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**DONOVAN E. WALKER**  
Senior Counsel  
[dwalker@idahopower.com](mailto:dwalker@idahopower.com)

May 25, 2010

**VIA HAND DELIVERY**

Jean D. Jewell, Secretary  
Idaho Public Utilities Commission  
472 West Washington Street  
P.O. Box 83720  
Boise, Idaho 83720-0074

Re: Case No. IPC-E-10-17

**IN THE MATTER OF THE APPLICATION OF IDAHO POWER COMPANY  
FOR APPROVAL OF A FIRM ENERGY SALES AGREEMENT WITH NEW  
ENERGY TWO LLC FOR THE SALE AND PURCHASE OF ELECTRIC  
ENERGY FROM THE SWAGER FARMS DAIRY ANAEROBIC DIGESTOR  
PROJECT**

Dear Ms. Jewell:

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

Very truly yours,

Donovan E. Walker

DEW:csb  
Enclosures

DONOVAN E. WALKER (ISB No. 5921)  
LISA D. NORDSTROM (ISB No. 5733)  
Idaho Power Company  
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UTILITIES COMMISSION

Attorneys for Idaho Power Company

Street Address for Express Mail:  
1221 West Idaho Street  
Boise, Idaho 83702

BEFORE THE IDAHO PUBLIC UTILITIES COMMISSION

IN THE MATTER OF THE APPLICATION )  
OF IDAHO POWER COMPANY FOR ) CASE NO. IPC-E-10-17  
APPROVAL OF A FIRM ENERGY SALES )  
AGREEMENT WITH NEW ENERGY TWO, ) APPLICATION  
LLC, FOR THE SALE AND PURCHASE )  
OF ELECTRIC ENERGY FROM THE )  
SWAGER FARMS DAIRY ANAEROBIC )  
DIGESTOR PROJECT. )  
\_\_\_\_\_ )

Idaho Power Company ("Idaho Power" or the "Company"), in accordance with Idaho Code § 61-503 and RP 52 and the applicable provisions of the Public Utility Regulatory Policies Act of 1978 ("PURPA"), hereby respectfully applies to the Idaho Public Utilities Commission ("IPUC" or the "Commission") for an Order approving the Firm Energy Sales Agreement between Idaho Power and New Energy Two, LLC ("New Energy") under which New Energy would sell and Idaho Power would purchase electric energy generated by the Swager Farms Dairy Anaerobic Digester Power Project ("Facility") located in Cassia County, Idaho.

In support of this Application Idaho Power represents as follows:

### **I. BACKGROUND**

1. Sections 201 and 210 of PURPA, and pertinent regulations of the Federal Energy Regulatory Commission ("FERC"), require that regulated electric utilities purchase power produced by cogenerators or small power producers that obtain qualifying facility ("QF") status. The purchase price a QF receives for the sale of its power is generally referred to as the avoided cost rate and is computed to be equal to the incremental cost to an electric utility of electric energy or capacity or both, which, but for the purchase from the QF, such utility would generate itself or purchase from another source. The Commission has authority under PURPA Sections 201 and 210 and the implementing regulations of the FERC, 18 C.F.R. § 292, to set avoided costs, to order electric utilities to enter into fixed-term obligations for the purchase of energy from QFs, and to implement FERC's PURPA rules.

### **II. THE FIRM ENERGY SALES AGREEMENT**

2. On May 24, 2010, Idaho Power and New Energy entered into a Firm Energy Sales Agreement ("Agreement") for the Facility pursuant to the terms and conditions of the various Commission Orders applicable to this PURPA agreement. See, Order Nos. 30415, 30488, 30738, and 30744. A copy of the Agreement is enclosed with this Application as Attachment No. 1. The Agreement is for a term of 15 years and contains the non-levelized published avoided cost rates established by the Commission in Order No. 30744 for energy deliveries of less than 10 average megawatts ("MW").

