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BEFORE THE IDAHO PUBLIC UTILITIES COMMISSION

GRAND VIEW PV SOLAR TWO, LLC, Complainant, vs. IDAHO POWER COMPANY, Respondent.	CASE NO. IPC-E-11-15 IDAHO POWER COMPANY'S ANSWER TO MOTION FOR SUMMARY JUDGMENT

Pursuant to the Idaho Public Utilities Commission's ("Commission") RP 57 and RP 256, Idaho Power Company ("Idaho Power" or "Company"), by and through its attorneys of record, hereby submits its Answer to the Motion for Summary Judgment filed by Grand View PV Solar Two, LLC ("Grand View") on November 29, 2011.

I. INTRODUCTION

On August 2, 2011, Grand View filed a Complaint against Idaho Power requesting that the Commission issue a declaratory judgment that it is entitled to a 20-year, long-term, fixed rate Public Utility Regulatory Policies Act of 1978 ("PURPA")

power purchase agreement ("PPA") in which Idaho Power would explicitly disclaim any ownership of the environmental attributes, or Renewable Energy Certificates ("RECs"), associated with the purchase of that energy. Complaint at p. 2. Grand View demands that the Commission require Idaho Power to insert language into its PURPA power purchase agreement, "to the effect that Idaho Power makes no claim to REC ownership." Complaint at p. 6. Grand View also demands a declaration that Idaho Power is in violation of PURPA, FERCs implementing regulation, and the Commission's orders for failing to do so. *Id.*

On September 6, 2011, Idaho Power filed its Answer to Grand View's Complaint. In its Answer, Idaho Power stated that neither PURPA, nor this state's implementation thereof, requires it to disclaim any possible legal claim that it may have to the environmental attributes associated with its purchase of power from a PURPA Qualifying Facility ("QF") for the next 20 years. Answer at p. 2. In fact, such a disclaimer has potentially costly consequences for Idaho Power's customers should the Legislature or other legal body determine some time during the proposed 20-year term of the contract that the environmental attributes from the purchase of QF power in Idaho are in fact owned by the purchasing utility and its customers. *Id.*

On November 29, 2011, Grand View filed a Motion for Summary Judgment where it asks for a declaratory order from the Commission requiring Idaho Power to disclaim ownership of all environmental attributes in the PURPA power sales agreement with Grand View. Motion for Summary Judgment at p. 36. Additionally, Grand View asks the Commission to declare that it is entitled to a contract with rates that were in effect on the date of the filing of the Complaint. *Id.* Grand View alleges that inclusion in

the PPA of a provision that, in effect, states that ownership of environmental attributes, or RECs, will be determined in accordance with applicable law would violate Section 210(e) of PURPA, violate the Takings Clause of the U.S. and Idaho Constitutions, and violate the Dormant Commerce Clause of the U.S. Constitution.

II. SUMMARY JUDGMENT

The Commission employs the same standard on summary judgment as that contained in the Idaho Rules of Civil Procedure: "The standard for a summary judgment is contained in Idaho Rule of Civil Procedure 56(c), which provides that summary judgment should be granted if 'the pleadings, depositions, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.' Upon review of a motion for summary judgment, '[a]ll disputed facts are to be construed liberally in favor of the non-moving party, and all reasonable inferences that can be drawn from the record are to be drawn in favor of the non-moving party.' Frazier v. J.R. Simplot Company, ___ Idaho ___, 29 P.3d 936, 938 (2001)." Order No. 28888 at p. 12.

III. ARGUMENT

Grand View's Motion for Summary Judgment should be denied in its entirety. Grand View is not entitled to the disclaimer that they request as a matter of law. In fact, such a disclaimer is not in the best interest of Idaho Power's customers, and forcing Idaho Power to affirmatively disclaim all environmental attributes for the next 20 years, and filling its system with intermittent, renewable generation sources that it cannot claim are renewable, could have large and costly consequences for customers should the Company come under future federal and/or state renewable portfolio standards that

require such environmental attributes for compliance. The ownership of RECs is currently unsettled in Idaho and Grand View has failed to show how it is any more entitled, as a matter of law, than Idaho Power and its customers to currently make a claim of ownership over the environmental attributes from a proposed PURPA qualifying facility ("QF") project. The language proposed by Idaho Power does not violate Section 210(e) of PURPA, the Takings Clause does not apply, and the Dormant Commerce Clause does not support Grand View's claims. Grand View is not entitled to judgment as a matter of law and the Motion for Summary Judgment should be denied.

A. Ownership of RECs is Currently Unsettled in Idaho.

As an initial matter, Grand View grossly mischaracterizes both its relief requested in its Complaint as well as the issues and nature of this case. Grand View has two main objections in this case: (1) Grand View objects to following language from the PPA,

> Under this Agreement, ownership of Green Tags and Renewable Energy Certificates (RECs), or the equivalent environmental attributes, directly associated with the production of energy from the Seller's Facility sold to Idaho Power will be governed by any and all applicable Federal or State laws and/or any regulatory body or agency deemed to have authority to regulate these Environmental Attributes or to implement Federal and/or State laws regarding the same.

