RICHARDSON & O'LEARY
ATTORNEYS AT LAW

Peter Richardson

Tel: 208-938-7901 Fax: 208-938-7904
peter@richardsonandoleary.com
P.O. Box 7218, Boise, ID. 83707 - 515 N. 27th St., Boise, ID. 83702

March 7, 2006

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

RE: AVU-E-05-7

Dear Ms. Jewell:

We are enclosing an original and seven (7) copies of the MOTION FOR PARTIAL SUMMARY JUDGMENT and/or MOTION FOR CLARIFICATION BY THOMPSON RIVER CO-GEN, LLC, in the above matter.

A copy to be file date stamped and returned to our office is also enclosed.

Please let us know if you have any questions.

Sincerely,

Nina M. Curtis

Nina M. Curtis
Administrative Assistant for Peter Richardson

encl.

Peter J. Richardson
RICHARDSON & O'LEARY PLLC
515 N. 27th Street
Boise, Idaho 83702
Telephone: (208) 938-7901
Fax: (208) 938-7904
peter@richardsonandoleary.com

Mike Uda
DONEY, CROWLEY, BLUMQUIST, PAYNE & UDA
Suite 200
Diamond Block
Helena, MT 59601
(406) 443-2211
(406) 449-8443
muda@doneylaw.com

Attorneys for Complainant Thompson River Co-Gen, LLC

BEFORE THE IDAHO PUBLIC UTILITIES COMMISSION

THOMSPON RIVER CO-GEN, LLC, a Colorado Company Complainant, vs. AVISTA CORPORATION, dba, Avista Utilities, a Washington Corporation, Respondent	CASE NO. AVU-E-05-7 MOTION FOR PARTIAL SUMMARY JUDGMENT AND/OR MOTION FOR CLARIFICATION

COMES NOW, Complainant, Thompson River Co-Gen, LLC, (hereinafter "TRC"), by and through their attorneys and pursuant to Rule 56 of this Commission's rules of procedure hereby respectfully moves for an order granting summary judgment on the limited issues of entitlement to published avoided cost rates. In the alternative, to a motion for summary judgment on the issue of entitlement to published rates, TRC moves for an order clarifying whether a QF may voluntarily limit its generation and/or deliveries to no more than 10 aMW and still be entitled to the published avoided cost rates.

MOTION FOR PARTIAL SUMMARY JUDGMENT

1. Entitlement to Published Avoided Cost Rates:

This Commission outlined the standard for summary judgment motions in Order NO. 28888 thusly:

> The standard for a summary judgment is contained in Idaho Rule of Civil Procedure 56(c), which provides that summary judgment should be granted if "the pleadings, depositions, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Upon review of a motion for summary judgment, "[a]ll disputed facts are to be construed liberally in favor of the non-moving party, and all reasonable inferences that can be drawn from the record are to be drawn in favor of the non-moving party." *Frazier v. J.R. Simplot Company*, ___ Idaho ___, 29 P.3d 936, 938 (2001).

With the filing of Avista's direct testimony it is now apparent that a motion for summary judgment is appropriate on limited question of whether TRC is entitled to the published avoided cost rates. In keeping with the standards for summary judgments, TRC is not, by virtue of this motion, conceding that the evidence at hearing will demonstrate that the project is not capable of generating more than 10 aMW on a monthly basis.

The current standard for determining entitlement to published avoided cost rates was recently promulgated by this Commission in *U.S. Geothermal v. Idaho Power,* Case No. IPC-E-04-8 by Order No. 29632:

> The Commission finds it reasonable to define firmness as predictability on a monthly basis. By way of eligibility criteria, we find it reasonable for the utility to make an initial capacity determination and require that the QF demonstrate that under normal or average design conditions the project will generate at no more than 10 aMW in any given month. To provide further definition and sideboards, we also find it reasonable to cap the maximum generation that qualifies for published rates at the total number of hours in the month multiplied by 10 MW.

Order No. 29632 at p. 14.

The Commission's decision caps the size of a QF for eligibility for published rates at no more that 10 aMW in any given month -- which means that a QF's nameplate rating may be higher than 10 MW while still maintaining eligibility for the published rates. The last sentence in the Commission's finding also makes it clear that the fact that a QF may generate more than 10 aMW in any given month does

not disqualify that QF from entitlement for the published rates for the first 10 aMW generate in that month.

