

# McDevitt & Miller LLP

Lawyers

RECEIVED

420 W. Bannock Street  
P.O. Box 2564-83701  
Boise, Idaho 83702

2012 JAN -9 PM 3:08  
IDAHO PUBLIC  
UTILITIES COMMISSION

(208) 343-7500  
(208) 336-6912 (Fax)

Chas. F. McDevitt  
Dean J. (Joe) Miller

January 9, 2012

*Via Hand Delivery*

Jean Jewell, Secretary  
Idaho Public Utilities Commission  
472 W. Washington St.  
Boise, Idaho 83720

**Re: Hoku Materials, Inc. v. Idaho Power  
Case No. IPC-E-11-28**

Dear Ms. Jewell:

Enclosed for filing in the above matter, please find an original and seven (7) copies of Hoku Materials, Inc.'s Response.

Kindly return a file stamped copy to me.

Very Truly Yours,

McDevitt & Miller LLP

  
Dean J. Miller

DJM/hh  
Encl.

Dean J. Miller (ISB No. 1968)  
Chas. F. McDevitt (ISB No. 835)  
McDEVITT & MILLER LLP  
420 West Bannock Street  
P.O. Box 2564-83701  
Boise, ID 83702  
Tel: 208.343.7500  
Fax: 208.336.6912  
[joe@mcdevitt-miller.com](mailto:joe@mcdevitt-miller.com)

RECEIVED  
2012 JAN -9 PM 3:08  
IDAHO PUBLIC  
UTILITIES COMMISSION

*Attorneys for Hoku Materials, Inc.*

**BEFORE THE IDAHO PUBLIC UTILITIES COMMISSION**

HOKU MATERIALS, INC.,

Complainant,

v.

IDAHO POWER COMPANY,

Respondent.

**Case No. IPC-E-11-28**

**RESPONSE OF HOKU  
MATERIALS, INC.**

COMES NOW Hoku Materials Inc., (“Hoku”) and, as permitted by Order No. 32431, responds to Idaho Power Company’s Answer, Motion to Dismiss and Motion to Set Termination Date (“Idaho Power Pleadings”).

**INTRODUCTION**

1. This Response is divided into three sections. In the first, Hoku outlines the relief it is requesting from the Commission. Section II elaborates on the reasons for the requested relief. The final section responds, to the extent not covered in the first two sections, to allegations in the Idaho Power Pleadings.

## SECTION I

2. The operable legal standard under which this case is evaluated is Rule 605 of the Commission's Utility Customer Relations Rules, IDAPA 31.21.01, which provides in part, "The Commission may stay termination of service upon its finding that the public interest requires service to be maintained to the customer."

3. When making a public interest determination, the Commission considers all relevant facts and circumstances. See Order No. 28213, *In re: Scottish Power*, Case No. PAC-E-99-1. The Commission may also impose conditions upon a proposed activity to insure the public interest is served. *Id.* As the Commission said in *Scottish Power*:

"The term "public interest" as it appears in Idaho Code § 61-328, is not specifically defined anywhere in that statute nor anywhere in Title 61 of the Idaho Code. Moreover, we find no definitive definition of the term in any Idaho Supreme Court opinion interpreting § 61-328. The Idaho Supreme Court has ruled that the term "public interest" (as used in relation to a motor carrier statute) "is not susceptible of precise definition." *Browning Freight Lines, Inc. v. Wood*, 99 Idaho 174, 180, 579 P.2d 120, 126 (1978). The Court ruled that "[i]n general, where the Commission is required to consider the 'public interest,' it must look to 'the interest of the public, their needs and necessities and location and, in fact, all the surrounding facts and circumstances...to the end that the people be adequately served. Order No. 28213, Pg. 33

4. Contemporaneously with the filing of this Response, Hoku is filing with the Commission a Complaint for Reformation of Contract and Reparations. A true copy is attached as Exhibit 1.

5. As discussed in more detail herein, Hoku respectfully suggests that a correct public interest result in this case, balancing the needs of Idaho Power, of ratepayers generally, of Hoku (also a ratepayer), and of the economy of the State of Idaho is as follows:

- a. The Commission should temporarily stay termination of service based on the November invoice, with the following conditions to apply during the period of a stay (Stay Period).

