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Jeffrey S. Lovinger  
Kenneth E. Kaufmann  
Lovinger Kaufmann LLP  
825 NE Multnomah, Suite 925  
Portland, Oregon 97232  
Telephone: (503) 230-7715  
Fax: (503) 972-2921  
[lovinger@lklaw.com](mailto:lovinger@lklaw.com)  
[kaufmann@lklaw.com](mailto:kaufmann@lklaw.com)

Daniel E. Solander  
Rocky Mountain Power  
201 South Main Street, Suite 2300  
Salt Lake City, UT 84111  
Telephone: (801) 220-4014  
Fax: (801) 220-3299  
[daniel.solander@pacificorp.com](mailto:daniel.solander@pacificorp.com)

Attorneys for PacifiCorp dba Rocky Mountain Power

**BEFORE THE IDAHO PUBLIC UTILITIES COMMISSION**

**IN THE MATTER OF THE  
ADJUSTMENT OF AVOIDED COST  
RATES FOR NEW PURPA  
CONTRACTS FOR AVISTA  
CORPORATION DBA AVISTA  
UTILITIES, IDAHO POWER  
COMPANY, AND PACIFICORP DBA  
ROCKY MOUNTAIN POWER**

**CASE NO. GNR-E-10-01**

**PACIFICORP'S ANSWER TO  
PETITION OF WINDLAND, INC.,  
AND AGPOWER JEROME, LLC,  
FOR RECONSIDERATION OF  
ORDER NO. 31025**

**INTRODUCTION**

PacifiCorp d/b/a Rocky Mountain Power submits this Answer to the Petition for Reconsideration of Order No. 31025 ("Petition") filed April 6, 2010, by Windland, Inc. ("Windland") and AgPower Jerome, LLC ("AgPower") (collectively, "Petitioners") before the Idaho Public Utilities Commission ("Commission") pursuant to Idaho Administrative Rules 31.01.01.331. PacifiCorp respectfully requests that the

Commission deny the Petition because the Commission's Order No. 31025 violates neither Idaho Code section 61-307 nor the procedural due process clauses of the Idaho or United States Constitutions. In the event the Commission does grant Petitioners a hearing, PacifiCorp respectfully requests that the avoided cost rates adopted in Order No. 31025 remain in effect unless and until such rates are found to be unjust or unreasonable.

#### DESIGNATION OF REPRESENTATIVES

Copies of all pleadings and other correspondence in this matter should be served upon the following counsel for PacifiCorp:

Jeffrey S. Lovinger  
Kenneth E. Kaufmann  
Lovinger Kaufmann LLP  
825 NE Multnomah, Suite 925  
Portland, OR 97232  
Telephone: (503) 230-7715  
Fax: (503) 972-2921  
[lovinger@lklaw.com](mailto:lovinger@lklaw.com)  
[kaufmann@lklaw.com](mailto:kaufmann@lklaw.com)

Daniel E. Solander  
Rocky Mountain Power  
201 South Main Street, Suite 2300  
Salt Lake City, UT 84111  
Telephone: (801) 220-4014  
Fax: (801) 220-3299  
[daniel.solander@pacificorp.com](mailto:daniel.solander@pacificorp.com)

#### BACKGROUND

The Commission establishes avoided cost rates payable by Avista, Idaho Power Company, and PacifiCorp to qualifying facilities ("QFs") in Idaho based upon the estimated cost (\$/MWH) of meeting the utility's next increment of need from a hypothetical new resource ("Surrogate Avoided Resource", or "SAR"). The Commission adopted the methodology currently used to estimate the cost of the Surrogate Avoided Resource in Order No. 29124. Under that SAR methodology, the Commission uses the medium natural gas price forecast published by the Northwest Power and Conservation

Council ("Council").<sup>1</sup> The estimated future price of gas is an important input affecting the avoided cost rate calculation. When the price forecast goes up, the avoided cost rates go up; when price forecasts go down, so do avoided cost rates.

