DONALD L. HOWELL, II
DAPHNE HUANG
DEPUTY ATTORNEYS GENERAL
IDAHO PUBLIC UTILITIES COMMISSION
472 WEST WASHINGTON STREET
PO BOX 83720
BOISE, ID 83720-0074
Idaho Bar Nos. 3366 and 8370
Tele: (208) 334-0312
(208) 334-0318
Fax: (208) 334-3762
E-mail: don.howell@puc.idaho.gov
daphne.huang@puc.idaho.gov

Attorneys for Commission Staff

BEFORE THE IDAHO PUBLIC UTILITIES COMMISSION

IN THE MATTER OF IDAHO POWER COMPANY'S PETITION TO MODIFY TERMS AND CONDITIONS OF PURPA PURCHASE AGREEMENTS	**CASE NO. IPC-E-15-01**
IN THE MATTER OF AVISTA CORPORATION'S PETITION TO MODIFY TERMS AND CONDITIONS OF PURPA PURCHASE AGREEMENTS	**CASE NO. AVU-E-15-01**
IN THE MATTER OF ROCKY MOUNTAIN POWER COMPANY'S PETITION TO MODIFY TERMS AND CONDITIONS OF PURPA PURCHASE AGREEMENTS	**CASE NO. PAC-E-15-03** **STAFF'S MOTION TO STRIKE ADAM WENNER'S DIRECT TESTIMONY**

COMES NOW the Staff of the Idaho Public Utilities Commission and files this Motion to Strike the Direct Testimony of Idaho Conservation League and Sierra Club witness Adam Wenner, filed April 22, 2015. For the reasons below, the Commission should strike Wenner's testimony as improper and inadmissible.

BACKGROUND

On January 30, 2015, Idaho Power Company filed a Petition asking that the Commission issue an Order reducing the length of new IRP-based PURPA contracts from 20

years to two years. In Order Nos. 33222 and 33250, the Commission granted temporary relief to Idaho Power, Avista and Rocky Mountain Power, while the Commission investigates the issue of contract length. In Order No. 33253, the Commission set deadlines for Staff's and Intervenors' prefiled direct and rebuttal testimony and the utilities' prefiled rebuttal testimony, and set a technical hearing to begin on June 29, 2015. Order No. 33253 at 5.

Several parties timely filed direct and rebuttal testimony. Among them were the Idaho Conservation League (ICL) and the Sierra Club, which filed direct and rebuttal testimony by witnesses Thomas Beach and Adam Wenner. Commission Staff now moves to strike all of Wenner's direct testimony following page 1, line 14.

ARGUMENT

Commission Staff moves to strike Wenner's testimony, which ICL and the Sierra Club improperly offered into the record before the Commission, for two reasons. First, it is well-established that issues of law, on which Wenner opines, are not proper subjects for expert testimony. Second, Idaho law and rules prohibiting the unauthorized practice of law prohibit consideration of Wenner's testimony as memoranda of legal arguments.

1. Wenner's Testimony should be Stricken as Inadmissible Legal Conclusions

Although it is not bound by the rules of evidence, the Commission generally follows "[r]ules as to the admissibility of evidence used by the district court of Idaho in non-jury civil cases." Rule of Procedure 261, IDAPA 31.01.01.261; *see* Order No. 30955 at 7 (Commission applied its discretion pursuant to Rule 261 and denied a Motion to Strike). Both the state and federal evidentiary Rule 702 provide,

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

Idaho R. Evid. 702; Fed. R. Evid. 702. Case law addressing the rule is well settled.

