BEFORE THE
PUBLIC UTILITY COMMISSION OF OREGON

UM 1725

In the Matter of	)	
	)	
IDAHO POWER COMPANY	)	**PROTEST AND OPPOSITION OF GARDNER CAPITAL SOLAR DEVELOPMENT, LLC**
	)	
Motion for Temporary Stay of Its Obligation to Enter Into New Power Purchase Agreements With Qualifying Facilities	)	
	)	

INTRODUCTION

Gardner Capital Solar Development, LLC ("Gardner Solar"), a leading developer of utility scale solar projects that is developing solar projects in the state of Oregon, respectfully submits this Protest and Opposition urging the Public Utility Commission of Oregon (the "Commission") to deny in part Idaho Power Company's ("Idaho Power") April 24, 2015 Motion for Temporary Stay of its Obligation to Enter into New Power Purchase Agreements with Qualifying Facilities ("Motion"). Specifically, the Motion should be denied to the extent that it would apply to projects which have already made formal requests under Idaho Power's standard contract QF tariff, Schedule 85 (the "Timely Schedule 85 Projects") prior to the date of Commission's notice of or ruling on the Motion. Idaho Power's initial filing appears to identify five Timely Schedule 85 Projects which total 40 MW. *See Motion at 4, lines 10-14*.[1] The Commission denied a very similar stay request from Idaho Power in 2012, and it should take similar action now. *See Re Idaho Power Company, Docket UE 1590 & UM 1593, Order No. 12-*

[1] Other than those five projects, the Motion does not clearly state whether any of the other QFs projects Idaho Power is aware of have formally submitted Schedule 85 requests. Besides the five, Gardner Solar is aware of at least one other solar project which formally submitted all required Schedule 85 materials to Idaho Power and requested an energy sales agreement on or before May 6, 2015. A supplement to the motion appears to add additional projects.

146 (Apr. 25, 2012) (denying motion stay of QF contracting obligations during pendency of investigation).

PROCEDURAL BACKGROUND

Just last year, the Commission confirmed Schedule 85 as a valid and effective rate that appropriately defined Idaho Power's obligations under PURPA and appropriately determined avoided cost pricing. *See Re Investigation of Qualifying Facility Contracting and Pricing*, Docket UE 1610, Order No. 14-058 (Feb. 24, 2014). The Commission re-affirmed its support for "standard contract rates, terms and conditions" for QFs. *Id*. at 7. The Commission responded to utility concerns that current avoided cost methodology could "result in the utility and its customers offering prices in excess of actual avoided costs" by stating the such "concerns about potential overpayments are best addressed through our decisions to require annual updates to avoided costs." *Id*.

On April 7, 2015, Gardner Solar submitted formal requests to Idaho Power for five qualifying facility ("QF") solar projects.[2] Idaho Power acknowledged receipt of the materials by e-mail that same day. On information and belief, these five projects are the Timely Schedule 85 Projects described in Idaho Power's Motion.

Idaho Power further responded by letter to Gardner Solar on April 27, 2015. This was a timely but incomplete response within the 15-day window during which Schedule 85 requires Idaho Power to respond in writing to such formal requests; the response failed to include the required draft energy sales agreement with current standard avoided cost prices. The written response acknowledged the formal requests and did not describe any deficiencies or irregularities

[2] The five projects are named: Olds Ferry Solar; Owyhee Solar; Malheur River Solar; Cooper Solar; and Fourth Ave Solar.

suggesting that the Timely Schedule 85 Projects were in any way ineligible for standard contracts.

Nonetheless, the written response stated that Idaho Power was unilaterally suspending its obligations under Schedule 85 effective immediately.[3] It also informed Gardner Solar that Idaho Power had filed this Motion.

This Motion was filed on April 24, 2015, well after the Timely Schedule 85 Projects had submitted their materials to Idaho Power. The Motion requests a stay of Idaho Power's obligations under its Schedule 85 tariff. Such obligations would include the execution of contracts with the Timely Schedule 85 Projects.