Since adopting the current SAR methodology in 2002, the Commission has recalculated avoided cost rates each time the Council updated its published natural gas price forecast. Most recently, the Council updated its natural gas price forecast in conjunction with its *Sixth Power Plan*, which the Council adopted and posted on its website on February 10, 2010.<sup>2</sup> The version of the Plan posted February 10 included a note that Appendix A, the Council's natural gas Fuel Price Forecast "ha[d] been adopted and will be posted within the next few days."<sup>3</sup> The Council posted Appendix A on the Council website on March 8, 2010.<sup>4</sup> The Commission promptly generated new avoided cost rates based upon the Council's updated Fuel Price Forecast. The Commission then sent Avista, Idaho Power, and PacifiCorp a copy of its recalculated avoided cost rates on March 9, 2010, and asked the utilities to confirm by March 12 that its calculations were "accurate." PacifiCorp forwarded the Commission's March 9 letter to Petitioners' attorney on March 10, 2010. On March 16, 2010, after the utilities confirmed that its calculations were correct, the Commission issued Order No. 31025 declaring that the

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<sup>1</sup> Order No. 29124 refers to the "Northwest Power Planning Council." Sometime after 2002, that organization changed its name to the "Northwest Power and Conservation Council."

<sup>2</sup> This is before Petitioner Windland made a written request for a QF power purchase agreement (February 26, 2010), filed its application for self-certification as a QF (March 2, 2010), or applied for a generation interconnection agreement (March 3, 2010).

<sup>3</sup> <http://www.nwcouncil.org/energy/powerplan/6/default.htm> (prior to April 13, 2010).

<sup>4</sup> *Id.* The Council also posted a draft version of its *Sixth Power Plan* (thereby giving notice of a pending update to its natural gas price forecast) in September 2009. *Id.*

revised avoided cost rates shall apply to power purchase agreements between an investor owned utility and a QF executed on or after March 15, 2010.

On April 6, 2010, Petitioners filed the Pctition, alleging that Order No. 31025 violated Idaho Code section 61-307 as well as Petitioners' constitutional due process rights to notice and an opportunity to be heard regarding the new avoided cost rates.

### DISCUSSION

#### I. Order No. 31025 did not violate Idaho Code section 61-307.

##### A. Idaho Code section 61-307 does not apply to Order No. 31025 because the utilities did not request the rate change.

Idaho Code section 61-307<sup>5</sup> ("section 61-307") prohibits the Commission from allowing a rate change proposed by a utility to take effect without 30 days prior notice to the Commission and the public. On its face, that statute applies to changes *initiated by the utility*. Neither Avista nor Idaho Power nor PacifiCorp initiated Order No. 31025 modifying avoided cost rates. Furthermore, applying section 61-307 to a Commission-initiated change would require contortion of the statute's notice provisions: The statute

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<sup>5</sup> Idaho Code section 61-307 (2010) states:

Unless the commission otherwise orders, no change shall be made by any public utility in any rate, fare, toll, rental, charge or classification, or in any rule, regulation or contract relating to or affecting any rate, fare, toll, rental, charge, classification or service, or in any privilege or facility except after thirty (30) days' notice to the commission and to the public as herein provided. Such notice shall be given by filing with the commission and keeping open for public inspection new schedules stating plainly the change or changes to be made in the schedule or schedules then in force, and the time when the change or changes will go into effect. The commission, for good cause shown, may allow changes without requiring the thirty (30) days' notice herein provided for, by an order specifying the changes so to be made and the time when they shall take effect, and the manner in which they shall be filed and published. When any change is proposed in any rate, fare, toll, rental, charge or classification, or in any form of contract or agreement or in any rule, regulation or contract relating to or affecting any rate, fare, toll, rental, charge, classification or service, or in any privilege or facility, attention shall be directed to such change on the schedule filed with the commission by some character to be designated by the commission, immediately preceding or following the item.

prescribes 30-day notice *to*, not from, the Commission; it makes no provision for notice from the Commission to the public. There is no support in the language of section 61-307 for Petitioners' uncritical assumption that section 61-307 applies to the Commission.<sup>6</sup> Because section 61-307 applies only to rate changes proposed by a utility, it does not apply to the Commission's actions in Order No. 31025.

