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2
3 **BEFORE THE PUBLIC UTILITY COMMISSION**
4 **OF OREGON**
5 **UM 1129**
6 **PHASE II TRACK 1 -- COMPLIANCE**
7

8 In the Matter of

9 PUBLIC UTILITY COMMISSION OF
10 OREGON

11 Staff's Investigation Relating to Electric
12 Utility Purchases From Qualifying
Facilities.

IDAHO POWER'S POST-HEARING BRIEF

13 **INTRODUCTION**

14 In this Compliance Phase of Docket 1129, the Oregon Public Utility Commission
15 ("OPUC" or "the Commission") will determine whether the standard contracts filed by the
16 utilities comply with the Public Utility Regulatory Policies Act ("PURPA"),¹ Oregon's parallel
17 state legislation,² and the principles laid out in OPUC Order 04-584.³ In so doing the
18 Commission must be mindful to maintain the careful balance at the heart of its PURPA policies,
19 namely to "encourage the economically efficient development of [] qualifying facilities ("QFs"),
20 while protecting the ratepayers by ensuring that utilities pay rates equal to that which they would
21 have incurred in lieu of purchasing QF power."⁴ In other words, the Commission's policies
22 implementing PURPA should ensure that the customers of a utility purchasing energy under
23 PURPA should be left no worse off than they would otherwise be.

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25 ¹ 16 U.S.C. § 824a-3.

² ORS 758.505 et seq.

³ Order No. 04-584, issued in UM 1129 on May 13, 2005.

⁴ *Id.*, at p. 1.

1 Idaho Power Company (“Idaho Power” or the “Company”) appreciates Commission
2 Staff’s (“Staff”) diligent work in reviewing the utilities’ standard contracts and in making
3 specific recommendations to the Commission. Idaho Power believes that, in most cases Staff’s
4 recommendations are well reasoned and comport with the Commission’s articulated policies.
5 However, on several critical issues, Staff has departed from the Commission’s principles and has
6 recommended contract terms that have the effect of shifting development risk that properly lies
7 with the QF developers and financiers, squarely onto the shoulders of the utilities and their
8 customers. *First*, Staff recommends that QFs not be held liable for shortfall damages when they
9 fail to deliver monthly minimum amounts of energy. *Second*, Staff proposes that the
10 Commission impose caps on the absolute amount of damages for which QFs may be held liable.
11 *And third*, Staff proposes striking utility provisions that require QFs to obtain insurance from
12 companies with specific independent ratings.

13 In each of these cases, Staff attempts to protect the QFs from the risks that are inherent in
14 energy development projects, and in doing so, simply shifts the risk to the utilities. These
15 proposals are not necessary to encourage QF development in Oregon, they expose the utilities
16 and their customers to unreasonable risks, and they should therefore be rejected.

17 ARGUMENT

18 A. Monthly Minimums Energy Commitments

19 Idaho Power’s standard contract (the “Standard Contract”) (a) requires each QF to
20 specify the minimum amount of net energy that it will deliver each month, and (b) allows the
21 Company to recover damages if the QF fails to deliver as promised.

22 Under Section 6.1, the QF is required to specify the amount of net energy it will deliver
23 each month for a one year period. Section 6.2 provides that at any time the QF may revise the
24 monthly amounts beginning with the next calendar year, for the remainder of the agreement.
25 The QF’s failure in any month to deliver the minimum monthly amount may result in “Shortfall
26 Energy Damages.” These Shortfall Energy Damages are based upon actual market prices

1 existing at the time of the default and are designed to compensate the company for damages it
2 will incur if it is forced to purchase replacement energy.⁵

3 This framework set out in the Standard Contract allows Idaho Power to most accurately
4 predict the amount of energy it can expect on a monthly basis, and best balances the interests of
5 Idaho Power's customers and the QFs. As explained by Idaho Power witness John R. Gale,
6 Idaho Power is heavily reliant on hydroelectric generation, and as a result, is faced with the
7 significant challenge of managing customer exposure to price risk arising out of the potential for
8 the convergence of low water conditions and high market prices. In order to meet this challenge,
9 the Company has implemented a Risk Management Policy that has been reviewed and approved
10 by the Idaho Public Utilities Commission ("Idaho Commission") and is coordinated with a
11 Customer Advisory Group which includes representatives of the Idaho Commission Staff and
12 various customer groups. Consistent with this Risk Management Policy, Idaho Power makes
13 energy purchases and sales on a monthly basis in order to hedge its price risk. As a result,
14 having QFs commit to deliver a specific amount of energy each month helps Idaho Power
15 manage its resource portfolio to comply with its Risk Management Policy and to reduce
16 customer costs. In this regard, Idaho Power may be unique when compared to PacifiCorp and
17 Portland General Electric.⁶