Idaho Power concurrently filed three applications in this same docket which are related to the underlying subject matter, an "Application to Lower Standard Contract Eligibility Cap and to Reduce the Standard Contract Term," and "Application for Approval of Solar Integration Charge," and an "Application for Change in Resource Sufficiency Determination" (the "Applications").[4]

On May 7, 2015, the Commission provided notice of the Motion and Applications and set a Prehearing Date of May 20, 2015.

Gardner Solar is submitting its Petition to Intervene of even date herewith.

Idaho Power also filed a "Supplement" to the Motion on May 8, 2015.

[3] This illegal action will be the subject of a separate complaint to be filed with the Commission in the near future by Gardner Solar. A complaint from a different party regarding similar action by Idaho Power has been filed in docket UM 1731.

[4] These Applications request that the Commission lower the standard contract eligibility for wind and solar QFs to 100 kW, reduce the maximum term of non-standard QF contracts to two years, approve the implementation of solar integration charges, and modify Idaho Power's resource sufficiency period.

Because Gardner Solar concurs with Idaho Power as to the need for an expedited decision on the Motion, Gardner Solar is submitting this Protest and Opposition to the Motion prior to the designation of a date for responsive pleadings. The need for expedited action is explained further below, and Gardner Solar provides this response now to demonstrate its willingness to act as quickly as possible to expedite proceedings on the Motion.

ARGUMENT

I. Idaho Power's Motion Fails to Meet Standard for Granting Motion to Stay and Must be Denied

A. Standard for Granting Motion For Stay

The Motion, by requesting a stay of Idaho Power's Schedule 85 obligations, is effectively asking for a stay of the 2014 order which approved the Schedule 85 tariff and confirmed that Idaho Power must meet those obligations. *See Re Investigation of Qualifying Facility Contracting and Pricing*, Docket UE 1610, Order No. 14-058 (Feb. 24, 2014). Oregon statutes authorize the Commission to stay a prior Commission order. *ORS § 756.568*. In determining whether to grant a stay, the Commission relies on the standards set forth in the Administrative Procedures Act, which allows an agency to stay enforcement of an order upon a showing of (i) irreparable injury to the petitioner and (ii) a colorable claim of error in the order. *ORS § 183.482(3)*; *see also In the Matter of Metro One Telecommunications, Inc*., Docket IC 1, Order No. 03-462, at 2 (Aug. 1, 2003). However, even if the agency finds in favor of the petitioner on these two issues, it will not grant the stay if it determines that "substantial public harm will result if the order is stayed." *Id.*

Idaho Power has failed to meet its burden of proof to satisfy each of these requirements, at least as they apply to the Timely Schedule 85 Projects.

B. No Showing of Irreparable Injury

Idaho Power has not proven that there will be any irreparable injury to it or its ratepayers if it enters into contracts with the Timely Schedule 85 Projects at the avoided cost prices the Commission confirmed last year.[5] Rather, Idaho Power's claims of potential harm are based on the size of the costs to ratepayers if all of the QF projects that Idaho Power has seemingly ever heard about, no matter where they are located or what stage in development they may be, all came on line and were all eligible for Schedule 85 contracts, and after weighing those contract prices against a new, unvetted and unilaterally derived benchmark. *Motion at 7-8*.

The basis for the prospective harm includes a vast array of "projects." These include projects for which Idaho Power is aware of informal "indications of interests" and others from people "actively investigating projects." *See Motion at 4, lines 4-10*. The various descriptions Idaho Power provides include:

- 1326 MWs "in the queue actively seeking PURPA energy sales agreements and/or PURPA interconnections" (*Motion at 3, lines 10-13*, without providing a definition of "queue")
- 26 projects totaling 245 MWs "that have applied for interconnection *and/or* are seeking QF energy sales agreements" in Oregon (emphasis added) (*Motion at 3, 7, lines 17-19*)

[5] The Supplement filed by Idaho Power indicates that there may be more than 40 MWs of Timely Schedule 85 Projects.

- 137 MWs in Oregon "with interconnection studies underway and pending" (*Motion at 4, lines 5-8*)

Idaho Power seems to think that throwing around numbers will scare the Commission into action. But a closer look is required to actually judge potential harm. For example, Idaho Power's own numbers in the Motion for the "26 projects" totaling "245 MWs" are presented as potentially creating a 20 year differential of either $24 million or $278 million – a vast difference indicating significant speculation. *Motion at 8*. Further, the Motion does not mention why these 245 MWs were used for the differential calculation rather than the 1326 MWs purportedly in a "queue." It appears Idaho Power tallied up projects that are not relevant to Commission action.

