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**BEFORE THE IDAHO PUBLIC UTILITIES COMMISSION**

<b>THOMPSON RIVER CO-GEN, L.L.C., a</b>	)	
<b>Colorado Company,</b>	)	<b>CASE NO. AVU-E-05-7</b>
	)	
<b>Complainant,</b>	)	
<b>vs.</b>	)	<b>THOMPSON RIVER CO-GEN'S</b>
	)	<b>MOTION TO STRIKE</b>
<b>AVISTA CORPORATION, dba, Avista Utilities,</b>	)	<b>PORTIONS OF AVISTA</b>
<b>a Washington Corporation,</b>	)	<b>CORPORATION'S AMENDED</b>
	)	<b>ANSWER</b>
<b>Respondent</b>	)	
	)	
	)	
	)	

**INTRODUCTION**

Thompson River Co-Gen, L.L.C., ("TRC"), acting by and through counsel, submits this motion to strike portions of Avista Corporation's ("Avista") amended answer pursuant to Rule 56 of the Idaho Public Utilities Commission's ("Commission") Rules of Procedure.

The rationale for this motion is that two of the affirmative defenses pled by Avista in its amended answer have nothing to do with TRC's complaint. The first of these defenses is a collateral attack on the requirements imposed on utilities by the Public Utility Regulatory Policies Act of 1978, 16 U.S.C. §§ 2601 et seq. ("PURPA"), as amended. The second defense is a complaint about Avista's avoided cost rates as established by this Commission. These defenses are irrelevant to this proceeding and raise the specter of the parties expending considerable resources on issues having no bearing on TRC's complaint.

The issues raised in TRC's complaint are narrowly drawn, namely whether TRC's facility is eligible for Avista's standard offer rate for fueled projects that are 10 MW or less. TRC contends its facility is eligible under PURPA and this Commission's rulings; Avista contends it is not. As such, there is no need to engage in discovery and solicit testimony regarding extraneous matters irrelevant to the narrowly drawn issues in TRC's complaint.

### **ARGUMENT**

Motions to strike affirmative defenses can be used to strike an insufficient defense. Stewart v. Arrington Const. Co., 92 Idaho 526, 529-30, 446 P.2d 895, 898-99 (1968). Issues that are raised in a responsive pleading which are not responsive to the plaintiff's cause(s) of action need not be allowed to complicate and impede the progress of pretrial discovery. See generally, 5A Wright and A. Miller, Federal Practice and Procedure § 1380 (1990). A motion to strike portions of a responsive pleading serves the limited purpose of excluding **irrelevant** material from pending litigation. See, Donovan v. Robbins, 99 F.R.D. 593, 596 (N.D.Ill.1983), rev'd on other grounds, 752 F.2d 1170

(7th Cir.1984). Issues raised in a responsive pleading which are irrelevant to a cause of action need not be allowed to complicate and impede the progress of pretrial discovery. Id. "[V]ague allegations that seek to raise defenses of dubious legal merit are subject to being stricken for 'indefiniteness'." Id. (citing U.S. v. 416.81 Acres of Land, 514 F.2d 627, 629-32 (7th Cir.1975)).

**1. Avista's Third Affirmative Defense Regarding Indirect Sales is a Collateral Attack on PURPA and Should be Stricken.**

Avista's third affirmative defense states:

It is against the public interest to apply Idaho's published avoided cost rates in a manner that provides an incentive to TRC to discontinue sales at a favorable rate to NorthWestern, another regional utility, in order to extract a windfall profit from Avista's customers.

Amended Answer, p. 8.

Whether one agrees or disagrees with Avista's characterization of TRC's proposed sale to Avista, the fact is that federal law permits **precisely** the behavior of which Avista complains. Section 210 of PURPA requires that utilities purchase power directly or indirectly supplied to them. 18 C.F.R. § 292.303(a) (1987). There is no requirement that a Qualifying Facility ("QF") be located in the same service territory, or even the same state, as the purchasing utility.

