurisdiction over a QF located in Idaho proposing to wheel power across state lines.” *Idaho Power’s Response to Kootenai’s Motion to Supplement the Record* at 2. Idaho Power then asks the IPUC to control conduct beyond Idaho’s border – a sale of electricity occurring in the state of Oregon pursuant to the Public Utility Commission of Oregon’s (“OPUC”) implementation of the Public Utility Regulatory Policies Act of 1978 (“PURPA”) and Oregon’s related policies regarding ownership of non-energy environmental attributes of generation of the electricity. Idaho Power’s proposed rule would prohibit Idaho QFs selling to Idaho Power from utilizing the rules and terms available for sales in Oregon, without regard to the location to which the QF actually pays to deliver the electricity for sale. This rule would violate the Dormant Commerce Clause because the IPUC cannot force Kootenai to seek regulatory approval in Idaho before undertaking a transaction in Oregon. That Idaho Power’s customers are primarily located in Idaho is not important because the sale for resale of electricity will occur in Oregon.

As demonstrated by the Western Electricity Coordinating Council (“WECC”) map attached in Attachment No. 1 to this Reply,¹ Idaho Power’s control area (or balancing authority) boundary spans across the entire Idaho-Oregon state border.

¹ W. Elec. Coordinating Council, *Western Interconnection Balancing Authorities* (2009), available at <http://www.wecc.biz/library/WECC%20Documents/Publications/Balancing%20Authorities.pdf> (illustrating the location and relationships between all the NERC Balancing Authorities in North America).

Kootenai respectfully requests that the Commission take official notice of the map, or otherwise consider its impact on this case. Idaho Power's control area is vast and includes electrical lines owned by other utilities. Idaho Power has acknowledged that its control area includes 17 different utilities within its metered boundaries. According to Idaho Power's proposed rule, even if an Idaho QF built, owned and operated its own interconnection line that crossed the Oregon border to directly interconnect to Idaho Power's system in Oregon, that QF would still be ineligible for an OPUC power purchase agreement ("PPA") with Idaho Power. Such a QF's electricity would first be metered and thus enter Idaho Power's control area at the point where it first entered the QF's own interconnection line, and, according to Idaho Power, the IPUC would insert itself to prohibit the sale in Oregon. The IPUC cannot endorse a rule that completely walls off the border to the Oregon market for Idaho Power.

It is for the OPUC to determine whether its tariff applies in the first instance based upon the facts developed in the OPUC proceeding, many of which Kootenai set forth in its June 20, 2012 letter filing to the IPUC. To summarize, it is undisputed that, for deliveries over the Lolo-Oxbow line, Avista is responsible to Idaho Power for line losses up to the point in change in ownership near Imnaha, Oregon. In turn, Avista's Open Access Transmission Tariff ("OATT") passes that cost onto Kootenai, as a transmission customer, who would pay Avista under its OATT for transmission rates and line losses for point-to-point service all the way to the point in change in ownership near Imnaha, Oregon. Consistent with these arrangements, Idaho Power's Oregon PPA likewise requires Kootenai to accept responsibility for line losses up to the point where the electricity reaches Idaho Power's electrical system. The Oregon PPA does not allow

a QF to simply arrange to have its electricity enter Idaho Power's control area, without paying all costs and line losses associated with delivering to Idaho Power's electrical system.

As demonstrated by Avista's tendered point-to-point agreement and FERC's decision, Avista will provide point-to-point transmission service all the way to the point of interconnection near Imnaha, Oregon. Avista can only transmit Kootenai's output to Idaho Power pursuant its OATT as point-to-point transmission service. Here, the point-to-point service will continue all the way past Avista's Lolo Substation for delivery of electricity to the point near Imnaha, Oregon. Simply put, the electricity will not merely be delivered to the Lolo Substation.

Finally, Idaho Power incorrectly argues that FERC "specifically rejected Kootenai's argument that the point in change in ownership is the 'only location to which Avista will deliver the QF output for Idaho Power's purchase and use . . .'" *Idaho Power's Response to Kootenai Motion to Supplement the Record* at 2 (quoting *Avista Corporation*, 140 FERC ¶ 61,165, ¶ 21 (2012)). This is misleading. The quoted sentence of FERC's order actually stated in full:

Finally, we find that Kootenai's requested clarification that the term "near Imnaha, Oregon" be in the description of the POD or, alternatively, that the order state that Imnaha, Oregon is the only location to which Avista will deliver the QF output for Idaho Power's purchase and use *is unnecessary in light of our finding that Avista's proposed language meets the standards set forth in both the NAESB and NERC guidelines.*

Avista Corporation, 140 FERC ¶ 61,165 at ¶ 21 (emphasis added).

