UDA LAW FIRM, P.C.

ATTORNEY AT LAW

MICHAEL J. UDA, MS

7 WEST 6TH AVENUE, SUITE 4E
HELENA, MT 59601
TELEPHONE: (406) 457-5311
EMAIL: muda@mthelena.com

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July 20, 2012

OVERNIGHT MAIL:

Jean D. Jewell, Secretary
Idaho Public Utilities Commission
P.O. Box 83720
Boise, ID 83720-0074

RE: GNR-E-11-03

Dear Ms. Jewell,

Enclosed for filing please find the original and seven copies of *Mountain Air Projects, LLC's Pre-Hearing Legal Brief.* Thank you for your assistance.

Sincerely,

Cathleen N. Uda
Legal Secretary
To Michael J. Uda

Enclosures

J. Kahle Becker (ISB No. # 7408)
The Alaska Center
1020 W. Main St. Suite 400
Boise, ID 83702
Telephone: (208) 333-1403
Facsimile: (208) 343-3246
Email: kahle@kahlebeckerlaw.com

Michael J. Uda
Uda Law Firm, P.C.
7 W. 6th Avenue, Suite 4E
Helena, MT 59601
Telephone (406) 457-5311
Facsimile: (406) 447-4255
Email: muda@mthelena.com

Attorneys for Mountain Air Projects, LLC.

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BEFORE THE IDAHO PUBLIC UTILITIES COMMISSION

IN THE MATTER OF THE COMMISSION'S REVIEW OF PURPA QF CONTRACT PROVISIONS INCLUDING THE SURROGATE AVOIDED RESOURCE (SAR) AND INTEGRATED RESOURCE PLANNING (IRP) METHODOLOGIES FOR CALCULATING PUBLISHED AVOIDED COST RATES	Case No. GNR-E-11-03 **MOUNTAIN AIR PROJECTS, LLC'S PREHEARING LEGAL BRIEF**

I. INTRODUCTION

Pursuant to the Idaho Public Utilities Commission's ("Commission") Notice of Scheduling Order No. 32388, dated November 2, 2011, potential Intervenor Mountain Air Projects, LLC[1] ("Mountain Air") hereby submits its prehearing legal brief. Mountain Air

[1] Mountain Air is a subsidiary of Terna Energy USA. Terna is an independent energy company involved in the development, construction, financing and operation of renewable energy projects. The Mountain Air projects are Cold Springs Windfarm, LLC ("Cold Springs"); Desert Meadow Windfarm, LLC ("Desert Meadow"); Hammett Hill Windfarm, LLC ("Hammett Hill"); Mainline Windfarm, LLC ("Mainline"); Ryegrass Windfarm, LLC ("Ryegrass"); and Two Ponds Windfarm, LLC ("Two Ponds") (collectively, the "Mountain Air QFs").

believes that Idaho Power Company's ("Idaho Power") proposed schedule 74 does not comport with the Public Utility Regulatory Policies Act of 1978 ("PURPA"), 16 U.S.C. § 824a-3. Specifically, Mountain Air believes there is substantial federal authority that Idaho Power's proposed Schedule 74 would violate PURPA by permitting the unilateral and retroactive modification of Mountain Air's existing QF contracts. Mountain Air also contends that Idaho Power's proposed Schedule 74 may not be applied to any QF contract with forecast rates, as those rates necessarily reflect situations where a utility is experience low loading events, and the forecast rates in the QF contracts concomitantly reflect a lower avoided cost to reflect the lower value of QF energy in such low load hours. Finally, Mountain Air does not believe that the Federal Energy Regulatory Commission ("FERC") regulation, 18 C.F.R. § 292.304(e) permits curtailment except in very specific and limited "light loading" circumstances, and these do not include curtailment on economic and environmental grounds. The Commission should not approve Idaho Power's proposed Schedule 74.