18 In her testimony, Staff Witness Lisa Schwartz criticizes Idaho Power's requirement that
19 QFs specify minimum monthly net energy amounts below which the Company assesses damages
20 for under-delivery. Ms. Schwartz explains that she is concerned that QFs that are dependent on
21 wind and water flows may be unable accurately to predict production.⁷ Ms. Schwartz has similar

22 ⁵ Section 7.3 of the Standard Contract provides that if the current month's Market Energy Cost [85% of the weighted
23 average of the daily on-peak and off-peak Dow Jones Mid-Columbia Index prices for non-firm energy, as defined in
24 Section 1.8] is greater than the current month's Net Energy Purchase Price [the price contracted by the QF to be
25 paid, under Section 7.1] the Shortfall Energy Repayment Price will be determined by subtracting the current
26 month's Market Energy Cost from the current months Net Energy Purchase Price. If the result of this subtraction is
less than 0 then the Shortfall Energy Replacement Price is 0.

⁶ Idaho Power/200, Gale/2-3.

⁷ Staff/1000, Schwartz/30. Ms. Schwartz is also concerned that small wind and hydro projects may have insufficient
data on which to base projections.

1 concerns regarding cogeneration projects that serve industrial hosts.⁸ Ms. Schwartz therefore
2 recommends that delivery requirements for QFs relying on intermittent resources, as well as
3 cogeneration facilities, be set on annual, rather than monthly bases. Thus, under Staff's
4 recommendation, QFs would be liable for damages for failure to deliver contracted-for energy
5 only if the amount of net energy calculated at the end of the calendar year is less than the
6 minimum annual amount.⁹

7 Staff's recommendation, if accepted, would undermine the Company's current efforts to
8 manage its exposure to price risk, shift an unacceptable degree of risk to Idaho Power's
9 customers, and mitigate the beneficial results of Idaho Power's risk management policies.

10 First, as explained above, because of its heavy reliance on hydroelectric generation, Idaho
11 Power has a unique need to manage its monthly energy purchases and market exposure.
12 Ms. Schwartz's proposal that QF's make an annual commitment of net energy as opposed to
13 monthly commitment does not alleviate Idaho Power's concern. For Idaho Power, receiving
14 excess energy in April will not make up for shortfalls in deliveries in July. Consistent with its
15 Risk Management Policy, Idaho Power makes monthly purchases and sales in order to hedge its
16 low water-high market price risk and to balance its loads and resources. If the Company has firm
17 contract commitments from all wholesale suppliers, including QFs, specifying the resources that
18 will be available on a monthly basis, Idaho Power can make more cost-effective decisions on
19 monthly power purchases and sales. More volumetric specificity in the QF contracts, i.e.,
20 monthly energy commitments, allows the Company to be more precise in its wholesale market
21 purchases and this ultimately reduces costs to customers. Allowing QFs to contract for an annual
22 commitment will significantly reduce any planning benefit to customers.¹⁰

23 Moreover, assessing damages based upon an annual as opposed to monthly commitment
24 will not accurately compensate Idaho Power for costs that it may incur as a result of under-

25 ⁸ *Id.*

26 ⁹ Staff/1000, Schwartz/30-31.

¹⁰ Idaho Power/200, Gale/3.