3. The nameplate rating of this Facility will be 2 MW. As defined in paragraph 1.21 of the Agreement and as described in paragraph 4.1.3 of the Agreement, New Energy will be required to provide data on the Facility that Idaho Power will use to confirm that under normal and/or average conditions the Facility will not exceed 10 average MW on a monthly basis.

4. New Energy has elected a Scheduled Operation Date of December 1, 2012, for the Facility. If the Facility has not achieved its Operation Date by that date, Delay Liquidated Damages and associated Delay Security provisions within this Agreement are applicable.

5. Section 21.1 of the Agreement provides that the Agreement will not become effective until the Commission has approved all of the Agreement's terms and conditions and declared that all payments Idaho Power makes to New Energy for purchases of energy will be allowed as prudently incurred expenses for ratemaking purposes.

6. All applicable interconnection study charges under Schedule 72 have been assessed and collected from New Energy. The final interconnection Feasibility Study is complete and the final Facility Study for the Facility is underway. Idaho Power Power Supply has made application for applicable transmission capacity and has been notified that transmission capacity is available.

### **III. APPLICABLE RATES**

7. On March 16, 2010, in Order No. 30125 issued in Case No. GNR-E-10-01, the Commission adopted new published avoided cost rates for the purchase by Idaho Power of capacity energy from PURPA QFs. The rates adopted in Order No. 31025 are

approximately 10 percent lower than the rates previously adopted in Case No. GNR-E-09-01, Order No. 30744. By its terms, Order No. 31025 applies to new PURPA contracts executed on and after March 16, 2010. Because the Agreement is dated May 24, 2010, Order No. 31025 would require that the rates to be paid New Energy under the Agreement would be the rates set out in Order No. 31025 rather than the higher rates approved by the Commission in Order No. 30744. However, this Commission has recognized in prior Orders that there are situations when QF rates are changed that it is appropriate to include a prior vintage of rates in a current PURPA contract.<sup>1</sup> In several cases litigated in the early to mid-1990s, the Commission determined, and the Idaho Supreme Court affirmed, certain criteria that a QF developer must satisfy in order to establish an entitlement to sell energy at a particular published avoided cost rate.<sup>2</sup> One of the criteria that would qualify a particular generating facility to receive the superseded rate requires that the developer have executed a power sales agreement with the utility at the rate in question before a successor rate becomes effective. If the QF cannot meet the first criteria, the second criteria requires that prior to the new rates effective date, the QF developer must have filed a meritorious complaint alleging that the project was sufficiently mature and far enough along in the contracting process that but for the conduct of the utility company, the developer would have been able to sign a contract with the utility containing the superseded rates.

8. In this case, New Energy had not signed a contract with Idaho Power to purchase the Facility generation on or before March 16, 2010. On April 15, 2010, New

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<sup>1</sup> The Idaho Supreme Court has confirmed that it is within the Commission's jurisdiction to determine which vintage of QF rates should apply to a PURPA contract. See *Empire Lumber v. Washington Water Power*, 114 Idaho 191, 755 P.2d 1229 (1988) and *A.W. Brown Co., Inc., v. Idaho Power Company*, 121 Idaho 812, 828 P.2d 841 (1992).

<sup>2</sup> *A.W. Brown, Rosebud*, 131 Idaho.

Energy filed a Complaint at the Commission alleging that it was entitled to 3 contracts containing the higher Order No. 30744 rates. Upon further review of the facts, and by signing this agreement and voluntarily submitting it to the Commission, Idaho Power has concluded that New Energy meets the second test described above and should be entitled to the rates established by Order No. 30744 in Case No. GNR-E-09-01. The Company has received a number of requests for "grandfathering" of QF contracts. In making a determination to file and support an application urging that a particular QF project is entitled to the Order No. 30744 rates, the Company concluded that a project must have met ALL of the following criteria prior to March 16, 2010.

a. Interconnection and Transmission

- i. Filed an interconnection application; and
- ii. Received and accepted an interconnection feasibility study report for the project and paid any requested study deposits (or established credit) for the next phase of the interconnection process in accordance with Schedule 72; and
- iii. Received confirmation from Idaho Power that transmission capacity is available for the project and/or received and accepted transmission capacity study results and cost estimates.

b. Purchase Power Agreement

- i. An agreement was materially complete prior to March 16, 2010, and except for routine Idaho Power final processing, an agreement would have been executed by both parties prior to March 16, 2010.