II. ARGUMENT

A. Facts

Each of the Mountain Air QFs is a direct, wholly owned subsidiary of Mountain Air, and is developing, and will own and operate, wind generation facilities with a gross capacity of 23.0 MW, and an average net output of less than 10 MW per month, that will interconnect to the Idaho Power transmission system. Each of the Mountain Air QFs has been self-certified as a QF, and will sell all of its net output under PURPA to Idaho Power, pursuant to a long-term PURPA PPA with forecast avoided cost rates (the "Mountain Air PURPA PPAs"). Each of the Mountain Air PURPA PPAs was executed on November 12, 2010, and approved by order of the Idaho PUC issued on November 16, 2010. Mountain Air has a substantial investment backed expectation in the revenues to be derived from the rates to be paid in these existing Mountain Air PURPA PPAs, and Idaho Power's proposed Schedule 74 curtailments may substantially undermine those expectations.

B. Idaho Power's Proposed Schedule 74 Cannot Be Applied To Existing PURPA PPAs, As This Would Constitute An Impermissible, Retroactive Modification.

As stated previously, Idaho Power's proposed Schedule 74 would authorize Idaho Power to modify, unilaterally and retroactively, the curtailment provisions of existing PURPA PPAs – PPAs that have already been executed by Idaho Power and reviewed and approved by this Commission. If the Commission were to approve schedule 74, it would run afoul of FERC's long-standing FERC policy against invalidating, or permitting retroactive modifications, of pre-existing PURPA PPAs. Furthermore, there is substantial federal and state court precedent which forbids just such retroactive application of existing contracts.

FERC has consistently held that an existing PURPA PPA cannot be retroactively modified to change the avoided cost rate, or other terms and conditions set forth therein, whether the retroactive modification has been proposed by the QF or the host utility. In *Connecticut Valley Elec. Co. v. Wheelabrator Claremont Co.,*[2] FERC explained that:

> It would not be consistent with Congress' directive to encourage cogeneration and small power production to upset the settled expectations of parties to, and to invalidate any of their obligations and responsibilities thereunder, such executed PURPA sales contracts.[3]

[2] 82 FERC ¶ 61,116 (1998), *on reh'g, clarification and reconsideration*, 83 FERC ¶ 61,136, *aff'd Connecticut Valley Elec. Co. v. FERC*, 208 F.3d 1037 (2000).

[3] *Id.* at 61,419-20. *See also Southern California Edison Co. and San Diego Gas & Elec. Co.*, 70 FERC ¶ 61,215 at 61,677-78 ("*SoCal Edison*"), *order denying reconsideration*, 71 FERC ¶ 61,269 at 62,079 (1995) (same).

Instead, the "appropriate time to challenge a state-imposed rate is up to or at the time the contract is signed, not several years into a contract which has heretofore been satisfactory to both parties."[4]

FERC further elaborated on the rationale underlying its policy against retroactive PURPA contract modification in *New York State Electric & Gas Corporation*.[5] There, the Commission rejected a request by New York State Electric & Gas Company ("NYSEG"), a host utility, to revise the forecast avoided cost rates in PURPA PPAs that, in the utility's view, had become uneconomic (*i.e.*, the forecast avoided cost rates in the contracts exceeded its avoided cost at the time of delivery), where NYSEG had not challenged the rates at the time it executed the contract or in the proceeding in which the contracts were approved by the New York State Public Service Commission. FERC rejected NYSEG's request to modify the pre-existing PURPA contracts, first pointing out that FERC's regulations explicitly provide that PURPA is not violated where forecast avoided cost rates exceed avoided costs at the time of delivery, and that the QFs at issue here and their investors:

> [I]nvested in these projects in the reasonable belief that, once the deadline for timely challenges had passed, their contracts with NYSEG were lawful and binding under PURPA.[6]

These PURPA contracts "allocated risks to both buyers and sellers,"[7] and, like NYSEG, the QFs "bore risks that their agreement would become uneconomic over time."[8] FERC further emphasized that QFs and their investors bear greater development risks than a traditional utility

4 *Connecticut Light & Power Co.*, 70 FERC ¶ 61,012 at 61,029 (*"CL&P"*), *order denying reconsideration*, 71 FERC ¶ 61,035 at 61,154 (1995), *appeal dismissed sub nom. Niagara Mohawk Power Corp. v. FERC*, 117 F.3d 1485 (D.C. Cir. 1997).