Discussing Rule 702, the Ninth Circuit Court of Appeals recently wrote, "an expert cannot testify to a matter of law amounting to a legal conclusion." *United States v. Tamman*, 782 F.3d 543, 552-53 (9th Cir. 2015); *citing Aguilar v. Int'l Longshoremen's Union*, 966 F.2d 443, 447 (9th Cir. 1992). In *Tamman*, the challenged expert testimony "provided only a recitation of facts and the legal conclusion that [the defendant] acted in conformity with unidentified SEC rules and regulations and otherwise did not break the law." *Id.* at 553. This, the Court

concluded, "is not a proper expert opinion," thus the lower court did not err in excluding the expert's testimony. *Id.*

In an earlier case, also holding that "[e]xpert testimony is not proper for issues of law," the Ninth Circuit Court of Appeals explained, "Experts interpret and analyze factual evidence. They do not testify about the law." *Crow Tribe of Indians v. Racicot*, 87 F.3d 1039, 1045 (9th Cir. 1996) (internal quotation and citation omitted).

The Idaho Supreme Court also addressed the issue in *Carnell v. Barker Management, Inc.*, 137 Idaho 322, 48 P.3d 651 (Idaho 2002). In *Carnell*, the Court considered a district court's ruling striking an affidavit that provided "nothing more than conclusions as to questions of law." *Id.* at 328, 48 P.3d at 657. The Court concluded, "Witnesses are not allowed to give opinions on questions of law," and affirmed the district court ruling as proper. *Id.*

Applied here, Wenner's testimony, offering his opinions about the law, is improper. In stating his qualifications as an expert witness, Wenner summarizes his experience as an attorney. Wenner Direct (attached) at 1. When asked about his opinion of Idaho Power's proposal, Wenner responds, "In my view [Idaho Power's] approach does not satisfy the FERC's regulations and is inconsistent with PURPA." *Id.* at 2. Wenner specifies that "[a]n Idaho PUC policy that limits legally enforceable obligations to purchase from QFs to a two year period would be inconsistent with and in violation of the FERC's regulation." *Id.* at 2-3.

Quoting from FERC Order No. 69, Wenner offers his legal analysis that the quoted language "must be read to require that sufficiently long contract terms or legally enforceable obligations are available . . ., a requirement that is not consistent with a two-year term." *Id.* at 3-4. Wenner affirms his belief that the Idaho Supreme Court has "interpreted [18 CFR] section 292.304(d) as granting a QF the right, under PURPA, to a long-term fixed contract." *Id.* at 5-6. Wenner further opines, "If a state commission adopts rules under which a utility is permitted to limit the purchase obligation to a term that is too short to enable it to affect the utility's planning, then the state commission will have failed to implement the FERC's regulations permitting capacity payments." *Id.* at 7.

Again addressing contract length, Wenner asserts that, contrary to IPUC Order No. 33253, Idaho Supreme Court decisions cited therein do not give the Idaho PUC discretion to establish a maximum contract length for QFs that would impede the QF from receiving a long-term avoided cost contract. *Id.* at 9-10, *citing Afton Energy v. Idaho Power*, 107 Idaho 781

(1984); *Idaho Power v. Idaho PUC*, 155 Idaho 780 (2013). Wenner sums up his legal analysis, reiterating that an Order approving Idaho Power's proposal – to establish "a maximum required term of two years for Idaho QF PURPA contracts" – "would not be consistent with PURPA or the FERC's regulations thereunder." *Id.* at 10-11.

Wenner's testimony is plainly legal opinion, argument or analysis. Even Sierra Club and ICL's other witness, Thomas Beach, characterizes Wenner's testimony as "detailed legal analysis." Beach Direct at 3. As such, Wenner's testimony is improper. Wenner's legal conclusions will not assist the trier of fact to understand the evidence or determine a fact at issue, but are inadmissible opinions on the ultimate issue of law before the Commission. Accordingly, except for the introductory and background statements on page 1 (lines 1-13), Wenner's direct testimony must be stricken.