9. It is Idaho Power's opinion that the New Energy Facility meets all of the above-referenced criteria. With respect to the power purchase agreement criteria, New

Energy and Idaho Power had resolved all material outstanding contract issues prior to March 16, 2010. Both parties expected that final review of the contract would be a relatively straightforward process. However, in early February, the Company became aware of some new procedural requirements from FERC that affected the way that the Facility would qualify for a Network Resource designation and thereby obtain the transmission needed to bring the power to be generated by the Facility from the interconnection to the Company load centers. The new procedure required some changes to the internal process at Idaho Power. Idaho Power embarked upon interpreting the regulations and implementing a process to be in compliance. In Idaho Power's opinion, the Agreement would have been signed by both parties prior to March 16, 2010, except for the time required by Idaho Power to implement the new internal transmission and network resource process and, as a result, the Facility should qualify for a contract including the Order No. 30744 rates. New Energy is current in all of its interconnection study payments and so as long as New Energy continues to provide requested information in a timely manner and pay invoices on time, it appears that the interconnection can be completed in time for New Energy to achieve its Scheduled Operation Date for the Facility.

10. The Agreement contains the most recent terms and conditions, including the liquidated damages and security provisions previously approved by the Commission in the Arena Drop and the Dry Creek dairy cases, Order Nos. 31060 and 31034, respectively.

11. Based on the foregoing, Idaho Power believes that the Agreement meets the criteria established by the Commission in its prior Orders and the Commission should approve the Agreement as presented.

#### **IV. MODIFIED PROCEDURE**

12. Idaho Power believes that a hearing is not necessary to consider the issues presented herein and respectfully requests that this Application be processed under Modified Procedure, i.e., by written submissions rather than by hearing. RP 201, *et seq.* If, however, the Commission determines that a technical hearing is required, the Company stands ready to present its testimony and support the Application in such hearing.

#### **V. COMMUNICATIONS AND SERVICE OF PLEADINGS**

13. Communications and service of pleadings, exhibits, orders, and other documents relating to this proceeding should be sent to the following:

Donovan E. Walker, Senior Counsel  
Lisa Nordstrom, Lead Counsel  
Idaho Power Company  
1221 West Idaho Street  
P.O. Box 70  
Boise, Idaho 83707  
[dwalker@idahopower.com](mailto:dwalker@idahopower.com)  
[lnordstrom@idahopower.com](mailto:lnordstrom@idahopower.com)

Randy C. Allphin  
Energy Contract Administrator  
Idaho Power Company  
1221 West Idaho Street  
P.O. Box 70  
Boise, Idaho 83707  
[rallphin@idahopower.com](mailto:rallphin@idahopower.com)

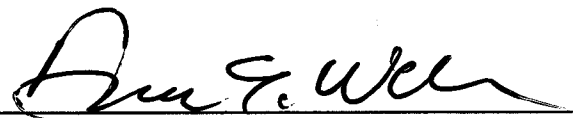
#### **VI. REQUEST FOR RELIEF**

14. Idaho Power Company respectfully requests that the Commission issue an Order: (1) authorizing that this matter may be processed by Modified Procedure; (2) approving the Firm Energy Sales Agreement between Idaho Power Company and New Energy Two, LLC, without change or condition; and (3) declaring that all payments for purchases of energy under the Firm Energy Sales Agreement between Idaho Power



Company and New Energy Two, LLC, be allowed as prudently incurred expenses for ratemaking purposes.

Respectfully submitted this 25<sup>th</sup> day of May 2010.

A handwritten signature in black ink, appearing to read "Donovan E. Walker", written over a horizontal line.