5 71 FERC ¶ 61,027, 1995 WL 216781 (*"NYSEG"*), *order denying reconsideration*, 72 FERC ¶ 61,067 (1995), *appeal dismissed, New York State Elec. & Gas Corp. v. FERC*, 117 F.3d 1473 (D.C. Cir. 1997). *See also New York State Elec. & Gas Co. v. Saranac Power Partners, L.P.*, 117 F.Supp.2d 211 (N.D.N.Y. 2000); *Niagara Mohawk Power Corp. v. FERC*, 162 F.Supp.2d 107 (N.D.N.Y. 2001).

6 *NYSEG*, 1995 WL 216781 at * 16.

7 *Id.*

8 *Id.*

like NYSEG, and, "[a]s a result, they must rely on their power purchase agreements to obtain project financing."[9] FERC then reaffirmed the policy adopted in *CL&P* and *SoCal Edison* against modifying existing PURPA contracts and rejected NYSEG's request, holding that:

> If we were to grant the relief requested by NYSEG and allow the reopening of QF contracts that had not been challenged at the time of their execution, financeability of such projects would be severely hampered. Such result is not, in our opinion, consistent with Congress' directive that we encourage the development of QFs.[10]

Following FERC's decision to deny NYSEG the relief it had requested, NYSEG filed an action in federal district court. In the course of granting defendants' motions to dismiss NYSEG's federal district court action, the court summarized the holdings of various courts on the permissibility of retroactively modifying existing PURPA QF contracts:

> As discussed above, FERC's regulations, which account for and forgive a rate in excess of avoided costs in NYSEG's very circumstances, are not illegal and QFs are entitled to rely on purchase rates in long-term PPAs even if they violate PURPA's rate cap. *See Connecticut Valley*, 208 F.3rd at 1043-44; *Indep. Energy Producers Assoc., Inc. v. California Public Utilities Comm'n*, 36 F.3d 848, 858-59 (9th Cir. 1994)("IEP") (federal regulations provide that QFs are entitled to "lock in" energy sales at an avoided cost rate calculated at the time the contract is signed even if the utilities' avoided costs are lower than estimated at the time the energy is delivered); *Smith Cogeneration Management, Inc. v. Corp. Comm'n*, 863 P.2d 1227, 1240 (Okla. 1993) (cogenerator which chooses to set purchase rate based on avoided costs in long-term PPA as estimated at time contract is signed is entitled to receive benefits of contract even if, due to changed circumstances, contract price for power at time of delivery is unfavorable to utility).[11]

Like NYSEG, Idaho Power could have proposed to include its proposed QF curtailment provisions before executing any of its existing PURPA contracts, or it could have challenged the provisions in the executed contracts in the Commission proceeding approving the Mountain Air PURPA PPAs, but Idaho Power failed to take either action. In fact, Idaho Power submitted the

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9 *Id.*

10 *Id.*

11 *Saranac Power Partners, L.P.*, 117 F.Supp.2d at 237.

PURPA PPAs to this Commission for review and approval. Even assuming *arguendo* that the curtailment provisions of Schedule 74 as proposed were consistent with PURPA (which they are not), the time for Idaho Power to challenge the curtailment provisions in its existing PURPA contracts has passed. FERC and the federal courts have clearly stated that Idaho Power may not now, years after executing the contracts, challenge the contracts or seek unilateral and retroactive modification thereof.

C. Schedule 74 Cannot Be Applied To Any PURPA PPA With Forecast Avoided Cost Rates.

PURPA and FERC's implementing regulations thereunder do not permit Idaho Power to apply Schedule 74 to curtail a QF that has a PURPA contract with forecast avoided cost rates. In FERC Order No. 69, FERC explained that QF curtailment under 18 C.F.R. § 292.304(f) of FERC's regulations is permitted only in very limited circumstances, namely, during "light loading" periods where "operational circumstances" would drive base load generation units below minimum generation limits.[12] Such a "light loading" justification does not apply to a QF with forecast avoided cost rates because such rates are calculated as an average avoided cost over a long term (*e.g.*, 20 years), and therefore already reflect the lower value of QF energy during low loading periods where the time of delivery avoided costs could be lower than the average, long-run forecast avoided costs in the contract. In Order No. 69, FERC ruled that that forecast avoided cost rates will, by necessity, be higher than time of delivery avoided costs at some points and lower at others, but that, "in the long run, 'overestimations' and 'underestimations' will balance out."[13] Similarly, in *Entergy*, FERC held that forecast avoided cost rates "already reflect the variations in the value of the purchase in the lower overall rate," and that "the utility is