Motion for Summary Judgment at p. 5-6; and (2) Grand View demands that the Commission issue a declaratory judgment that Grand View "is entitled to a PPA with a clause in which Idaho Power explicitly disclaims ownership of the environmental attributes." Complaint at p. 2.

As stated in Idaho Power's Answer,

> Contrary to Grand View's allegations, Idaho Power has not proposed language for the PURPA contract that purports to allocate ownership to either the QF or the utility and its

> customers. Instead, Idaho Power has proposed language that states the ownership of environmental attributes will be determined by the applicable federal or state laws and/or the appropriate regulatory body or agency deemed to have authority to regulate environmental attributes or to implement federal and/or state laws regarding the same.

Answer at p. 2. Clearly the provision cited above from the PPA does not itself assign ownership to either Grand View or Idaho Power, but merely states that ownership will be determined by the applicable law. In stark contrast to this PPA language, Grand View's proposed disclaimer by Idaho Power of any ownership claim in the RECs does necessarily require a determination that the QF is the owner of such RECs. Indeed, Grand View expressly states the same, albeit without any corresponding authority, in its Motion. Motion for Summary Judgment at p. 22 (stating that "Grandview clearly owns the RECs ...").

The PPA language does not violate PURPA nor Idaho law because it does not purport to determine ownership of RECs. It is merely a change in law provision stating that if applicable law determines REC ownership, then that applicable law governs. Grand View's requested relief, however, does purport to determine ownership in its demand that Idaho Power affirmatively disclaim any ownership claim in the RECs for the next 20 years. This is inconsistent with both PURPA and with Idaho law.

The ownership of RECs is governed exclusively by State law. FERC precedent is clear: "RECs are created by the States. They exist outside the confines of PURPA. PURPA thus does not address the ownership of RECs . . . States, in creating RECs, have the power to determine who owns the RECs in the initial instance, and how they may be sold or traded; it is not an issue controlled by PURPA." *America Ref-Fuel Co.*, 105 FERC ¶ 61,004, 61,007 (2003). This proposition has been affirmed repeatedly by

FERC, most recently in *California Public Utility Commission*: "Compensation for such environmental externalities through RECs is outside of PURPA, and is not part of the avoided cost calculations; RECs are separate commodities from the capacity and energy produced by QFs. If a state chooses to create these separate commodities, they are not compensation for capacity and energy." 133 FERC ¶ 61,059 at n. 62. As the United States Court of Appeals for the Second Circuit noted, "RECs are inventions of state property law whereby the renewable energy attributes are 'unbundled from the energy itself and sold separately." *Wheelabrator Lisbon, Inc. v. Conn. Dept, of Pub. Util. Control*, 531 F.3d 183, 186 (2d Cir. 2008).

Consequently, it is the State of Idaho that determines ownership of RECs, and not FERC, nor PURPA. However, Idaho State law has neither created RECs nor determined ownership. The Idaho Legislature has not yet acted upon this issue. The Commission has looked at this issue on at least three occasions, but has not made any determination as to ownership. *See*, IPUC Case Nos. IPC-E-04-02, IPC-E-04-16, and AVU-E-09-04.

In Case No. IPC-E-04-02 Idaho Power filed a declaratory order action with the Commission requesting an ownership determination as to the environmental attributes associated with purchases from QFs. The Commission declined to issue an Order determining ownership in that matter, stating that "the issue presented by Idaho Power in it Petition does not present an actual or justiciable controversy in Idaho and is not ripe for a declaratory judgment by this Commission." Order No. 29480 at p. 16. The IPUC has been clear: "the State of Idaho has not created a green tag program, has not established a trading market for green tags, nor does it require a renewable resource

portfolio standard." Order No. 29480 at 16. The Commission also noted that the parties were free to negotiate the sale and purchase of RECs, but that the same was not recoverable as a PURPA cost. *Id.*

In Case No. IPC-E-04-16 Idaho Power argued that by filing the proposed PURPA PPA with the Commission it had now presented the Commission with "a real case or controversy, and therefore the lack of ripeness identified by the Commission in the declaratory judgment action [Case No. IPC-E-04-02] is not present in this case." Order No. 29577 at p. 3. However, the Commission again did not address the issue of REC ownership noting that "The regulatory landscape has not changed" since issuing Order No. 29480 because "the State of Idaho has still not created a green tag program, has not established a trading market for green tags, nor does it require a renewable resource portfolio standard." Order No. 29557 at 5-6.

In Case No. AVU-E-09-04, Avista filed a request for a declaratory order as to the issue of REC ownership in the State of Idaho. However, again this issue was not addressed because the Petition in that case was withdrawn without a ruling on the merits.