- b. The Commission should require Idaho Power to apply amounts held in deposit to pay the November invoice in the amount of \$1,895,656.26.
- c. As soon as possible, and no later than 15 calendar days after this Order, Hoku should make a payment to Idaho Power to replenish the deposit account.
- d. During the Stay Period, the Commission should establish a procedural schedule to expeditiously consider and decide the issues raised by the Complaint. The Stay Period should be orders to have commenced December 1, 2011 and extend to the time the Commission issues a final order in the Complaint case.
- e. During the Stay Period, commencing December, 2011, Hoku should be required to pay for monthly energy it actually consumes at the rates contained in Idaho Power's Schedule 19T.
- f. Upon the later to occur of (a) 15 calendar days after this Order, or 15 calendar days after receipt of a revised invoice for the month of December, 2011 that reflects only the amounts owing to Idaho Power for the energy actually consumed pursuant to the immediately preceding paragraph e, Hoku should make a payment Idaho Power for such invoice.
- g. During the Stay Period, commencing December 1, 2011, Hoku's obligation to pay First Block Energy (as defined in the Amended and Restated Electric Service Agreement, a true copy of which is attached to Hoku's Complaint Contesting Termination (AESAs)) charges should be suspended.
- h. During the Stay Period, the Commission should preclude Idaho Power from attempting termination of service for non-payment of a claimed \$1.8 million deposit.

## SECTION II

6. Before responding to the specific allegations in Idaho Power's Pleadings, Hoku believes it is important for the Commission to understand the structure of the AESA. Pursuant to the AESA, Hoku's demand and energy requirements are divided into two segments for pricing purposes, referred to as the First Block and Second Block. The AESA defines First Block Contract Demand as the number of kilowatts Idaho Power has agreed to make available as listed in Section 6 of the AESA. These amounts are fixed by month in the AESA. First Block Energy is the number of kilowatt hours determined by multiplying the First Block Contract Demand by the number of hours in the billing period, multiplied by the Contract Load Factor. Under the AESA, commencing in April of 2011, Hoku became obligated by the terms of the AESA to pay the First Block Demand and Energy Charges regardless of whether it actually consumed demand or energy.

7. While the AESA creates a contractual obligation to pay, the AESA balances the obligation to pay with an important "safety valve." Paragraph 5.7 of the AESA allows Hoku to request a waiver of First Block Energy Charges. As discussed in more detail below and in the attached Complaint for Contract Reformation, Idaho Power's refusal to grant relief under the safety valve clause is at the core of this dispute. As written, the safety valve clause is imperfect because it grants to Idaho Power the sole discretion as to whether to grant relief. The Complaint for Contract Reformation asks the Commission to correct this deficiency by allowing for Commission supervision of the waiver decision.

8. Further, the AESA establishes a rate for First Block Energy charges of \$.061660. The AESA rate for First Block Energy charges was established by reference to Idaho Power's then existing published avoided costs. Since 2009, the Commission has entered orders lowering

Idaho Power's avoided costs and current avoided costs are approximately 12% lower than the First Block Energy rate contained in the AESA.

9. As noted, Hoku became obligated to pay the First Block Demand and Energy charges in April, 2011. Hoku was not physically interconnected to the Idaho Power system in April, 2011, and did not become interconnected until November, 2011. Between April and November, Hoku paid to Idaho Power Company a total of \$11,572,211 for First Block Demand and Energy minimum charges, despite the fact that Idaho Power did not deliver a single electron of electricity to the Hoku Facility.

10. During the month of November, 2011, the first month Hoku was physically interconnected, the actual consumption was 220 KW of demand and 46,167 KWH of energy. To further illustrate the magnitude of the inequity currently occurring under the AESA, Hoku believes this level of monthly consumption would otherwise be priced under Idaho Power's Tariff Schedule 19T, Large General Service. Under that tariff, the rate for demand is \$4.47 per KW and the rate for energy is \$.037902 per KWH (assuming all consumption is on-peak). Pricing the actual consumption at those rates would produce a monthly bill for demand and energy of \$2,732. Yet, the AESA requires a payment for demand and energy of \$1,890,158, producing for Idaho Power Company a gross profit of \$1,887,421, or 99.85% gross margin. Assuming the \$2,732 price of actual consumption roughly reflects Idaho Power's actual cost of serving the Hoku load, the revenue produced under the AESA is approximately 700 times Idaho Power's cost of service ( $1,890,158/2,684 = 691$ ).

11. The Idaho Power Pleadings<sup>1</sup> make a different calculation and say that Hoku's power bill runs approximately \$65,000 per day. Hoku does not dispute that calculation based on the required minimum First Block Energy payment under the AESA. Hoku observes, however, as further illustration of the current inequity, and assuming the \$2,732 price of actual November consumption, Hoku's daily power bill would be \$91 ( $2,732/30 = 91.06$ ).