[12] Order No. 69, 45 Fed. Reg. 12,214, 12,227-28.
[13] *Id.* at 12,224.

already compensated," through this lower overall rate, "for any periods in which it purchases unscheduled QF energy even though that energy's value is lower than the true avoided cost."[14]

The forecast avoided cost rates set forth in the Mountain Air PURPA PPAs were calculated using the SAR methodology, which estimates the value of QF energy and capacity based on a number of variables, including fuel costs, capital costs, and fixed and variable operation and maintenance costs. In addition, these forecast avoided cost rates are further adjusted to account for seasonal variations in value and the time of day in which energy is delivered. Most importantly, these rates already account for the additional, incremental costs to Idaho Power of integrating wind generation through the Wind Integration Charge of up to $6.50/MWh, which is deducted from the avoided cost rate in its PURPA contracts with wind generators. Thus, Idaho Power is already purchasing QF output under its existing PURPA PPAs on a basis that takes into account the fact that there will be times of both higher value of QF energy and lower value of QF energy, for instance during "light loading" periods when purchases could result in negative avoided costs, and is compensated for these lower value periods through the long-term average rate that it pays to QFs with forecast avoided cost pricing.

D. Schedule 74 Violates FERC's PURPA Regulations Because It Authorizes QF Curtailment On Economic And Environmental Grounds.

Section 292.304(f) of FERC's PURPA regulations permit curtailment of QF output only due to ***operational circumstances*** that occur during the "light loading" conditions where the accommodation of QF purchases would require a base load unit to shut down or reduce its output below minimum generation limits below which it could not increase its output level rapidly when system demand later increases because of the long lead time (*e.g.*, several days or weeks)

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[14] *Entergy* at P 56.

required to restart certain base load generation (*e.g.*, coal and nuclear units).[15] Idaho Power's Schedule 74 is not consistent with FERC's PURPA regulations because it authorizes Idaho Power to curtail QF output, and avoid its statutory PURPA purchase obligation, in circumstances beyond the "operational circumstances" contemplated by Section 292.304(f), namely, based on impermissible economic and environmental considerations.

Specifically, Idaho Power's testimony in this proceeding indicates that Idaho Power would be permitted to curtail QF output under Schedule 74 in three distinct sets of circumstances: (1) when base load coal generation would be turned down below its minimum generating limits, such that the coal units would be forced off line, and would not be able to return to service for several days;[16] (2) to avoid backing down its run-of-the-river hydro facilities because of economic concerns;[17] and (3) to avoid backing down its Hells Canyon hydro dam facility because of environmental license conditions.[18] Idaho Power acknowledges that it can ramp its hydroelectric resources down and back up again[19] and that it can otherwise sell excess energy from its through off-system sales or on the spot market at the Mid Columbia hub.[20]

Only the first of these three circumstances – curtailment to avoid reducing Idaho Power's base load coal units below minimum generation limits – fits within Section 292.304(f) of FERC's PURPA regulations. That is to say, the proposed curtailment fits within the Commission's PURPA regulations provided that (1) it is not applied to ***existing*** PURPA PPAs, and (2) is implemented as Idaho Power says it will be (*i.e.*, only when base load coal facilities

15 Order No. 69, 45 Fed. Reg. 12,214, 12,227.

16 *See* Direct Testimony by Idaho Power witness Tessia Park, at 21:17-24.

17 *See id.* at 20:13-17.

18 *See id.* at 20:12-13.

19 *See* Park Rebuttal Testimony at 10:19-11:23.