1 delivery. If a QF fails to deliver the energy it agreed to supply, it is likely that the Company will
2 be required to replace that energy in real-time. If the Company is forced to pay market prices
3 that are significantly higher than the actual QF purchase price, then the Company and its
4 customers will suffer real harm. That harm will not be mitigated simply because the QF “makes
5 up” the shortfall in a future month—particularly if market prices have fallen. Idaho Power
6 believes that QFs should reimburse customers for additional cost based on the actual damages
7 the Company incurs. To require otherwise would be to transfer the QF’s risk to the customers.¹¹

8 Finally, requiring QFs to commit to monthly minimum energy amounts is a reasonable
9 requirement. It is true that QFs cannot “predict the weather” as Ms. Schwartz maintains.¹²
10 However, consistent with Idaho Power’s Standard Contract, the QFs are in control of the
11 estimates they provide. Idaho Power allows the QF to designate the monthly amounts of energy
12 that it reasonably can be expected to produce and QFs have the option of providing conservative
13 estimates in order to decrease the chance that they will be subject to shortfall damages.¹³
14 Further, for wind and hydro projects, QFs can set monthly amount at a level less than the long-
15 term average production to accommodate reasonably anticipated reductions in natural motive
16 force. For cogeneration projects at industrial plants, Idaho Power has stated that it would be
17 reasonable that the QF would make allowances in the long-term average energy production
18 estimates for market and price conditions that may impact the ability of the QF to deliver energy
19 to the utility.¹⁴

20 Ms. Schwartz and Oregon Department of Energy (“ODOE”) witness Jeff Keto both
21 express concern that some QFs, particularly QFs using weather-dependent generating
22 technologies, may not be able to obtain financing and develop their projects if they are required
23 to specify realistic minimum monthly energy amounts they will deliver and possibly pay

24 ¹¹ *Id.*

25 ¹² If Idaho Power has questions about the QF’s estimate, it will work cooperatively with the QF developer to
determine an equitable monthly energy amount for inclusion in the contract. Staff/1000, Schwartz/29-30.

26 ¹³ Staff/1002, Schwartz/2, 5.

¹⁴ Staff/1002, Schwartz/6.

1 damages based on actual excess costs incurred if they fail to perform as agreed.¹⁵ However,
2 Idaho Power’s experience in Idaho indicates that this concern is unfounded.

3 Idaho Power’s template contract which is currently in use in Idaho places even more
4 stringent performance requirements on QFs than does the Standard Contract the Company has
5 proposed to use in Oregon. The Idaho template contract requires QFs to commit to deliver an
6 amount of energy each month and provides for liquidated damages based on actual market
7 conditions for both under-delivery and over-delivery in any month subject to a 90%/110% band.
8 The monthly amount is specified by the QF and the 90%/110% band encourages QFs to commit
9 to supply realistic amounts of energy, not worst-case amounts. There is no special treatment for
10 weather-dependent generation technologies.¹⁶

11 At the time the Company’s Idaho template contract was being considered by the Idaho
12 Commission, the QF industry and their lenders presented all of the same arguments to the Idaho
13 Commission that are being presented by the Oregon Staff and ODOE in this case. QF
14 developers and lenders warned the Commission that new QF projects using weather-dependant
15 technologies could not be developed or financed if QFs were required to commit to realistic
16 monthly generation amounts with liquidated damages provisions if they failed to provide the
17 amounts of energy they agreed to provide.^{17 18}

18 Those dire predictions failed to materialize in Idaho. Since the Company’s template
19 contract (including monthly energy commitments by QFs and the assessment of damages for
20 failure to provide the agreed-upon energy amounts) was approved by the Idaho Commission, the
21 Company has entered into more than 20 contracts with a combined nameplate capacity of
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23 ¹⁵ In its testimony, ODOE Witness Keto states that the ODOE’s Small Energy Loan Program (“SELP”) generally
24 would not loan to a QF if there were more than an incidental risk of default due to under-delivery related to
25 minimum delivery requirements. ODOE also states that for QFs relying on natural motive force, i.e., wind, solar,
26 the minimum delivery requirements would need to be very low in order for ODOE to make a loan.

¹⁶ Idaho Power/200, Gale/4.

¹⁷ *Id.*

¹⁸ *See, e.g.*, Direct Testimony of Sutherland, page 3, lines 10-19; Reading, pages 5-8; and Kunz, pages 8-10 in U.S.
Geothermal/Lewendowski and Schroeder, filed in IPC-E-04-8 and 10, Order No. 29632.