2. If Offered as Legal Argument, Wenner's Testimony should be Rejected as the Unauthorized Practice of Law

To the extent Wenner asserts his testimony should be considered as legal memoranda, rather than expert opinion, such a submission would violate Idaho statutes governing the practice of law. The Idaho Legislature gave the Board of Commissioners of the Idaho Bar the power to promulgate requirements, qualifications, and procedures regarding bar admission, subject to approval by the Idaho Supreme Court. *Idaho Code* § 3-408; *see also Idaho Code* § 3-420 (making it unlawful to practice law without a license).

Under Idaho Bar Commission Rules, an attorney practicing in Idaho must be licensed to practice in Idaho, or be admitted pro hac vice. Bar Comm. R. 101, 227. Idaho Bar Commission Rule 227 concerning pro hac vice admission is incorporated by reference in this Commission's Rules of Procedure 19 and 43.03. IDAPA 31.01.01.019, .043.03. Mr. Wenner is neither licensed to practice in Idaho, nor admitted pro hac vice in these proceedings. Accordingly, his direct testimony is not properly before this Commission as legal memoranda.

CONCLUSION

For the foregoing reasons, Commission Staff asks the Commission to strike and not consider Wenner's direct testimony following page 1, line 13, in these proceedings. If the Commission grants Staff's Motion as requested, Staff suggests that the Commission direct all parties to identify the pages and lines of their witnesses' testimony referencing Wenner's stricken testimony, so that those parts of the record can be stricken as well.

Respectfully submitted this 19th day of June 2015.

Daphne Huang
Deputy Attorney General

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Benjamin J. Otto (ID Bar # 8292)
710 N 6th Street
Boise, ID 83701
Ph: (208) 345-6933 x 12
Fax: (208) 344-0344
botto@idahoconservation.org

Matt Vespa (CA Bar #222265)
Sierra Club
85 Second St., 2nd Floor
San Francisco, CA 94105
Ph: (415) 977-5753
Fax: (415 977-5793
matt.vespa@sierraclub.com

Attorneys for the Idaho Conservation League and Sierra Club

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IN THE MATTER OF IDAHO POWER COMPANY'S PETITION TO MODIFY TERMS AND CONDITIONS OF PURPA PURCHASE AGREEMENTS	CASE NO. IPC-E-15-01
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Idaho Conservation League and the Sierra Club

Direct Testimony of Adam Wenner

April 23, 2015

Q. What is your name and background?

A. My name is Adam Wenner. I am a partner at Orrick, Herrington and Sutcliffe, LLP, and work in the Washington DC office. Prior to working at Orrick, I served as an attorney in the Federal Energy Regulatory Commission ("FERC") Office of the General Counsel, from 1976-1981. During my term at the FERC, I worked with a staff team that was responsible for drafting and implementing regulations under the Public Utility Regulatory Policies Act of 1978 ("PURPA"). In that capacity I am listed as one of the four staff contacts for the FERC's order adopting regulations implementing section 210 of PURPA, which requires electric utilities to purchase electric power from and sell electric power to qualifying cogeneration and small power production facilities ("QFs"), and to pay rates based on the utility's avoided costs. These regulations require state regulatory commissions to implement the FERC regulations.

Since leaving FERC in 1981, I have worked as an attorney in the electric power industry and have handled many matters relating to PURPA.

Q. As a staff member, you did not vote on the rules that FERC issued, correct?

A. That is correct. I and the other members of the group working on PURPA implementation drafted proposed rules, participated in conferences around the country, reviewed and analyzed comments filed in the rulemaking proceeding, and drafted a recommended final rule that FERC voted to adopt.

Q. What is the purpose of your testimony?

A. I have been asked to provide my opinion regarding a proposal before the Idaho Public Utility Commission ("Idaho PUC") in the above-styled docket regarding the PURPA and FERC requirements for long-term power purchases from QFs. In this docket the Idaho PUC is

considering a proposal ("Petition") by Idaho Power Company ("Idaho Power") to direct that the maximum required term for prospective Idaho Power PURPA energy sales agreements be reduced from 20 years to two years.

Q. Do you have an opinion as to whether this approach is consistent with PURPA and the FERC's PURPA regulations and decisions?

