

# Williams · Bradbury

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February 9, 2012

IDAHO PUBLIC  
UTILITIES COMMISSION

Ms. Jean Jewell  
Commission Secretary  
Idaho Public Utilities Commission  
472 W. Washington  
Boise, ID 83702

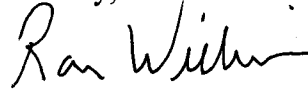
Re: IPC-E-11-25

Dear Ms. Jewell:

Please find enclosed an original and seven copies of the Reply Comments of Dynamis Energy, LLC for filing in the above referenced case.

Thank you for your assistance in this matter. Please feel free to give me a call should you have any questions.

Sincerely,



Ronald L. Williams

RLW/jr  
Enclosures

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IDAHO PUBLIC  
UTILITIES COMMISSION

Attorneys for Dynamis Energy, LLC

**BEFORE THE IDAHO PUBLIC UTILITES COMMISSION**

IN THE MATTER OF THE APPLICATION OF )	Case No. IPC-E-11-25
IDAHO POWER COMPANY FOR A )	
DETERMINATION REGARDING ITS FIRM )	<b>REPLY COMMENTS OF</b>
ENERGY SALES AGREEMENT WITH )	<b>DYNAMIS ENERGY, LLC</b>
DYNAMIS ENRGY, LLC, )	
_____ )	

COMES NOW, Dynamis Energy, LLC, (“Dynamis”) by and through its counsel of record, Williams Bradbury, PC, and files these Reply Comments in response to Comments of Commission Staff.

**I**

**INTRODUCTION**

Dynamis and Idaho Power Company (“Idaho Power” or the “Company”) entered into a Firm Energy Sales Agreement (“FESA” or “Agreement”) on November 16, 2011. Commission Staff, on February 2, 2012, recommended rejection of the Agreement for reasons primarily related to Staff’s belief that the Company should have employed a few alternative avoided cost methodologies or used different modeling input variables in calculating Dynamis’ avoided cost rates. Staff also notes a computational error that, if

corrected, would result in “an increase of approximately \$1 per MWh in each year of the Agreement.”<sup>1</sup>

Staff recommends rejection of the Agreement because of this computational error (that would increase FESA rates) and for five other IRP methodology driven points, summarized as follows: (1) that there is an inherent capacity value captured in AURORA energy prices, (2) that the IRP methodology fails to recognize the time new capacity may be needed by the Company, (3) that Idaho Power should have used 2011 IRP assumptions, not 2009 assumptions, (4) that the Company should have used a more current weighted cost of capital, and (5) the prices for the last five years of the FESA were extrapolated, not AURORA calculated.

While each point will be discussed in more detail below, Staff acknowledges that points 1, 2 and 5, would not necessarily result in a different avoided cost rate for Dynamis. In fact, Staff admits as to being “uncertain of how to quantify the [potential rate-change] amount,”<sup>2</sup> or whether different modeling assumptions “would produce different results.”<sup>3</sup> For points 3 and 4, Staff admits that such methodology changes would have a “relatively minor”<sup>4</sup> impact on avoided costs, or that such change would “lower[] slightly” Dynamis’ avoided cost rate.

Dynamis, unlike Staff or the Company, does not have AURORA and is unable to calculate the upward rate adjustment related to the calculation error, nor the “minor” or “slight” downward adjustments related to Staff’s recommendations 3 and 4. There is a possibility, if not a likelihood, that all three rate adjustments, taken together, would result

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<sup>1</sup> Staff Comments, p. 5.

<sup>2</sup> In reference to whether there is a capacity value captured by AURORA. Staff Comments, p. 6.

<sup>3</sup> 2009 versus 2011 IRP Assumptions; Staff Comments, p. 7.

<sup>4</sup> Failure to recognize Need for New Capacity until 2015, Staff Comments, p 6.

in an avoided cost rate increase for Dynamis. Dynamis is not interested in a rate increase however, and explicitly waives any right or claim to its full avoided cost, if that is the potential outcome adjusting for this model input variable. In good faith, after almost a year of negotiations with Idaho Power, Dynamis signed the FESA, is bound by it, and intends to honor that contractual commitment, even if, in hindsight, it might have “done better.” Dynamis would prefer to move forward with this FESA, and get on with building its project.