12. Further, Hoku has paid to Idaho Power the entire cost of constructing facilities to serve Hoku's load. In September of 2008, Hoku and Idaho Power entered into an agreement whereby Hoku agreed to pay the entire cost of constructing approximately six miles of 138,000 volt overhead transmission, a new 138,000-13,800 volt substation to supply up to 82 MWs with two 67 MVA transformers. Hoku also paid for required additional facilities at other Idaho Power existing substations. Hoku has fully performed that agreement and has paid to Idaho Power \$18,049,182 for construction of the facilities. Pursuant to the agreement, Idaho Power retains ownership of the facilities and the agreement provides, "Hoku recognizes that the Requested Facilities will become part of Idaho Power's integrated electrical transmission and distribution system and will be used by Idaho Power to provide electric service to other existing, and future customers." Thus, neither Idaho Power nor its other customers are burdened by the cost of facilities to serve Hoku and, in fact, are benefitted by those facilities, at no cost to them.

13. Hoku further believes that Idaho Power incurs minimal or zero cost associated with the First Block contract minimums. While the truncated nature of this proceeding precludes formal discovery on this issue, and Idaho Power has never demonstrated its actual cost of service, notwithstanding that, two prior Commission Orders support Hoku's belief. The first is Order No. 31005, issued in Case No. IPC-E-08-21. That case involved a previous waiver of the First Block Energy minimum payment. An issue in the case was whether Idaho Power would

---

<sup>1</sup> Idaho Power Pleadings, paragraph 17.

incur cost when not providing service. Based on the record and representations of Idaho Power, the Commission concluded:

“If Hoku does not take minimum service under the contract, Idaho Power may have to unwind positions that are long in two of 16 months in the waiver period. Unwinding the long positions could prove to be a net cost or benefit to other customers as the cost or benefit flows through the PCA. Because the long positions are relatively small, Staff believes the impact on other customers will be insignificant. Staff recommends that the Commission approve the Letter Agreement. The unwinding costs are unknown but estimated to be small or non-existent”

14. The second is Order No. 32424, issued in Case No. IPC-E-11-22, in which Idaho Power requested an accounting order with respect to accumulated deferred income tax credits. There, based on the Company’s Application and a Stipulation between the parties, the Commission found that Idaho Power’s earnings for the year 2011 would exceed the Company’s authorized return on equity of 10.5%, producing a customer benefit of approximately \$20 million under an approved sharing formula. In previous years, Idaho Power’s earnings did not exceed its authorized return on equity. In 2011, upon receiving \$11.5 million in revenue from Hoku, without significant off-setting cost, Idaho Power over-earned its authorized return on equity. From this, it is possible to infer that revenue from the Hoku First Block charges is providing a massive subsidy to both Idaho Power’s earnings and to other Idaho Power customers<sup>2</sup>.

15. Attached hereto as Exhibit 2 is the Affidavit of Scott Paul, the Chief Executive Officer of Hoku. As established by the Affidavit, Hoku’s current financial stress is not the result of negligence or ineptitude, but is the result of disturbances in the global solar and polysilicon markets.

---

<sup>2</sup> The Company’s Application in Case No. IPC-E-11-22, did not contain detailed accounting information regarding the source of over-earnings and it is conceivable that other factors contributed to the over earnings. It, however, seems undeniable that \$11.5 million in Hoku revenue, without off setting cost, had some contribution.

16. Hoku acknowledges that Idaho Power has demanded a deposit in the amount of \$5.8 million. It is undisputed that \$4 million of the demanded deposit has been paid and \$1.8 million is unpaid.

17. It is important to note, however, that the demanded deposit amount is not incorporated in the AESA and has not been approved by the Commission. The deposit results from the unilateral demand of Idaho Power, occurring outside the AESA. While Hoku has paid the \$4 million portion of the deposit, it did so only because payment was necessary to begin taking service. Hoku does not believe it has made a contractual commitment to pay the demanded deposit.

18. Hoku further asserts that Idaho Power's unilateral demand for an additional \$1.8 million is unreasonable because Hoku's highest estimated demand and energy usage for the next twelve months of operations is unlikely to exceed the First Block Energy charges, which, including demand charges, are less than \$2.0 million per month. Rule L only authorizes a deposit that is equal to two times the highest anticipated bill in the next twelve months. Therefore, the \$4.0 million deposit should be sufficient. Hoku has informed Idaho Power of this reduced power forecast; however, Idaho Power has continued to demand the additional \$1.8 million deposit.