20 *See* Park Direct Testimony at 4:22-5:8 and 9:6-10.

would be pushed below minimum generation limits), and not, as Idaho Power implies in other places in its testimony, at any time the output of any base load unit is reduced.[21]

The second two proposed circumstances in proposed Schedule 74 – economic curtailment and environmental curtailment – are not authorized under Section 292.304(f) of FERC's regulations. Idaho Power cannot curtail QF output, and avoid its statutory PURPA purchase obligation, just because the forecast avoided cost price established by Idaho Power turns out to be uneconomic at certain points in time. Likewise, Idaho Power cannot use its environmental obligations as a basis to prioritize its own generation over QF generation, and thereby avoid its statutory PURPA purchase obligation.

First, by its terms, Schedule 74 permits curtailment during Must Run Periods where, "due to operational circumstances," continued QF purchases would require Idaho Power (1) "to dispatch higher cost, less efficient resources to serve system load" ***or*** (2) "to make Base Load Resources unavailable for serving the next anticipated load."[22] The use of the disjunctive "or" means that QF curtailment is authorized where continued QF purchases would require Idaho Power to use higher-cost generation, *i.e.*, for purely economic reasons, without any requirement that there also be "light loading" conditions for base load units as described in Order No. 69. This proposal directly contradicts 18 C.F.R. § 292.304(f), as FERC has held that this provision "cannot be relied upon to curtail purchases of unscheduled QF energy for general economic reasons."[23]

Second, Schedule 74 impermissibly permits QF curtailment based on the environmental limitations on certain hydroelectric resources. Such environmental requirements do not constitute "operational circumstances" within the meaning of 18 C.F.R. § 292.304(f), and

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21 *See, e.g.,* Park Direct Testimony at 15:10-15.

22 Schedule 74 at 1.

23 *Entergy* at P 55 (*citing* Order No. 69, 45 Fed. Reg. 12,214, 12,227).

therefore cannot be used as a ground to justify QF curtailment. FERC has strictly interpreted the exceptions to the PURPA purchase obligation, and has not permitted utilities to curtail QF output for any other reason than those set forth in FERC's regulations.[24] Moreover, just last year, in *Iberdrola Renewables, Inc. v. Bonneville Power Administration*,[25] FERC rejected a similar proposal by Bonneville Power Administration ("BPA") to use environmental curtailment to give BPA's own hydro units priority rights over all other generation on the system and to allow BPA to curtail all firm wind generation based on BPA's environmental obligations. FERC found that BPA did not have the right to impose such environmental curtailment of firm wind transactions on BPA's system because it resulted in unduly discriminatory treatment of wind generators.[26] In *SPP*, FERC found that QFs have curtailment rights at least equivalent to firm transactions.[27] Therefore, just like BPA, Idaho Power cannot use environmental curtailment as a basis to give its hydro units priority rights over all QFs selling under PPAs to Idaho Power and avoid its PURPA purchase obligation. Such environmental curtailment does not fall within the curtailment allowed under Section 304(f) of FERC's regulations.

In addition, Idaho Power's proposed Schedule 74 is inconsistent with 18 C.F.R. § 292.304(f) insofar as it contends that hydroelectric resources are the type of slow ramping base load units addressed by this provision. As Idaho Power acknowledges, its hydroelectric resources, have "effectively no incremental cost"[28] and can be dispatched "on demand,"[29] "to meet system balancing needs ... of the wind generators."[30] Idaho Power's claim that these

24 *See Entergy* at PP 52-58.
25 137 FERC 61,185 (2011) ("*BPA*").
26 *See id.* at P 78.
27 *See, e.g., SPP* at PP 14-15.
28 Park Direct Testimony at 11:5-6.
29 *Id.* at 12:11-12.
30 *Id.* at 12:23-24.

resources cannot be rapidly ramped up or down to accommodate QF purchases is therefore not credible.[31]

Moreover, Idaho Power freely acknowledges that it can, and routinely does, sell excess power through off-system sales and on the spot market. Curtailment under 18 C.F.R. § 292.304(f) is limited to specific "operational circumstances" in which Idaho Power would ***actually*** have to back down its base load coal units below their minimum generation limits and the units could not be returned to service in a timely manner when needed to serve load, not when economic conditions are not to Idaho Power's liking.

