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**DONOVAN E. WALKER**  
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August 25, 2017

**VIA HAND DELIVERY**

Diane M. Hanian, Secretary  
Idaho Public Utilities Commission  
472 West Washington Street  
Boise, Idaho 83702

Re: Case No. IPC-E-14-15  
Clark Canyon Hydro, LLC – Comments of Idaho Power Company

Dear Ms. Hanian:

Enclosed for filing in the above matter please find an original and seven (7) copies of the Comments of Idaho Power Company.

Very truly yours,



Donovan E. Walker

DEW:csb  
Enclosures

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Attorney for Idaho Power Company

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IDAHO PUBLIC  
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BEFORE THE IDAHO PUBLIC UTILITIES COMMISSION

IN THE MATTER OF THE APPLICATION	)	
OF IDAHO POWER COMPANY TO	)	CASE NO. IPC-E-14-15
APPROVE OR REJECT ENERGY SALES	)	
AGREEMENT WITH CLARK CANYON	)	COMMENTS OF IDAHO POWER
HYDRO, LLC FOR THE SALE AND	)	COMPANY
PURCHASE OF ELECTRIC ENERGY	)	
FROM THE CLARK CANYON PROJECT	)	
	)	

Idaho Power Company ("Idaho Power" or "Company"), pursuant to the procedural schedule set forth in Order No. 33810, hereby files the following Comments.

**I. INTRODUCTION AND SUMMARY**

This case is for the Idaho Public Utilities Commission's ("Commission") review, and approval or rejection, of the submitted Energy Sales Agreement ("ESA") between Idaho Power and Clark Canyon Hydro, LLC ("Clark Canyon"). The issue, as acknowledged by Clark Canyon, is that because of the lengthy delay in these proceedings where Clark Canyon lost and then regained its required Federal Energy Regulatory Commission ("FERC") license, the Scheduled First Energy Date and Scheduled Operation Date from

the submitted ESA have already past. In addition, the project configuration is now different. Because of this, the Commission cannot approve “all terms and provisions hereof without change or condition” as is required before the ESA becomes a fully effective contract.

Clark Canyon requests that the Scheduled First Energy Date and Scheduled Operation Date be modified and changed and that the remaining terms and conditions of the ESA, most particularly the price, remain in place. Idaho Power has communicated to Commission Staff (“Staff”) and to Clark Canyon that because of the substantial differential in avoided cost rates contained in the submitted ESA and that which is available today, that the Company cannot simply agree to extend the Scheduled Operation Date. The Commission must determine whether it is in the public interest to modify the submitted ESA and approve the same—including the much higher avoided cost rates contained therein that will be passed on to Idaho Power customers if the ESA is approved.

## **II. BACKGROUND**

This is not the first time that Idaho Power and Clark Canyon have faced this very issue. This is, in fact, the third time that Idaho Power and Clark Canyon have had a fully signed ESA where Clark Canyon has failed to construct the project and failed to meet the Scheduled Operation Dates that it chose contained in those ESAs.

### **A. 2011 ESA.**

Clark Canyon and Idaho Power signed an ESA on May 20, 2011, for the project to be constructed at the Clark Canyon Reservoir in Montana with a 4.7 MW nameplate capacity and a Scheduled First Energy Date of November 1, 2012, and a Scheduled Operation Date of March 31, 2013. This ESA was approved by the Commission on July 19, 2011. Case No. IPC-E-11-09, Order No. 32294.

**B. 2013 ESA First Amendment Extending the Operation Dates.**

Clark Canyon was delayed in beginning construction of the project and was not going to achieve the Scheduled First Energy Date or the Scheduled Operation Date that it requested in the 2011 ESA. Clark Canyon asked the Company to extend the Scheduled First Energy Date and Scheduled Operation Date with an amendment to the 2011 ESA. Idaho Power and Clark Canyon executed the First Amendment to the 2011 ESA on March 14, 2013, in which the parties agreed to: (1) extending the Scheduled First Energy Date to November 30, 2013, and extending the Scheduled Operation Date to December 31, 2013; (2) adding a provision granting Idaho Power a first right of purchase should the facility be sold; and (3) providing for the payment of Delay Liquidated Damages and the continued maintenance of Delay Damage Security. Case No. IPC-E-13-07, Motion and First Amendment.