Consequently, the issue of ownership of RECs in the state of Idaho with regard to QF purchases remains an unsettled issue. Additionally, Idaho still has no green tag program, Idaho still has not created a tradable market for green tags, and Idaho has not instituted a renewable portfolio standard. Thus, the issue of REC ownership remains unsettled in Idaho, despite Grand View's unsupported claim that it "clearly owns the RECs." Motion for Summary Judgment at p. 22.

Grand View also incorrectly tries to argue that the Idaho treatment of RECs is analogous to that of Montana and Oregon and therefore the QF should retain ownership of the RECs. Motion for Summary Judgment at p. 15-16. However, Comparisons to Oregon and Montana are inapt because both those states have adopted clear and unambiguous standards that state that the QF retains the RECs. Idaho has very clearly not done this.

Additionally, many other states have determined that the utility and its customers are in fact the owners of the RECs from a QF. The Superior Court of New Jersey noted in a 2007 case that the issue of initial ownership of RECs for contracts that predated their existence had arisen in at least nine states. *Re Ownership of Renewable Energy Certificates*, 913 A.2d 825, 828 (NJ Super.2007). And in each state, including New Jersey, the result was the same – the utility was determined the owner of the RECs. *Id.* In fact it is noteworthy that courts have found that even where the environmental attributes are not part of the avoided costs set pursuant to PURPA, and the QF is not separately compensated for RECs, that nonetheless the RECs still pass under the PPA and state law to the utility as part of the electrical output purchased by the utility. *In re The Riley Energy Corp.*, 2004 WL 3160409 (Conn. DPUC 2004).

Consequently Grand View's assertion that it "clearly owns the RECs" is completely unfounded. It is however clear that the law is unsettled in Idaho regarding ownership of RECs. It is also clear that the proposed PPA language does not purport to establish ownership of RECs itself, as does Grand View's proposed disclaimer, but rather it simply states that ownership will be governed by the applicable law. The important issue is that the State of Idaho may someday determine that the ownership of

RECs generated by a QF flows to the utility and its customers who purchase the energy and capacity from such QF project.

B. Grand View's Disclaimer Provision Should Be Rejected Outright.

The Commission's orders have been clear that ownership of RECs has not been determined under Idaho law and the Commission will not require REC ownership to be determined as a condition of entering into a PURPA contract. Order No. 29480 at 16. As noted above, this is consistent with *America Ref-Fuel*, where FERC concluded unequivocally that REC ownership is outside of PURPA and therefore a PURPA contract cannot logically be conditioned upon a party accepting a term that is outside the confines of the statute. However, that is precisely what Grand View proposes here. By requiring Idaho Power to disclaim ownership of RECs in this contract, even though Idaho law does not so require, Grand View is requesting that the Commission require the PURPA contract to definitively determine REC ownership.

Following Order No. 29480, the Commission declined to alter its conclusions regarding the treatment of RECs in PURPA contracts because the "regulatory landscape ha[d] not changed. The state of Idaho has still not created a green tag program, has not established a trading market for green tags, nor does it require a renewable resource portfolio standard." Order No. 29577 at 5-6. Here, the regulatory landscape has still not changed and therefore there is no basis for the Commission to change its long-standing policy regarding the treatment of RECs in PURPA contracts.

Importantly, the rationale for rejecting Grand View's proposed contract term does not apply to Idaho Power's proposed term. The PPA proposed a straightforward change of law provision that merely states REC ownership will be determined by the

applicable law. This provision in the PPA does not determine ownership of RECs—it leaves that determination subject to applicable state or federal law.

In sum, FERC has made clear that RECs are outside the purview of PURPA and governed exclusively by state law. Idaho state law has not established RECs or otherwise determined ownership of RECs in the context of a PURPA transaction. Therefore, to require IPC to affirmatively disclaim all ownership claims to the RECs is not warranted by Idaho law. Grand View is not entitled judgment as a matter of law. The Motion for Summary judgment should be denied.

C. *The Provision in the PPA that Ownership of RECs is Governed by Applicable State or Federal Law is Not a Reopener and is Not Preempted by PURPA.*

Idaho Power's proposed contract language is not a reopener provision. Grand View argues that PPAs proposed clause constitutes a reopener clause that is preempted by Section 210(e) of PURPA. Motion for Summary Judgment at p. 16. Idaho Power's proposed language is not a reopener clause, as that term is commonly used in contract law. In contract law, a reopener provision provides an opportunity (or requirement) for the parties to the contract to "reopen" the contract after its has been finalized to renegotiate a particular term. *See, State, Dept. of Cent. Management Services v. State, Labor Relations Bd.*, 869 N.E.2d 274, 277 (Ill. App. 2007). Idaho Power's proposed term states:

> Under this Agreement, ownership of Green Tags and Renewable Energy Certificates (RECs), or the equivalent environmental attributes, directly associated with the production of energy from the Seller's Facility sold to Idaho Power will be governed by any and all applicable Federal or State laws and/or any regulatory body or agency deemed to have authority to regulate these Environmental Attributes or to implement Federal and/or State laws regarding the same.

