

Peter J. Richardson
Gregory M. Adams
Richardson & O'Leary, PLLC
515 N. 27th Street
P.O. Box 7218
Boise, Idaho 83702
Telephone: (208) 938-7901
Fax: (208) 938-7904
peter@richardsonandoleary.com
greg@richardsonandoleary.com

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IDAHO PUBLIC
UTILITIES COMMISSION

Attorneys for Petitioners
Windland, Inc., and AgPower Jerome, LLC

**BEFORE THE
IDAHO PUBLIC UTILITIES COMMISSION**

IN THE MATTER OF THE ADJUSTMENT OF)
AVOIDED COST RATES FOR NEW PURPA) **CASE NO. GNR-E-10-01**
CONTRACTS FOR AVISTA CORPORATION)
DBA AVISTA UTILITIES, IDAHO POWER) **PETITION OF WINDLAND, INC.,**
COMPANY, AND PACIFICORP) **AND AGPOWER JEROME, LLC,**
DBA ROCKY MOUNTAIN POWER) **FOR RECONSIDERATION OF**
) **ORDER NO. 31025**

INTRODUCTION

This is a petition for reconsideration filed by Windland, Inc. ("Windland") and AgPower Jerome, LLC ("AgPower") (collectively "Petitioners") with the Idaho Public Utilities Commission (the "Commission") pursuant to Idaho Code section 61-626 and Idaho Administrative Rules 31.01.01.331. Prior to the March 16, 2010, service date of the Commission's Order No. 31025, Petitioners were independently engaged in developing qualifying facilities ("QFs") under 10 average monthly mega-watts ("aMW") entitled to the published avoided cost rates on file pursuant to the Public Utility Regulatory Policies Act of 1978 ("PURPA"). Petitioners each took steps towards

development of, and execution of power purchase agreements and interconnection agreements for, these QFs relying upon the published avoided cost rates on file pursuant to Order No. 30744. As set forth in detail below, the Commission provided Petitioners and other QFs with no notice or opportunity to be heard on the avoided cost rate schedule attached to Order No. 31025 prior to its service date. Petitioners hereby respectfully request that the Commission reconsider its Order No. 31025, and delay the effective date of that order until after Petitioners and other interested parties are provided with their statutory and constitutional rights to notice and opportunity to be heard on the new avoided cost rates.

PRELIMINARY MATTERS

Copies of all pleadings and other correspondence in this matter should be served upon counsel for Petitioners at:

Peter J. Richardson
Gregory M. Adams
Richardson & O'Leary, PLLC
515 N. 27th Street
P.O. Box 7218
Boise, Idaho 83702
Telephone: (208) 938-7901
Fax: (208) 938-7904
peter@richardsonandoleary.com
greg@richardsonandoleary.com

PETITION FOR RECONSIDERATION

Petitioners respectfully petition for reconsideration of Order No. 31025, and in support thereof, respectfully show as follows, to wit:

BACKGROUND

A. Windland

Windland, Inc., a California corporation, is a developer of wind energy projects, with its principle place of business being located at 7669 W. Riverside Drive, Suite 102, Boise, Idaho 83714. Windland is the manager and sole member of Power County Wind Park North, LLC, and Power County Wind Park South, LLC. Windland's Power County Wind Parks North and South are each PURPA QFs under 10 aMW entitled to the avoided cost rates on file at the Commission. *See* 16 U.S.C. § 824a-3(a)(2); 18 C.F.R. § 292.304(c), (d); Idaho Public Utilities Commission Order No. 29069, at p. 7.

Prior to March 16, 2010, the service date of Order No. 31025, Windland was engaged in developing these QFs, and made financial expenditures in efforts to obligate itself to deliver energy and capacity from its QFs pursuant to standard PURPA power purchase agreements ("PPAs") and to enter into interconnection agreements with PacifiCorp, dba Rocky Mountain Power, ("PacifiCorp") in Idaho. Windland incurred financial expenses in expectation that it could secure the avoided cost rates authorized in Order No. 30744.