1 approximately 219 MW, and ranging in size from 0.13 MW to 21 MW. The QF projects under
2 those contracts represent almost all of the PURPA-qualified generating technologies, including
3 wind, geothermal, industrial waste, biomass, landfill gas, and hydro. And there is no indication
4 that the monthly minimum requirements—including potential shortfall damage assessments—
5 have had a chilling effect on the intermittent renewable resources. On the contrary, the greatest
6 demand for contracts has been from QFs seeking to develop intermittent wind projects. In fact,
7 QF development of these resources has been so successful that recently, the Idaho Commission
8 ordered a temporary reduction in the capacity size for entitlement to the standard rates for
9 intermittent resources such as wind because so many intermittent wind resources were seeking to
10 sign contracts containing the very same or more stringent provisions than those about which
11 Staff and ODOE are concerned.¹⁹

12 In short, Idaho Power’s actual experience in Idaho demonstrates that Oregon can develop
13 a very robust QF industry while at the same time expecting QFs, including QFs whose
14 generation is dependent on weather and market conditions, to commit to provide energy on a
15 monthly basis that allows Idaho Power to successfully integrate QF resources without an undue
16 or adverse impact on customers.

17 **B. Damage Caps**

18 In addition to damages for failure to meet monthly minimums. Idaho Power’s Standard
19 Contract requires QFs to pay damages to the Company in the event of the QF plant fails to come
20 on line on the promised date,²⁰ and in the event the contract is terminated due to the QF’s
21 default.²¹ Like the damages for shortfall energy, these damage provisions are intended to make
22 the utility and its customers whole in the event a QF fails to perform under its contract. In so
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25 ¹⁹ Idaho Power/200, Gale/5.

26 ²⁰ Standard Contract, § 5.3.

²¹ Standard Contract, § 18.2.1.

1 doing, Idaho Power’s Standard Contract helps balance the interests of the QFs with those of the
2 utility’s customers, and to ensure that customers are not harmed by QF transactions.

3 However, in a sharp departure from this principle, Staff recommends that the
4 Commission impose caps on the damages for which QFs can be held liable in the case of
5 default—caps that may prevent the utility from recovering the actual damages incurred by the
6 QFs failure to abide by its contractual obligations. These caps are unnecessary to QF
7 development in this state and constitute another unjustified attempt to shift to the utilities and
8 their customers risks that reasonably should rest with the QFs

9 **1. Damages for Default due to Failure to Provide Minimum Energy**

10 As explained above, under Idaho Power’s Standard Contract, QFs are entitled to specify
11 the minimum monthly energy they agree to provide under the contract, and the utility may assess
12 default damages for shortfalls based upon the costs the Company is expected to incur. Staff
13 proposes not only to substitute a minimum annual commitment, but also to impose a damage cap
14 on the total amount the utility can recover. Specifically, Staff has adopted ODOE’s
15 recommendation and proposes that damages be capped at the “contract value” of the minimum
16 delivery obligation during the default period.²² In other words, Staff recommends a total dollar
17 cap for default losses that the utility may assess a QF for an event of default equal to 100% of the
18 QF contract price multiplied by the amount of energy the QF failed to deliver the previous year,
19 based upon its annual minimum delivery obligation.²³

20 Idaho Power opposes this damage cap, which is pegged to the contract price as opposed
21 to the actual damages it incurs in replacing the contracted-for energy. Depending on market
22 conditions at the time of the QF’s default, the cap on damage collection recommended by Ms.
23 Schwartz could result in Idaho Power’s being unable to collect all of its actual damages. This
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25 _____
26 ²² Staff/1500, Schwartz/19. ODOE’s recommendation is at ODOE/6, Keto/16.

²³ *Id.*

1 cap is unnecessary and serves simply to shift the risk of nonperformance away from QFs onto the
2 Company's customers.

3 Ms. Schwartz defends the damage cap, arguing that damages must be transparent and
4 verifiable in order for the QF's to receive financing.²⁴ Ms. Schwartz quotes ODOE witness Jeff
5 Keto who stated, "I would likely not recommend SELP [Oregon's Small Energy Loan Program]
6 finance most of the current QF projects we are reviewing if the power purchase contract's
7 maximum default damages can not be quantified at the time the loan is advanced, usually upon
8 execution of the power purchase agreement."²⁵ Ms. Schwartz's reasoning is faulty. First, as
9 evidenced by the Company's experience in Idaho, QFs have apparently had no difficulty in
10 obtaining financing for QF contracts which contain uncapped damage provisions for failure to
11 meet monthly minimum energy requirements. Second, if in fact the characteristics of a QF
12 project—or the condition of the market at the time of the contract—were such that the risks of
13 uncapped damages posed an obstacle to financing, capping damages should not be the answer. It
14 is unreasonable for the Commission to require the utility and its customers to accept the risk of a
15 QF project that the project's own developers and financiers are unwilling to accept.