This provision cannot reasonably be read to require a "reopening" and renegotiation of the contract terms. The proposed PPA language does not address REC ownership at all. Therefore, parties cannot "renegotiate" something that was not negotiated in the first instance. Additionally, Idaho Power's proposed contract term does not even require negotiation—all it says is that ownership will be determined by the applicable law. There is nothing to negotiate. Therefore, characterizing this term as a "reopener" is simply incorrect.

Section 210(e) of PURPA does not prohibit the PPAs proposed language. Grand View argues that Idaho Power's proposed contract language will subject Grand View to ongoing utility-like regulation in violation of Section 210(e) of PURPA. As support for this argument, Grand View relies on cases focusing on state commission decisions that required renegotiation of the *rates* in a PURPA contract. Grand View concludes its argument by stating, unequivocally, that the present case "is not different in any material regard from the similar provision rejected by every state and federal authority to address the issue." Motion for Summary Judgment at p. 19. Grand View's characterization of the law and its argument is wrong for two reasons. First, numerous courts addressing the actual issue presented here—REC ownership—have concluded that Section 210(e) of PURPA does not preempt the type of provision proposed by Idaho Power. And second, the cases Grand View relies on are entirely distinguishable because they involve the reopening of a PURPA contract to change the avoided cost rate and not to address the ownership RECs, which is exclusively a state matter outside of PURPA, including Section 210(e).

First of all, numerous courts have concluded that Section 210(e) does not apply to RECs. In *Wheelabrator Lisbon, Inc. v. Connecticut Department of Public Utility Control*, the United States Court of Appeals for the Second Circuit addressed the specific question presented here—whether Section 210(e) of PURPA preempt a state commission decision requiring a QF to transfer ownership of RECs to the interconnected utility. 531 F.3d 183 (2d Cir. 2008). In that case the Connecticut regulatory commission concluded that the utilities were the owners of RECs resulting from PURPA contracts entered into prior to the state's creation and regulation of RECs. The Second Circuit concluded that the state commission's decision, which determined REC ownership, was not preempted by Section 210(e) of PURPA. *Id.* at 188. While the court's analysis focused on the fact that the PPA was silent as to RECs and therefore did not require "modification" to determine REC ownership, the court also made clear that RECs are not subject to PURPA and therefore PURPA does not preempt their regulation. Indeed, the Second Circuit noted that there was no evidence that "Congress intended to occupy the field or otherwise preempt state regulation of the ownership of RECs entirely." *Id.* at 189 n. 10. The Second Circuit also rejected an argument that FERC's decision in *American Ref-Fuel* preempted the state commission's decision because that order "explicitly acknowledges that state law governs the conveyance of RECs." *Id.* at 190. Here, Idaho Power's proposed contract term does not modify the contract or otherwise require renegotiation of its terms. It simply states that the ownership of RECs shall be determined by applicable law, if that law determines the issue during the life of the contract.

The Second Circuit's decision in *Wheelabrator* affirmed the district court's ruling that Section 210(e) does not preempt a state commission ruling determining that RECs are transferred from the QF to the interconnecting utility. *Wheelabrator Lisbon, Inc. v. Conn. Dept. of Pub. Util. Control*, 526 F.Supp.2d 295 (D. Conn. 2006). Quoting FERC's *America Ref-Fuel* order, the district court in that case correctly concluded: "While a state may decide that a sale of power at wholesale automatically transfers ownership of the state-created RECs, that requirement must find its authority in state law, not PURPA." *Id.* at 306. Therefore, "neither PURPA, the regulations, nor *America Ref-Fuel* preempt the [state commission's] decisions that [RECs] associated with renewable energy transferred pursuant to the [PPAs] must also be transferred." *Id.* The district court also distinguished this case from *Freehold Cogeneration Associates v. Board of Regulatory Commissioners of New Jersey*, 44 F.3d 1178 (3d Cir. 1995) (relied upon by Grand View) because the state commission did not order renegotiation of the contract purchase price nor did it lower rates. *Id.*

In another case the Commonwealth Court of Pennsylvania likewise ruled that PURPA does not preempt state regulation of RECs. *ARRIPA v. Penn. Publ. Util. Comm'n*, 966 A.2d 1204 (2009). The court in that case concluded that "*Freehold* is completely distinguishable; the ownership of [RECs] was not at issue in *Freehold*." *Id.* at 1210. The court concluded that "PURPA did not preempt the Commission's authority to determine the ownership of [RECs]." *Id.*

Although these cases all addressed ownership of RECs in contracts entered into before RECs were created by state law, Idaho Power does not rely on them for the proposition that Idaho Power is entitled to the RECs as a matter of law. Indeed, Idaho

Power's proposed contract terms, unlike that proposed by Grand View, does not determine REC ownership. Rather, the Company relies on these cases for the simple proposition that Section 210(e) of PURPA does not preempt the proposed PPA language because (1) it does not re-open the contract or require future negotiations and (2) state law, not PURPA, governs RECs.

