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IDAHO PUBLIC UTILITIES COMMISSION

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BEFORE THE

IDAHO PUBLIC UTILITIES COMMISSION

HIDDEN HOLLOW ENERGY 2 LLC,

Complainant,

vs.

IDAHO POWER COMPANY,

Respondent.

*1A-E-12-18*  
~~Case No. IPC E-10-44~~

**ANSWER TO MOTION TO DISMISS**

COMES NOW Complainant Hidden Hollow Energy 2, LLC and, pursuant to Rule 57, hereby responds to the Motion to Dismiss filed by Respondent Idaho Power Company dated August 16, 2012, which Motion was embedded in its Answer.

The Motion should be denied for numerous reasons of fact and law, including the following:

**ORIGINAL**

1. As a matter of procedure, the “Motion” is no more than a tag line on the title of Respondent’s Answer, and fails to identify facts or legal authority to justify immediate dismissal. Accordingly, it is impossible for Complainant to admit or deny specific allegations, as none was made in support of the so-called Motion to Dismiss. However, out of abundance of caution, Complainant denies each and every allegation that Respondent may claim to support dismissal.

2. As a matter of procedure, Respondent ignores the special dispute resolution clause contained in Section 19.1 of the FESA, granting the Commission authority to resolve the dispute of the parties. This docket has only just been opened, so the Commission has not yet had an opportunity to investigate the dispute, let alone resolve it.

3. As a matter of procedure, Respondent should have foreseen incoming discovery from Complainant, which discovery will be served in the near term and which will focus on subjects raised in the Formal Complaint and this Answer.

4. As a matter of substance, Complainant invokes the following defenses to the Motion:

A. Respondent cites FESA § 14.1 as its main defense to the Formal Complaint, which section provides that “the *force majeure* clause did not apply to ‘short-term disruptions or curtailment of the Facility’s fuel supply’ or other similar events that are known or anticipated events in the operation of a landfill gas-supplied generation facility.” Answer at 5 ¶ 13 and 8 ¶ 29. However, the disruption identified in the Formal Complaint is hardly “short term,” but may last the life of the project. Moreover, the FESA was drafted substantially by Respondent, and the *contra proferentem* rule of construction applies against Respondent, and thus against the instant Motion.

B. Complainant cited in its Formal Complaint legal authority from the Idaho Supreme Court regarding the *force majeure* doctrine in a similar context, which authority was substantially on point, but which the Answer and Motion ignore.<sup>1</sup> Moreover, unlike the facts of the *Cogeneration* case, here Complainant did post security, which Respondent has “collected.” Similar to the *Cogeneration* case, here the air quality permit issued to Complainant was put in jeopardy through no fault of Complainant. See Exhibit B to the Formal Complaint.

C. Complainant posted security with Respondent in the amount of \$144,000 under the rubric of “Delay Liquidated Damages,” which Respondent admits to having now “collected.” Answer at 7 ¶ 21. However, the amount and rationale of said security is unenforceable and, upon information and belief, Respondent has recently conceded as much by returning or refunding same to other PURPA qualified facility owners. Nonetheless, Complainant is not now seeking return of its security but the reinstatement of its contract, including its security deposit.

D. One basis of Complainant’s alleged *force majeure* is the contract between Ada County and Dynamis Energy LLC. See Exhibit C to Formal Complaint. Said contract formed the basis of a power purchase agreement between Dynamis Energy LLC and Respondent, dated November 16, 2011, which the Commission approved by Final Order 32470, entered February 24, 2012 in Case No. IPC-E-11-25. Accordingly, upon information and belief,

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<sup>1</sup> Formal Complaint alleges at page 4:

7. On July 13, 2000, the Idaho Supreme Court held that a civil authority’s revoking or suspending of a required environment permit in the context of a PURPA project could constitute an event of *force majeure*, which would not excuse posting of security but would excuse other obligations for construction and operation. *Idaho Power Co. vs. Cogeneration, Inc.*, 134 Idaho 738, 9 P.3d 1204 (2000).

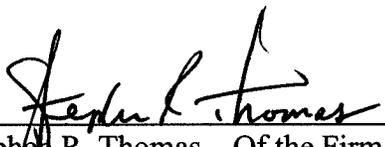
Respondent may be complicit in creating Complainant's expected future shortfall of landfill methane, which may rise to tortious interference with contract and/or tortious interference with prospective economic advantage.

E. Respondent raises in its Answer a number of equitable defenses, e.g., estoppel, judicial estoppel and unclean hands. Answer at 8 ¶¶ 30-32. However, it takes equity to receive equity. Therefore, Respondent's having raised equitable defense subjects its conduct to the same scrutiny applying rules of equity, including without limitation clean hands on the part of Respondent.

5. WHEREFORE, the Motion to Dismiss added by Respondent to its Answer—in name but not in substance—ought to be denied in all respects.

DATED this 30th day of August, 2012.

MOFFATT, THOMAS, BARRETT, ROCK &  
FIELDS, CHARTERED

By   
Stephen R. Thomas – Of the Firm  
Attorneys for Complainant

**CERTIFICATE OF SERVICE**

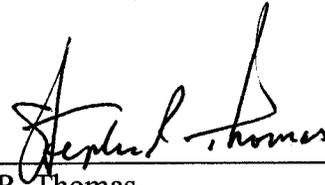
I HEREBY CERTIFY that on this 30th day of August, 2012, I caused a true and correct copy of the foregoing **ANSWER TO MOTION TO DISMISS** to be served by the method indicated below, and addressed to the following:

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