If Avista wishes to argue that PURPA requires a QF to be located in the same service territory or state as the purchasing utility, it should first seek to revise the law either through legislation in Congress or through amendment of the Federal Energy Regulatory Commission regulations permitting such sales. Simply put, this is an irrelevant and immaterial argument, and TRC should not have to expend scarce resources responding to such a completely specious collateral attack on federal law.

As such, Avista's third affirmative defense should be stricken in its entirety.

**2. Avista's Fifth Affirmative Defense is a Collateral Attack on its QF Rates and Should be Stricken.**

Avista's fifth affirmative defense should also be stricken in its entirety. It states:

Following acquisition of the second half of the Coyote Springs 2 project in January 2005, Avista no longer has natural gas-fired combined cycle combustion turbines in its resource acquisition plans. The avoided cost rates requested by TRC are based upon a natural gas-fired combined cycle combustion turbine project, which is not representative of Avista's next resource or avoided resource.

Natural gas prices are unusually high, which has a significant impact on the current and immediate future "fueled" avoided cost rates. Based upon a combination of year-to-date and forward market natural gas prices for 2005, the projected gas price that would become the basis for the "fueled" avoided cost in July of 2006 is \$7.875/MMBtu. The resultant estimated "fueled" avoided cost would be approximately \$77.35/MWh.

It is not in the public interest to pay high prices for TRC's coal-fired/wood-fired generation that are driven by the current extraordinary natural gas market conditions, because natural gas-fired generation is no longer Avista's avoided resource. Therefore, the Commission should require pricing for the purchase of TRC's project to be based upon Avista's Integrated Resource plan.

Amended Answer, p. 9.

Again, irrespective of whether one believes what Avista asserts in the above-quoted passage, this is plainly a collateral attack on the avoided cost rates established by this Commission, which were in place at the time that TRC was attempting to negotiate its contract with Avista. If Avista thought its avoided costs rates were unduly burdensome in January of 2005, it had plenty of notice and opportunity to amend those rates prior to the time that TRC and Avista attempted to negotiate an agreement in the spring and summer of 2005. At that time, and still today, a natural gas-fired combined cycle combustion turbine project is the surrogate resource used to set rates for Avista's fueled standard offer rate. If Avista believes its rates are in error, it should petition this Commission to adjust those rates accordingly on a *prospective basis*. Avista should not

be allowed to use this proceeding to collaterally litigate the appropriateness of its existing QF tariffs established by this Commission.

Furthermore, TRC should not be burdened with having to litigate some prospective rate structure that was not in effect at the time it attempted to enter into its agreement with Avista. TRC did not contemplate and does not believe it has a duty to litigate Avista's general avoided cost rate structure before this Commission. Not only would litigating such questions be unduly burdensome and expensive for TRC, such prospective rates would not arguably even apply to TRC since those rates were not in effect at the time that TRC and Avista reached a negotiating impasse. One would also think that an attempt to retroactively apply a new rate based on a resource other than a gas-fired combined cycle combustion turbine would raise due process issues for TRC.

As such, Avista's fifth affirmative defense should be stricken in its entirety.

### **CONCLUSION**

TRC does not have the resources or the obligation to either re-argue PURPA's requirements or Avista's general QF tariffs as established by this Commission. To require TRC to litigate such issues would be unduly burdensome and expensive and would not advance the resolution of this relatively simple case. As such, the third and fifth affirmative defenses in Avista's amended answer should be stricken.

RESPECTFULLY SUBMITTED THIS 5th DAY OF DECEMBER, 2005.

*Betty G. Richardson for*  
PETER RICHARDSON  
*Attorney For TRC* *Peter Richardson*

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 5<sup>th</sup> day of December, 2005,  
THOMPSON RIVER CO-GEN'S Motion to Strike Portions of AVISTA  
CORPORATION'S Amended Answer was sent to the following parties as shown:

Jean Jewell  
Commission Secretary  
Idaho Public Utilities Commission  
472 West Washington  
Boise, Idaho 83702

☐ U.S. Mail, Postage Prepaid  
☒ Hand Delivered  
☐ Overnight Mail  
☐ Facsimile  
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KELLY NORWOOD  
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Signed Betty H. Richardson  
Betty H. Richardson