## II

### CONTRACT NEGOTIATIONS FOR PROJECTS GREATER THAN 10 MW

Dynamis and Idaho Power spent the better part of 2010 in good faith, but technical, negotiations on the FESA. As a larger, 22 MW high load factor PURPA project, many operating attributes and “value adders” were discussed, some of which found their way into the Agreement. Other concepts, such as Dynamis’ offer to make the plant dispatchable by Idaho Power, did not. Idaho Power was always willing to discuss how unique Dynamis project characteristics could be of benefit to the Company, and its ratepayers. Idaho Power was also constantly reminding Dynamis of its obligation to “assist the Commission in its gatekeeper role of assuring that utility customers are not being asked to pay more than the Company’s avoided cost for the QF contracts.”<sup>5</sup> Idaho Power also notified Dynamis, during negotiations, that the Company’s position on ownership of Renewable Energy Credits (“RECs”) had changed, and after some challenging sessions, the parties agreed to share equally in REC ownership over the life of the FESA. Idaho Power also informed Dynamis that it would prefer not to accept delivery of energy during light load hours. Dynamis was able to re-configure its project

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<sup>5</sup> Order No. 32104, Case No. IPC-E-10-22, *In the Matter of . . . Yellowstone Power, Inc.*

operations to accommodate this request, which also happened to result in a higher price per kWh avoided cost rate.<sup>6</sup>

Dynamis understands and appreciates that Staff's review of FESAs is an important public interest "check" on any utility's execution of such agreements. However, that check should be primarily focused on whether the "deal" (i.e., the price paid) is fair to the ratepayer, and that ratepayers are protected if the deal comes apart. There comes a point where Staff's after-the-fact review of each of the details of the arms-length negotiation between a utility and a QF puts Staff in control of such negotiations, without Staff having actually "been there" to appreciate how difficult negotiations can, at times, be. To Dynamis, and likely to other developers, Staff's point-by-point suggestions that Idaho Power could have done "this" or should have considered "that" – when such changes, in total, appear to have little material impact on the avoided cost rate – has a chilling effect on any future arms-length negotiations of large QF projects. Such a belated critique of the negotiating process, not necessarily the end result, also significantly dilutes this Commission's directive to the utilities that contracts for larger projects are to be "negotiated" – provided that the utility also exercises its fiduciary role as a "gatekeeper" to insure that such contract prices do not exceed avoided costs.

The IRP methodology for determining avoided cost rates for larger PURPA projects was established in a 1995-96 case.<sup>7</sup> In that case, it was Staff's recommendation that the Commission no longer decide and dictate modeling assumptions and input variables to be used by each utility in calculating IRP based avoided costs. Instead, Staff

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<sup>6</sup> In order to get the higher \$/MWh rate Dynamis had to agree to sell less kWhs annually (e.g., no light load hours generation), which resulted in lower overall project revenues than otherwise could have been achieved in a 24 X 7 operation.

<sup>7</sup> IPUC Case No. IPC-E-95-9.

recommended that: “With implementation of the IRP methodology, the Companies will be responsible for determining those variables. As long as the values and assumptions fall within a reasonable range, utilities are free to choose values most appropriate for their own situation.”<sup>8</sup> (emphasis added) The Commission adopted this Staff recommendation in its order approving the IRP methodology for calculating avoided cost rates for larger PURPA projects.<sup>9</sup> The Commission should continue to apply this “reasonable range” test, in determining if negotiated IRP QF rates are fair to utility ratepayers.

The first Idaho Power approved FESA using IRP calculated rates was the *Rockland Wind* contract where the Commission said: “The value of each factor was not individually quantified. Nevertheless, the rates included in the Agreement, Staff notes, were the result of mutual negotiations.”<sup>10</sup> The Commission, in *Rockland*, also “. . . commend[ed] the parties for negotiating an Agreement that we [the Commission] find sets forth a creative solution to resource issues that have heretofore often resulted only in impasse and the filing of complaints.”<sup>11</sup> More recently, the Commission in the *Interconnect Solar* contract approval case<sup>12</sup> rejected a very similar set of Staff IRP methodology proposed changes, instead instructing Idaho Power to continue to “negotiate these agreements with an awareness of its actual avoided cost.”<sup>13</sup>

While the FESA in this case may not be perfect, it represents the product of “mutual negotiations” that resulted in an Agreement “both feasible for the developer and favorable to Idaho Power customers.”<sup>14</sup> The Dynamis FESA submitted for approval

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<sup>8</sup> Exhibit 101, Case No. IPC-E-95-9, R. Sterling DI, Page 15 of 24 (emphasis added).