B. AgPower

AgPower is a Delaware limited liability company developing an anaerobic digester at the Double A Dairy in Jerome, Idaho. AgPower's anaerobic digester converts biomass to renewable energy and is a PURPA QF under 10 aMW entitled to the avoided

cost rates on file at the Commission. *See* 16 U.S.C. § 824a-3(a)(2); 18 C.F.R. § 292.304(c), (d); Idaho Public Utilities Commission Order No. 29069, at p. 7.

Prior to March 16, 2010, the service date of Order No. 31025, AgPower was engaged in developing this QF, and made financial expenditures in efforts to obligate itself to deliver energy and capacity from its QF pursuant to a standard PURPA PPA and to enter into interconnection agreements with Idaho Power Company in Idaho. AgPower incurred financial expenses in expectation that it could secure the avoided cost rates authorized in Order No. 30744.

C. Order No. 31025

On March 15, 2010, without prior notice whatsoever to the public or to QFs engaged in developing renewable energy projects, the Commission signed Order No. 31025, declaring that significantly lower avoided cost rates would apply to all PURPA PPAs executed after the order's service date of March 16, 2010. Order No. 31025 states that it follows the methodology approved in Order No. 29124, whereby the Commission uses the Northwest Power and Conservation Planning Council's (the "Council's") medium natural gas price forecast as the basis for computing avoided cost rates. *See* Order No. 31025, at p. 1. According to Order No. 31025, "[i]n Order No. 29124, the Commission also found that the release of a new fuel price forecast by the Council or the Council's general advisory committees automatically triggers a recalculation of the published avoided cost rates." *Id.*

The Council approved a new natural gas price forecast "in conjunction" with its release of its Sixth Power Plan and posted it on its website on March 8, 2010. *Id.* at p. 2. Staff provided Idaho Power Company, Avista Utilities, and PacifiCorp with "worksheets

on March 9, 2010, for review and comment showing the computation of the revised avoided cost rates.” *Id.* at p. 2. The Commission did not post Staff’s March 9 letter on the Commission’s website until after issuing Order No. 31025. Windland received this March 9 letter with new proposed rates on March 10 only because PacifiCorp attached it to a letter rejecting Windland’s ongoing attempts to obligate itself to deliver the energy and capacity from its two Power County wind QFs pursuant to standard PURPA contracts. PacifiCorp’s March 10 letter asserted that the proposed rates in Staff’s letter “may be adopted . . . sometime in the next 30 days,” and insinuated there was no way Windland could complete “negotiations” to obtain fully executed PPAs by that time. AgPower received no prior notice of the avoided cost rate schedules attached to Order No. 31025.

On March 10, 12, and 15, Idaho Power Company, PacifiCorp and Avista provided responses to the Commission concurring in Staff’s avoided cost computations. Then, on March 15, 2010, the Commission stated in Order No. 31025: “We find it reasonable to issue an Order implementing new published avoided cost rates without further notice or procedure.” *Id.* at p. 2. The order further provides “the Commission hereby approves the revised published avoided costs . . . for new PURPA contracts executed on and after this date.” *Id.* Windland, AgPower, and other QFs had no notice and hence no opportunity to comment or otherwise be heard regarding the new avoided cost rate schedule attached to Order No. 31025.

As predicted by PacifiCorp in its March 10 letter, Windland was unsuccessful in its efforts to receive fully executed PPAs with the avoided cost rates in Order No. 30744

for its QFs prior March 16, 2010. AgPower was likewise unsuccessful in its efforts to receive a fully executed PPA from Idaho Power Company prior to March 16.

ARGUMENT

A. Petitioners are interested parties entitled to reconsideration, and if granted will present evidence and argument as requested by the Commission.