DONOVAN E. WALKER  
Attorney for Idaho Power Company

**CERTIFICATE OF MAILING**

I HEREBY CERTIFY that on the 25<sup>th</sup> day of May 2010 I served a true and correct copy of the foregoing APPLICATION upon the following named parties by the method indicated below, and addressed to the following:

**New Energy One, LLC**  
Attn: Laura Knothe, PE.  
New Energy One, LLC  
8720 Vic Lane  
Middleton, Idaho 83644

Hand Delivered  
 U.S. Mail  
 Overnight Mail  
 FAX  
 Email

Dean J. Miler  
McDEVITT & MILLER LLP  
420 West Bannock Street  
P.O. Box 2564  
Boise, Idaho 83701

Hand Delivered  
 U.S. Mail  
 Overnight Mail  
 FAX  
 Email [joe@mcdevitt-miller.com](mailto:joe@mcdevitt-miller.com)



Donovan E. Walker

**BEFORE THE  
IDAHO PUBLIC UTILITIES COMMISSION**

**CASE NO. IPC-E-10-17**

**IDAHO POWER COMPANY**

**ATTACHMENT NO. 1**

FIRM ENERGY SALES AGREEMENT  
BETWEEN  
IDAHO POWER COMPANY  
AND  
NEW ENERGY TWO, LLC  
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FIRM ENERGY SALES AGREEMENT  
(10 aMW or Less)

Project Name: Swager Farms

Project Number: 31616130

THIS AGREEMENT, entered into on this 24<sup>th</sup> day of May 2010 between NEW ENERGY TWO, LLC, an Idaho limited liability company (Seller), and IDAHO POWER COMPANY, an Idaho corporation (Idaho Power), hereinafter sometimes referred to collectively as "Parties" or individually as "Party."

WITNESSETH:

WHEREAS, Seller will design, construct, own, maintain and operate an electric generation facility; and

WHEREAS, Seller wishes to sell, and Idaho Power is willing to purchase, firm electric energy produced by the Seller's Facility.

THEREFORE, In consideration of the mutual covenants and agreements hereinafter set forth, the Parties agree as follows:

ARTICLE I: DEFINITIONS

As used in this Agreement and the appendices attached hereto, the following terms shall have the following meanings:

- 1.1 "Base Energy" – Monthly Net Energy less than 110% of the monthly Net Energy Amount as specified in paragraph 6.2 of this Agreement.
- 1.2 "Commission" - The Idaho Public Utilities Commission.
- 1.3 "Contract Year" - The period commencing each calendar year on the same calendar date as the Operation Date and ending 364 days thereafter.
- 1.4 "Delay Liquidated Damages" – Damages payable to Idaho Power as calculated in paragraph 5.3, 5.4, 5.5, 5.6 and 5.8.

- 1.5 “Delay Period” – All days past the Scheduled Operation Date until the Seller’s Facility achieves the Operation Date.
- 1.6 “Delay Price” - The current month’s Mid-Columbia Market Energy Cost minus the current month’s All Hours Energy Price specified in paragraph 7.3 of this Agreement. If this calculation results in a value less than 0, the result of this calculation will be 0.
- 1.7 “Designated Dispatch Facility” - Idaho Power’s Systems Operations Group, or any subsequent group designated by Idaho Power.
- 1.8 “Facility” - That electric generation facility described in Appendix B of this Agreement.
- 1.9 “First Energy Date” - The day commencing at 00:01 hours, Mountain Time, following the day that Seller has satisfied the requirements of Article IV and the Seller begins delivering energy to Idaho Power’s system at the Point of Delivery.
- 1.10 “Heavy Load Hours” – The daily hours beginning at 7:00 am, ending at 11:00 pm Mountain Time, (16 hours) excluding all hours on all Sundays, New Years Day, Memorial Day, Independence Day, Labor Day, Thanksgiving and Christmas.
- 1.11 “Inadvertent Energy” – Electric energy Seller does not intend to generate. Inadvertent energy is more particularly described in paragraph 7.5 of this Agreement.
- 1.12 “Interconnection Facilities” - All equipment specified in Schedule 72.
- 1.13 “Initial Capacity Determination” – The process by which Idaho Power confirms that under normal or average design conditions the Facility will generate at no more than 10 average MW per month and is therefore eligible to be paid the published rates in accordance with Commission Order No. 29632.
- 1.14 “Light Load Hours” – The daily hours beginning at 11:00 pm, ending at 7:00 am Mountain Time (8 hours), plus all other hours on all Sundays, New Years Day, Memorial Day, Independence Day, Labor Day, Thanksgiving and Christmas.
- 1.15 “Losses” – The loss of electrical energy expressed in kilowatt hours (kWh) occurring as a result of the transformation and transmission of energy between the point where the Facility’s energy is metered and the point the Facility’s energy is delivered to the Idaho Power electrical system. The loss calculation formula will be as specified in Appendix B of this Agreement.