A. Yes. In my view this approach does not satisfy the FERC's regulations and is inconsistent with PURPA.

Q. Please explain the basis for your opinion.

A. There are two grounds for my opinion: (1) the PURPA legislation and the FERC regulations require that QFs be paid capacity payments when their commitment to provide energy to a utility enables the utility to replace new capacity with QF purchases. Capacity can only be replaced when QF power is guaranteed to be available for a term that is sufficiently long, in terms of the utility planning horizon – which typically involves twenty-year or longer service lives for the "avoided" generating unit that is displaced by QF energy and capacity; and (2) the FERC regulations provide QFs, at their option, the legal right to provide energy and capacity to a utility pursuant to a "legally enforceable obligation", over a term specified by the QF, in which the QF is paid based on projections of avoided costs, determined at the time that the obligation is incurred. FERC has interpreted this regulation to mean that by making a binding offer to sell its power over a specified term, the QF obligates the state commission to impose a legally enforceable obligation to purchase the QF's power over the specified term, at rates based on projected avoided costs. An Idaho PUC policy that limits legally enforceable obligations to

purchase from QFs to a two year period would be inconsistent with and in violation of the FERC's regulation.

Q. Please elaborate on the first reason that you identify above for concluding that Idaho's proposal to limit QF contracts to two years is not appropriate.

A. As FERC noted in Order No. 69 in a discussion about whether avoided costs should include capacity payments as well as energy payments, the Conference Report issued by Congress, in conjunction with section 210 of PURPA, stated:

> The conferees expect that the Commission in judging whether the electric power supplied by the cogenerator or small power producer will replace future power which the utility would otherwise have to generate itself either through existing capacity or additions to capacity or purchase from other sources will take into account the reliability of the power supplied by the cogenerator or small power producer by reason of any legally enforceable obligation of such cogenerator or small power producer to supply firm power to the utility.

Small Power Production and Cogeneration Facilities; Regulations Implementing Section 210 of the Public Utility Regulatory Policies Act of 1978, Order No. 69, FERC Stats. & Regs. ¶ 30,128 (1980), 45 Fed. Reg. 12,214, 12,225 (Feb. 25, 1980) ("Order No. 69") (quoting Conference Report on H.R. 4018, Public Utility Regulatory Policies Act of 1978, H. Rep. No. 1750, 99, 95th Cong., 2d. Sess. (1978)).

Based on this Congressional intent of PURPA, FERC observed, in Order No. 69, that:

> In order to defer or cancel the construction of new generating units, a utility must obtain a commitment from a qualifying facility that provides contractual or other legally enforceable assurances that capacity from alternative sources will be available sufficiently ahead of the date on which the utility would otherwise have to commit itself to the construction or purchase of new capacity. If a qualifying facility provides such assurances, it is entitled to receive rates based on the capacity costs that the utility can avoid as a result of its obtaining capacity from the qualifying facility.

45 Fed. Reg. at 12,225.

Q. How does this instruction by FERC apply to an Idaho QF's right to a purchase contract of more than two years?

A. The FERC's language is straightforward. If a QF enters into a contract or provides "legally enforceable assurance" that it will be available on the date that the utility would otherwise make a commitment to construct new generating capacity, then the QF is entitled to payments based on the avoided cost of constructing the new generating unit. A new conventional coal or gas-fired plant has a service life in excess of 20 years, and therefore can only be replaced by power from QFs if the QFs are obligated to provide power for a term at least that long. Conversely, if a QF contracts or legally enforceable obligations are limited to two years, that power cannot be counted on to be available after two years, and so a utility could not cancel planned generation based on such a short commitment. The FERC's statement in Order No. 69 accordingly must be read to require that sufficiently long contract terms or legally enforceable obligations are available to enable planned generation to be canceled, a requirement that is not consistent with a two-year term.