The baseline price for this differential is described as "the Company's updated resource sufficiency determination." *Motion at 8, line 4-5.* Such internal and self-serving calculations should be viewed with great skepticism, particularly when measured against fully vetted avoided cost calculations so recently approved by the Commission. Similarly misleading is Idaho Power's benchmark use of a negotiated rate for a project which does not meet Schedule 85 eligibility requirements, as large projects have different economics.

Most importantly, Idaho Power's assertions regarding potential harm all rely on the assumption that every QF project, no matter how dimly perceived on their radar, comes to fruition and receives a standard Oregon contract. These assertions have little to do with the Timely Schedule 85 Projects – the only projects which are actually entitled to a standard Oregon contract based on the status quo the day Idaho Power filed the Motion.

Thus the potential harm, even assuming (against the haziness of their presentation) that Idaho Power's numbers can be trusted, can be properly warded against by granting a stay that would be effective only as to projects which had not yet submitted a formal Schedule 85 request as of the date of Commission-provided notice of or final action on Idaho Power's filing. Even assuming that every project Idaho Power mentions continued in development, the Commission should consider granting the stay with an effective date of May 7, 2015 (the day the Commission first acted on and provided notice of the Motion),[6] or as of the date of the Commission's ruling on the Motion, while the Commission analyzes the actual QF pipeline. This would be sufficient action to insulate ratepayers from Idaho Power's purported harm. The Timely Schedule 85 Projects would not and should not be affected by the issuance of a stay to Idaho Power's obligations.

C. No Showing of Error

The Motion also fails to assert any colorable claim of error in the Commission's prior orders establishing QF avoided cost rates. At best, Idaho Power is simply suggesting that perhaps conditions have changed and thus the Commission might consider revisiting the decisions it so recently issued.

D. Public Harm Would Result

Because Idaho Power has failed to show that without the requested stay it would suffer irreparable harm, or that the Commission order erred in affirming Schedule 85, the Motion does not pass the applicable standard and should be rejected, at least as to the Timely

[6] Gardner Solar is aware of at least one other solar project which formally submitted all required Schedule 85 materials to Idaho Power and requested an energy sales agreement on or before May 7, 2015, which is nonetheless not identified in the Motion as having formally triggered the Schedule 85 process. It is unclear whether the Supplement identifies this project.

Schedule 85 Projects. The Motion should also be rejected because it could cause significant substantial harm to both the public and the individual QF developers by denying ratepayers the benefits of clean solar power that will likely be built only if the projects are able to benefit from the federal investment tax credit ("ITC"). Delays in project development and financing that would result from the stay would likely cause the Timely Schedule 85 Projects as well as other projects to be at significant risk of losing ITC eligibility.

As background, the ITC as relevant here is a significant tax credit for solar systems that applies to utility-scale projects under Section 48 of the Internal Revenue Code and remains in effect through December 31, 2016. The ITC has spurred significant growth in solar generation across the country by reducing the costs of solar projects and development and thus the prices consumers ultimately pay in their electric rates. To meet the 2016 deadline to be placed into service and thus eligible for the ITC, in practical terms, projects need to be in advanced stages of development and investment, including equipment ordering, by this summer.

Thus, for developments like the Timely Schedule 85 Projects, a stay in Idaho Power's Schedule 85 obligations means there is no practical way forward to obtain a timely power purchase contract. Idaho Power has provided Gardner solar no evidence of any intent to negotiate bilateral QF agreements other than for an un-financeable two year term. Thus issuance of a stay, simply by delaying the development schedule for the Timely Schedule 85 Projects, could well kill them altogether. This would deprive Oregon ratepayers and the environment of the benefits of clean energy provided at the avoided cost prices approved by the Commission just last year.

A stay would also thwart state policy, which firmly establishes the public need for renewable energy generated by QFs as seen in Oregon's renewable portfolio standard (RPS) law. *ORS § 758.515(3)* (it is "the policy of the State of Oregon to . . . [i]ncrease the marketability of electric energy produced by qualifying facilities located throughout the state for the benefit of Oregon's citizens" and to "[c]reate a settled and uniform institutional climate for qualifying facilities in Oregon").