As stated in Idaho Power's Motion to Amend the 2011 ESA:

The avoided cost rates contained in Clark Canyon's FESA [the 2011 ESA] are substantially similar to the avoided cost rates the project would receive in a new contract today. In addition, Idaho Power and its customers receive half of the Renewable Energy Credits associated with the project with the current FESA. The Amendment provides that Clark Canyon will pay \$211,500 (the Delay Liquidated Damages amount from the FESA) to Idaho Power and its customers. Additionally, Clark Canyon will maintain the posting of liquid financial security in the amount of \$211,500 (\$45 times 4,700 kilowatts nameplate capacity) as specified in the FESA as Delay Damage Security with an expiration no sooner than April 30, 2014.

*Id.*, p. 3. Commission Staff performed an analysis to compare the estimated energy payments under the 2011 ESA with estimated energy payments under a contract at the then current, 2013, avoided cost rates. "Staff determined that continuing under the current contract [2011 ESA] would cost Idaho Power less than entering into a new



contract at today's rates [2013]." Order No. 32814, p. 2. Based upon Staff's analysis, the Commission approved the 2013 First Amendment to the 2011 ESA stating, "Allowing amendments to the existing contract, including payment of liquidated damages by Clark Canyon to Idaho Power, ultimately inures to the benefit of Idaho Power ratepayers. Therefore, we approve the proposed amendments without material change or condition." Order No. 32814, p. 2.

**C. 2014 ESA and Memorandum of Understanding Terminating the Amended 2011 ESA.**

Clark Canyon again failed to construct the project and missed the extended Scheduled Operation Date of December 31, 2013. Clark Canyon again requested that Idaho Power extend the Scheduled Operation Date of the 2011 ESA. Idaho Power and Clark Canyon then entered into a Memorandum of Understanding ("MOU") which established a mechanism for a third revision to the Scheduled Operation Date for the project by providing terms and conditions for the termination of the 2011 ESA and entering into a new ESA for the project. This is the 2014 ESA which is currently before the Commission for its approval or rejection, and to which Clark Canyon now requests a fourth revision to again extend its required Scheduled Operation Date.

The MOU was filed with the Commission along with the 2014 ESA for its review and approval or rejection, Case No. IPC-E-14-15, which is the current matter now before the Commission. As summarized in the Application in this case:

5. The project did not come on-line prior to the revised December 31, 2013, Scheduled Operation Date and contacted Idaho Power and advised it also would not be on-line within 90 days of the Scheduled Operation Date (March 31, 2014) as required by the FESA and, in fact, construction had not even begun. March 31, 2014, has significant meaning in the FESA because after that date, if the project has not come on-line, Idaho Power is allowed to collect Delay Liquidated Damages from the Delay Security if necessary and has the option to terminate the agreement.

6. The project submitted two letters to Idaho Power dated March 18, 2014, and March 24, 2014, respectively, in which it requested to terminate the existing FESA and replace it with a new Seasonal Hydro Energy Sales Agreement. Idaho Power had significant concerns with the project's request to terminate the existing FESA and replace the FESA with a new Seasonal Hydro ESA just days before Idaho Power's option to collect Delay Liquidated Damages and terminate the FESA was reached. Subsequent to the previous FESA's approval, the Commission had issued Order No. 32697 in which revised PURPA avoided cost pricing methodologies were established; new contracting requirements, terms, and conditions were established; a Seasonal Hydro resource category was established; and Delay Liquidated Damages provisions were revised. Idaho Power and the project met to discuss the issues and ultimately agreed to a Memorandum of Understanding ("MOU") that was executed between Idaho Power and Clark Canyon addressing the termination of the previous FESA and execution of a new Seasonal Hydro Project ESA. A copy of the MOU is attached to this Application as Attachment 1. In negotiating these terms and conditions with Clark Canyon, Idaho Power adhered to its PURPA obligation to contract with this new proposed QF project, addressed the project's previous lack of performance, satisfied the project's requests to contract and purchase in a timely and reasonable manner, and maintained the value from the terminated FESA for Idaho Power and its customers by requiring terms and conditions that would carry certain provisions from the terminated FESA forward into the new ESA. In summary, the MOU provides for the following:

(a) Termination of the existing (previously approved) FESA;

(b) Collection by Idaho Power of Delay Liquidated Damages;

(c) Negotiation and execution of a new Seasonal Hydro ESA that retains the Delay Liquidated Damages provisions of the previous FESA, requires the project to post Delay Security for the new ESA at \$45 per kilowatt of nameplate, and allows the project to offset this Delay Security amount by the previously forfeited Delay Security;

(d) Any energy deliveries to Idaho Power in the months of March or April will be paid the market value of energy and not the Surrogate Avoided Resource ("SAR") published avoided cost rate;

(e) If the project fails to meet the Seasonal Hydro Project requirements (55 percent of generation delivered during the months of June, July, and August), payments will be revised to reflect Non-Seasonal Hydro SAR published avoided cost prices; and

(f) The provision from the terminated FESA whereby Idaho Power owns 50 percent of the Renewable Energy Certificates/Credits associated with the project is carried forward to the new ESA.