Within 21 days of the service date of any final Commission Order, any person *interested* in the order or any issue decided therein may petition for reconsideration. I.C. § 61-626; IDAPA 31.01.01.331.01. The petition should set forth specifically the grounds why the order or issue decided is unreasonable, unlawful, erroneous, or not in conformity with the law, and a statement of the nature and quantity of evidence or argument the petitioner will offer if the Commission grants reconsideration. *Id.*

Because Order No. 31025 significantly decreases the avoided cost rate applicable to Windland's and AgPower's QFs, Windland and AgPower are interested in Order No. 31025, and are adversely affected thereby. Windland and AgPower are therefore entitled to petition for reconsideration. *See* I.C. § 61-626. Windland and AgPower stand ready to provide the Commission affidavits, testimony, and exhibits supporting the factual assertions herein. Windland and AgPower will also provide argument and additional comments or briefing supporting its arguments, as directed by the Commission.

B. The lack of notice in issuing Order No. 31025 violated I.C. § 61-307.

Idaho Code section 61-307 states “[u]nless the commission otherwise orders, no change shall be made by any public utility in any rate . . . 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.” This section applies to changes in the avoided cost rates. *See A.W. Brown Co. v. Idaho Power Co.*, 121 Idaho 812, 819, 828 P.2d 841, 848 (1992). There is only a limited exception to the rule. “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.” I.C. § 61-307.

Here, the Commission’s Order No. 31025 states that “[i]n Order No. 29124, the Commission also found that the release of a new fuel price forecast by the Council or the Council’s general advisory committees automatically triggers a recalculation of the published avoided cost rates.” But Order No. 29124 contains no express finding that any new gas forecast from the Council “automatically triggers” new avoided cost rates by a procedure whereby the Commission Staff and the utilities recalculate the rates to the exclusion of all others. Rather, it stated that “[n]atural gas prices *can* be updated when a new NWPPC forecast becomes available.” Order No. 29124, at p. 10 (emphasis added). That order also stated that it established a “platform” going forward, but provided no detail as to the procedures the Commission will follow to incorporate a new gas forecast. *See id.* at p. 13. Order No. 29124 put QFs on notice that the Commission may open an investigation into revising the avoided cost when the Council changes its gas forecast, but nothing in the order states so conclusively. And Order No. 29124 certainly does not constitute an “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.” I.C. § 61-307 (emphasis added).

In the years since Order No. 29124, predicting when and how a new gas forecast will impact the avoided cost rate has not been easy. In the last change in the avoided cost rates approved in Order No. 30744, the Council released a gas forecast on December 29, 2008, and the gas prices, standing alone, called for a significant avoided cost rate increase. Order No. 30744, at p. 1. But the Commission Staff waited until after the conclusion of Idaho Power’s general rate case to mail the utilities its new avoided cost rate calculations on February 9, 2009. *Id.* In response to Staff’s letter, PacifiCorp objected to instituting the new, higher rates until after the Council’s draft fuel prices became final, or not continuing to use the medium gas forecast. *See* Order No. 30744 at p. 2. The Commission opened a docket to investigate and accepted comments from all interested parties, including QFs. Thus, the effective date of that rate change was March 16, 2009 -- long after the new gas forecast became available on December 29, 2008. *Id.* at p. 5.

Likewise, when Idaho Power questioned the validity of using the Council’s forecast released on July 31, 2007, the utility proposed to change the methodology altogether. *See* Order No. 30480 at p. 2. The Commission ultimately altered the “three-year calculation methodology” for gas prices approved in Order No. 29124. *Id.* at p. 10-11. There too, multiple QFs had the opportunity to be heard on the rate change. The new rates with the Council’s July 2007 gas forecast did not go into effect until January 1, 2008. *Id.* at p. 12.