E. Idaho Power Mischaracterizes Precedent

Idaho Power asserts that there is ample precedent for freezing its obligations under PURPA. *Motion at 4-7.* The vast majority of cases it cites, however, do not deal with developments such as the Timely Schedule 85 Projects which have already triggered a utility's tariffed obligations. In fact this Commission has respected the notion that changes with significant impact should be made on a prospective basis only. *See*, *e.g.*, *Re Investigation of Qualifying Facility Contracting and Pricing*, Docket UM 1610, Order No. 14-058 (Feb. 24, 2014) ("our proposed consideration of any proposal to revise the rates, terms, and conditions for QF standard contracts is done on a prospective basis only").

The most specific case on point to which Idaho Power cites actually involves a reversal by the Idaho state commission after it had had initially agreed to stay all obligations for the utility to enter into contracts. *See Order No. 21332, Idaho Public Utilities Commission* (*July 13, 1987*). Concluding that a complete freeze on all contracting activity would be "a vehicle and source of potential and unintended injustice," and where, as here, the "avoided cost rates on file with the Commission have not been determined to be unreasonable, void, or otherwise without rational basis" it was more appropriate that the suspension of utility obligations "would be

inapplicable as to those QF projects that prior to the issuance of [its previous order] had satisfied [the applicable requirements and] would otherwise be entitled to a contract and a lock-in of avoided cost rates." *Id.* at 1-2. The Colorado Commission took similar action in one of Idaho Power's cases. *See Application of the Pub. Serv. Co. of Colo. For a Moratorium Regarding Indep. Power Prod. Facilities*, Colo. PUC Dec. No. C87-1690, at 37 (Dec. 16, 1987) (grandfathering from moratorium QF developers if they had "contacted Public Service prior to the filing of this application").

Similarly, a California PUC decision to which Idaho Power cites would not have applied to developments like the Timely Schedule 85 Projects. *See Motion at 9, fn 20*, *citing* Decision 96-10-036, California PUC (1996). That case did not apply to QFs which had done everything necessary to trigger negotiations for standard contracts. *Id.* at *26.

The central Commission case that Idaho Power relies on is a 2012 decision temporarily suspending Idaho Power's obligation to enter into standard PURPA contracts until Idaho Power's avoided costs were updated through the contemporaneous Integrated Resource Planning ("IRP") process, which the Commission planned to consider the day after making its decision. *See Motion at 5, lines 3-5*, *citing Re Idaho Power Company*, Docket UE 244, Order No. 12-042 (Feb. 14, 2012). But more relevant and directly analogous is that two months later the Commission rejected Idaho Power's request for a stay very similar to the Motion in response to a specific request that the Commission investigate the methodology used to calculate avoided costs. *See Re Idaho Power Company, Docket UE 1590 & UM 1593, Order No. 12-146* (*Apr. 25, 2012*) (denying stay in part because "[i]f the Commission grants the stay as Idaho Power requests, QFs will have no Standard Contract available for the duration of the investigation,

effectively freezing all QF activity for what may be a year"). In that 2012 proceeding, Idaho Power's motion for stay included an almost identical line of argument to the current Motion, making the same doomsday predictions about QF development, and similarly mischaracterizing the same case law in an attempt to convince the Commission to freeze its obligations under PURPA. The Commission rejected the 2012 motion for stay, and the Commission should similarly reject the Motion.