**B. Alternatively, if Idaho Code section 61-307 does apply, good cause exists to waive its notice requirement.**

Under section 61-307, the Commission may allow a rate change without a 30-day waiting period if: (1) good cause is shown, (2) the order specifies the changes to be made, (3) the order specifies when the changes will go into effect, and (4) the order specifies the manner in which they will be filed and published. Here, all four criteria are clearly satisfied. The latter three criteria are explicitly satisfied by Order No. 31025. The order specifies the new rates. Order No. 31025 at Attachment 2-4. The order specifies that the changes will go into effect on the date of the order (March 15, 2010). *Id.* at p. 3. The order itself publishes the new rates. *Id.* at Attachment 2-4.

While the Commission chose not to use the phrase "good cause", the order makes abundantly clear that the "good cause" for foregoing the notice period is that the change is merely ministerial and is necessary to update avoided cost rates. The Commission found that the change was a "simple arithmetic calculation" following the methodology

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<sup>6</sup> It is also questionable whether avoided cost rates approved by the Commission pursuant to PURPA are "rates" as that term is used in section 61-307 and other sections of the Idaho Code. The term "rates" in the Idaho statutes applies to products and services sold by the utility; avoided cost rates, in contrast, apply to utility purchases. Utilities lack authority to deviate from "rates" (I.C. § 61-310); however, a utility and a QF may agree not to use the published avoided cost rate. Finally, the Commission's authority to establish avoided cost rates comes from federal law (PURPA), not state law. Order No. 22948, at p. 2. These important differences call into question whether the Idaho legislature ever intended for section 61-307 to apply to avoided cost rates established pursuant to PURPA. *But see* Order No. 22948, at pp. 2-3 (stating that the 30-day period in section 61-307 applies where a utility proposed a revised variable energy rate for power delivered under certain existing QF Power Purchase Agreements).

for calculation of avoided cost rates established in Order No. 29124. Order No. 31025, at p. 2. The Commission also found that the new rates accurately incorporated the Northwest Power Conservation Council's revised natural gas price and were consistent with the Commission-approved SAR methodology. *Id.*

In Order No. 29124, upon which Order No. 31025 relies, the Commission established the Council's medium gas price forecast as a component of avoided cost and explained why promptly updating avoided costs to reflect actual gas price forecasts is necessary to protect ratepayers. Order No. 29124, at pp. 4, 10. The Commission explained the need to keep the gas price component current in order to protect ratepayers:

QF contracts signed now calculated with abnormally high gas rates ...could result in unreasonable and unfair costs borne by the regulated utility, which ultimately will be paid by its ratepayers. The Commission cannot expose ratepayers to avoided cost rates that rely too heavily on uncharacteristically high gas prices...

*Id.* at p. 4. In promptly updating the avoided cost rates in Order No. 31025, the Commission was simply furthering the cause of ratepayer protection as explained in Order No. 29124. In short, Order No. 31025 satisfies the criteria for foregoing the 30-day notice period, especially when considered in conjunction with Order No. 29124.

**C. Alternatively, if Idaho Code section 61-307 did require notice under the circumstances, Petitioners had actual notice.**

Petitioners had actual notice and ample time to object to the Commission's calculation of the new avoided cost rates, but did not object. Petitioners' attorney received a copy of the Commission's March 9, 2010 letter (asking Avista, Idaho Power, and PacifiCorp to verify the accuracy of its calculation of new avoided costs based on the Council's most recent gas forecast) on March 10, 2010. Petition, at p. 5. With that letter, Petitioners knew as much as the utilities about the Commission's calculated change to

avoided cost rates and received this information at essentially the same time as the utilities. Petitioners had all the information they needed to verify the Commission's calculation of revised avoided cost rates. If Petitioners believed the new avoided cost rates were calculated incorrectly, Petitioners should have objected by the March 12 deadline established in the Commission's March 9 letter.