Furthermore, when the Commission incorporated a new gas forecast in 2004, it issued a notice of proposed rate change and accepted comments from all parties prior to making the new proposed rates effective. *See* Order No. 29646, at pp. 2-3. There, the Council released its forecast on September 24, 2004, and the parties were given until November 23, 2004 to comment. The new rates did not go into effect until December 1, 2004. *Id.*

That Staff feels it necessary to send its draft calculations to the utilities for their review confirms that the methodology is not so simple that notice to interested parties is unnecessary. Furthermore, providing only the utilities with the opportunity to challenge the rate calculations and their implementation is patently unfair and results in a procedure where whenever the gas forecast, standing alone, requires an avoided cost rate increase, the utilities can protect their interests by challenging the entire methodology prior to the rates taking effect. *See* Order No. 30480, at pp. 2, 10-12; Order No. 30744, at pp. 2, 4-5. When the gas forecast calls for a drop in the rates, QFs have no opportunity to review Staff's calculations or renew arguments QFs often make regarding the methodology which may mitigate the effect on the QF market of a drastic rate decrease.

To add to this confusion, the Commission still has an open generic docket questioning whether continued use of a Combined Cycle Combustion Turbine as the surrogate avoidable resource is appropriate for intermittent resources such as wind. *See* GNR-E-09-03. Because of this open docket, wind QFs had no idea whether the Council's Sixth Power Plan would even apply to them or whether the Commission would issue an order in the open generic docket for wind projects, specifically excluding them from the impact of the new gas forecast. The effect on the avoided cost rates applicable

to contracts sought by those in the position of Windland was completely unknown until the Commission issued Order No. 31025.

In past avoided cost rate change proceedings, interested QFs have had the opportunity to comment. *See, e.g.*, Order No. 29646, at p. 2; Order No. 30480, at pp. 4-8; Order No. 30744, at pp. 2-3. Had the Commission provided Windland and AgPower with the opportunity to be heard on the new rate changes, they may have advocated for additional changes to the methodology in light of the new gas price forecast that resulted in a significant drop in the avoided cost rate. These would include alterations to carry forth PURPA's objective to promote renewable development, including increasing the avoided cost rate for renewables that have no gas price volatility. The current methodology decreases the avoided cost rate for the cost to integrate wind, but provides no benefit for the lack fuel price variability for wind projects or for other renewable resources without fuel price variability, such as AgPower's digester. Windland and AgPower should be given the opportunity to raise their arguments just as the utilities have been allowed in the past to challenge wholesale adoption of the increased gas prices into the avoided cost rates.

In sum, Order No. 31025 is simply incorrect to the extent it implies that QFs were on notice from Order No. 29124 as to "the time when the [new re-calculated] rate shall take effect, and the manner in which they shall be filed and published." I.C. § 61-307. Order No. 31025 violated section 61-307. Thus, the Petitioners respectfully request that the Commission reconsider the order, and declare the rates currently in effect to be the rates in Order No. 30744, which went into effect only after all interested parties had an opportunity to review and comment on the then-proposed rates.

B. The lack of notice in issuing Order No. 31025 violated the Procedural Due Process Clauses of the Idaho and United States Constitutions.

“The right to procedural due process is secured by Article 1, Section 13, of the Idaho Constitution and by the Fourteenth Amendment to the United States Constitution.” *Gay v. County Comm’rs of Bonneville County*, 103 Idaho 626, 628, 651 P.2d 560, 562 (Ct. App. 1982). “Procedural due process requires that there must be some process to ensure that the individual is not arbitrarily deprived of his rights in violation of the state or federal constitutions.” *Cowan v. Board of Comm’rs of Fremont County*, 143 Idaho 501, 510, 148 P.3d 1247, 1256 (2006) (internal quotation omitted). “[A]n individual must be provided with notice and an opportunity to be heard.” *Spencer v. Kootenai County*, 145 Idaho 448, 454, 180 P.3d 487, 493 (2008). “The opportunity to be heard must occur at a meaningful time and in a meaningful manner in order to satisfy the due process requirement.” *Aberdeen-Springfield Canal Co. v. Peiper*, 133 Idaho 82, 91, 982 P.2d 917, 926 (1999) (internal quotation omitted).