The Motion also mischaracterizes federal decisions. *See*, *e.g.*, *Motion at 6-7*, *citing Southern California Edison Co*., 70 FERC ¶ 61,215, at pp 26-27 (1995). According to Idaho Power, this case is authority for granting the Motion as "FERC suggested to the California Commission that it stay its requirements that utilities purchase QF output pending the establishment of the new methodology." *Motion at 6.* However, the ruling was predicated on a previous finding that the California Commission's procedure for determining avoided costs was "unlawful" under PURPA. *Southern California Edison Co*., 70 FERC ¶ 61,215, at pp 26-27 (1995). There has been no such finding in regard to Schedule 85. To the contrary, Schedule 85's avoided cost methodology and terms and conditions were affirmed by the Commission last year. *See Re Investigation of Qualifying Facility Contracting and Pricing*, Docket UM 1610, Order No. 14-058 (Feb. 24, 2014). Even market fluctuations which may or may not have occurred since that time do not change this conclusion, as FERC has recognized that contracted avoided costs rates over time may be higher (or lower) than the actual avoided costs at the time of purchase. *See Small Power Production and Cogeneration Facilities; Regulations Implementing Section 210 of PURPA*, 45 Fed. Reg. 12214, 12224 (1990) (quoted in *Independent Energy Producers Ass'n, Inc. v. California Pub. Util. Comm*., 36 F.3d 848, 858 (9th

Cir. 1994) (while current avoided costs might be lower than the rates provided in the contracts, "in other cases, the required rate will turn out to be lower than the avoided costs at the time of purchase . . . and in the long run, "overestimations" and "under estimations" of avoided costs will balance out").

Accordingly, the Commission should adhere to its longstanding position to "remain grounded in the policies we articulated in previous orders addressing [the rates, terms, and conditions for QF contracts] and decline to make changes without compelling evidence of a need for the proposed revision." *See Re Investigation of Qualifying Facility Contracting and Pricing*, Docket UM 1610, Order No. 14-058 (Feb. 24, 2014). Idaho Power itself, in a different context, has stated its view that retroactively adjusting QF rates is inappropriate. *See In Re Staff's Investigation Related to Electric Utility Purchases from Qualifying Facilities*, Docket No. UM-1129, Order No. 05-1061, at 3 (Oct. 4, 2005) ("Idaho Power argues that state commissions are obligated under federal law to provide certainty in setting QF rates and that retroactively adjusting QF rates is inappropriate, particularly when such adjustments would be asymmetric in nature"). Thus, to the extent the Commission grants any form of a stay, it should have a prospective impact only and should not change Idaho Power's Schedule 85 obligations to offer standard contracts to the Timely Schedule 85 Projects. *See id*. ("consideration of any proposal to revise the rates, terms, and conditions for QF standard contracts is done on a prospective basis only").

F. Rather Than Maintaining Status Quo, Granting the Motion Would Actually Cause Irreparable Harm

The Motion requests a stay of utility obligations while larger issues regarding the scope of its future obligations are considered and decided. When deciding about lifting or granting a stay the Commission is concerned with preserving the status quo pending some further action. *See, e.g., Threemile Canyon Wind I, LLC vs. PacifiCorp d/b/a Pacific Power*, Docket UM 1576, Order No. 12-475 (Dec. 10, 2012). In this sense, the Motion can reasonably be analogized to a request for a preliminary injunction, and consideration of the standards for granting a preliminary injunction can reasonably help guide Commission consideration.[7] In determining whether to order temporary relief, the Commission applies the general standards set out in ORCP 79, which seek to protect all parties by maintaining the status quo and preventing a party from taking an action which would injure another party. *Id.*

In this case, because of its substantial prior investment and the pending expiration of the ITC, Gardner Solar and ratepayers are in danger of suffering irreparable injury if the Commission grants the Motion. Ratepayers and the environment will be harmed if these solar projects at recently approved avoided cost rates are prevented from coming on line and joining Oregon's generation portfolio. Similarly harmed would be Gardner Solar, which has invested substantial amounts of money in developing the Timely Schedule 85 Projects. This investment was made in part on reasonable reliance on prior Commission orders and governing Idaho Power

[7] The Oregon Rules of Civil Procedure govern preliminary injunctions and temporary restraining orders and apply to the Commission where no specific rule otherwise governs. *See* ORCP 79; OAR 860-011-0000(3); *see also RIO Communications, Inc., Complainant, vs. US West Communications, Inc*., Docket UC 410, Order No. 99-349, at 7-8 (May 24, 1999) (While Commission does not issue preliminary injunctions or other explicitly injunctive relief, it does have authority to order utilities under its jurisdiction to do or refrain from doing acts. For example, the Commission has noted that "under OAR 860-021-0015, it can direct utilities to act in ways that are "clearly in the nature of injunctive relief.")

tariffs. Solar developers and projects, including the Timely Schedule 85 Projects, are under tremendous pressure to timely execute power purchase agreements so that they can attract tax equity and place their projects into service prior to the expiration of the ITC. The Motion asserts that granting the stay would preserve the status quo. *Motion at 7, line 5*. Not so. Based on the timing of ITC expiration and the typical development timeline, granting the Motion to stay would go much further than preserving the status quo for Idaho Power while the Commission investigates the issues raised in the Applications – rather it would effectively grant Idaho Power a complete victory on the merits by killing viable QFs like the Timely Schedule 85 Projects.