Secondly, the cases relied upon by Grand View are clearly and significantly distinguishable because they address rate changes and involve renegotiation or modification of a PURPA contract. In support of its argument that Section 210(e) prohibits the inclusion of Idaho Power's proposed contract language, Grand View relies on several cases where courts have invalidated commission action because the action constituted utility-like regulation in violation of PURPA. These cases are distinguishable from the current case for two reasons. First, the cases involve commission orders addressing changes in the avoided cost rate during the life of a contract, not REC ownership. Second, the cases deal expressly with state commission orders requiring renegotiation and modification of PURPA contracts. Idaho Power's proposed contract language does not involve changes to the avoided cost rate in the contract, does not require renegotiation of the contract, nor does it modify the contract in any way.

By its clear terms Section 210(e) of PURPA exempts QFs from "State laws and regulations respecting the rates, or respecting the financial or organizational regulation, of electric utilities." 16 U.S.C. § 824a-3(3). And the cases relied upon by Grand View address exclusively renegotiation of purchase/price terms. In *Freehold*, the lead case relied on by Grand View, the issue was whether a state commission decision requiring the QF and the utility to renegotiate the rate terms of the PPA or, in the alternative, to

negotiate an appropriate buyout of the PPA violated PURPA. *Freehold*, 44 F.3d at 1190. The United States Court of Appeals for the Third Circuit held that the state commission's action was preempted by PURPA because requiring renegotiation of the purchase price constituted utility-like regulation prohibited by Section 210(e).

In *Afton Energy, Inc. v. Idaho Power Company*, the Idaho Supreme Court concluded that a PURPA contract that included a provision stating that the "rates, terms and conditions set forth in this agreement are subject to the continuing jurisdiction of the [IPUC]" violated Section 210(e) of PURPA because it subjected the QF to utility-type regulation, again focusing on the Commission's continuing jurisdiction over the rates in the contract. 107 Idaho 781, 787-788. The remaining cases relied on by Grand View also all include contract terms allowing the state commission to modify the avoided cost rate over the life of the contract. See Motion for Summary Judgment at p. 18-19 (relying on *Smith Cogeneration Mgt. v. Corp. Comm'n*, 863 P.2d 1227 (Okla. 1993) and *Oregon Trail Elec. Consumers Co-op, Inc. v. Go-Gen Co.*, 7 P.3d 594 (Or. App. 2000)).

Here, Idaho Power's proposed contract term has no impact on the avoided cost rate, does not require renegotiation of the contract, nor does it modify the contract in any way. Therefore, the present case is easily distinguishable from those relied upon by Grand View. Additionally, as referenced above, in cases where courts have actually examined the issue in this case—REC ownership—the courts have consistently concluded that Section 210(e) of PURPA does not apply because RECs fall outside of PURPA and are subject to exclusively state regulation. The PPA provision that provides that ownership of RECs is governed by the applicable law is not a contract reopener, is not preempted by PURPA, and does not subject the QF to utility type

regulation. Grand View is not entitled judgment as a matter of law. The Motion for Summary judgment should be denied.

D. The Takings Clause Does Not Apply.

Grand View argues that approval of Idaho Power's proposed contract term amounts to an impermissible taking under both the Idaho and federal constitutions. Motion for Summary Judgment at p. 20. This argument has been soundly rejected by several courts. Indeed, the United States District Court for the District of Connecticut directly rejected a QF's argument that a state commission's ruling determining ownership of RECs constituted a taking under the federal constitution. *Wheelabrator*, 526 F.Supp.2d at 307. In that case, the QFs argued that a state commission decision holding that RECs were the property of the interconnected utility constituted a taking because it deprived them of valuable property. The court dismissed this argument reasoning that RECs are a creation of state law and state law determined that the utility was the owner.

In a case arising out of the same dispute, the Supreme Court of Connecticut likewise rejected the QF's argument that the state commission's decision constituted a taking under Connecticut law. *Wheelabrator Lisbon, Inc. v. Dept. of Pub. Util. Control*, 931 A.2d 159, 176-77 (Conn. 2007). The court concluded that there was no taking because the RECs were not the property of the QF, because it was within the jurisdiction of the state commission to determine QF ownership, and because the commission concluded that the utility was the owner. *Id.*

Here, FERC has been clear that RECs are the creation of state law and their ownership is subject to, and determined by state law. Idaho Power's proposed

language simply states that if state law determines that Idaho Power, or the QF, is the owner of the RECs, then it is so. Because Idaho law determines the owner of the RECs, Grand View cannot be deprived of a property interest if it turns out that state law determines it had no property interest in the first place. Regardless, the PPA language itself merely states that ownership of RECs is controlled by the applicable law. This language itself performs no "taking" of property. The Takings clause of the U.S. and Idaho Constitutions does not apply. Grand View is not entitled to judgment as a matter of law. Summary Judgment should be denied.