- 1.16 “Market Energy Reference Price” – Eighty-five percent (85%) of the Mid-Columbia Market Energy Cost.
- 1.17 “Material Breach” – A Default (paragraph 19.2.1) subject to paragraph 19.2.2.
- 1.18 “Maximum Capacity Amount” – The maximum capacity (MW) of the Facility will be as specified in Appendix B of this Agreement.
- 1.19 “Metering Equipment” - All equipment specified in Schedule 72, this Agreement and any additional equipment specified in Appendix B required to measure, record and telemeter bi directional power flows between the Seller's electric generation plant and Idaho Power's system.
- 1.20 “Mid- Columbia Market Energy Cost” – The monthly weighted average of the daily on-peak and off-peak Dow Jones Mid-Columbia Index (Dow Jones Mid-C Index) prices for non-firm energy. If the Dow Jones Mid-Columbia Index price is discontinued by the reporting agency, both Parties will mutually agree upon a replacement index, which is similar to the Dow Jones Mid-Columbia Index. The selected replacement index will be consistent with other similar agreements and a commonly used index by the electrical industry.
- 1.21 “Nameplate Capacity” –The full-load electrical quantities assigned by the designer to a generator and its prime mover or other piece of electrical equipment, such as transformers and circuit breakers, under standardized conditions, expressed in amperes, kilovolt-amperers, kilowatts, volts or other appropriate units. Usually indicated on a nameplate attached to the individual machine or device.
- 1.22 “Net Energy” – All of the electric energy produced by the Facility, less Station Use, less Losses, expressed in kilowatt hours (kWh). Subject to the terms of this Agreement, Seller commits to deliver all Net Energy to Idaho Power at the Point of Delivery for the full term of the Agreement. Net Energy does not include Inadvertent Energy.
- 1.23 “Operation Date” – The day commencing at 00:01 hours, Mountain Time, following the day that all requirements of paragraph 5.2 have been completed.
- 1.24 “Point of Delivery” – The location specified in Appendix B, where Idaho Power’s and the Seller’s electrical facilities are interconnected and the energy from this Facility is delivered to the Idaho Power electrical system.

- 1.25 “Prudent Electrical Practices” – Those practices, methods and equipment that are commonly and ordinarily used in electrical engineering and operations to operate electric equipment lawfully, safely, dependably, efficiently and economically.
- 1.26 “Scheduled Operation Date” – The date specified in Appendix B when Seller anticipates achieving the Operation Date. It is expected that the Scheduled Operation Date provided by the Seller shall be a reasonable estimate of the date that the Seller anticipates that the Seller’s Facility shall achieve the Operation Date.
- 1.27 “Schedule 72” – Idaho Power’s Tariff No 101, Schedule 72 or its successor schedules as approved by the Commission. The Seller shall be responsible to pay all costs of interconnection and integration of this Facility into the Idaho Power electrical system as specified within Schedule 72.
- 1.28 “Season” – The three periods identified in paragraph 6.2.1 of this Agreement.
- 1.29 “Special Facilities” - Additions or alterations of transmission and/or distribution lines and transformers as described in Schedule 72.
- 1.30 “Station Use” – Electric energy that is used to operate equipment that is auxiliary or otherwise related to the production of electricity by the Facility.
- 1.31 “Surplus Energy” – Is (1) Net Energy produced by the Seller’s Facility and delivered to the Idaho Power electrical system during the month which exceeds 110% of the monthly Net Energy Amount for the corresponding month specified in paragraph 6.2. or (2) If the Net Energy produced by the Seller’s Facility and delivered to the Idaho Power electrical system during the month is less than 90% of the monthly Net Energy Amount for the corresponding month specified in paragraph 6.2, then all Net Energy delivered by the Facility to the Idaho Power electrical system for that given month or (3) All Net Energy produced by the Seller’s Facility and delivered by the Facility to the Idaho Power electrical system prior to the Operation Date.
- 1.32 “Total Cost of the Facility” - The total cost of structures, equipment and appurtenances.