<sup>9</sup> Order No. 26576.

<sup>10</sup> Order No. 32125, p. 6. *In the Matter of . . . Rockland Wind Project LLC.*

<sup>11</sup> *Id.* at p. 10

<sup>12</sup> Case No. IPC-E-11-10

<sup>13</sup> Order No. 32384, p. 10. *In the Matter of . . . Interconnect Solar Development, LLC.*

<sup>14</sup> *Rockland*, at p. 10.

“contains acceptable contract provisions . . . that are just and reasonable”<sup>15</sup> and are within a “reasonable range.”

### III

#### RESPONSE TO STAFF SPECIFIC POINTS

a. **Rates:** Staff notes that the rates in the FESA are above the “Standard” QF rates, primarily for the reasons that: (i) the Dynamis project will only deliver energy during heavy load hours (except Sundays and holidays), and (ii) the Dynamis facility has a very high capacity factor, with “generation [that] will not be intermittent.”<sup>16</sup> Staff also notes that the rates calculated by Idaho Power might have been different, had Idaho Power adopted all of Staff’s recommended changes from its comments in the *Interconnect Solar* case, instead of just “some of Staff’s recommendations.”<sup>17</sup> (emphasis added) Staff suggests that the *Interconnect Solar* Order directs Idaho Power to adopt all of Staff’s IRP recommended changes in that case, “while negotiating future power purchase agreements.”<sup>18</sup>

The fundamental point missed by Staff, in making this recommendation, is that “negotiations” between Idaho Power and Dynamis had finished before the *Interconnect Solar* Order was published by the Commission and the parties had come to a meeting of the minds as to all material terms and conditions of the Dynamis FESA. In fact, Dynamis advised Idaho Power in writing on October 19, 2011, prior to the *Interconnect Solar*

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<sup>15</sup> *Id.*

<sup>16</sup> Staff Comments, p. 3.

<sup>17</sup> As discussed above, this very statement implies that Staff believes it is in control of all the elements of large project contract negotiations, not the parties, for the reason that all of Staff’s comments in a previous case should have been adopted by the utility, even though they were rejected by the Commission in *Interconnect Solar*.

<sup>18</sup> Staff Comments, p. 5.

Order, that Dynamis was “ready, willing and able to execute this PPA<sup>19</sup> at your [Idaho Power’s] earliest convenience,” and that the draft PPA presented to Dynamis “is ready to be finalized and executed.”<sup>20</sup>

Under PURPA, Dynamis had established its right to a legally enforceable obligation<sup>21</sup> with Idaho Power, prior to issuance of Order No. 32384<sup>22</sup>. Thus, regardless of the question of whether Idaho Power should have adopted all, or just some of Staff’s recommendations made in *Interconnect Solar*, the fact that the *Interconnect Solar* Order was published after Idaho Power and Dynamis had finished contract negotiations and reached a *meeting of the minds* makes this Staff point moot.

**b. Idaho Power Error in Computations**

Dynamis appreciates Staff discovering that Idaho Power’s application of the IRP methodology understated the value of Dynamis capacity, by failing to calculate capacity values derived from 2013 capital expenditures, not 2011 costs. As mentioned above, Dynamis waives any claim to this adjustment and would prefer to see the FESA approved by the Commission in a timely manner, rather than correcting for this error. To the extent that Idaho Power’s ratepayers benefit from this concession, Dynamis believe it is all the more reason for the Commission to approve the FESA.

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<sup>19</sup> *Empire Lumber v. Washington Water Power*, 114 Idaho 191, 193, 755 P.2d 129, 1231 (1988) (holding that a utility is not required to enter into a PPA until the seller is “ready, willing and able to sign a contract.”); *see also*, *A.W. Brown Co. Inc. v. Idaho Power Co.*, 121 Idaho 812, 828 P.2d 841 (1992)

<sup>20</sup> Email confirmation from Dynamis’ attorney to Idaho Power, October 19, 2011, at 4:04 PM.

<sup>21</sup> 18 C.F.R. § 292.304(d)(2). *See also* 18 C.F.R. § 292.304(b)(5); 18 C.F.R. § 292.304(e)(2)(iii). *See, e.g.*, *Small Power Production and Cogeneration Facilities; Regulations Implementing Section 210 of the Public Utility Regulatory Policies Act of 1978*, Order No. 69, FERC Statutes and Regulations, Regulations Preambles 2001-2005 ¶ 30,128, at 30,880 (1980) (subsequent history omitted).