Further, taking into account payments made under the AESA, payments made under the construction agreement and amounts paid as a deposit, Hoku has paid to Idaho Power a total of approximately \$36 million. In light of this, the implication in the Idaho Power Pleadings that Hoku has failed to fulfill any of its obligations under the AESA borders on fantasy.

19. Based on all these circumstances, a stay of termination, subject to the conditions suggested above, is reasonable and in the public interest. Hoku further notes that it is not unusual for the Commission to temporarily stay or alter the rights of parties while it devotes necessary time to resolution of regulatory issues. *See e.g.* Order No. 32212, Case No. GNR-E-10-4, *In Re: Adjust Published Avoided Cost Rate Eligibility Cap*; Order No. 30277, Case No, IPC-E-05-22, *In Re: Temporarily Suspend PURPA Obligation*.

### SECTION III

20. Hoku now turns to statements in the Idaho Power Pleadings, to the extent they have not previously been rebutted or explained.

21. In paragraph 8 of the Idaho Power Pleadings, Idaho Power points to Commission Order 31005, and the Commission's expressed concern that other customers not be burdened by the AESA and its implementation. Hoku acknowledges the legitimacy of this concern, but as observed above, other customers have likely received a significant subsidy from Hoku's First Block revenues. Moreover, Hoku cannot conceive of how it would be in other customers' interest to terminate service to Hoku. When the Hoku facility is fully operational it is anticipated that revenue for the AESA should be approximately \$20 million per year, which revenue would be reflected either in the Power Cost Adjustment or in the calculation of base rates, to the benefit of all customers.

22. In paragraph 11, Idaho Power alleges it has "gone out of its way to accommodate Hoku." Hoku believes it would not benefit the Commission to attempt a summary of the long history of discussions and communications between Hoku and Idaho Power regarding the AESA. Suffice it to say, Hoku's perspective is the opposite. And, on the most important issue—whether

Idaho Power would grant a waiver of First Block Energy charges under paragraph 5.7—Idaho Power has been unmovable.

23. In paragraph 12, Idaho Power alleges that Hoku has missed a payment and not provided any assurance of payment. Two responding observations are appropriate: First, as a courtesy and in the interests of maintaining clear communications, Hoku informed Idaho Power in advance that the payment may be delayed, authorized Idaho Power to apply the \$4 million deposit to satisfy the November bill, and asked again if the \$1.8 million additional deposit could be waived. Idaho Power's response was to insist on payment in full of the November invoice, while offering only to extend by two months the date when the \$1.8 million deposit would be due. Idaho Power then served its Termination Notice one day after the November payment became past due. Idaho Power did not further communicate with Hoku either to discuss payment arrangements or payment assurances. Second, as set forth in Hoku's Complaint, Idaho Power has on hand a \$4 million deposit and Hoku has consented to a draw upon the deposit. Idaho Power can pay itself at any time it desires.

24. In paragraph 13, Idaho Power alleges that Hoku has filed a complaint to forestall disconnection and continue to receive service even though there is no controversy between the parties. This Response and Hoku's Complaint for Reformation of Contract and Reparations filed contemporaneously herewith, demonstrate that there is indeed a substantial and legitimate dispute between the parties. And, as noted above, Hoku has attempted to demonstrate its good faith by allowing amounts on deposit to pay the November invoice.

25. In paragraph 17, as noted above, Idaho Power calculates that Hoku's power bill approximates \$65,000 day and worries this daily rate will drain amounts deposited; therefore, Idaho Power argues, applying the deposit to past due amounts will eliminate the security deposit

and expose Idaho Power to immediate credit risk beginning with the electrical service provided in January. To mitigate this immediate risk, Idaho Power is requesting the immediate disconnect of Hoku's power supply. This argument is moot if the First Block Energy is waived and if Hoku is only billed for the energy consumed, as requested herein..