16 Rather than limit the Company's ability to recover its losses based on actual, market
17 conditions in place at the time of the breach, Idaho Power believes the Commission correctly
18 addressed this issue in Order No. 05-584 by requiring the standard contract to include provisions
19 to allow QF developers to repay the utility's damages over time.²⁶ This allows the QF to
20 continue to operate and maintain its project, pay its debt service, and repay the losses Idaho
21 Power has incurred as a result of the QF's failure to perform in accordance with the terms of the
22 agreement. In its Standard Contract, Idaho Power included a default 36-month payment period.²⁷
23 In the past, the Company has entered into repayment arrangements with QFs for both shorter and
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25 ²⁴ Staff/1500, Schwartz/15-15.

26 ²⁵ Staff/1500, Schwartz/14, quoting from ODOE's response to Staff Data Request 20, Staff /1502, Schwartz/22-23.

27 ²⁶ Order No. 05-584, page 45.

²⁷ Staff/1502, Schwartz/13.

1 longer time periods keyed to the QF's economics. Idaho Power has stated that it would make
2 similar arrangements in Oregon.²⁸

3 **2. Default Due to Construction Delay**

4 Under Section 5.3 of Idaho Power's Standard Contract, if the QF fails to achieve the
5 "Operations Date" (commence operations) within 30 days of the scheduled date, the QF will
6 reimburse Idaho Power for any shortfall damages accruing from 30 days following the Operation
7 Date, until the QF achieves the Operation Date.

8 Ms. Schwartz recommends that the shortfall damages the utility may assess the QF under
9 these circumstances be capped at the "contract value" of the minimum delivery obligation during
10 the default period.^{29 30} Idaho Power opposes this cap for the same reasons it opposes the damage
11 cap on monthly minimum shortfalls, described above. In short, in the case of QF default, the
12 utility should be entitled to damages that are reasonably designed to compensate the utility for its
13 actual losses incurred as a result of the QF's failure to perform.

14 **3. Early Contract Termination**

15 Under Idaho Power's Standard Contract, the Company has the right to terminate the
16 agreement if the QF fails to come on line within ten months of the contracted date³¹ or if the QF
17 fails to deliver at least 10 percent of the contracted energy (unless excused by an event of force
18 majeure) in any one contract year.³² Section 18.2.1 provides that in the event the contract is
19 terminated due to the QF's default, Idaho Power will pursue its legal and equitable remedies.³³

21 ²⁸ Idaho Power/200, Gale/6-7.

22 ²⁹ Staff/1500, Schwartz/19.

23 ³⁰ Ms. Schwartz explains that the utility would need to prorate the annual delivery obligation. Ms. Schwartz also
24 recommends that damages would not apply if, on the date of contract execution, the utility expected to be in a
25 resource sufficient position on the date the QF was committed to being on line.

26 ³¹ Standard Contract Section 5.4.

³² Standard Contract Section 6.3.

³³ Since 1981, out of 86 QF contracts, Idaho Power has involuntarily terminated only three QF contracts. Idaho
Power/200, Gale/7. All of those involuntary terminations have come as a result of the QFs curtailing their
generation to very low levels while making no reasonable efforts to cure the problem. *Id.* Even though Idaho Power
has invoked the remedy of contract termination very sparingly, the interests of Idaho Power's customers require that
the Company have the ability, in appropriate circumstances, to terminate QF contracts for non-performance. *Id.*

1 This contract language would allow Idaho Power to attempt to recover the actual damages it
2 incurs due the QF’s default and the subsequent termination of the contract.