Additionally, Grand View also argues that the Commission's approval of Idaho Power's proposed contract term amounts to a regulatory taking under *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992). Motion for Summary Judgment at p. 23. As Grand View admits, however, in that case the United States Supreme Court held that a taking occurs only when the government action results in the deprivation of all economically beneficial use of the property. *Lucas*, 505 U.S. at 1019. Here, in the worst case, even Grand View itself claims that a Commission ruling in Idaho Power's favor would merely "cloud Grand View's clear title" to the RECs. Motion for Summary Judgment at p. 24. Indeed, Grand View is not being deprived of the revenue it will receive from the contract to sell energy and capacity to Idaho Power, and moreover, the unsubstantiated claim that the PPA language makes the RECs invaluable is simply not true, and at the least is a contested issue of material fact.

Grand View acknowledges that if it retains any economic value in the RECs then "just compensation may be required by weighing relevant factors set forth in *Penn Central Transportation Company v. New York City*, 438 U.S. 104, 124 (1978)." Motion

for Summary Judgment at p. 23. Although Grand View does not say what these factors are, the United States Supreme Court has identified the following factors that are used to determine if a regulatory taking requires compensation: (1) the character of the governmental action; (2) the action's economic impact; and (3) the actions interference with reasonable investment-backed expectations. *Id.* Importantly, this analysis is case-specific and requires the development of a robust factual record upon which to determine if a taking has occurred and the appropriate level of compensation. *Id.* This points to a fatal flaw with Grand View's regulatory takings claim—on a motion for summary judgment there is simply an insufficient factual record upon which to determine if the Commission's action would rise to the level of a regulatory taking. Indeed, without the robust factual record required for such a finding, the Commission should dismiss this argument out of hand.

However, for the sake of argument, if the Commission were to determine that the factual records provide it with sufficient bases to undergo the regulatory takings analysis, Grand View's argument nonetheless falls well short of demonstrating that the inclusion of a provision in the PPA stating that the applicable law governs REC ownership constitutes a regulatory takings.

With respect to the first factor, the Court noted that a taking is "more readily" found when the government action results in a physical invasion "than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good." *Id.* The Court noted that it has recognized "in a wide variety of contexts, that government may execute laws or programs that adversely affect recognized economic values" without requiring

compensation. *Id.* (quoting *Pennsylvania Coal. Co. v Mahon*, 260 U.S. 393, 413 (1922) ("Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law"). Here, there is no physical invasion. Rather, there is regulation by a government body designated to regulate public utilities in the state of Idaho. Even assuming arguendo that a decision to insert Idaho Power's proposed term into the contract may adversely affect Grand View's economic interests, it is not a regulatory taking simply because of that fact.

With respect to the second factor, courts require a party arguing that a regulatory taking has occurred to demonstrate "serious financial loss." *Cineaga Gardens v. United States*, 331 F.3d 1319, 1340 (Fed. Cir. 2003). Although courts have been clear that there is no specific numerical value, "serious financial loss" generally entails the loss of most, if not all, of the economic value of the property. See *Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926) (75% diminution in value caused by zoning law not a taking), and *Hadacheck v. Sebastian*, 239 U.S. 394 (1915) (87 1/2% diminution in value not a taking). Here, the record does not contain sufficient evidence to demonstrate the extent of Grand View's claimed economic harm if any. In any event, it is undisputed that Grand View will be able to engage in its primary business—the generation and sale of energy and capacity to Idaho Power. While it may not be able to obtain the highest possible REC price (although the factual record does not necessarily demonstrate this), Grand View has hardly demonstrated that it will suffer "serious financial harm" as a result of the Commission adopting Idaho Power's proposed contract language. See *Yancey v. U.S.*, 915 F.2d 1534, 1540 (Fed. Cir. 1990) (a regulation that denies the best

or most profitable use of property is not necessarily a taking). This also assumes that the proposed PPA language is doing the "taking" which it arguably is not.

The third factor—the actions interference with reasonable investment-backed expectations—is intended to "limit recoveries to property owners who can demonstrate that they bought their property in reliance on a state of affairs that did not include the challenged regulatory regime." *Cineaga Gardens*, 331 F.3d at 1345. "This factor also incorporates an objective test to support a claim for a regulatory taking, an investment-backed expectation must be "reasonable.'" *Id.* Here, the state of the law in Idaho is clear—PURPA contracts cannot be conditioned upon the inclusion of terms determining REC ownership and the law is unsettled as to the owner of QF-generated RECs. This has been the clear state of the law at least since the Commission's two cases in 2004. In light of the unsettled nature of Idaho law with respect to REC ownership, Grand View cannot reasonably argue that it had an expectation of absolute REC ownership irrespective of changes in Idaho law. And, most importantly, because Grand View's Motion does not even address these factors, Grand View did not actually make this argument or represent that it had this expectation.