Courts have recognized “specific findings and notice of meetings . . . as fundamental elements of procedural due process in a variety of contexts.” *Gay*, 103 Idaho at 629, 651 P.2d at 563. Except in “extraordinary situations” where some valid governmental interest justifies the postponement of notice and hearing, due process requires an adversary proceeding before a person can be deprived of his property interest or a statutory entitlement. *Fuentes v. Shevin*, 407 U.S. 67, 86, 90, 92 S.Ct. 1983, 1997, 1999 (1972); see also *Southern California Edison Co. v. Lynch*, 307 F.3d 794, 808 (9th Cir. 2002) (holding that a court’s “expedited notice” did not violate due process rights of

ratepayer advocacy group because notice allowed time for detailed briefing of rate issue before ruling). “[I]t is no answer to say that, in his particular case, due process of law would have led to the same result because he had no adequate defense on the merits.” *Fuentes*, 407 U.S. at 87, 92 S.Ct. at 1991 (internal quotation omitted).

PURPA’s published avoided cost rates are a government-created, statutory entitlement. “Section 210 of PURPA sets forth the *benefit to which QFs are entitled*. It creates a market for their energy by requiring that the FERC establish regulations that obligate public utilities to sell electric energy to and purchase electric energy from QFs.” *Freehold Cogeneration Associates, L.P. v. Board of Regulatory Comm’rs of the State of New Jersey*, 44 F.3d 1178, 1191 (3rd Cir. 1995) (citing 16 U.S.C. § 824a-3(a)) (emphasis added). FERC “regulations address the purchase of energy by utilities, and the cost to be paid to the QF supplying the energy and guidelines for calculating such costs.” *Id.*; see also 18 C.F.R. § 292.304(c), (d) (entitling individual QFs to published rates if QF is below size threshold); Order No. 29069, at p. 6 (setting 10 aMW as size threshold in Idaho). QFs pursuing the published rates have an entitlement to those rates protected by the due process clause.

Here, Windland and AgPower 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. Absent the rates purportedly available in Order No. 30744, the economic viability of Petitioners’ projects would be substantially diminished. 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. See *Cowan*, 143 Idaho at 510, 148 P.3d at 1256.

CONCLUSION

Windland and AgPower respectfully request the Commission issue an order that it will reconsider Order No. 31025, declare that order null and void for violating I.C. § 61-307 and the Procedural Due Process Clauses of the Idaho and United States Constitutions, and declare the rates currently in effect to be the rates in Order No. 30744, until all interested parties have an opportunity to review and be heard on the rate schedule contained in Order No. 31025. If the Commission grants reconsideration, Windland and AgPower will provide evidence and argument supporting the contents of this petition in whatever form requested by the Commission.

Respectfully submitted this 6th day of April 2010,

A handwritten signature in black ink, appearing to read "Peter Richardson", written over a horizontal line.

Peter Richardson
Attorney for Petitioners
ISB No: 3195

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 6th day of April, 2010, a true and correct copy of the within and foregoing **PETITION OF WINDLAND, INC., AND AGPOWER JEROME, LLC, FOR RECONSIDERATION OF ORDER NO. 31025** was served in the manner shown to:

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

Hand Delivery
 U.S. Mail, postage pre-paid
 Facsimile
 Electronic Mail

Barton L Kline
IDAHO POWER COMPANY
PO Box 70
Boise ID 83707

Hand Delivery
 U.S. Mail, postage pre-paid
 Facsimile
 Electronic Mail

Jeffrey K Larsen
PacifiCorp
201 South Main Ste 2300
Salt Lake City UT 84111

Hand Delivery
 U.S. Mail, postage pre-paid
 Facsimile
 Electronic Mail

Clint Kalich
AVISTA Corporation
PO Box 3727
Spokane WA 99220

Hand Delivery
 U.S. Mail, postage pre-paid
 Facsimile
 Electronic Mail


Nina Curtis