Q. Are there other provisions of the FERC's regulations under PURPA that shed light on this issue?

A. Yes. Section 292.304(d)(2) of the FERC's rules states that a QF has the option to provide energy or capacity on an "as-available" basis, or pursuant to a "legally enforceable obligation for the delivery of energy or capacity over a specified term."

Q. Does the QF have options with respect to the determination of its avoided cost rate, if it chooses the second option, namely to provide energy pursuant to a "legally enforceable obligation for the delivery of energy or capacity over a specified term"?

A. Yes. Section 292.304(d)(2) states that the QF has the option to receive avoided cost rates calculated at the time of delivery or at the time the obligation is incurred.

Q. Do the FERC rules specify a specific number of years or other time period for the term over which the QF which accepts a legally enforceable obligation is entitled to receive avoided cost rates calculated at the time the obligation is incurred?

A. No. However, there are many provisions of the rules and of FERC's decisions applying its rules that provide guidance on this topic.

Q. Please describe these provisions.

A. First, FERC has explained that section 292.304(d)(2) gives a QF the right to establish a fixed contract price for its energy and capacity at the outset of its obligation. Order No. 69, FERC Stats. & Regs. ¶ 30,128 at 30,880).

Q. Did FERC explain that the section 292.304(d)(2) right to a fixed price contract means that a QF has a right to a contract or legally enforceable obligation based on projected avoided costs?

A. Yes. Section 292.304(d)(2) provides that a QF has the option to sell on an "as-available" basis, or pursuant to a legally enforceable obligation, over a specified term. In the latter case, the QF has the option to select rates that are calculated at the time that the obligation is incurred.

Q. Are there instances in which FERC characterized the right of a QF to a fixed-rate contract or legally enforceable obligation under section 292.304(d)(2) as giving a QF the right, at its option, to a long-term contract?

A. Yes. In its discussion in Order No. 69 of "levelized avoided cost payments," FERC noted that that "[a] facility which enters into a *long term contract* to provide energy or capacity to a utility may wish to receive a greater percentage of the total purchase price during the beginning of the obligation." 45 Fed. Reg 12,224 (emphasis added).

Q. Has Idaho interpreted section 292.304(d) as granting a QF the right, under PURPA, to a long-term fixed contract?

A. Yes. In its 1984 decision affirming an order by the Idaho PUC requiring Idaho Power Company to enter into a thirty-five year contract to purchase power from a QF, the Idaho Supreme Court stated that "FERC's intent that [QFs], at their option, could enter into fixed-term contracts is manifested by" the above-quoted language from Order No. 69 regarding long-term contracts. *Afton Energy, Inc. v. Idaho Power Co.*, 107 Idaho 781, 786, 693 P.2d 427, 432 (1984) ("*Afton Energy*").

Q. Did the Afton Energy decision indicate the basis for the thirty-five year contract term proposed by the QF and imposed by the Idaho PUC?

A. Yes. The decision states "[t]he thirty-five year period corresponds to the life of Idaho Power's own thermal unit that can be "avoided" by purchasing power from the [QF]." *Afton Energy*, 107 Idaho at 783, 693 P.2d at 429.

Q. Is that reasoning consistent with the concept of avoided costs, as defined by FERC in Order No. 69?

A. Yes. The provisions that are referenced above, relating to the circumstances in which a QF can receive capacity payments by enabling the purchasing utility to alter its capacity

expansion plans based on the obligation to provide power in the future, inherently contemplate that the QF's legally enforceable obligation will be sufficiently long to accomplish this result. This is consistent with the Idaho PUC's order as affirmed by the Idaho Supreme Court in Afton Energy.

If a state commission adopts rules under which a utility is permitted to limit the purchase obligation to a term that is too short to enable it to affect the utility's planning, then the state commission will have failed to implement the FERC's regulations permitting capacity payments.