### **CONCLUSION**

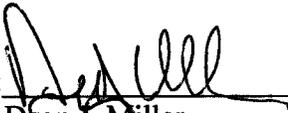
WHEREFORE, Hoku respectfully requests of the Commission that:

- a. The Commission temporarily stay termination of service based on the November invoice, with the following conditions to apply during the period of a stay (Stay Period).
- b. The Commission require Idaho Power to apply amounts held in deposit in payment of the November invoice in the amount of \$1,895,656.26.
- c. As soon as possible, and no later than 15 calendar days after this Order, Hoku make a payment to Idaho Power to replenish the deposit account.
- d. During the Stay Period, the Commission should establish a procedural schedule to expeditiously consider and decide the issues raised by the Complaint. The Stay Period should extend to the time the Commission issues a final order in the complaint case.
- e. During the Stay Period, commencing December, 2011, Hoku should be required to pay for monthly energy actually consumed at the rates contained in Idaho Power's Schedule 19T.
- f. Upon the later to occur of (a) 15 calendar days after this Order, and (b) 15 calendar days after receipt of a revised invoice for the month of December, 2011 that reflects only the amounts owing to Idaho Power for the energy actually consumed pursuant to the immediately preceding paragraph 5, Hoku should make a payment Idaho Power for such invoice.

- g. During the Stay Period, commencing December, 2011, Hoku's obligation to pay First Block Energy charges should be suspended.
- h. During the Stay Period, the Commission should preclude Idaho Power from attempting termination for non-payment of a claimed \$1.8 million deposit.

DATED this 9 day of January, 2012.

HOKU MATERIALS, INC

By:  \_\_\_\_\_  
Dean J. Miller  
*Attorney for Hoku Materials, Inc.*



State of Hawaii

City & County of Honolulu }

On 01/09/2012, before me, Sharon A. Higa,  
*(here insert name of notary)*

personally appeared Scott Paul  
*(name(s) of Signer(s))*

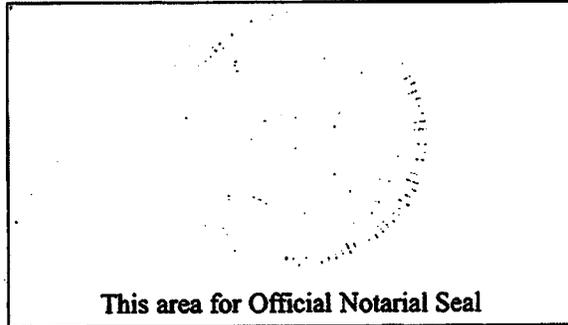
personally known to me (or proved to me on the basis of satisfactory evidence) to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.

WITNESS my hand and official seal.

Signature  (SEAL)

SHARON A. HIGA  
Expiration Date: May 11, 2012

My Commission Expires: \_\_\_\_\_



This area for Official Notarial Seal

**NOTARY PUBLIC CERTIFICATION**

Doc. Date: 01/09/2012

# Pages: 15

Notary Name: Sharon A. Higa

Judicial Circuit: First

Doc. Description: Response Of Hoku Materials Inc

Notary Signature: 

Date: 01/09/2012



**ALL PURPOSE ACKNOWLEDGMENT**

**CERTIFICATE OF SERVICE**

I hereby certify that on the 9<sup>th</sup> day of January, 2012, I caused to be served a true and correct copy of the foregoing document, upon:

Jean Jewell, Secretary  
Idaho Public Utilities Commission  
472 West Washington Street  
P.O. Box 83720  
Boise, ID 83720-0074  
[jjewell@puc.state.id.us](mailto:jjewell@puc.state.id.us)

Hand Delivered   
U.S. Mail   
Fax   
Fed. Express   
Email

Lisa D. Nordstrom  
Idaho Power Company  
1221 W. Idaho St. (83702)  
PO Box 70  
Boise, ID 83707-0070  
[lnordstrom@idahopower.com](mailto:lnordstrom@idahopower.com)

Hand Delivered   
U.S. Mail   
Fax   
Email

McDEVITT & MILLER LLP

BY Heather Houle

Dean J. Miller (ISB No. 1968)  
Chas. F. McDevitt (ISB No. 835)  
McDEVITT & MILLER LLP  
420 West Bannock Street  
P.O. Box 2564-83701  
Boise, ID 83702  
Tel: 208.343.7500  
Fax: 208.336.6912  
[joe@mcdevitt-miller.com](mailto:joe@mcdevitt-miller.com)

*Attorneys for Hoku Materials, Inc.*

**BEFORE THE IDAHO PUBLIC UTILITIES COMMISSION**

HOKU MATERIALS INC,

Complainant,

v.

IDAHO POWER COMPANY,

Respondent.