Application, pp. 4-5.

Idaho Power and Clark Canyon signed the present ESA on May 30, 2014, and on June 4, 2014, Idaho Power filed an application requesting the Commission accept or reject an ESA between Idaho Power and Clark Canyon entered into pursuant to the Public Utility Regulatory Policies Act of 1978 ("PURPA"). The Commission subsequently issued a Notice of Application and Notice of Modified Procedure setting forth comment deadlines. Order No. 33064. During Staff's review of the ESA, "some discrepancies were discovered between Clark Canyon's FERC license and its Power Purchase Agreement with Idaho Power." Order No. 33088, p. 1. The parties agreed that it was reasonable "to suspend the schedule until Clark Canyon is able to resolve and/or clarify the discrepancies." *Id.* On July 31, 2014, Staff filed a motion with the Commission to suspend the procedural schedule until pending matters could be resolved.

On August 5, 2014, the Commission granted the requested suspension and stated:

YOU ARE HEREBY NOTIFIED that the procedural schedule set by Order No. 33064 is suspended. Idaho Power and Clark Canyon, as parties to the Power Purchase Agreement, are directed to notify the Commission as soon as the discrepancies and underlying matters are resolved so that the Commission may proceed in considering the Application filed on June 4, 2014.

Order No. 33088, p. 1.

**D. 2017 Status of ESA, FERC License, and Project Construction.**

On April 26, 2017, Clark Canyon notified Idaho Power that it had received its renewed FERC license on March 31, 2017. This was the first written correspondence Idaho Power had received from Clark Canyon regarding the status of the FERC license, the powerhouse construction, and Clark Canyon's transmission line construction from the powerhouse to the Peterson substation since July 31, 2014.

The ESA between Clark Canyon and Idaho Power contains a Scheduled First Energy Date of April 1, 2017, and a Scheduled Operation Date of June 1, 2017. More than three years have passed since Idaho Power and Clark Canyon executed the ESA and submitted the same to the Commission for its review and approval or rejection. It is Idaho Power's understanding that Clark Canyon has not started construction of the generator powerhouse, nor started construction of the 69 kilovolt transmission line from the Clark Canyon Reservoir to Idaho Power's Peterson substation, approximately 10 miles, which is the point of interconnection to Idaho Power's system.

The parties met with Staff on May 11, 2017, to discuss the status. At that meeting, the parties agreed to recommend lifting the suspension and to propose a procedural schedule for submitting the ESA for the Commission's review. Subsequent to the Commission lifting the suspension of the procedural schedule, Clark Canyon retained legal counsel. The schedule was again suspended to allow another meeting with Clark Canyon, Idaho Power, and Commission Staff, which included Clark Canyon's counsel.

**III. COMMENTS**

As summarized above, this case is for the Commission's review, and approval or rejection, of the submitted ESA between Idaho Power and Clark Canyon. The issue, as acknowledged by Clark Canyon, is that because of the lengthy delay in these proceedings where Clark Canyon lost and then regained its required FERC license, the Scheduled

First Energy Date and Scheduled Operation Date from the submitted ESA have already past. In addition, the project configuration is now different. Because of this, the Commission cannot approve “all terms and provisions hereof without change or condition” as is required before the ESA becomes a fully effective contract.

Clark Canyon requests that the Scheduled First Energy Date and Scheduled Operation Date be modified and changed and that the remaining terms and conditions of the ESA, most particularly the price, remain in place. Idaho Power has communicated to Commission Staff and to Clark Canyon that because of the substantial differential in avoided cost rates contained in the submitted ESA and that which is available today, the Company cannot simply agree to extend the Scheduled Operation Date. The Commission must determine whether it is in the public interest to modify the submitted ESA and approve the same—including the much higher avoided cost rates contained therein that will be passed on to Idaho Power customers if the ESA is approved.

Filed herewith as Attachment 1 is Idaho Power’s Response to Clark Canyon’s First Set of Production Requests, Request No. 2, incorporated herein by this reference. In this Response, Idaho Power has used the project’s estimated monthly generation from the 2014 ESA and compared the estimated cost to customers using the different avoided cost rates that were in place for the 2011 ESA, the 2014 ESA, and the currently approved 2017 avoided cost rates. The difference in a 20-year, levelized rate is approximately \$114 in the 2014 ESA, as compared to approximately \$72 for a current, 2017 ESA. The net present value in total cost to customers over the 20-year contract is \$17,924,845 for the 2014 ESA, and \$11,337,522 for a 2017 ESA—a net present value difference of over \$6,587,000. See Attachment 1 hereto.