Q. What other provisions are relevant to this issue?

A. Section 292.302(b)(2) requires utilities to make available the utility's plans for the addition of capacity, purchases of firm energy and capacity, and capacity retirements for each year during the succeeding ten years. The ten-year horizon is consistent with the long-term planning associated with utility capacity additions, and is indicative of the time frame that FERC concluded was necessary in order for QFs to compute the avoided costs on which their contracts or other legally enforceable obligations would be calculated.

Q. Are there other provisions of the FERC's rules that shed light on this topic?

A. Yes. Section 292.304(e) identifies factors which are to be taken into account in determining the avoided cost rate to which a QF is entitled. One of the factors listed is: "(iii) the terms of any contract or other legally enforceable obligation, including the duration of the obligation, termination notice requirement and sanctions for non-compliance."

Q. Did the FERC discuss this provision in its order adopting the PURPA regulations?

A. Yes. FERC stated that clause (iii) (quoted above) "refers to the length of time during which the qualifying facility has contractually or otherwise guaranteed that it will supply energy or capacity to the electric utility." Order No. 69, 45 Fed. Reg. at 12,226.

> A utility-owned generating unit normally will supply power for the life of the plant, or until it is replaced by more efficient capacity. In contrast, a cogeneration or small power production unit might cease to produce power as a result of changes in the industry or in the industrial processes utilized. Accordingly, the value of the service from the qualifying facility to the electric utility may be affected by the degree to which the qualifying facility ensures by contract or other legally enforceable obligation that it will continue to provide power. Included in this determination, among other factors, are the term of the commitment, the requirement for notice prior to termination of the commitment, and any penalty provisions for breach of the obligation.

Id.

Q. How is this provision relevant to the issue of the term that a state commission must establish for QF sales?

A. The rule states that the value of the QF's power, and therefore its avoided cost payment, is linked to the term over which it agrees, by contract or by accepting a legally enforceable obligation, to provide power. Implicit in the rule is that the length of the term over which the QF commits to provide power is a decision for the QF. Also, in discussing QFs' right to capacity payments, FERC stated, in the preamble to its PURPA regulations, that "capacity payments can only be required when the availability of capacity from a qualifying facility or facilities actually permits the purchasing utility to reduce its need to provide capacity by deferring the construction of new plant or commitments to firm power purchase contracts." Order No. 69, 45 Fed. Reg. at 12,225-26. FERC confirmed its position that "if a qualifying facility offers energy of sufficient reliability and with sufficient legally enforceable guarantees of deliverability to permit the purchasing electric utility to avoid the need to construct a generating plant, to enable it to build a smaller, less expensive plant, or to purchase less firm power from another utility than it would

otherwise have purchased, then the rates for purchases from the qualifying facility must include the avoided capacity and energy costs." *Id.* at 12,226. A state commission PURPA implementation that denies QFs the ability to enter into a contract or legally enforceable obligation to provide long-term value to the utility, and thus to receive avoided cost payments reflecting that value, is inconsistent with section 292.304(e)(iii).

Q. Are you aware of orders by the Idaho PUC that discuss its view of the requirements of PURPA and FERC's regulations regarding contract length?

A. Yes. I have reviewed Idaho PUC Order No. 33253, issued March 18, 2015. Citing *Afton Energy*, 107 Idaho at 785-86, 693 P.2d at 431-32 and *Idaho Power v. Idaho PUC*, 155 Idaho 780, 782, 316 P.3d 1278, 1280 (2013) ("*Idaho Power*"), that order states that "PURPA, and regulations implementing the Act, are silent as to contract length; consequently, the issue is in the [Idaho PUC's] discretion." Idaho PUC Order No. 33253 at 2.

Q. Do the references to *Afton Energy* and *Idaho Power* state that the issue of contract length is in the Idaho PUC's discretion?