Grand View also argues that a Commission ruling in Idaho Power's favor will result in a taking of its property right in the "going concern value of its QF business." Motion for Summary Judgment at p. 22. However, approval of Idaho Power's proposed contract language does not compromise Grand View's "right to conduct a business." *Coeur d'Alene Garbage Service v. Coeur d'Alene,* 114 Idaho 588, 591 (1988). Clearly, Grand View's primary business is generating and selling energy and capacity to Idaho Power. The proposed clause does nothing to impact its ability to continue to do so

going forward. If anything, it would be the state of law on the issue of REC ownership, itself, that is impacting the parties, and not a PPA provision stating that ownership is governed by the applicable law. Indeed, even Grand View argues that the "going concern value is a compensable property interest separate and distinct from the RECs." Motion for Summary Judgment at p. 23. If that is the case, then Grand View fails to demonstrate how a term in the contract addressing REC ownership somehow compromises its "separate and distinct" property interest in the business of generating and selling power. And, to reiterate, takings claims are highly factual specific and in this case there are currently insufficient facts for Grand View to make the types of claims that it does.

Finally, it is necessary to point out that Grand View argues that a provision in the PPA stating that applicable law governs REC ownership constitutes a takings while simultaneously arguing that the inclusion of a provision requiring Idaho Power to disclaim all rights to the RECs is legally necessary. Because Idaho law has not determined ownership of RECs, its stands to reason that if Idaho Power is required to disclaim RECs over which it may be determined to have an ownership interest, then a takings will definitely have occurred in that instance. In other words, the proposed PPA language does nothing to constitute a taking. It simply refers the issue of ownership to the applicable state or federal law. However, Grand View's proposed language requiring Idaho Power to affirmatively disclaim any ownership claim it may have for the next 20 years does itself have a serious taking clause problem. If Idaho law determines that Idaho Power is the owner, then the disclaimer provision constitutes a takings from Idaho Power and its customers.

Grand View has failed to set forth a sufficient factual basis appropriate for summary judgment. Grand View has failed to establish that there are no genuine issues as to material facts. Grand View is not entitled to judgment as a matter of law. Summary Judgment should be denied.

E. The Dormant Commerce Clause Does Not Support Grand View's Claim.

Grand View argues that if the Commission requires the contract to include Idaho Power's proposed language it will constitute a burden on interstate commerce for protectionist purposes in violation of the Dormant Commerce Clause of the federal constitution. This argument is without merit. In support of its position, Grand View relies on cases that deal with examples of affirmatively discriminatory state action—none of which are applicable to this case. Motion for Summary Judgment at p. 27. In the context of the Dormant Commerce Clause, "'discrimination' simply means differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter." *United Haulers Ass'n Inc., v. Oneida-Herkimer Solid Waste Management Authority*, 550 U.S. 330, 331 (2007). The Dormant Commerce Clause prohibits affirmative discriminatory state action, such as facially discriminatory laws or laws that have a discriminatory impact, unless the state can demonstrate the action "serves a legitimate local purpose and that this purpose could not be served as well by available nondiscriminatory means." *Maine v. Taylor*, 477 U.S. 131, 137-38 (internal citations omitted). "Shielding in-state industries from out-of-state competition is almost never a legitimate local purpose, and state laws that amount to 'simple economic protectionism' consequently have been subject to a 'virtually per se rule of invalidity.'" *Maine v. Taylor*, 477 U.S. 131, 148-49 (1986) (quoting *Philadelphia v. New Jersey*, 437

U.S. 617, 624 (1978); *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 471 (1981)).

Unlike the cases cited by Grand View, Idaho Power's PPA clause is not affirmatively discriminatory. Nothing in Idaho Power's PPA clause creates differential treatment between in-state QFs and out-of-state QFs. The mere fact that Grand View perceives its ability to sell RECs in a particular manner as impeded by Idaho Power's PPA clause is not enough to make the clause discriminatory on its face or in effect. Further, Idaho Power's PPA clause does not limit the REC markets that Grand View can transact in, nor does it prohibit Grand View from transacting in REC markets. Indeed, Grand View acknowledges that it would still be able to sell RECs, albeit in a form Grand View considers less desirable—that is, not in a "long-term forward strip of up to 5 years." Motion for Summary Judgment at p. 24. The Dormant Commerce Clause is meant to protect against state's erecting barriers to interstate commerce for purposes of state economic protectionism; it is not designed to ensure that participants in interstate commerce receive the best possible deal. Additionally, Grand View's Dormant Commerce Clause argument suffers the same infirmity that its Takings Clause argument suffers. Their issue is not with the benign language proposed for the PPA that simply states ownership is controlled by the applicable state or federal law. It is with the state of the law itself, or the law governing ownership of RECs that Grand View would have issue with. The proposed PPA language itself does not confer ownership to either Idaho Power or the QF.