Petitioner's argument that it should be given notice and opportunity to dispute the rate adjustment is a pretense intended primarily to delay the effective date of the new rates such that Petitioner may qualify for a power purchase agreement at the old rates. Petitioners make no assertion in their Petition that the Commission erred in its calculations of avoided cost. Rather, Petitioners argue they should have the opportunity to argue for a change in the Commission's settled methodology for calculating avoided costs. Petition, p. 9. The Commission's periodic revision of avoided cost rates to reflect changes in the gas forecast does not trigger an entitlement for qualifying facilities to challenge the Commission's settled avoided cost methodology. Nor should such challenges delay the Commission's implementation of an updated rate based upon a long-established methodology. The Commission has a pending proceeding investigating the methodology for calculating avoided cost rates. *See In the Matter of a Review of the Surrogate Avoidable Resource Methodology for Calculating Published Avoided Cost Rates*, IPUC Case No. GNR-E-09-03. If Petitioners have evidence why the avoided cost methodology is no longer proper, they can and should raise those concerns in Case No. GNR-E-09-03. Petitioners did not do this, however, because what they really seek is a postponement of the effective date of the new rates.<sup>7</sup> Petitioners are not entitled to such a

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<sup>7</sup> The earliest each Petitioner could possibly have established an entitlement to a rate under Idaho law is the date it filed its complaint: April 6, 2010 for Windland (Case No. PAC-E-10-05) and April 9, 2010 for

postponement and any postponement that would allow Petitioners to qualify for the old avoided cost rates would be unreasonable and unfair to Idaho ratepayers.

**II. IPUC Order No. 31025 did not violate procedural due process of Petitioners.**

**A. Petitioners lack an interest protected by due process.**

The Petitioners assert that QF developers pursuing a published avoided cost rate have an entitlement to that rate and that this entitlement is protected by the due process clauses of the Idaho and United States Constitutions. Petition, at pp. 11-12. Petitioners also assert they “each relied on the published rates in Order No. 30744 when they incurred financial expenses in perfecting eligibility for contracts at the published rates and interconnection for their respective QFs.” *Id.* at p. 12. Finally, Petitioners assert that the “Commission’s complete lack of notice to QFs prior to setting the new rates in Order No. 31025 deprived Petitioners of procedural due process.” *Id.*

Petitioners are mistaken in concluding that Order No. 31025 violated their due process rights. A QF developer is not entitled to a published avoided cost rate merely because the developer relies on the rate. Order No. 19745, at p. 3.<sup>8</sup> Indeed, the Idaho

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AgPower (Case No. IPC-E-10-11). See discussion *infra* Section II.A (Idaho Supreme Court upholding Commission rule requiring signed contract or a meritorious complaint to lock in a rate).

<sup>8</sup> In Order No. 19745 the Commission denied a petition for reconsideration of Order No. 19673 which revised avoided cost rates. Order No. 19673 also established that only those QF developers who had entered into a contract before the new rate took effect, or who had filed a meritorious claim with the Commission for the old rates before the new rates took effect, were entitled to the old rates. A number of petitioners objected and argued that they had meritorious claims to the old rates even though they had not filed a complaint before the rates changed. These petitioners argued that they should also be entitled to the old rates. The Commission rejected this argument and observed:

The Petitioners had no indefinite right to the rates established by Order No. 18190 in Case No. U-1006-200. While that Order anticipated in 1983 that the rates established in that case would be in effect for four years, there are no legally enforceable rights associated with such an expectation. Informed investors in cogeneration and small power production projects know or should know that this Commission has no authority under state or federal law to freeze entitlement to a given rate four years into the future.

Supreme Court has held that a QF developer's due process rights do not attach to a particular avoided cost rate until the developer has established a legally enforceable obligation to sell its output to a utility at the rate in question. *Rosebud Enterprises, Inc. v. Idaho Pub. Utils. Comm'n*, 131 Idaho 1, 12 (1997) ("*Rosebud I*").<sup>9</sup> The Commission has the authority to determine when a legally enforceable obligation has been established. *Rosebud Enterprises v. Idaho Pub. Utils. Comm'n*, 128 Idaho 609, 623-24 (1996) ("*Rosebud I*") ("according to the FERC, it is up to the State, not [FERC], to determine the specific parameters of individual [qualified facility] power purchase agreements, including the date at which a legally enforceable obligation is incurred under State law.")