II. Granting Idaho Power's Motion to Stay Would Impermissibly Allow Idaho Power to Violate the Filed-Rate Doctrine

Schedule 85 is part of a Commission-approved tariff, and under the filed-rate doctrine, its current terms must apply to the Timely Schedule 85 Projects. Granting a stay of Idaho Power's current obligations under Schedule 85 would improperly and effectively allow Idaho Power to violate the filed rate doctrine.

The filed-rate doctrine is a cornerstone of utility regulation and generally provides "that the rate filed with a commission is the only lawful charge and that deviation from it is not permitted on any pretext." *Utility Reform Project v. Portland Gen. Elec. Co.*, Docket No. UCB-13, Order No. 03-629, at 2 (Oct. 22, 2003). Rates filed with and approved by the Commission are "conclusively lawful until a new rate is approved." *See Dreyer v. Portland General Elec. Co.*, 341 Or. 262, 142 P.3d 1010, 1014 n.10 (2006).[8] The Supreme Court has stated that "no

[8] Schedule 85 is a rate filed with the Commission. The Commission has previously stated that ORS 757.220 (regarding notice for schedule changes) "does not apply to the prices paid by utilities to QFs." *Order 12 042, at footnote 1*. This does not remove Schedule 85 from the ambit of the filed rate doctrine, as utilities are obligated to file such rate schedules in Oregon pursuant to ORS 758.525.

Oregon court has expressly decided whether Oregon accepts the filed-rate doctrine," *id.*, but seemed to assume as much in a decision it issued just last year. *Gearhart v. Pub. Utility Comm'n of Oregon*, 356 Or. 216, 339 P.3d 904, 918 (2014) (en banc) (concluding that filed-rate doctrine did not prohibit Commission from reexamining prior rates and ordering a refund when previous rate decision was based on an error identified by reviewing court on appeal). In any event, the Commission has long argued that the filed-rate doctrine does apply in Oregon, *see Dreyer*, 142 P.3d at 1014 n.10, describing it as "cornerstone[] of Oregon regulatory law." *Utility Reform Project*, Order No. 03-629, at 3.

In this case, if the Commission were to grant Idaho Power's motion, it would effectively allow Idaho Power to violate the filed-rate doctrine. Schedule 85 is a Commission-approved rate that is currently in force. Under the terms of that tariff, after a QF submits a request for a draft Energy Sales Agreement ("ESA"), Idaho Power is required to respond with that draft ESA within 15 business days. Idaho Power cannot retroactively suspend its obligations to respond to and process these requests under the Schedule 85 tariff. That tariff is "conclusively lawful" and remains in place and effective until the Commission approves a new one. Accordingly, the filed-rate doctrine mandates that Idaho Power process requests for Timely Schedule 85 Projects under the existing Schedule 85 tariff.

Some jurisdictions have recognized that the filed rate doctrine does not extend to instances where parties have adequate notice that "resolution of some specific issue may cause a later adjustment to the rate being collected at the time of service." *In Re Joint Petition of Idaho Power Co. et al. to Address the Avoided Cost Issues and to Adjust the Published Avoided Cost Rate Eligibility Cap*, Case No. GNR-E-10-04, Order No. 32176, at 10 (Id. Pub. Utilities