FERC did not "reject" Kootenai's argument. FERC found Kootenai's requested clarification *unnecessary* because FERC agreed with Avista that Idaho Power was incorrect that the NERC guidelines mandated the only possible point of delivery is Lolo

Substation. *See id.* at ¶ 15 (noting Idaho Power’s reliance on the NERC guidelines for Idaho Power’s assertion that “the only designated POD for the Lolo-Oxbow line is the Lolo Substation”).

FERC determined it was entirely appropriate for Avista to deliver to the point on the Lolo-Oxbow 230 kilovolt (“kV”) transmission line where the 230 kV facilities of Idaho Power Company and Avista are interconnected. Again, Avista’s description of the Point of Delivery, accepted by FERC, was as follows:

The point on the Lolo-Oxbow 230 kV Transmission Line where the 230 kV facilities of Idaho Power Company and Avista are interconnected, and, for scheduling purposes, the LOLO POD.

Id. at ¶ 2.

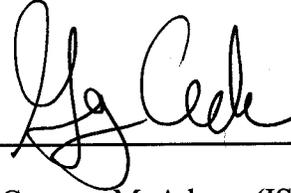
FERC specifically stated, “we conclude that Avista’s description of the POD provides Kootenai non-discriminatory transmission service all the way across Avista’s transmission system, because the description incorporates *the entirety of Avista’s transmission assets* on the Lolo-Oxbow line.” *Id.* at ¶ 21 (emphasis added). That Avista must schedule the deliveries to the designated scheduling point described as the “LOLO POD” is not important because Kootenai will pay for, and Avista will provide, point-to-point service for delivery of the electricity all the way to the point of interconnection near Innaha, Oregon – just as the Oregon PPA requires. The IPUC should not attempt to erect a barrier excluding Kootenai from the Oregon market under these circumstances.

III. CONCLUSION

Kootenai again respectfully requests that the IPUC dismiss Idaho Power’s petition for lack of jurisdiction.

Respectfully submitted this 24th day of September 2012.

RICHARDSON AND O'LEARY, PLLC

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

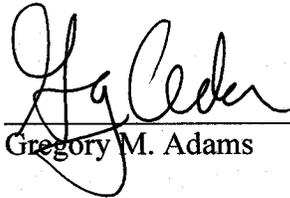
Gregory M. Adams (ISB No. 7454)
Attorney for Kootenai Electric
Cooperative, Inc.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 24th day of September, 2012, a true and correct copy of the within and foregoing **REPLY IN SUPPORT OF MOTION TO SUPPLEMENT THE RECORD BY KOOTENAI ELECTRIC COOPERATIVE, INC.** was served by ELECTRONIC MAIL and HAND DELIVERY, to:

Donovan E. Walker
Jason Williams
Idaho Power Company
1221 West Idaho Street
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dwalker@idahopower.com
jwilliams@idahopower.com