**Case No.**

**COMPLAINT FOR CONTRACT  
REFORMATION AND  
REPARATIONS**

COMES NOW Hoku Materials Inc., (“Hoku”), pursuant to RP 54, and for claims against Idaho Power Company (“Idaho Power”, “the Company”, “IPCo”) complains and alleges as follows, to wit:

**STATEMENT OF FACTS**

1. Hoku is a corporation organized and existing under the laws of the State of Delaware and authorized to conduct business in the State of Idaho.
2. Hoku is constructing a manufacturing facility in Pocatello, Idaho, for the purpose of manufacturing, marketing and selling polysilicon to the solar industry (“Facility”).
3. Idaho Power Company is an electric utility company subject to the jurisdiction of the Idaho Public Utilities Commission (“Commission”).

**COMPLAINT FOR CONTRACT REFORMATION AND REPARATIONS-1**

4. On September 17, 2008, Hoku and Idaho Power entered into an Agreement for Electric Service for the supply of electric power and energy to the Facility. On June 19, 2009, Hoku and Idaho Power entered into an Amended and Restated Agreement for Electric Service (“AESAs”) which superseded and replaced the September 17, 2008, Agreement for Electric Service. On July 24, 2009, the Commission entered Order No. 30869, Case No. IPC-E-08-21 approving the AESA. A true and correct copy of the AESA is attached hereto as Exhibit 1.

5. Pursuant to the AESA, Hoku’s demand and energy requirements are divided into two blocks for pricing purposes. The AESA defines First Block Contract Demand and the number of kilowatts Idaho Power has agreed to make available as listed in Section 6 of the AESA. First Block Energy is the number of kilowatt hours determined by multiplying the First Block Contract Demand by the number of hours in the billing period, multiplied by the Contract Load Factor. Under the AESA, commencing in April of 2011, Hoku is obligated to pay the First Block Demand and Energy Charges regardless of whether it actually consumes or demands energy.

6. The AESA establishes a rate for First Block Energy charges of \$.061660. The AESA rate for First Block Energy charges was established by reference to Idaho Power’s then existing published avoided costs. Since 2009 the Commission has entered orders lowering Idaho Power’s avoided costs and current avoided costs are approximately 12% lower than the First Block Energy rate contained in the AESA.

7. Hoku re-alleges as if fully set forth herein, and incorporates by reference, paragraphs 9—12 of Hoku’s Response to Idaho Power Pleadings, filed contemporaneously herewith.

8. At the time the AESA was executed it was the mutual assumption of the parties that the polysilicon deposition reactors would be energized and operational, and Hoku would begin its production ramp-up by December 1, 2009.
9. Through a series of events and circumstances beyond the control of Hoku, although some of the polysilicon deposition reactors have been energized and become operational, Hoku has not yet begun its production ramp-up.
10. Paragraph 5.7 of the AESA provides:

“Release of First Block Energy: With adequate notice and the written consent of Idaho Power, Hoku may request a release of all or part of its First Block Energy purchase commitment in return for credit on its First Block Energy Charge. The value of the credit will be determined by mutual agreement and will take into consideration the timing of the notice and Idaho Power's ability to manage any supply commitments made on Hoku's behalf.”
11. In March, 2011, Hoku’s officials met with Idaho Power’s officials at Idaho Power’s offices and requested of Idaho Power a release of First Block Energy pursuant to paragraph 5.7 of the AESA. Idaho Power unreasonably refused a release. On or about August 16, 2011, Hoku requested in writing of Idaho Power a release of First Block Energy pursuant to Paragraph 5.7. Idaho Power again unreasonably refused a release.
12. As written, Paragraph 5.7 is contrary to the public interest because it vests sole discretion in Idaho Power Company.

#### **STATEMENT OF LEGAL AUTHORITY**

13. While Hoku acknowledges that the Commission does not have authority to alter a contract merely to relieve one or the other of the parties from an unprofitable or injudicious undertaking, the Commission does have the authority and the responsibility to reform or alter terms of contracts that are contrary to the public interest. The Idaho Supreme Court has confirmed the Commission’s authority to modify contracts when required by the public interest.