Comm'n, Feb. 7, 2011); *see also In Re Rocky Mountain Power's Proposed Revisions to Electric Service Schedule No. 37*, Docket No. 14-035-T04, Order on Cumulative 25,000 kW Cap (Pub. Serv. Comm'n of Utah, Jul. 3, 2014); *In Re Southwest Power Pool, Inc.*, 143 FERC ¶ 61,018 p 20 Apr. 5, 2013). In this case, however, the Timely Schedule 85 Projects have had no notice that Idaho Power would unilaterally seek to stay its obligations under Schedule 85, or that it would be opening an entirely new docket to change the terms and conditions under which it enters into power purchase agreements with QFs. Both the Motion and the Applications were filed on April 24, 2015. The issues that are the subject of Idaho Power's application—the eligibility cap and the contract term for QFs—have certainly been debated in the past. However, QFs had no way of knowing that Idaho Power would be raising these issues again, especially given that the Commission just recently reaffirmed its decision to establish a 10 MW contract eligibility cap and a 20-year term for PPAs. Moreover, when Gardner Solar submitted requests for the Timely Schedule 85 Projects, it certainly had no way of knowing that Idaho Power would attempt to unilaterally suspend its obligations under Schedule 85. Accordingly, the "notice" exception to the filed-rate doctrine does not apply in this instance.

In sum, Schedule 85 is part of a Commission-approved rate, and under the filed-rate doctrine, its current terms must apply to the Timely Schedule 85 Projects. Granting Idaho Power's Motion to stay its current obligations under Schedule 85 would effectively allow Idaho Power to violate the filed rate doctrine. For this reason, the Commission should deny the Motion.

III. Granting the Motion Might Be Considered an Impermissible Termination of a Legally Enforceable Obligations, But Action on This Basis Is Not Being Requested

The Commission is familiar with issues involving the creation of a "legally enforceable obligation" or "LEO" under which a utility must purchase QF power, and is currently considering the proper resolution of this matter in Docket UM 1610 Phase II. *See* ALJ's Ruling, March 26, 2015 (listing as Issue no. 8 for the Phase II proceeding: "When is there a legally enforceable obligation?")

As background, federal regulations provide this avenue for QFs to sell energy pursuant to 18 CFR § 292.304(d). While Idaho Power will certainly take an opposing view, it would be reasonable and consistent with federal and state law to conclude that the Timely Schedule 85 Projects, by the timely filing of complete and formal requests under Schedule 85, have already created a LEO. Nonetheless the Commission need not decide the issue of when precisely a LEO is created for resolving the Motion, and Gardner Solar will not attempt to litigate that question for purposes of the Motion. There are ample reasons provided above demonstrating the appropriateness of rejecting the Motion, at least to the extent a stay would apply to the Timely Schedule 85 Projects.

Further, because of the likelihood that the Commission would not want to base its ruling on the Motion on the determination of whether or not a LEO was created during the pendency of UM 1610 Phase II proceedings, and because of the potential for project-killing delay if the two dockets become intertwined, Gardner Solar is not asking for a resolution on this question for purposes of ruling on the Motion. The Commission, however, should be on notice that Gardner Solar believes the Timely Schedule 85 Projects already have created a LEO, that

each is entitled to Schedule 85 contracts, and that it reserves the right to raise this issue at an appropriate time.

CONCLUSION

For the reasons stated above, the Commission should deny Idaho Power's Motion in its entirety or, in the alternative, grant it with an effective date no earlier than May 7, 2015, the day the Commission provided public notice of the Motion, or as of the date of the Commission's ruling on the Motion, thereby obligating Idaho Power to continue to meet its Schedule 85 obligations to the Timely Schedule 85 Projects and any similarly situated projects.

Dated this 13th day of May, 2015.

FOLEY & LARDNER LLP

By *<u>/s/ Thomas McCann Mullooly</u>*

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Certificate of Service

I hereby certify that I have on this day served by email a true and correct copy of the foregoing document upon each person designated on the service list in Docket UM 1725.

Dated at Washington, D.C., this 13th day of May, 2015.

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Docket No: UM 1725 **Docket Name:** IDAHO POWER STANDARD CONTRACT ELIGIBILITY CAP Print Summary

Subject Company: IDAHO POWER COMPANY

In the Matter of IDAHO POWER COMPANY, Application to Lower Standard Contract Eligibility Cap and to Reduce the Standard Contract Term, for Approval of Solar Integration Charge, and for Change in Resource Sufficiency Determination; Filed by Lisa F....

Filing Date: 4/24/2015

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