That a QF may generate more than 10 aMW in any given month while retaining eligibility for the published rates for its first 10 aMW is further supported by the Commission's discussion of the 90/110 band later in Order No. 29632. The Commission instructed that the consequence of such excess generation is that the utility is simply not required to purchase that excess generation:

> The Commission finds that energy delivered in excess of 110% should be priced at 85% of the market or the contract price, whichever is less. As reflected in our discussion of 10 MW we find it reasonable to cap the maximum monthly generation that qualifies for published rates at the total number of hours in the month multiplied by 10 MW. This is also a cap for excess energy payments. By way of example, a QF that commits to deliver a monthly total of 7,000 kWh in January and delivers greater than 90% of the commitment amount that month will receive the posted rate for all energy up to 110% of the 7,000 kWh commitment amount and 85% of the Mid-C market price for energy exceeding 110% of the 7,000 kWh commitment amount and 85% of the Mid-C market price for energy exceeding 110% up to the 10 MW cap. The QF will receive no payment for any energy provided above the 10 MW cap.

Id. at p. 20. (Emphasis provided). While allowing the QF to generate in excess of 10 aMW, the Commission does not require the utility to *purchase* that power in excess of 10 aMW.

This reading of the Commission's order is supported by subsequent orders actually implementing the 10 aMW rule that was first announced in the *U.S. Geothermal* case. For example, in ruling that the J.R. Simplot Company is entitled to the published rate for its 15.9 MW cogeneration facility, the Commission simply observed that "Simplot does not intend to generate and deliver Inadvertent Energy" *See* Order No. 29577 at p. 2. "Inadvertent Energy" is defined in the contract as energy exceeding 10,000 kW in a single hour. *Id.* at p. 1. The Commission specifically ruled that, despite the fact that Simplot's facility was much larger than 10 MW, "Although the Simplot cogeneration facility has a generation capacity of 15.9 MW, we find that the "inadvertent energy" contract provisions provide an adequate means of qualifying the project for the published avoided cost rates." *Id.* at p. 5.

A similar result was reached by the Commission in its final order approving the U.S. Geothermal agreement. In fact, the U.S. Geothermal contract is very similar to the circumstances surrounding the TRC agreement. Both have nameplate ratings of approximately 16 MW, both are located in a different utility's service area, both have agreed to limit the generation to no more than 10 aMW. In Order No. 29692 the Commission approved the U.S. Geothermal agreement and its entitlement to the published avoided cost rates by quoting the following language from Idaho Power's application for approval:

> Idaho Power and U.S. Geothermal have agreed that U.S. Geothermal will supply Idaho Power with a certificate from a professional engineer certifying that the facility's design and operating protocols will limit generation at this facility to no more than 10 aMW in any given month.

Id. at p. 2. (Emphasis provided.)

In sum, the Commission has recognized that a QF with a nameplate rating in excess of 10 MW may, without jeopardizing its entitlement to published rates; (1) generate and deliver more than 10 aMW in any given month (Order No. 29632); (2) simply make representations in a contract that it will not deliver more than 10 MW (Simplot, Order No. 29577); or (3) contractually commit to deliver no more than 10 aMW (U.S. Geothermal, Order No. 29692). Indeed this Commission has routinely approved many contracts for projects whose nameplate ratings exceed 10 MW, some recent examples:

Salmon Falls 22.40 MW (29951);

Notch Butte 19.2 MW (Order No. 29950);

Lava Beds 18.0 MW (Order No. 29949);

Thousand Springs 10.5 MW (Order No. 29770).

Assuming everything Avista says in their testimony is true relative to the size and ability of this project to generate more than 10 aMW in any given month, the facility is physically and contractually limited from delivering any more than 10 aMW. Its transmission agreement with NorthWestern Energy limits deliveries

to 10 MW. See Exhibit No. 7 and the affidavit of Mr. Underwood attached hereto as Attachment A. Therefore, there is no ability for TRC to deliver more than 10 aMW in any given month.

Avista's assertion that TRC is limiting deliveries to no more than 10 aMW while possibly generating more than that amount is irrelevant in that the Commission has ruled that the "maximum monthly generation that qualifies for published rates" is the "number of hours in a month multiplied by 10 MW" *See* Order No. 29692 at p. 2.