3 Staff recommends that Idaho Power place in its Standard Contract a “cap”³⁴ on damages
4 that may be assessed against the QF if the contract is terminated due to the QF’s default.
5 Specifically, Staff recommends that the utility’s damages be capped at the positive difference
6 between the replacement power price and the QF contract price for a period of 24 months,
7 beginning with the date of termination.³⁵

8 Idaho Power appreciates the fact Staff is recommending that termination damages (as
9 opposed to shortfall damages) be calculated in reference to the costs the utility will actually incur
10 to replace the energy that the QF fails to deliver. Staff explains that it does so in order to
11 eliminate the opportunity for the QF to “game the system” by purposely terminating the contract
12 when market prices are higher than the contracted-for price.³⁶ This aspect of Staff’s proposal is,
13 in and of itself, beneficial. In the event that Idaho Power suffers damages flowing from the
14 termination in 24 or fewer months, the Company may be made whole. *However*, in the event
15 that the utility’s termination damages continue past 24 months, the cap amount will ensure that
16 the Company does *not* recover its actual damages. Therefore, while Idaho Power supports
17 Staff’s proposal that termination damages be calculated based on the difference between market
18 and contracted prices, Idaho Power should have the opportunity to recover those damages—if it
19 incurs them—until the Company is able to mitigate its damages.

20 Moreover, Staff’s proposal does *not* eliminate the QFs ability to game the system. Quite
21 to the contrary. Staff’s proposal makes it possible for a QF to game the system if it determines
22 that capped damages will be less over the long run than the amount it could sell its energy on the
23 market. Thus, when market prices exceed avoided costs, the presence of a cap on damages may

24 _____
25 ³⁴ Staff takes the position that its proposal does not constitute a true cap, but rather a time limit for which damages
26 may be sought. *See* Transcript of Proceedings, Hearing UM 1129, Phase II, Track I, Feb. 2, 2006, and Feb. 8., 2006,
(hereafter “Transcript”) at p.108.

³⁵ Staff/1500, Schwartz/21.

³⁶ Staff/1500, Schwartz/21.

1 encourage QF developers to terminate their contract with the utility and simply convert their
2 projects to merchant power plants. This is not just a hypothetical situation. During the 2000
3 energy crisis, when market prices temporarily went above avoided cost rates, a large QF project
4 terminated its contract with Idaho Power, paid the liquidated damages, and immediately began
5 searching for opportunities to sell power on the wholesale market.³⁷ Staff Witness Schwartz
6 admitted that Staff's cap proposal would make such gaming possible.³⁸

7 Ms. Schwartz argues that the termination damage cap is necessary in order to ensure that
8 small QFs will be able to obtain financing for their projects. Staff's concern is belied by Idaho
9 Power's actual experience in Idaho. For at least the last ten years, no Idaho QF contracts have
10 included a cap on damages arising out of contract termination.³⁹ Yet, the absence of a cap does
11 not appear to have adversely affected the development of a robust QF industry in Idaho. Since
12 the mid-1990s Idaho Power has signed approximately 30 QF contracts with a combined capacity
13 of approximately 259 MW, none of which include a cap on damages the utility can collect if the
14 contract is terminated due to a QF default. Thus, the evidence would suggest that a damage cap
15 is not required to encourage QF financing and development.⁴⁰

16 Ms. Schwartz also argues, in reference to various damage calculations that she produced
17 for illustrative purposes, that in most cases the utility's actual damages will not exceed the
18 damage caps.⁴¹ However, if Ms. Schwartz is correct on this point, then the QFs should be able to
19 negotiate financing in absence of damage caps. At any rate, the utility should not be forced to
20 take on that risk on behalf of its customers.

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24 ³⁷ In that particular case, the QF developer eventually shut down the generation facility, but under the right
conditions, this scenario could play out again. Idaho Power/200, Gale/8-9.

25 ³⁸ Transcript, page 120-21.

26 ³⁹ As explained by Idaho Power witness John R. Gale, a prior vintage of contracts under which QFs were paid
levelized rates did contain a cap on damages if the contract was terminated prior to its expiration.

⁴⁰ Idaho Power/200, Gale/8.

⁴¹ Staff/1503, Schwartz/1.