Clark Canyon has raised several common law contractual issues and/or claims in its initial Comments, which are interesting and informative but not dispositive of the

Commission's role, responsibility, and authority in this matter. At the end of the day, the Commission has the full authority to approve or reject this signed ESA according to its evaluation as to whether it is in the public interest or not. This authority is based on and from the express terms of the ESA itself, the Commission's case-by-case implementation of federal PURPA requirements for the state of Idaho, and the Commission's inherent authority to annul, supersede, or reform the contracts of the public utilities it regulates in the public interest. *Ag. Prods. Corp. v. Utah Power & Light Co.*, 98 Idaho 23, 29, 557 P.3d 617, 623 (1976)("Private contracts with utilities are regarded as entered into subject to reserved authority of the state to modify the contract in the public interest."). The Commission, in its role as the regulatory authority for implementing PURPA in the state of Idaho, has an independent obligation and duty to assure that all PURPA contracts entered into by Idaho Power are in the public interest. *Rosebud Enterprises, Inc. v. Idaho Public Utilities Commission*, 128 Idaho 609, 613-14, 917 P.2d 766 (1996)(The Commission, in acting pursuant to PURPA, must strike a balance between "the local public interest of a utility's electric consumers and the national public interest in development of alternative energy resources.").

The express terms of the contract clearly and unequivocally state that, "This Agreement shall only become finally effective upon the Commission's **approval of all terms and provisions hereof without change or condition** and declaration that all payment to be made to Seller hereunder shall be allowed as prudently incurred expenses for ratemaking purposes." 2014 ESA, p. 31 (emphasis added). The main problem here is that if the Commission were to approve the submitted 2014 ESA without changing the Scheduled Operation Date, then Clark Canyon, with no ability to bring its project on-line within those required dates, which have already past, will be in default and breach and subject to contract termination. The further problem is that rates for that same project in



a current ESA today are more than \$6.8 million dollars less for customers than those contained in the submitted 2014 agreement. Staff has made clear that both Staff and the Commission expect Idaho Power to “ruthlessly enforce” the terms and conditions of PURPA contracts that it enters into for the protection of Idaho Power customers. Given that, Idaho Power has no ability to agree on its own to an extension of time in the 2014 ESA, where that would extend the application of higher prices to Idaho Power customers. That decision is only one that the Commission could make by finding it to be in the public interest—or not—to extend the dates in the 2014 ESA.

#### **IV. CONCLUSION**

This case is for the Commission’s independent review and subsequent approval or rejection of the submitted 2014 ESA between Idaho Power and Clark Canyon. This is the third time that this same project has failed to meet the required Scheduled Operation Dates in its ESAs with Idaho Power and the fourth time Clark Canyon has requested to extend those required deadlines. The submitted 2014 ESA is only a valid, fully effective contract if it is approved without change or condition. If it is approved without change or condition, it will be terminated as the dates for performance have come and gone with no ability to cure. The rates contained in the submitted 2014 ESA are substantially higher than the rates that would be available for this project in a current ESA today. Consequently, Idaho Power cannot agree to extend the dates, as it has done in the past. The Commission must determine whether it is in the public interest to modify the submitted ESA and approve the same—including the much higher avoided cost rates contained therein that will be passed on to Idaho Power customers if the ESA is approved.

Respectfully submitted this 25<sup>th</sup> day of August 2017.



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DONOVAN E. WALKER  
Attorney for Idaho Power Company



## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 25<sup>th</sup> day of August 2017 I served a true and correct copy of the within and foregoing COMMENTS OF IDAHO POWER COMPANY upon the following named parties by the method indicated below, and addressed to the following:

**Commission Staff**

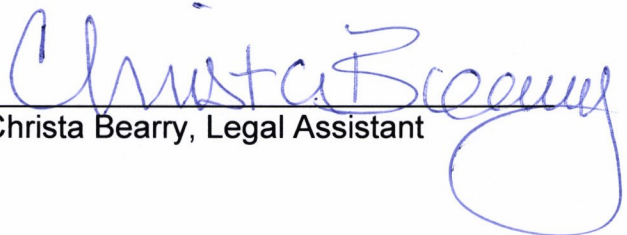
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**Clark Canyon Hydro, LLC**

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Attorney for Idaho Power Company