*See Agricultural Products v. Utah Power & Light*, 98 Idaho 23, 557 P.2d 617 (1976). And, Idaho Power Company has recently acknowledged this authority in pleadings filed with the Commission:

“The Commission, in its role as the regulatory authority for all investor owned, public utilities in the state of Idaho, has an independent obligation and duty to assure that all contracts entered into by the public utilities it regulates are ultimately in the public interest. In the state of Idaho, contracts are afforded constitutional protection against interference from the State. Idaho Const. Art. I, § 16. However, despite this constitutional protection, the Commission may annul, supersede, or reform the contracts of the public utilities it regulates in the public interest. *Agricultural Products Corp. V. Utah Power & Light Co.*, 98 Idaho 23, 29, 557 P.2d 617, 623 (1976) (“Interference with private contracts by the state regulation of rates is a valid exercise of the police power, and such regulation is not a violation of the constitutional prohibition against impairment of contractual obligations.”); see also *Federal Power Comm's v. Sierra Pac. Power Co.*, 350, US. 348, 76 S.Ct. 368, 100 L.Ed. 388 (1 956); *United Gas Pipe Line Co. v. Mobile Gas Service Corp.*, 350 U.S. 332, 76 S.Ct. 373, 100 L.Ed. 373 (1956) (U.S. Supreme Court finding that rates fixed by contract could be modified only “when necessary in the public interest”). The Commission may interfere in such a way with the contracts of a public utility only to prevent an adverse affect to the public interest. *Agricultural Products*, 98 Idaho at 29. “Private contracts with utilities are regarded as entered into subject to reserved authority of the state to modify the contract in the public interest.” *Id.*” See Reply Comments of Idaho Power Company, Case No. IPC-E-10-59. (2011).

The Commission has recently exercised its public interest authority not merely to modify contracts, but to reject them entirely. See e.g. Order No. 32256, Case No. IPC-E-11-58, Order No. 32298, Case No. IPC-E-51—55; Order No. 32255, Case No. IPC-E-11-57.

The AESA by its own terms implies that the Commission may modify contract terms.

Section 14.1 provides:

“The terms, conditions, and rates set forth in this Agreement and Schedule 32 are subject to the continuing jurisdiction of the Commission.”

The Commission also has authority to require reparations for excessive or discriminatory charges pursuant to Idaho Code §61-641:

**“61-641. Overcharge—Reparation.**—When complaint has been made to the commission concerning any rate, fare, toll, rental or charge for any product, or commodity, furnished or service performed by any public utility, and the commission has found, after investigation, that the public utility has charged an excessive or discriminatory amount for such product, commodity or service, the commission may order that the public utility make due reparation to the complainant therefor, with interest from the date of collection: provided, no discrimination will result from such reparation. [1913, ch. 61, § 67a, p. 247; reen. C.L. 106:147; C.S., § 2515; I.C.A., § 59-641.]”

#### **FIRST CLAIM FOR RELIEF—CONTRACT REFORMATION**

14. Paragraph 5.7 should be reformed to provide:

“Release of First Block Energy: With adequate notice and the written consent of Idaho Power or by order of the Commission, Hoku may request a release of all or part of its First Block Energy purchase commitment in return for credit on its First Block Energy Charge. The value of the credit will be determined by mutual agreement or by order of the Commission and will take into consideration the timing of the notice and Idaho Power's ability to manage any supply commitments made on Hoku's behalf.”

#### **SECOND CLAIM FOR RELIEF—REPARATIONS**

15. Hoku is entitled to reparations for First Block Energy and Demand payments in an amount to be determined by the Commission.

#### **THIRD CLAIM FOR RELIEF—SUSPENSION OF FIRST BLOCK ENERGY**

16. The Commission should enter its order releasing First Block Energy charges until such time as Hoku is prepared to commence the production ramp-up of its polysilicon deposition reactors.

WHEREFORE, Hoku respectfully requests of the Commission that:

1. Reform the ARESA as herein requested.
2. Release First Block Energy as herein requested.
3. Award to Hoku reparations in an amount to be determined.

**COMPLAINT FOR CONTRACT REFORMATION AND REPARATIONS-5**

4. Grant such other relief as is appropriate in the circumstance.

DATED this 9 day of January, 2012.

HOKU MATERIALS, INC

By:  \_\_\_\_\_

Dean J. Miller

*Attorney for Hoku Materials, Inc.*

**CERTIFICATE OF SERVICE**

I hereby certify that on the 9<sup>th</sup> day of January, 2012, I caused to be served a true and correct copy of the foregoing document, upon:

Jean Jewell, Secretary  
Idaho Public Utilities Commission  
472 West Washington Street  
P.O. Box 83720  
Boise, ID 83720-0074  
[jjewell@puc.state.id.us](mailto:jjewell@puc.state.id.us)

Hand Delivered   
U.S. Mail   
Fax   
Fed. Express   
Email

Lisa D. Nordstrom  
Idaho Power Company  
1221 W. Idaho St. (83702)  
PO Box 70  
Boise, ID 83707-0070  
[lnordstrom@idahopower.com](mailto:lnordstrom@idahopower.com)

Hand Delivered   
U.S. Mail   
Fax   
Email

McDEVITT & MILLER LLP

BY Heather Houb



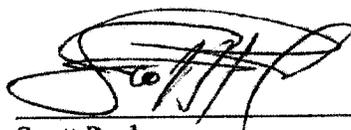
for polysilicon was approximately \$200 per kilogram, customers were signing 10-year fixed price contracts, and industry analysts were forecasting robust demand in the years to come. In 2008, market prices climbed even higher, in some cases exceeding \$500 per kilogram.