<sup>22</sup> *Id.*, *Interconnect Solar*.



**c. Amount of Capacity Value Captured in AURORA Energy Prices**

Staff suggests that there may be a capacity value contained within the AURORA energy price, implying therefore that Dynamis may be paid too much for capacity.<sup>23</sup> Staff offers no evidence to support this assertion however, and admits Staff “is uncertain of how to quantify this [capacity] amount.”<sup>24</sup>

When Idaho Power runs AURORA to determine QF energy rates, the Company is running AURORA in an energy dispatch mode and not in a capacity expansion mode. Running in this [energy dispatch] mode, AURORA explicitly ignores capacity values. It also ignores carbon costs, taxes or other offsets that would potentially increase the energy avoided cost value. This is in contrast to when AURORA runs for IRP planning purposes, where “The potential cost of carbon emissions is accounted for in the IRP [AURORA modeling] by applying a carbon adder or tax.”<sup>25</sup>

As the Commission said in Order No. 32350 “It is through Case No GNR-E-11-03 that the Commission intends to address the larger issues surrounding avoided cost calculations and methodologies.”<sup>26</sup> As in the *Interconnect Solar* docket, Dynamis urges the Commission not to turn this contract approval case into one that delves into the complex question of whether AURORA does, or does not, contain a capacity component. Staff admits that “nearly all of the specific issues that have been raised regarding the Dynamis Agreement will be addressed more fully in a generic context in Case No. GNR-E-11-03.”<sup>27</sup> This question belongs in that case, not this contract approval case.

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<sup>23</sup> Staff Comments, p. 6.

<sup>24</sup> *Id.*

<sup>25</sup> DRAFT Idaho Power 2011 IRP, p. 94.

<sup>26</sup> P. 6, *Interconnect Solar* Order, denying the intervention of Grand View Solar.

<sup>27</sup> Staff Comments, P. 8.

**d. Failure to Recognize Need for New Capacity Value.**

Paying, or not paying, for capacity before capacity is needed, has been a topic debated for the last 30 plus years of PURPA implementation in Idaho. In Case No. IPC-E-93-28 (establishing the methodology for IRP calculated rates) the Commission specifically required capacity payments to be made over the life of a contract, noting that: “[capacity] levelization more accurately reflects the way in which costs are recovered for utility-owned projects.”<sup>28</sup> This issue was again reviewed in 2002 in Case No. GNR-E-02-01 with Staff outlining nine reasons why a utility’s short term surplus should not be a reason to defer long term capacity payments in PURPA contracts.<sup>29</sup> If the specter of deferring the inclusion of avoided capacity costs in avoided cost rates to match utility plant additions is to again rise, it should do so in GNR-E-11-03 and not this contract approval case.

Staff also correctly notes that Idaho Power’s 2009 IRP showed a slight capacity deficit in 2013, extended to 2015 in the 2011 IRP. The scheduled First Energy Date for the Dynamis project is October 15, 2013 and the Scheduled Operation Date is February 15, 2014. Consequently, Dynamis believes that even if this recommendation was adopted, it would have negligible, if any, impact on Dynamis’ FESA prices.

**e. Use of 2009 IRP Assumptions vs. 2011 IRP Assumptions.**

Staff suggests that with a 2011 draft IRP in circulation, input variables from that IRP, instead of the 2009 IRP, should have been used to calculate Dynamis’ rate, because they “would produce different [rate] results.”<sup>30</sup> However, at the time the Dynamis FESA

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<sup>28</sup> IPUC Order No. 25884, p 8 of 11.

<sup>29</sup> See Order No. 29124 at p. 5 – 9.

<sup>30</sup> Staff Comments, p. 7.

was signed (November 16, 2011), the 2011 IRP was still in draft form. It was not “accepted” by the Commission until December 30, 2011.

As pointed out above, at the 1995 launch of the IRP methodology for calculating rates for larger PURPA projects, Staff recommended “. . . that updates to resource portfolio data, such as plant capital costs, operation and maintenance costs, heat rates, generation capability, plant factors, economic life, etc. not be allowed except during biennial IRP submissions.”<sup>31</sup> Staff’s recommendation in this case, to use draft 2011 IRP inputs, instead of 2009 inputs, is contrary to Staff’s more reasoned recommendation in the 1995 case establishing the IRP methodology for calculating avoided cost rates. In *Interconnect Solar* the Commission sanctioned the use of the 2009 IRP input variables and rejected a premature shift to the 2011 IRP variables, as recommended by Staff. Likewise, the Commission should refrain from ordering the Dynamis FESA to be renegotiated using 2011 input variables.