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



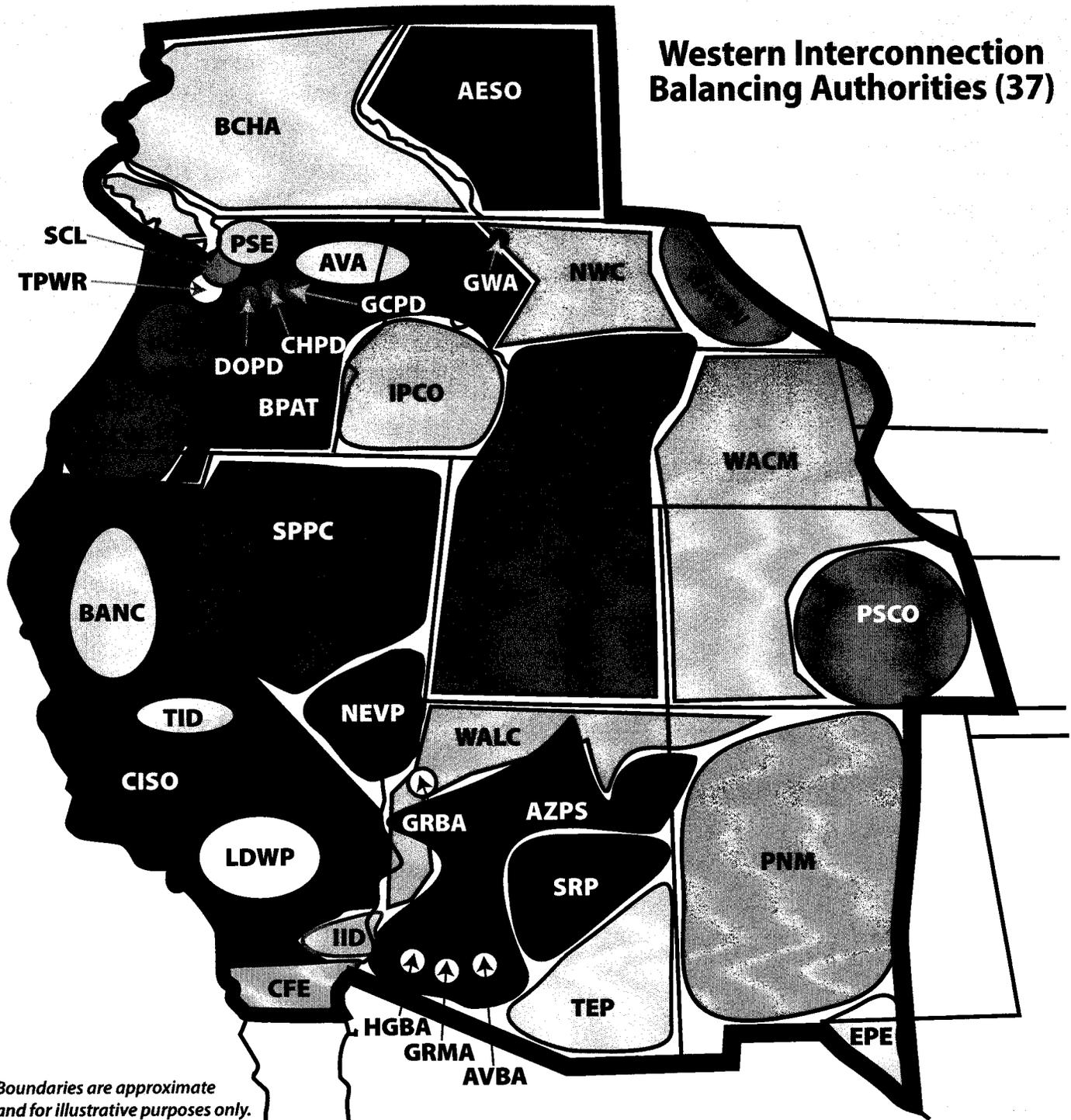
Gregory M. Adams

**KOOTENAI'S REPLY IN SUPPORT OF MOTION TO
SUPPLEMENT**

ATTACHMENT NO. 1



Western Interconnection Balancing Authorities (37)



*Boundaries are approximate
and for illustrative purposes only.*

Alberta Electric System Operator (AESO)
 Arizona Public Service Company (AZPS)
 Avista Corporation (AVA)
 Balancing Authority of Northern California (BANC)
 Bonneville Power Administration – Transmission (BPAT)
 British Columbia Hydro Authority (BCHA)
 California Independent System Operator (CISO)
 Comisión Federal de Electricidad (CFE)
 Arlington Valley, LLC (AVBA)*
 El Paso Electric Company (EPE)
 Gila River Power, LP (GRMA)*
 Griffith Energy, LLC (GRBA)*
 Idaho Power Company (IPCO)

Imperial Irrigation District (IID)
 Los Angeles Department of Water and Power (LDWP)
 NaturEner Power Watch, LLC (GWA)*
 Nevada Power Company (NEVP)
 New Harquahala Generating Company, LLC (HGBA)*
 NorthWestern Energy (NWC)
 PacifiCorp — East (PACE)
 PacifiCorp — West (PACW)
 Portland General Electric Company (PGE)
 Public Service Company of Colorado (PSCO)
 Public Service Company of New Mexico (PNM)
 PUD No. 1 of Chelan County (CHPD)
 PUD No. 1 of Douglas County (DOPD)
 PUD No. 2 of Grant County (GCPD)

Puget Sound Energy (PSE)
 Salt River Project (SRP)
 Seattle City Light (SCL)
 Sierra Pacific Power Company (SPPC)
 City of Tacoma, Department of Public Utilities (TPWR)
 Tucson Electric Power Company (TEP)
 Turlock Irrigation District (TID)
 Western Area Power Administration, Colorado-Missouri Region (WACM)
 Western Area Power Administration, Lower Colorado Region (WALC)
 Western Area Power Administration, Upper Great Plains West (WAUW)

**Generation-only, controls no load*