The Commission has determined, and the Idaho Supreme Court has affirmed, that a QF developer must satisfy one of two conditions to establish a legally enforceable obligation to sell QF output at a particular published avoided cost rate. The QF developer must execute a power sales contract with a utility at the rate in question before a successor rate becomes effective. Alternatively, a QF developer must file a meritorious complaint with the Commission before the successor rate becomes effective alleging that the utility improperly refused to execute a contract for the old rate. *A.W. Brown Co. v.*

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Order No. 19745, at p. 3.

<sup>9</sup> In most relevant part, the *Rosebud II* Court stated:

Rosebud contends that IPUC's 1994 orders gave it a property interest in the form of a legally enforceable obligation it was required to have to be entitled to the 1994 rates. Because Rosebud never made a legally enforceable obligation, as discussed above, it never had a reasonable expectation that IPUC could not change the methodology for determining avoided cost rates. *Cf. Smith v. Meridian Joint Sch. Dist. No. 2*, 128 Idaho 714, 722-723, 918 P.2d 583, 591-92 (1996) (requiring more than a mere hope or expectation of continued employment to constitute a property interest). Therefore, it never had a property interest in the 1994 rates, and due process never attached to IPUC's consideration of the change of the 1994 rates.

*Rosebud II*, 131 Idaho at 12.

*Idaho Power Co.*, 121 Idaho 812, 816 (1992); *Rosebud II*, 131 Idaho at 6 (“In *A.W. Brown Co.*, this Court ruled that IPUC has authority, under state and federal law, to require that before a developer can lock in a certain rate, there must be either a signed contract to sell at that rate or a meritorious complaint alleging that the project is mature and that the developer has attempted and failed to negotiate a contract with the utility; that is, there would be a contract but for the conduct of the utility.”).

In sum, a QF developer does not have sufficient entitlement to a published avoided cost rate to give rise to due process protections unless, prior to the date a successor rate becomes effective, the QF developer has either entered into a contract at that rate or filed a meritorious complaint with the Commission seeking that rate. Petitioners did not enter into a contract to sell their QF output to a utility before the new rates implemented by Order No. 31025 became effective on March 15, 2010. Nor did Petitioners file a meritorious complaint before that date. As a result, the Petitioners have neither a property right nor an entitlement to the Order No. 30744 rates sufficient to give rise to due process protection. In adopting new rates without prior notice or a hearing, the Commission did not violate Petitioners’ due process rights.

**B. Alternatively, any legitimate interest Petitioners may have could be protected by a later hearing.**

Even if the Commission assumed that Petitioners have a protected interest, the Commission is not obligated to grant Petitioners a hearing prior to updating avoided cost rates. “Due process is flexible and calls for such procedural protections as the situation demands.” *Morrissey v. Brewer*, 408 U.S. 471, 481, 92 S.Ct. 2593, 2600 (1972). What process is due is a function of the private interest at stake, the value of additional procedural safeguards, and the government’s interest in proceeding without such

procedures. *Mathews v. Eldridge*, 424 U.S. 319, 96 S.Ct. 893 (1976). Because the Commission raised rates without a prior hearing to protect an important government interest (ratepayer costs), and because the risk of erroneously recalculating rates was small, due process does not entitle Petitioners to a hearing prior to the change in avoided cost rates established by Order No. 29124.