## ARTICLE II: NO RELIANCE ON IDAHO POWER

- 2.1 Seller Independent Investigation - Seller warrants and represents to Idaho Power that in entering into this Agreement and the undertaking by Seller of the obligations set forth herein, Seller has investigated and determined that it is capable of performing hereunder and has not relied upon the advice, experience or expertise of Idaho Power in connection with the transactions contemplated by this Agreement.
- 2.2 Seller Independent Experts - All professionals or experts including, but not limited to, engineers, attorneys or accountants, that Seller may have consulted or relied on in undertaking the transactions contemplated by this Agreement have been solely those of Seller.

## ARTICLE III: WARRANTIES

- 3.1 No Warranty by Idaho Power - Any review, acceptance or failure to review Seller's design, specifications, equipment or facilities shall not be an endorsement or a confirmation by Idaho Power and Idaho Power makes no warranties, expressed or implied, regarding any aspect of Seller's design, specifications, equipment or facilities, including, but not limited to, safety, durability, reliability, strength, capacity, adequacy or economic feasibility.
- 3.2 Qualifying Facility Status - Seller warrants that the Facility is a "Qualifying Facility," as that term is used and defined in 18 CFR 292.201 et seq. After initial qualification, Seller will take such steps as may be required to maintain the Facility's Qualifying Facility status during the term of this Agreement and Seller's failure to maintain Qualifying Facility status will be a Material Breach of this Agreement. Idaho Power reserves the right to review the Facility's Qualifying Facility status and associated support and compliance documents at anytime during the term of this Agreement.

## ARTICLE IV: CONDITIONS TO ACCEPTANCE OF ENERGY

- 4.1 Prior to the First Energy Date and as a condition of Idaho Power's acceptance of deliveries of energy from the Seller under this Agreement, Seller shall:

- 4.1.1 Submit proof to Idaho Power that all licenses, permits or approvals necessary for Seller's operations have been obtained from applicable federal, state or local authorities, including, but not limited to, evidence of compliance with Subpart B, 18 CFR 292.201 et seq. as a certified Qualifying Facility.
- 4.1.2 Opinion of Counsel - Submit to Idaho Power an Opinion Letter signed by an attorney admitted to practice and in good standing in the State of Idaho providing an opinion that Seller's licenses, permits and approvals as set forth in paragraph 4.1.1 above are legally and validly issued, are held in the name of the Seller and, based on a reasonable independent review, counsel is of the opinion that Seller is in substantial compliance with said permits as of the date of the Opinion Letter. The Opinion Letter will be in a form acceptable to Idaho Power and will acknowledge that the attorney rendering the opinion understands that Idaho Power is relying on said opinion. Idaho Power's acceptance of the form will not be unreasonably withheld. The Opinion Letter will be governed by and shall be interpreted in accordance with the legal opinion accord of the American Bar Association Section of Business Law (1991).
- 4.1.3 Initial Capacity Determination - Submit to Idaho Power such data as Idaho Power may reasonably require to perform the Initial Capacity Determination. Such data will include but not be limited to, Nameplate Capacity, equipment specifications, prime mover data, resource characteristics, normal and/or average operating design conditions and Station Use data. Upon receipt of this information, Idaho Power will review the provided data and if necessary, request additional data to complete the Initial Capacity Determination within a reasonable time.
- 4.1.3.1 If the Maximum Capacity specified in Appendix B of this Agreement and the cumulative manufacture Nameplate Capacity rating of the individual generation units at this Facility is less than 10 MW. The Seller shall submit detailed, manufacturer, verifiable data of the Nameplate Capacity ratings of the actual individual generation units to be installed at this Facility. Upon verification by Idaho Power that the data provided establishes the combined Nameplate Capacity rating of the generation units to