Finally, the Montana Public Service Commission ("MPSC") recently rejected a request for declaratory ruling by NorthWestern Energy ("NorthWestern") that would have permitted that utility to curtail QFs for economic reasons.[32] In refusing to accept NWE's interpretation of 18 C.F.R. § 292.304(f) and Montana's own "light loading" curtailment rule, the MPSC held:

> 12. In light of the foregoing, the Commission finds that NWE's proposed curtailment language is not authorized by state or federal law, and NWE is prohibited from demanding that new QFs with whom it is negotiating accept such language as a pre-condition of contracting with NWE for the sale of their output to the utility. If market conditions occasionally result in prices less than NWE' s tariffed avoidable costs, that is not in itself a sign that the principle of consumer indifference is unlawfully being violated-no more than if a long-term acquisition of NWE's own were to result in a fixed-and-variable cost-per-unit which were higher than prices available on the spot market. Sec. 18 CFR 292.304(b) (5).

Note that NorthWestern did not propose, as Idaho Power has, that its economic curtailment language could be applied to existing QF contracts. Note further that the MPSC adopted the reasoning of many federal and state courts that the economic justification for

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31 With respect to Idaho Power's run-of-river resources, Idaho Power initially claimed that it cannot ramp down these resources to accommodate QF purchases due to FERC licensing requirements for its run-of-river resources, but it subsequently acknowledged that it is capable of decreasing generation from its run-of-river resources in compliance with the Commission's licensing requirements. *See* Park Rebuttal Testimony at 10:19-11:23.

32 Montana Public Service Commission Docket No. D2011.7.57, Order 7172 (Sept. 13, 2011) at p. 8, ¶ 12.

curtailment – i.e., that QF contract rates temporarily exceed market – do not violate avoided cost principles thus justifying curtailment of QF contracts.

III. CONCLUSION

WHEREFORE, Mountain Air requests that the Commission: (1) not approve Idaho Power's proposed Schedule 74 to permit curtailment of Mountain Air's existing PURPA PPAs as this result is plainly contrary to well established law and precedent as a violation of PURPA; (2) not approve the application of Idaho Power's proposed Schedule 74 to any QF with forecast avoided cost rates; and (3) not approve Idaho Power's proposed Schedule 74 because it exceeds the scope of permissible curtailments set forth in FERC's PURPA regulation, 18 C.F.R. § 292.304(f); and (4) grant such other relief as may be necessary to protect Mountain Air's interests.

DATED this 20th day of July 2012.

By: J. Kahle Becker

J. Kahle Becker, Idaho (ISB No. # 7408)
The Alaska Center
1020 W. Main St. Suite 400
Boise, ID 83702
Telephone: (208) 333-1403
Facsimile: (208) 343-3246
Email: kahle@kahlebeckerlaw.com

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Prehearing Legal Brief was served via e-mail on this 20th day of July, 2012 upon the following:

IDAHO POWER COMPANY: (Exhibit Nos. 1-100)	Donovan E. Walker Jason B. Williams Idaho Power Company PO Box 70 Boise, ID 83707-0070 E-mail: dwalker@idahopower.com jwilliams@idahopower.com
AVISTA CORPORATION: (Exhibit Nos. 101-200)	Michael G. Andrea Avista Corporation 1411 E. Mission Ave. Spokane, WA 99202 E-mail: michael.andrea@avistacorp.com
PACIFICORP, dba ROCKY MOUNTAIN POWER: (Exhibit Nos. 201-300)	Daniel Solander PacifiCorp/ dba Rocky Mountain Power 201 S. Main St., Suite 2300 Salt Lake City, UT 84111 E-mail: danielsolander@pacificorp.com

COMMISSION STAFF:
(Exhibit Nos. 301-400)

Kristine A. Sasser
Deputy Attorney General
Idaho Public Utilities
Commission
472 W. Washington (83702)
PO Box 83720
Boise, ED 83720-0074
E-mail: kris.sasser@puc.idaho.gov

THE NORTHWEST AND
INTERMOUNTAIN POWER
PRODUCERS COALITION:
(Exhibit Nos. 401-500)

Peter J. Richardson
Gregory M. Adams
Richardson & O'Leary, PLLC
PO Box 7218
Boise, ID 83702
E-mail: peter@richardsonandoleary.com
greg@richardsonandoleary.com