1 **C. Insurance Requirements**

2 Section 11.2. of Idaho Power’s Standard Contract requires QFs to maintain \$1,000,000 in
3 general liability insurance from an insurance company with an AM Best Company rating of A-
4 or better. Idaho Power believes that this level and quality of insurance will give the Company
5 and its customers the protection that they need.⁴²

6 Staff Witness Michael Dougherty recommends that QFs should be allowed to utilize any
7 liability insurance carrier authorized by the Insurance Division to sell insurance in the State of
8 Oregon. Mr. Dougherty suggests that the Insurance Division’s authorization should provide
9 sufficient assurance of the strength of the insurance company.⁴³ Mr. Dougherty further notes that
10 if an insurance carrier authorized to sell insurance in Oregon becomes insolvent or fails to pay
11 claims, the Oregon Insurance Guaranty Association provides back-up protection in the amount of
12 \$300,000 for each liability.⁴⁴

13 While Idaho Power has no reason to believe that the Oregon Department of Insurance is
14 not diligent in carrying out its statutory obligations, there is no question that the independent
15 review of an insurance carrier’s financial strength and stability as performed by the A.M. Best
16 Company provides an additional layer of protection for Idaho Power and ultimately its
17 customers. While liability insurance is not often used, when it is needed, the financial strength
18 of the insurer is critical. Idaho Power requires all entities doing business with Idaho Power that
19 are required to provide liability insurance do so utilizing insurance carriers that maintain an
20 “Excellent” A.M. Best rating.⁴⁵ As such, QF developers are not subjected to more stringent
21 requirements than are other entities doing business with Idaho Power. Moreover, the Oregon
22 Insurance Guaranty Association back up protection is not sufficient reassurance. In Order No.
23 05-584, the Commission authorized Idaho Power to include provisions in the standard contract
24

25 ⁴² Idaho Power/200, Gale/9-11.

⁴³ Staff/1300, Dougherty/4-5.

⁴⁴ Staff/1300, Dougherty/5-6.

⁴⁵ Idaho Power/200, Gale/9-10.

1 requiring QFs to provide prudent levels of liability insurance. Idaho Power considers \$1,000,000
2 as a prudent level of coverage and has signed 86 QF contracts including the \$1,000,000 amount
3 of coverage. Industry experience indicates that liability claims associated with electrical
4 generation and transmission can very easily exceed even \$1,000,000. Three hundred thousand
5 dollars is considerably less than \$1,000,000.⁴⁶

6 While Mr. Dougherty never explains in his testimony why he believes customers are
7 better off if QFs are permitted to purchase insurance from insurance carriers that do not carry an
8 A.M. Best “Excellent” rating, it appears that his recommendation is based on a belief that some
9 QFs may be unable to procure liability insurance from A.M. Best rated companies or that the
10 cost of buying insurance from these higher-quality companies will be higher. If that is his
11 concern, it is not consistent with Idaho Power’s experience with QF insurance in Idaho. Idaho
12 Power currently has 86 QF contracts in force that include the A.M. Best insurance rating
13 requirement. In the last 3 years Idaho Power has signed 22 new contracts containing the
14 “Excellent” rating requirement and the Company has not been advised by QFs that this
15 requirement was unreasonable or presented any difficulty for them.⁴⁷

16 CONCLUSION

17 For all of the above reasons, Idaho Power respectfully requests that this Commission
18 decline to adopt those policies proposed by Staff that would have the effect of imposing an
19 undue degree of risk on the utilities and their customers. Accordingly the Commission should
20 (1) allow Idaho Power to require QF’s to specify monthly minimum energy commitments below
21 which the QFs will be liable for shortfall damages; (2) reject Staff’s proposed damage caps that
22 may prevent the Idaho Power from the opportunity to recover actual damages flowing from QF

23 ///

24 ///

25 ⁴⁶ Idaho Power/200, Gale/10.

26 ⁴⁷ Idaho Power/200, Gale/11.

1 nonperformance; and (3) allow Idaho Power to require QFs to obtain and carry liability insurance
2 from a carrier that has been rated by AM Best at the level of A- or above.

3 Respectfully submitted this 20th day of March, 2006.

4 ATER WYNNE, LLP

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6
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March 20, 2006

VIA EMAIL AND US MAIL

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Salem, OR 97308-2148

Re: UM 1129 Phase II Track I – Idaho Power Company’s Post-Hearing Brief

Dear Sir or Madam:

Enclosed for filing in the above-referenced docket are the original and five copies of Idaho Power’s Post-Hearing Brief. Please contact me with any questions.

Very truly yours,



Jessica A. Gorham

Enclosures

cc: UM 1129 Service List

CERTIFICATE OF SERVICE
UM 1129

I hereby certify that a true and correct copy of **IDAHO POWER COMPANY'S POST-HEARING BRIEF** was served via U.S. Mail on the following parties on March 20, 2006:

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