be installed at this Facility is less than 10 MW, it will be deemed that the Seller has satisfied the Initial Capacity Determination for this Facility.

- 4.1.4 Nameplate Capacity – Submit to Idaho Power manufacturer’s and engineering documentation that establishes the Nameplate Capacity of each individual generation unit that is included within this entire Facility. Upon receipt of this data, Idaho Power shall review the provided data and determine if the Nameplate Capacity specified is reasonable based upon the manufacturer’s specified generation ratings for the specific generation units.
- 4.1.5 Engineer’s Certifications - Submit an executed Engineer's Certification of Design & Construction Adequacy and an Engineer's Certification of Operations and Maintenance (O&M) Policy as described in Commission Order No. 21690. These certificates will be in the form specified in Appendix C but may be modified to the extent necessary to recognize the different engineering disciplines providing the certificates.
- 4.1.6 Insurance - Submit written proof to Idaho Power of all insurance required in Article XIII.
- 4.1.7 Interconnection – Provide written confirmation from Idaho Power’s delivery business unit that Seller has satisfied all interconnection requirements.
- 4.1.8 Network Resource Designation – The Seller’s Facility has been designated as a network resource capable of delivering firm energy up to the amount of the Maximum Capacity.
- 4.1.9 Written Acceptance – Request and obtain written confirmation from Idaho Power that all conditions to acceptance of energy have been fulfilled. Such written confirmation shall be provided within a commercially reasonable time following the Seller’s request and will not be unreasonably withheld by Idaho Power.

#### ARTICLE V: TERM AND OPERATION DATE

- 5.1 Term - Subject to the provisions of paragraph 5.2 below, this Agreement shall become effective on the date first written and shall continue in full force and effect for a period of 15 (*not to exceed 20 years*) Contract Years from the Operation Date.

- 5.2 Operation Date - The Operation Date may occur only after the Facility has achieved all of the following:
- a) Achieved the First Energy Date.
  - b) Commission approval of this Agreement in a form acceptable to Idaho Power has been received.
  - c) Seller has demonstrated to Idaho Power's satisfaction that the Facility is complete and able to provide energy in a consistent, reliable and safe manner.
  - d) Seller has requested an Operation Date from Idaho Power in a written format.
  - e) Seller has received written confirmation from Idaho Power of the Operation Date. This confirmation will not be unreasonably withheld by Idaho Power.

5.3 Operation Date Delay - Seller shall cause the Facility to achieve the Operation Date on or before the Scheduled Operation Date. Delays in the interconnection and transmission network upgrade study, design and construction process that **are not** Force Majeure events accepted by both Parties, **shall not** prevent Delay Liquidated Damages from being due and owing as calculated in accordance with this Agreement.

5.3.1 If the Operation Date occurs after the Scheduled Operation Date but on or prior to 90 days following the Scheduled Operation Date, Seller shall pay Idaho Power Delay Liquidated Damages calculated at the end of each calendar month after the Scheduled Operation Date as follows:

Delay Liquidated Damages are equal to ((Current month's Initial Year Net Energy Amount as specified in paragraph 6.2.1 divided by the number of days in the current month) multiplied by the number of days in the Delay Period in the current month) multiplied by the current month's Delay Price.