Robert D. Kahn
Executive Director
Northwest and Intermountain Power
Producers Coalition
1117 Minor Ave., Suite 300
Seattle, WA 98101
E-mail: rkahn@nippc.org

J.R. SIMPLOT COMPANY:
(Exhibit Nos. 501-600)

Peter J. Richardson
Gregory M. Adams
Richardson & O'Leary, PLLC
PO Box 7218
Boise, ID 83702
E-mail:
peter@richardsonandoleary.com
greg@richardsonandoleary.com

Don Sturtevant
Energy Director
J.R. Simplot Company
PO Box 27
Boise, ID 83707-0027
E-mail: don.sturtevant@simplot.com

GRAND VIEW SOLAR II:
(Exhibit Nos. 601-700)

Peter J. Richardson
Gregory M. Adams
Richardson & O'Leary, PLLC
PO Box 7218
Boise, ID 83702
E-mail: peter@richardsonandoleary.com
greg@richardsonandoleary.com

Robert A. Paul
Grand View Solar II
15690 Vista Circle,
Desert Hot Springs, CA 92241
E-mail: robertapaul08@gmail.com

EXERGY DEVELOPMENT GROUP OF IDAHO, LLC:
(Exhibit Nos. 701-800)

Peter J. Richardson
Gregory M. Adams
Richardson & O'Leary, PLLC
PO Box 7218
Boise, ID 83702
E-mail: peter@richardsonandoleary.com
greg@richardsonandoleary.com

James Carkulis
Managing Member
Exergy Development Group of Idaho, LLC
802 W. Bannock St., Suite 1200
Boise, ID 83702
E-mail:
jcarkulis@exergydevelopment.com

Dr. Don Reading
6070 Hill Road
Boise, ID 83703
E-mail: dreading@mindspring.com

RENEWABLE ENERGY COALITION:
(Exhibit Nos. 801-900)

Ronald Williams
Williams Bradbury, P.C.
1015 W. Hays St.
Boise, ID 83702
E-mail: ron@williamsbradbury.com

John R. Lowe
Consultant to
Renewable Energy Coalition
12050 SW Tremont St.
Portland, OR 97225
E-mail:
jravenesanrnarcos@yahoo.com

INTERCONNECT SOLAR DEVELOPMENT, LLC:
(Exhibit Nos. 901-1000)

R. Greg Ferney
Mimura Law Offices, PLLC
2176 E. Franklin Rd., Suite 120
Meridian, ID 83642
E-mail: greg@mimuralaw.com

Bill Piske, Manager
Interconnect Solar Development, LLC
1303 E. Carter
Boise, ID 83706
E-mail: billpiske@cableone.net

DYNAMIS ENERGY, LLC:
(Exhibit Nos. 1001-1100)

Ronald L. Williams
Williams Bradbury, P.C.
1015 W. Hays Street
Boise, ID 83702
E-mail: ron@williamsbradbury.com

Wade Thomas
General Counsel
Dynamis Energy, LLC
776 W. Riverside Dr., Suite 15
Eagle, ID 83616
E-mail:
wthomas@dynamisenergy.com

NORTH SIDE CANAL COMPANY
TWIN FALLS CANAL COMPANY:
(Exhibit Nos. 1101-1200)

C. Thomas Arkoosh
Capitol Law Group, PLLC
205 N. 10th St., 4th Floor
PO Box 2598
Boise, ID 83701
E-mail:
tarkoosh@capitollawgroup.com

ELECTRONIC SERVICE ONLY

Brian Olmstead
General
Manager
E-mail: olmstead@tfcanal.com

Ted Diehl
General Manager
North Side Canal Company
E-mail: nscanal@cableone.net

Don Schoenbeck RCS
E-mail: dws@r-c-s-inc.com

Lori Thomas
Capitol Law Group, PLLC
E-mail: lthomas@capitollawgroup.com

THE BOARD OF COUNTY COMMISSIONERS OF ADAMS COUNTY, IDAHO: (Exhibit Nos. 1201-1300)

Peter J. Richardson
Gregory M. Adams
Richardson & O'Leary, PLLC
PO Box 7218
Boise, ID 83702
E-mail: peter@richardsonandoleary.com
greg@richardsonandoleary.com