The Supreme Court of Pennsylvania held that a state statute permitting electric rate fuel cost adjustments to take effect without prior notice and hearing did not violate the customers' due process rights where a year-end review offered customers an opportunity to challenge the rates and, if successful, receive a full refund with interest. *Allegheny Ludlum Steel Corp. v. Penn. Pub. Util. Comm'n* ("*Allegheny Ludlum*"), 501 Pa. 71, 78-79; 459 A.2d 1218 (1983). In performing the balancing of interests required by *Mathews v. Eldridge*, the Court found that the plaintiff had a substantial interest at stake (\$10,000 per day in increased power costs). It noted that the state commission's modification to rates was guided by a set formula, leaving the commission limited discretion. And it noted that a required year-end proceeding for final determination and adjustment of rate increases required advance public notice, allowed full participation by all interested parties, and required refunds, with interest, of any overpayments. Finally, the Court noted the strong interest of the state in protecting the public service provided by the utility:

The need for a public utility to receive a fair rate of return on its property to assure its continued financial integrity, necessary to achievement of the important goal of preserving modern, efficient, and dependable public service, consonant with rights of customers, is not to be ignored.

*Allegheny*, 501 Pa. at 77. Taking all of the facts above into account, the Court upheld the Pennsylvania fuel cost adjustment statute as not violative of due process. *Id.* at 79.

The Commission's change to avoided cost rates, in Order No. 31025, is similar to *Allegheny Ludlum*, because: (1) the Commission has only limited discretion to implement the fuel cost adjustment to avoided cost rates; and (2) it has an obligation to the entire customer base of the electric utility to ensure that the utility's rates permit it to provide efficient, dependable service.<sup>10</sup> As in *Allegheny Ludlum*, if the Petitioners have a protected interest, the Commission may still hold a hearing on whether its rate adjustment comported with the methodology adopted in Order No. 29124 and thereby satisfy due process.<sup>11</sup> The Commission could preserve its Order No. 31025 by holding a hearing, with prior public notice, on whether its fuel cost adjustment to avoided cost rates is just and reasonable. If justified by the outcome of such a hearing, the Commission could order utilities to pay QFs make-up payments. Unless and until an intervenor established that the new rates were unjust or unreasonable, the rates implemented by Order No. 31025 can and should remain in effect. Such a process would provide abundant opportunity for QFs to be heard while at the same time protecting utility ratepayers by

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<sup>10</sup> Indeed, the Commission has a duty, under PURPA, to ensure that the published rates to be paid for QF output do not exceed the utility's avoided cost. See *Rosebud I*, 128 Idaho at 614, 621 (citing 16 U.S.C. § 824a-3(b); 18 C.F.R. § 292.304(a)(2); *San Diego Gas & Elec. Co.*, 70 F.E.R.C. ¶ 61,215 (1995) (concluding that, "as the electric utility industry becomes increasingly competitive, the need to ensure that the States are using procedures which ensure that QF rates do not exceed avoided costs becomes more critical. This is because QF rates that exceed avoided cost will, by definition, give QFs an unfair advantage over other market participants (non-QFs).").

<sup>11</sup> PacifiCorp notes that the Commission's Order No. 31025 is distinguishable from the court's holding, in *Allegheny Ludlum*, because the plaintiff in *Allegheny Ludlum* had a protected interest (rates for existing service). Petitioners, who do not have a power purchase agreement or a meritorious complaint filed prior to the rate change, do not have a protected interest in avoided cost rates. See, *supra*, pp. 8-10. Therefore, PacifiCorp believes that the Commission has discretion (but no legal obligation) to provide Petitioners with a post rate-change hearing as discussed above.

ensuring that the utility is not required to enter into long-term power purchase obligations at rates in excess of the utility's avoided cost.<sup>12</sup>

### CONCLUSION

For all of the reasons stated above, PacifiCorp respectfully requests that the Commission deny Petitioners' request for reconsideration because Order No. 31025 violates neither Idaho Code section 61-307 nor the procedural due process clauses of the Idaho or United States Constitutions. In the event the Commission does grant Petitioners a hearing, PacifiCorp respectfully requests that the avoided cost rates adopted in Order No. 31025 remain in effect unless and until found unjust or unreasonable.