Even considering for the sake of argument that the proposed PPA language did discriminate on its face or in effect, (which it clearly does not) the clause serves a

legitimate local purpose that could not be served by any other means. It ensures that in the event state or federal law determines that Idaho Power is the owner of the RECs, Idaho Power and its customers will receive the benefit of those RECs – and will not have disclaimed or forgone its ownership rights for the 20 year term of the PPA. This legitimate local purpose is not mere economic protectionism nor is there any other way for Idaho Power to ensure that Idaho Power ratepayers receive the benefits for the RECs they paid for, should they be determined by the applicable laws to own them.

Grand View also argues that Idaho Power's PPA clause "clouds" Grand View's title to the RECs and that this cloud creates an "undeniable" burden on interstate commerce. Motion at 28. Even assuming Idaho Power's PPA clause creates a "cloud" on Grand View's title, the fact of such a burden is not the relevant question under Dormant Commerce Clause analysis. It is telling that Grand View fails to quote the relevant test for determining whether non-discriminatory action which creates a burden on interstate commerce violates the Dormant Commerce Clause.

In *Maine v. Taylor*, a case Grand View cites, the Supreme Court of the United States held that state action which incidentally burdens interstate commerce is invalid only if the burden is "clearly excessive in relation to the putative local benefit." *Id.* (quoting *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970)). In fact, "[t]he limitation imposed by the Commerce Clause on state regulatory power is by no means absolute, and the states retain authority under their general policy powers to regulate matters of legitimate local concern, even though interstate commerce may be affected." *Maine v. Taylor*, 477 U.S. 131, 137-38 (1986). In this case, any burden on interstate commerce resulting from Idaho Power's PPA clause is merely incidental to the State's legitimate

purpose. Further, the burden is slight. As recognized by Grand View, it is still able to sell its RECS, and may even be able to sell them in 5-year strips. In short, there is no conclusive proof that Grand View will experience any burden as result of the proposed PPA clause, and certainly none that did not all ready exist simply because of the state of the law itself in the state of Idaho.

Finally, Grand View argues that the "practical effect of Idaho Power's proposed clause clouding ownership to RECs is analogous to the illegal in-state processing requirements." Motion for Summary Judgment at p. 29. Grand View cites to several cases involving in-state processing requirements or their equivalent. *Id.* However, a central concern of these cases was that the state action constituted hoarding of a local resource to the detriment of out-of-state competitors. *C&A Carbone v. Clarkstown*, 511, US 383, 392 (1994) ("The flow control ordinance has the same design and effect. It hoards solid waste, and the demand to get rid of it, for the benefit of the preferred processing facility."); *South Central Timber Development, Inc. v. Wunnicke*, 467 U.S. 82, 84 (1984) (The contract for the sale of Alaskan timber required that "[p]rimary manufacture within the State of Alaska" prior to export); *New England Power Co. v. New Hampshire*, 455 U.S. 331, 339 (1982) ("The order of the New Hampshire Commission, prohibiting New England Power from selling its hydroelectric energy outside the State of New Hampshire, is precisely the sort of protectionist regulation that the Commerce Clause declares off-limits to the states."). A contract provision allowing Idaho Power to claim ownership of RECs in the event that state or federal law determines REC ownership flows to the purchasing utility is not analogous. Unlike the in-state

processing cases, the proposed PPA clause does not result in hoarding of a local resource, nor does it detrimentally impact out-of-state competitors.

Grand View has failed to set forth a sufficient factual basis appropriate for summary judgment. Grand View has failed to establish that there are no genuine issues as to material facts. Grand View is not entitled to judgment as a matter of law. Summary Judgment should be denied.

IV. CONCLUSION

Grand View's Motion for Summary Judgment should be denied in its entirety. Grand View is not entitled to the disclaimer that they request - as a matter of law. In fact, such a disclaimer is not in the best interest of Idaho Power's customers, and forcing Idaho Power to affirmatively disclaim all environmental attributes for the next 20 years, and filling its system with intermittent, renewable generation sources that it cannot claim are renewable, could have large and costly consequences for customers should the Company come under future federal and/or state renewable portfolio standards that require such environmental attributes for compliance. It could have additional and just as costly consequences for customers should the Idaho legislature determine that the RECs generated by QFs are owned by the purchasing utility and its customers in the future.

The ownership of RECs is currently unsettled in Idaho and Grand View has failed to show how it is any more entitled, as a matter of law, than Idaho Power and its customers to currently make a claim of ownership over the environmental attributes from a proposed PURPA QF project. Grand View seeks to extract additional value, above and beyond the avoided cost to which it is entitled, from Idaho Power's

customers. The language proposed by Idaho Power does not violate Section 210(e) of PURPA, the Takings Clause does not apply, and the Dormant Commerce Clause does not support Grand View's claims. Grand View is not entitled to judgment as a matter of law and the Motion for Summary Judgment should be denied.

Respectfully submitted this 13th day of December 2011.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 13th day of December 2011 I served a true and correct copy of IDAHO POWER COMPANY'S ANSWER TO MOTION FOR SUMMARY JUDGMENT upon the following named parties by the method indicated below, and addressed to the following:

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