MOTION FOR CLARIFICATION

The crux of Avista's opposition to TRC's entitlement to the Commission's published avoided cost rates is that TRC's cogeneration project has the capacity to generate more than ten average monthly megawatts. The Company witness Peterson states the issue thusly:

> It is important to consider *what the Commission meant* by "average or normal design conditions." *The Company believes* that the *Commission intended* that the full capability of the project be evaluated. The Commission did not say that the net output determination is based upon the discretion of the operator to voluntarily reduce output. There are many factors that are under the control of the operator of a "fueled" project that allow net output to be adjusted up or down at the discretion of the operator. *A capacity determination is to be based on the capability of the project equipment and not on decisions that the operator may make in order to reduce output.*

Peterson, Di, p. 12 lines 13-20. (Emphasis provided).

Rather than speculate on what the Commission meant in Order No. 29632, it would be helpful to the parties for the Commission were to clarify whether a facility that has a nameplate rating in excess of 10 MW, and that can generate or deliver in excess of ten average monthly megawatts, will nevertheless be entitled to the published avoided cost rates by voluntarily limiting its output or deliveries to under 10 aMW.

TRC believes the Commission has already made that determination by approving the U.S. Geothermal agreement with Idaho Power Company. In Order No. 29692 the Commission ruled that:

> The following is a summary of certain provisions within the Agreement that comport with the Commission's Order No. 29632:
>
> > ...
> > 10 MW threshold – As specified in Commission Order No. 29632 this threshold is measured based upon 10 average monthly megawatts.
> >
> > Initial Capacity Determination – As specific in Commission Order No. 29632, to be eligible for the published avoided cost rates, a facility must "...demonstrate that under normal or average design conditions the project will generate at no more than 10 aMW in any given month."
> >
> > > Paragraph 1.7 and paragraph 4.13 of this Agreement define and specify how this requirement will be met. Idaho Power and U.S. Geothermal have agreed that U.S. Geothermal will supply Idaho Power a certificate from a professional engineer certifying that the facility's design

> an operating protocols will limit generation at this facility to no more than 10 aMW in any given month.

Order No. 29692 at pp. 1-2. (Emphasis provided).

The Commission approved the U.S. Geothermal's use of "operating protocols" in order to limit its average monthly generation to less than 10 aMW. This is, of course, the very same U.S. Geothermal project that initiated the complaint against Idaho Power which resulted in Order No. 29632. The Commission was very familiar with both the U.S. Geothermal project (and presumably its own intent) when it approved the use of "operating protocols" to limit its generation. Indeed, the U.S. Geothermal project was designed to run at 12 megawatts during the winter months and at 8 megawatts in the summer months for an annual average of ten megawatts. (See direct testimony of Dan Kunz IPUC Case Nos. IPC-E-04-8 and IPC-E-04-10.)

Because TRC has contractually, and physically, limited its ability to deliver more than ten average monthly megawatts, it believes it is entitled to the published avoided cost rates in the same manner as are all of the other projects discussed above. TRC respectfully requests the Commission issue its order on clarification and/or summary judgment on this limited issue accordingly.

Pursuant to Rule 56.03, your movant respectfully requests oral argument on this motion.

RICHARDSON & O'LEARY PLLC

By: _____

Peter J. Richardson, ISB #3195
Mike Uda
Attorneys for Thompson River
Co-Gen, LLC

CERTIFICATE OF SERVICE

I hereby certify that on this 7th day of March, 2006, the MOTION FOR PARTIAL SUMMARY JUDGEMENT and/or MOTION FOR CLARIFICATION BY THOMPSON RIVER CO-GEN, LLC, was sent to the following parties as shown:

Jean Jewell Commission Secretary Idaho Public Utilities Commission 472 West Washington Boise, Idaho 83702 jjewell@puc.state.id.us	( ) U.S. Mail, Postage Prepaid (X) Hand Delivered ( ) Overnight Mail ( ) Facsimile ( ) Electronic Mail
Scott Woodbury Idaho Public Utilities Commission 472 West Washington Boise, Idaho 83702 swoodbury@puc.state.id.us	( ) U.S. Mail, Postage Prepaid (X) Hand Delivered ( ) Overnight Mail ( ) Facsimile ( ) Electronic Mail
David J. Meyer Vice President, Chief Counsel for Regulatory & Governmental Affairs Avista Corporation PO Box 3727 Spokane WA 99220-3727	( ) U.S. Mail, Postage Prepaid ( ) Hand Delivered (X) Overnight Mail ( ) Facsimile ( ) Electronic Mail
Kelly O. Norwood Vice President, State & Federal Regulation Avista Corporation PO Box 3727 Spokane WA 99220	( ) U.S. Mail, Postage Prepaid ( ) Hand Delivered (X) Overnight Mail ( ) Facsimile ( ) Electronic Mail

Signed Nina M. Curtis
Nina M. Curtis