3. The high demand for polysilicon led to unprecedented increases in polysilicon production capacity from incumbent and new producers; and, in the second half of 2011, supply began to exceed demand by an extraordinarily wide margin. What was expected to be a short-term glut has turned into a prolonged downward cycle in the market, with today's prices falling below the industry's average production costs. This is expected to continue for at least the next six months, until the excess inventory is consumed by the downstream solar cell market. In the meantime, to mitigate losses, many polysilicon plants around the world are reducing their production output or idling plants. For example, MEMC, a St. Louis based company, recently announced the suspension of production at their polysilicon plant in Merano, Italy, and has disclosed that they are evaluating the permanent shutdown of that 6,000 metric tons facility if they cannot reduce their production costs, including the renegotiation of their electricity rates. In addition, many facilities in China are idle today, and may not resume operations due to their less efficient processes and higher cost structure.

4. The current spot market prices are not sustainable—eventually the excess inventory will be consumed and the market will correct. However, it is unlikely that we will see a return to the record high prices of just a few years ago, and companies with poor cost structures will not survive in the new market environment. This market situation was not generally foreseen by industry analysts, and is not within the control of Hoku Materials. Fortunately, Hoku has a long-term cost advantage relative to many of the idled plants due to its efficient production process, and the availability of low-cost hydropower in Idaho. Although Hoku

cannot sustain its business operations at today's prices, and would not begin high volume production in the current market environment, Hoku is well positioned for success as the market corrects and returns to a stable and healthy price structure. In order to maintain its business operations, and to ready its plant for future operations when the market corrects, it needs to remain connected to the power grid to complete its commissioning activities, but it also needs to reduce its operating expenses. Right now, the first block energy charge from Idaho Power is Hoku's largest single operating expense—and Hoku can only afford to pay for the power it is consuming.

DATED this 9<sup>th</sup> day of January, 2012.



---

Scott Paul  
CEO, Hoku Materials, Inc.

State of Hawaii

City & County of Honolulu }

On 01/6/2012, before me, Sharon A. Higa  
*(here insert name of notary)*

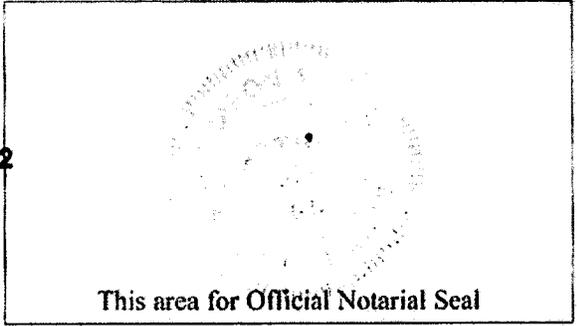
personally appeared Scott Paul  
*(name(s) of Signer(s))*

personally known to me (or proved to me on the basis of satisfactory evidence) to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.

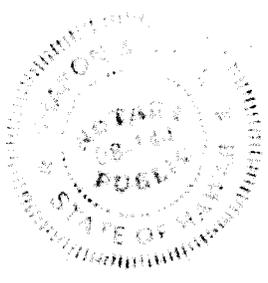
WITNESS my hand and official seal.

Signature *[Handwritten Signature]* (SEAL)

My Commission Expires: SHARON A. HIGA  
Expiration Date: May 11, 2012



NOTARY PUBLIC CERTIFICATION		
Doc. Date:	<u>01/09/2012</u>	# Pages: <u>4</u>
Notary Name:	<u>Sharon A. Higa</u>	Judicial Circuit: <u>First</u>
Doc. Description:	<u>Affidavit of Scott Paul</u>	
Notary Signature:	<u><i>[Handwritten Signature]</i></u>	
Date:	<u>01/06/2012</u>	



**ALL PURPOSE ACKNOWLEDGMENT**