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<sup>12</sup> The Commission may take notice that the Public Utilities Commission of Oregon ("OPUC") adopted a similar approach, in 2009, when PacifiCorp filed a required update to its Oregon avoided cost rates calculated using the methodology approved by the OPUC and proposing lower avoided cost rates due to very low market price forecasts for wholesale electricity. Several QFs protested implementation of the revised rates, but did not allege PacifiCorp applied the methodology incorrectly. See OPUC Advice 09-012. OPUC staff recommended that the effective date of the new rates not be delayed because (1) no party argued that PacifiCorp had not followed the Commission's instructions for calculations, (2) leaving the higher rates in effect would potentially harm customers, and (3) staff did not believe it would be good policy to allow new avoided cost rates to be delayed simply upon request despite lack of just cause. See OPUC Docket No. UM 1442, Staff Report (August 20, 2009) at pp. 3-4. Rather than delay the effective date of the new rates, the OPUC (after hearing input on whether the new rates should be effective pending resolution of the QFs' concerns) allowed the rates to take effect, provisionally, and convened a new docket to investigate the QFs' concerns. See *Id.*; OPUC Advice No. 09-012 (making new rates effective September 9, 2009). Notably, as soon as the OPUC made clear that the investigation would be limited to whether the utilities correctly applied the approved methodology (and *would not* re-investigate the adequacy of the methodology itself), the QFs effectively withdrew any objection to the new rates and the OPUC concluded that the new rates would remain unchanged. See Docket No. UM 1442, OPUC Order No. 09-506, at 4-5 (December 28, 2009).

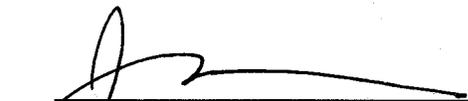
Dated this 13<sup>th</sup> day of April 2010.

Respectfully submitted,



Kenneth E. Kaufmann, OSB 982672  
Jeffrey S. Lovinger, OSB 960147  
Lovinger Kaufmann LLP

Daniel Solander, Utah Bar 11467  
Attorneys for PacifiCorp



John R. Kormanik, ISB #5850  
Kormanik Hallam & Sneed LLP  
1099 S. Wells Street, Ste. 120  
Meridian, ID 83642

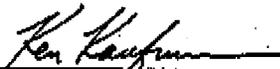
**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that, on the 13<sup>th</sup> day of April, 2010, I served a true and correct copy of the foregoing *PACIFICORP'S ANSWER TO PETITION OF WINDLAND, INC., AND AGPOWER JEROME, LLC, FOR RECONSIDERATION OF ORDER NO. 31025* in Case No. GNR-E-10-01 on the following named persons/entities by type of U.S. Mail specified below, properly addressed with postage prepaid, and electronic mail:

<p>Jean Jewell  Commission Secretary  Idaho Public Utilities Commission  472 W Washington  Boise, ID 83702  <a href="mailto:jean.jewell@puc.idaho.gov">jean.jewell@puc.idaho.gov</a>  (Hand Delivery)</p>	<p>Jeffrey K. Larsen  PacifiCorp  201 S Main, Suite 2300  Salt Lake City, UT 84111  <a href="mailto:jeff.larsen@pacificorp.com">jeff.larsen@pacificorp.com</a>  (First Class U.S. Mail)</p>
<p>Clint Kalich  Avista Corporation  PO Box 3727  Spokane, WA 99220-3727  <a href="mailto:clint.kalich@avistacorp.com">clint.kalich@avistacorp.com</a>  (First Class U.S. Mail)</p>	<p>Barton L. Kline  Idaho Power Company  PO Box 70  Boise, ID 83707  <a href="mailto:bkline@idahopower.com">bkline@idahopower.com</a>  (First Class U.S. Mail)</p>
<p>Gregory M. Adams  Richardson &amp; O'Leary PLLC  PO Box 7218  Boise, ID 83707  <a href="mailto:greg@richardsonandoleary.com">greg@richardsonandoleary.com</a>  (First Class U.S. Mail)</p>	<p>Peter J. Richardson  Richardson &amp; O'Leary PLLC  PO Box 7218  Boise, ID 83707  <a href="mailto:peter@richardsonandoleary.com">peter@richardsonandoleary.com</a>  (First Class U.S. Mail)</p>

DATED this 13<sup>th</sup> day of April, 2010.

LOVINGER KAUFMANN LLP


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Kenneth E. Kaufmann  
Attorney for PacifiCorp