5.3.2 If the Operation Date does not occur within ninety (90) days following the Scheduled Operation Date the Seller shall pay Idaho Power Delay Liquidated Damages, in addition to those provided in paragraph 5.3.1, calculated as follows:

Forty five dollars (\$45) multiplied by the Maximum Capacity with the Maximum Capacity being measured in kW.

5.4 If Seller fails to achieve the Operation Date within ninety (90) days following the Scheduled Operation

Date, such failure will be a Material Breach and Idaho Power may terminate this Agreement at any time until the Seller cures the Material Breach. Additional Delay Liquidated Damages beyond those calculated in 5.3.1 and 5.3.2 will be calculated and payable using the Delay Liquidated Damage calculation described in 5.3.1 above for all days exceeding 90 days past the Scheduled Operation Date until such time as the Seller cures this Material Breach or Idaho Power terminates this Agreement.

- 5.5 Seller shall pay Idaho Power any calculated Delay Damages or Delay Liquidated Damages within 7 days of when Idaho Power calculates and presents any Delay Damages or Delay Liquidated Damages billings to the Seller. Seller's failure to pay these damages within the specified time will be a Material Breach of this Agreement and Idaho Power shall draw funds from the Delay Security provided by the Seller in an amount equal to the calculated Delay Damages or Delay Liquidated Damages.
- 5.6 The Parties agree that the damages Idaho Power would incur due to delay in the Facility achieving the Operation Date on or before the Scheduled Operation Date would be difficult or impossible to predict with certainty, and that the Delay Liquidated Damages are an appropriate approximation of such damages.
- 5.7 Prior to the Seller executing this Agreement, the Seller shall have agreed to and executed a Letter of Understanding with Idaho Power that contains at minimum the following requirements:
- a) Seller has filed for interconnection and is in compliance with all payments and requirements of the interconnection process
  - b) Seller has received and accepted an interconnection feasibility study for this Facility.
  - c) Seller has provided all information required to enable Idaho Power to file an initial transmission capacity request.
  - d) Results of the initial transmission capacity request are known and acceptable to the Seller.
  - e) Seller acknowledges responsibility for all interconnection costs and any costs associated with acquiring adequate firm transmission capacity to enable the project to be classified as an Idaho Power firm network resource.

f) If the Facility is located outside of the Idaho Power service territory, in addition to the above requirements, the Seller must provide evidence that the Seller has acquired firm transmission capacity from all required transmitting entities to deliver the Facility's energy to an acceptable point of delivery on the Idaho Power electrical system.

5.8 Within thirty (30) days of the date of a final non-appealable order as specified in Article XXI approving this Agreement the Seller shall post liquid security ("Delay Security") in a form as described in Appendix D equal to or exceeding the amount calculated in paragraph 5.8.1.

5.8.1 Delay Security The greater of forty five (\$45) multiplied by the Maximum Capacity with the Maximum Capacity being measured in kW or the sum of three month's estimated revenue. Where the estimated three months of revenue is the estimated revenue associated with the first three full months following the estimated Scheduled Operation Date, the estimated kWh of energy production as specified in paragraph 6.2.1 for those three months multiplied by the All Hours Energy Price specified in paragraph 7.3 for each of those three months.

5.8.1.1 In the event (a) Seller provides Idaho Power with certification that (1) a generation interconnection agreement specifying a schedule that will enable this Facility to achieve the Operation Date no later than the Scheduled Operation Date has been completed and the Seller has paid all required interconnection costs or (2) a generation interconnection agreement is substantially complete and all material costs of interconnection have been identified and agreed upon and the Seller is in compliance with all terms and conditions of the generation interconnection agreement, the Delay Security calculated in accordance with paragraph 5.8.1 will be reduced by ten percent (10%).

5.8.1.2 If the Seller has received a reduction in the calculated Delay Security as specified in paragraph 5.8.1.1 and subsequently (1) at Seller's request, the generation interconnection agreement specified in paragraph 5.8.1.1 is revised and as a result the Facility will not achieve its Operation Date by the Scheduled Operation Date or (2) if the Seller does not maintain compliance with the generation interconnection agreement,