A. They do not. In *Afton Energy*, the Idaho Supreme Court stated that the Idaho PUC "did not abuse its discretion in implementing the mandates of PURPA by requiring Idaho Power to contract with Afton for the purchase of its power over a thirty-five year period." *Afton Energy*, 107 Idaho at 786, 693 P.2d at 432. In *Idaho Power*, the Idaho Supreme Court simply noted that "a state regulatory authority has discretion in determining the manner in which the rules will be implemented, and may comply by issuing regulations, by resolving disputes on a case-by-case basis, or by other action reasonably designed to give effect to FERC's rules." *Idaho Power*, 155 Idaho at 782, 316 P.3d at 1280 (citing *FERC v. Mississippi*, 456 U.S. 742, 751 (1982)), and that the Idaho PUC has "broad discretion . . . in implementing FERC's rules and in determining the

requirements for a legally enforceable obligation." *Id.*, 155 Idaho at 787, 316 P.3d at 1285. Neither decision gives the Idaho PUC discretion to establish maximum QF contract terms that are inconsistent with PURPA or the FERC's regulations thereunder.

Neither decision holds that the Idaho PUC has discretion to implement PURPA or the FERC's regulations thereunder by establishing a maximum contract length for QF that, by any industry standard, does not enable the QF to receive "long-term avoided cost contract or other legally enforceable obligation," as mandated by Order No. 69 and confirmed by *JD Wind.*

Q. Does Idaho Power express a position on this issue in its Petition?

A. Yes. Idaho Power's Petition states, at page 10, that "[d]etermination of the proper terms and conditions of a required PURPA energy sales agreement, including the authority to determine the proper price, *the proper term*, and the authority to approve or disapprove the contract itself is soundly, and completely, within the authority and discretion of the [Idaho PUC." (emphasis added). It also states, at page 35, that the require term for such a purchase "is within the authority and discretion of the [Idaho PUC] to determine and set."

Q. In your opinion would an Idaho PUC order establishing a maximum required term of two years for Idaho QF PURPA contracts be consistent with PURPA and the FERC's regulations under PURPA?

A. Such an order would not be consistent with PURPA or the FERC's regulations thereunder. As explained above, PURPA and the FERC regulations grant QFs the right to a contract or legally enforceable obligation to sell energy and capacity at long-term avoided costs. In the electric utility industry, and as discussed in my testimony, a two-year term fails to permit a QF to estimate, with reasonable certainty, the expected return on its potential investment in a

QF, and would frustrate the requirement of section 210 of PURPA that FERC's rules, as implemented by state commissions, encourage cogeneration and small power production.

Q. Does this conclude your testimony?

A. Yes.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY THAT I HAVE THIS 19th DAY OF JUNE 2015, SERVED THE FOREGOING **STAFF'S MOTION TO STRIKE ADAM WENNER'S DIRECT TESTIMONY,** IN CASE NOS. IPC-E-15-01/PAC-E-15-03/AVU-E-15-01, BY E-MAILING A COPY THEREOF, TO THE FOLLOWING:

DONOVAN E WALKER
REGULATORY DOCKETS
IDAHO POWER COMPANY
PO BOX 70
BOISE ID 83707-0070
E-mail: dwalker@idahopower.com
dockets@idahopower.com

PETER J RICHARDSON
GREGORY M ADAMS
RICHARDSON ADAMS PLLC
PO BOX 7218
BOISE ID 83702
E-mail: peter@richardsonadams.com
greg@richardsonadams.com

DR DON READING
6070 HILL ROAD
BOISE ID 83703
E-mail: dreading@mindspring.com

BENJAMIN J OTTO
ID CONSERVATION LEAGUE
710 N 6TH STREET
BOISE ID 83702
E-mail: botto@idahoconservation.org

DEAN J MILLER
McDEVITT & MILLER LLP
420 W BANNOCK ST
BOISE ID 83702
E-mail: joe@mcdevitt-miller.com

LEIF ELGETHUN
INTERMOUNTAIN ENERGY PARTNERS LLC
PO BOX 7354
BOISE ID 83707
E-mail: leif@sitebasedenergy.com