BEFORE THE IDAHO PUBLIC UTILITIES COMMISSION

IN THE MATTER OF THE APPLICATION	)	
OF IDAHO POWER COMPANY TO	)	CASE NO. IPC-E-14-15
APPROVE OR REJECT ENERGY SALES	)	
AGREEMENT WITH CLARK CANYON	)	IDAHO POWER COMPANY'S
HYDRO, LLC FOR THE SALE AND	)	RESPONSE TO CLARK CANYON
PURCHASE OF ELECTRIC ENERGY	)	HYDRO, LLC'S FIRST SET OF
FROM THE CLARK CANYON PROJECT	)	PRODUCTION REQUESTS
	)	

COMES NOW, Idaho Power Company ("Idaho Power" or "Company"), and in response to Clark Canyon Hydro, LLC's First Set of Production Requests to Idaho Power Company dated July 10, 2017, herewith submits the following information:

**REQUEST NO. 2:** Please provide the work papers in Idaho Power's possession supporting any calculations of the rate differential between the present value revenue requirement of the purchase of Clark Canyon's output under the ESA proposed for approval in this case with an ESA that would be available under the seasonal rates in effect at the time of this request. If not apparent from the work papers, please describe the basis for the major inputs, including rate assumptions, REC values, output projections, operation date, etc.

**RESPONSE TO REQUEST NO. 2:** Please see the Excel file provided on the enclosed non-confidential disk.

The response to this Request is sponsored by Michael Darrington, Energy Contracts Leader, Idaho Power Company.



**BEFORE THE**  
**IDAHO PUBLIC UTILITIES COMMISSION**

**CASE NO. IPC-E-14-15**

**IDAHO POWER COMPANY**

**ATTACHMENT 1**







2011 ESA Avoided Cost Prices			
"All Hours" Avoided Cost - IPUC Order No. 31025			
Year	Season 1	Season 2	Season 3

2017	58.71	95.85	79.87
2018	60.55	98.86	82.38
2019	62.36	101.82	84.85
2020	64.24	104.88	87.40
2021	66.46	108.51	90.42
2022	68.77	112.28	93.57
2023	71.17	116.20	96.83
2024	73.67	120.27	100.23
2025	76.26	124.51	103.76
2026	78.46	128.10	106.75
2027	80.74	131.81	109.85
2028	83.08	135.64	113.03
2029	85.50	139.59	116.32
2030	87.99	143.66	119.71
2031	91.34	149.12	124.27
2032	94.27	153.91	128.26
2033	97.31	158.87	132.39
2034	100.45	164.01	136.67
2035	103.69	169.32	141.09
2036	107.04	174.79	145.65

2014 ESA Avoided Cost Prices			
IPC Seasonal Hydro - "All Hours" Avoided Cost - IPUC Order No. 32817			
Year	Season 1	Season 2	Season 3

2017	62.13	101.44	84.53
2018	65.12	106.32	88.60
2019	67.39	110.03	91.69
2020	69.31	113.16	94.30
2021	72.04	117.62	98.01
2022	75.13	122.66	102.22
2023	77.80	127.02	105.85
2024	79.31	129.49	107.90
2025	80.88	132.05	110.04
2026	82.43	134.58	112.15
2027	83.69	136.63	113.86
2028	85.53	139.64	116.36
2029	87.52	142.90	119.08
2030	89.56	146.22	121.85
2031	91.95	150.12	125.10
2032	94.64	154.51	128.76
2033	97.44	159.09	132.57
2034	100.98	164.86	137.38
2035	105.27	171.87	143.22
2036	109.75	179.18	149.32

2017 IPUC Approved Avoided Cost Prices			
IPC Seasonal Hydro - "All Hours" Avoided Cost - IPUC Order No. 33773			
Year	Season 1	Season 2	Season 3

2017	21.03	34.33	28.61
2018	23.14	37.78	31.48
2019	25.30	41.31	34.42
2020	26.42	43.14	35.95
2021	27.03	44.13	36.78
2022	26.72	43.63	36.36
2023	27.27	44.52	37.10
2024	66.46	108.51	90.42
2025	69.43	113.36	94.47
2026	71.86	117.32	97.77
2027	73.39	119.82	99.85
2028	74.84	122.19	101.82
2029	76.46	124.84	104.03
2030	77.56	126.62	105.52
2031	78.66	128.43	107.02
2032	80.08	130.74	108.95
2033	81.29	132.71	110.59
2034	82.79	135.16	112.63
2035	84.45	137.87	114.89
2036	86.14	140.63	117.19

highlighted is manually escalated.