Bill Brown, Chair
Board of Commissioners
of Adams County, ID
PO Box 48
Council, ID 83612
E-mail: bdbrown@frontiemet.net

BIRCH POWER COMPANY: (Exhibit Nos. 1301-1400)

Ted S. Sorenson, P.E. Birch
Power Company 5203 South 11th
East Idaho Falls, ID 83404
E-mail: ted@tsorenson.net

IDAHO WINDFARMS, LLC:
(Exhibit Nos. 1401-1500)

Glenn Ikemoto
Margaret Rueger
Idaho Windfarms, LLC
672 Blair Avenue
Piedmont, CA 94611
E-mail: glenni@envisionwind.com
margaret@envisionwind.com

Dean J. Miller
McDevitt & Miller, LLP
420 W. Bannock St. (83702)
PO Box 2564
Boise, ID 83701
E-mail: joe@mcdevitt-miller.com

BLUE RIBBON ENERGY LLC:
(Exhibit Nos. 1501-1600)

M.J. Humphries
Blue Ribbon Energy LLC
3470 Rich Lane
Ammon, ID 83406
E-mail: blueribbonenergy@gmail.com

Arron F. Jepson
Blue Ribbon Energy LLC
10660 South 540 East
Sandy, UT 84070
E-mail: arronesq@aol.com

RENEWABLE NORTHWEST PROJECT:
(Exhibit Nos. 1601-1700)

Dean J. Miller
McDevitt & Miller, LLP
420 W. Bannock St. (83702)
PO Box 2564
Boise, ID 83701
E-mail: joe@mcdevitt-miller.com.

Megan Walseth Decker
Senior Staff Counsel
Renewable Northwest
Project
421 SW 6th Avenue, Suite
1125 Portland, OR 97204
E-mail: megan@rnp.org

IDAHO CONSERVATION LEAGUE:
(Exhibit Nos. 1701-1800)

Benjamin J. Otto
Idaho Conservation League
710 N. Sixth Street (83702)
PO Box 844
Boise, ID 83701
E-mail: botto@idahoconservation.org

SNAKE RIVER ALLIANCE:
(Exhibit Nos. 1801-1900)

Liz Woodruff
Ken Miller
Snake River Alliance
PO Box 1731
Boise, ID 83701
Email: woodruff@snakeriveralliance.org
kmiller@snakeriveralliance.org

CLEARWATER PAPER CORPORATION:
(Exhibit Nos. 1901-2000)

Peter J. Richardson
Gregory M. Adams
Richardson & O'Leary, PLLC
PO Box 7218
Boise, ED 83702
E-mail: peter@richardsonandoleary.com
greg@richardsonandoleary.com

Mary Lewallen
Clearwater Paper Corporation
601 W. Riverside Ave., Suite 1100
Spokane, WA 99201
E-mail: mary.lewallen@clearwaterpaper.com

ENERGY INTEGRITY PROJECT:
(Exhibit Nos. 2001-2100)

Tauna Christensen
Energy Integrity Project
769 N 1100 E
Shelley, ID 83274
E-mail: tauna@energyintegrityproject.org

IDAHO WIND PARTNERS I, LLC:
(Exhibit Nos. 2101-2200)

Deborah E. Nelson
Kelsey J. Nunez
Givens Pursley LLP
601 W. Bannock Street (83702)
PO Box 2720
Boise, ID 83701-2720
E-mail: den@givenspursley.com
kjn@givenspursley.com

RIDGELINE ENERGY, LLC:
(Exhibit Nos. 2201-2300)

Dean J. Miller
Chas. F. McDevitt
McDevitt & Miller, LLP
420 W. Bannock St. (83702)
PO Box 2564
Boise, ED 83701
E-mail: joe@mcdevitt-miller.com
chas@mcdevitt-miller.com

The foregoing was filed via overnight service (original and 7 copies) and e-mail to the following:

Jean Jewell
Commission Secretary
Idaho Public Utilities Commission
P.O. Box 83720
Boise ID 83720-0074
Phone: 208-334-0338
E-mail: Jean.Jewell@puc.idaho.gov

Cathleen N. Uda
Legal Secretary to
Michael J. Uda