**f. Weighted Cost of Capital Used in Idaho Power Analysis.**

As noted above, this recommendation by Staff is a sub-set of the 2009 versus 2011 IRP recommendation addressed above, and should be rejected for the reasons stated above. Furthermore, it is unfair for Staff to specifically “cherry pick” a single variable from the 2011 IRP – such as a new weighted cost of capital – and seek to apply it to the calculation of the Dynamis FESA, for the reason that this adjustment would “slightly lower” Dynamis’ contract rate.

**g. Idaho Power and Customer Safeguards**

Staff notes some public comments expressing concern about the reliability of the power producing technology to be employed by Dynamis at the facility. Others public

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<sup>31</sup> R. Sterling, DI, Page 18; IPUC Case No. IPC-E-95-9.

comments, expressing confidence from qualified experts as to the reliability of the facility and the process, are also worthy of note.

In response to the concerns expressed about the Dynamis technology, Staff reviews and does a good job of explaining the various provisions of the FESA that protect Idaho Power and its ratepayers from Dynamis' failure to perform. First and foremost, as noted by Staff; if Dynamis does not generate energy, it does not get paid. Dynamis would also like to point out that if it underperforms by more than 10% on its hourly energy obligations in a ten hour period, it takes a price reduction of 15%, until the hourly performance criteria are again met.<sup>32</sup> Dynamis is unaware of any other Idaho PURPA contract that has such hourly performance obligations, and penalties for failure to perform.

### III

#### CONCLUSION

Although Staff's recommendation is to reject the Dynamis FESA, Staff also acknowledges the Commission's recent support and reinforcement of existing IRP methodology calculated avoided cost rates, and the value derived from the arms-length negotiating process for larger PURPA projects. Staff also "recognizes that there is considerable room for negotiation, and that such flexibility has been exercised in this case."<sup>33</sup>

Dynamis is left with two obvious conclusions. First, had Staff been doing the negotiating instead of, or alone with Idaho Power, there might have been a different result. That result is unknown, however. This also raises an important policy

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<sup>32</sup> FESA, ¶ 6.3.

<sup>33</sup> Staff Comments, p. 12.

consideration: how much is Staff to inject itself into the negotiating process, after the fact? Staff's position in this case appears to be that "the next" negotiation by the utility should *de facto* include all of the recommendations Staff made on "the last" negotiated PPA, instead of just "some" of the recommendations made in a prior case.<sup>34</sup> The consequences of not doing so (i.e., not incorporating all of Staff's prior input adjustments) appear to justify a recommendation by Staff for FESA rejection in the follow-up case. Dynamis believes that the better role for staff is to review each FESA according to the standard originally articulated by Staff, such that: "As long as the values and assumptions fall within a reasonable range, utilities are free to choose values most appropriate for their own situation."<sup>35</sup>

Dynamis' second conclusion is that even if Staff's recommendations are fully implemented, they would not result in an avoided cost rate reduction for Dynamis. More likely, they would result in a rate increase. Dynamis appreciates Staff's honesty in discovering the capacity calculation error. If however, on this one point, Dynamis can accept a rate that is less than the full avoided cost, in order to move the process along, it is "ready, willing and able" to do so, and to get about the business of building its project.

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<sup>34</sup> At page 5 of Staff comments: "With regard to computation methods and assumptions in this case, Idaho Power has adopted some of Staff's recommendations made in the Interconnect Solar case, but has rejected others. Staff continues to believe that certain other assumptions and computational methods are appropriate."

<sup>35</sup> Exhibit 101, Case No. IPC-E-95-9, R. Sterling DI, Page 15 of 24 (emphasis added).

For the reasons stated above, Dynamis requests that the Commission approve the FESA entered into between Dynamis and Idaho Power.

DATED this 9<sup>th</sup> day of February, 2012.



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Ronald L. Williams  
Williams Bradbury P.C.  
Attorneys for Dynamis Energy, LLC

**CERTIFICATE OF SERVICE**

I hereby certify that on this 9<sup>th</sup> day of February, 2012, a true and correct copy of the foregoing was served by the method indicated below, and addressed to the following:

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Ronald L. Williams