KELSEY JAE NUNEZ
SNAKE RIVER ALLIANCE
PO BOX 1731
BOISE ID 83701
E-mail: knunez@snakeriveralliance.org

KEN MILLER
SNAKE RIVER ALLIANCE
E-MAIL ONLY:
kmiller@snakeriveralliance.org

TED WESTON
ID REG AFFAIRS MANAGER
ROCKY MOUNTAIN POWER
201 S MAIN ST STE 2300
SALT LAKE CITY UT 84111
E-mail: ted.weston@pacificorp.com

DANIEL E SOLANDER
YVONNE R HOGLE
ROCKY MOUNTAIN POWER
201 S MAIN ST STE 2400
SALT LAKE CITY UT 84111
E-mail: daniel.solander@pacificorp.com
yvonne.hogle@pacificorp.com

DATA REQUEST RESPONSE CENTER
E-MAIL ONLY:
datarequest@pacificorp.com

C TOM ARKOOSH
ARKOOSH LAW OFFICES
PO BOX 2900
BOISE ID 83701
E-mail: tom.arkoosh@arkoosh.com

ERIN CECIL
ARKOOSH LAW OFFICES
E-MAIL ONLY
erin.cecil@arkoosh.com

ERIC L OLSEN
RACINE OLSON NYE BUDGE
& BAILEY
PO BOX 1391
POCATELLO ID 83204-1391
E-mail: elo@racinelaw.net

ANTHONY YANKEL
29814 LAKE ROAD
BAY VILLAGE OH 44104
E-mail: tony@yankel.net

RONALD L WILLIAMS
WILLIAMS BRADBURY PC
1015 W HAYS ST
BOISE ID 83702
E-mail: ron@williamsbradbury.com

IRION SANGER
SANGER LAW PC
1117 SW 53RD AVE
PORTLAND OR 97215
E-mail: irion@sanger-law.com

MICHAEL G ANDREA
AVISTA CORPORATION
1411 E MISSION AVE
MSC-23
SPOKANE WA 99202
E-mail: michael.andrea@avistacorp.com

CLINT KALICH
AVISTA CORPORATION
1411 E MISSION AVE
MSC-23
SPOKANE WA 99202
E-mail: clint.kalich@avistacorp.com

MATT VESPA
SIERRA CLUB
85 SECOND ST 2ND FLOOR
SAN FRANCISCO CA 94105
E-mail: matt.vespa@sierraclub.org

RICHARD MALMGREN
SR ASSIST GEN COUNSEL
MICRON TECHNOLOGY INC
800 S FEDERAL WAY
BOISE ID 83716
E-mail: remalmgren@micron.com

FREDERICK J SCHMIDT
PAMELA S HOWLAND
HOLLAND & HART LLP
377 S NEVADA ST
CARSON CITY NV 89703
E-mail: fschmidt@hollandhart.com

CERTIFICATE OF SERVICE

SCOTT DALE BLICKENSTAFF
AMALGAMATED SUGAR CO
1951 S SATURN WAY
STE 100
BOISE ID 83702
E-mail: sblickenstaff@amalsugar.com

CAROL HAUGEN
CLEARWATER PAPER CORPORATION
E-MAIL ONLY
Carol.haugen@clearwaterpaper.com

JOHN GORMAN
ECOPLEXUS, INC.
650 TOWNSEND STREET, SUITE 310
SAN FRANCISCO, CA 94103
E-mail: johng@ecoplexus.com

ANDREW JACKURA
SR VP NORTH AMERICA DEVL
CAMCO CLEAN ENERGY
9360 STATION ST STE 375
LONE TREE CO 80124
E-mail: andrew.jackura@camcocleanenergy.com

JOHN R. HAMMOND, JR.
FISHER PUSCH LLP
101 S. CAPITOL BLVD., SUITE 701
BOISE, ID 83702
E-mail: jrh@fisherpusch.com

Brenda Tidwell
SECRETARY

CERTIFICATE OF SERVICE