

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

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

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IDAHO PUBLIC
UTILITIES COMMISSION

**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) **REPLY TO PACIFICORP'S**
COMPANY, AND PACIFICORP) **ANSWER TO PETITION OF**
DBA ROCKY MOUNTAIN POWER) **WINDLAND, INC., AND**
) **AGPOWER JEROME, LLC,**
) **FOR RECONSIDERATION OF**
) **ORDER NO. 31025**

INTRODUCTION

This is a reply to PacifiCorp's answer to the petition for reconsideration filed by Windland, Inc. ("Windland") and AgPower Jerome, LLC ("AgPower") (collectively "Petitioners") with the Idaho Public Utilities Commission (the "Commission") in this docket on April 6, 2010. The background regarding the Public Utility Regulatory Policies Act of 1978 ("PURPA") and the Commission's rate change in Order No. 31025

has been well established in prior filings in this docket. Petitioners will therefore limit this reply to rebuttal of PacifiCorp's arguments.¹

REBUTTAL ARGUMENT

A. Petitioners should be allowed to file this reply.

PacifiCorp filed its answer on April 13, 2010, and Petitioners respectfully request the Commission consider this reply filed two days later, April 15, 2010. The Commission's rules do not expressly provide for, or prohibit, a reply to an answer to a petition for reconsideration. Petitioners submit that they should be entitled to provide a reply to PacifiCorp's answer in this case because Petitioners had no opportunity to participate in this docket prior the Commission's final order – Order No. 31025. Because Petitioners have filed their reply within two days of PacifiCorp's answer, this reply will not unduly impede the Commission's preparation of a decision on the petition for reconsideration within the 28 days required by I.C. § 61-626(2). Further, without an opportunity to reply, Petitioners would be left without the opportunity to rebut new arguments in PacifiCorp's answer and adequately establish the administrative record in this docket.

¹ This reply will not address all arguments or authorities in PacifiCorp's answer. Petitioners merely attempt to address the arguments and authorities raised by PacifiCorp that were not directly addressed in Petitioners' original petition for reconsideration. Petitioners continue to stand by all arguments in the original petition and in no way concede any point not directly addressed in this reply.

B. Order No. 31025 violated Petitioners' procedural due process rights.

1. Federal courts have repeatedly recognized a protected property interest in government entitlements similar to PURPA's standard avoided cost rates.

A long line of federal authorities is to the contrary of PacifiCorp's position that qualifying facilities ("QFs") have no entitlement to published avoided cost rates. Federal law establishes protected property interests in a variety of statutorily-created entitlements, not the subject of an absolute entitlement, but nevertheless essential to pursuit of livelihood. *See, e.g., Bell v. Burson*, 402 U.S. 535, 539 (1971) (holding that due process restraints protect an entitlement to a driver's license); *Alaska Airlines, Inc. v. City of Long Beach*, 951 F.2d 977, 986 (9th Cir. 1991) (relying upon airline's expenditure on advertisements and announcements of flights to find protected entitlement to flight allocations and hold city violated due process with its ordinance that could "automatically" reduce flight allocations without prior notice and hearing).

As in *Alaska Airlines, Inc.*, Petitioners expended sums in reliance on a government-created entitlement in pursuit of livelihood – published avoided cost rates to develop PURPA projects. Petitioners are therefore entitled to at least some notice and process prior to being deprived of that right. The Commission may not "automatically" reduce those protected avoided cost rates without some advance notice and process.

2. The authorities relied upon by PacifiCorp for a due process test cannot overcome federal case law and are factually distinguishable.

PacifiCorp relies heavily on the due process analysis in *Rosebud Enterprises, Inc. v. Idaho Pub. Util. Comm'n* ("Rosebud II"), 131 Idaho 1, 951 P.2d 521 (1997), for the proposition that, in order to establish an entitlement to existing avoided cost rates protected by the due process clause, a QF must perfect its obligation to sell to the utility

pursuant to 18 C.F.R. § 292.304(d)(2)(ii). From there, PacifiCorp asserts that *Rosebud II* provides only two ways to perfect such grandfather status – a fully executed contract or a complaint for grandfather status pre-filed before the rate change. See *PacifiCorp's Answer* at pp. 8-10. But *Rosebud II* is inapplicable here.

First, *Rosebud II* does not distinguish whether it was addressing federal or state constitutional rights. It does not mention the *Bell* line of federal cases, or distinguish federal cases expressly stating that PURPA creates a “benefit to which QFs are entitled.” *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) (emphasis added). Federal law entitles QFs to the standard rates at any time QFs choose to secure them. The requirement that a QF file a grandfathering complaint with the Commission to establish a protected interest in its federal entitlement to the standard avoided cost rates is inconsistent with federal law. So *Rosebud II* (or at least PacifiCorp's reading of it) is inapplicable to this case, where Petitioners rely on the United States Constitution.

Second, *Rosebud II* addressed only the factual situation where QFs had prior notice of an impending rate change, and thus adequate opportunity to file a complaint prior to the rate change. See *Rosebud II*, 131 Idaho at 6, 951 P.2d at 526 (relying upon *A.W. Brown Co, Inc. v. Idaho Power Co.*, 121 Idaho 812, 816, 828 P.2d 841, 845 (1992), as legal authority approving this grandfather test). The pre-filed complaint requirement in the prior cases relied upon by PacifiCorp arose from a procedure where the utility filed a petition to change existing rates well in advance of the effective date of the rate change. See, e.g., *A.W. Brown Co, Inc.*, 121 Idaho at 814, 828 P.2d at 843 (noting that utility filed petition to change rates in January 1985, and rates did not go into effect until late April

1985); Order No. 19745, at pp. 1, 3 (noting that utility filed applications to lower rates in “summer 1984” and January 25, 1985, but cut-off date for filing a complaint for grandfather status at April 29, 1985). In those cases and thus the facts addressed in *Rosebud II*, QFs at least had notice of the impending rate change such that they could timely pre-file a complaint before a rate change.

Further, *Rosebud II* and *A.W. Brown* merely *approved* of this grandfather test; neither stated it was the only way to establish a legally enforceable obligation to sell to the utility and thereby achieve grandfathered status. *See Rosebud II*, 131 Idaho at 6, 951 P.2d at 526. And the Commission has not required this pre-filed complaint test consistently. *See* Order No. 25802 (noting that complaint was filed February 11, 1994, after rates had changed January 14, 1994, but nevertheless finding QF entitled itself to the old rates with its willingness to sign a contract prior to the rate change).

Because reasonable prior notice of the rate change did not occur here, Petitioners had inadequate opportunity to file a complaint prior the rate change to perfect their entitlement to the existing rates under the grandfather test approved in *Rosebud II* and *A.W. Brown*. That test, therefore, cannot satisfy due process here. Both Petitioners filed complaints shortly after the abrupt rate change. *See* Case Nos. IPC-E-10-11, PAC-E-10-05. Even if PacifiCorp is correct, therefore, that a QF must establish a meritorious grandfathering case in order to be protected by the due process clause, Petitioners have both done so.

3. The Oregon procedure for changing avoided cost rates cited by PacifiCorp actually gave QFs prior notice and an opportunity to comment before the rate change, and merely providing a post-rate-change hearing will not now cure the constitutional infirmity in this Idaho case.

PacifiCorp cites the recent avoided cost rate change in Oregon as a possible template for the Commission to cure any due process infirmities that have occurred here. *See PacifiCorp's Answer* at p. 13 n. 12. But this procedure and the Oregon Commission Staff's Report support Petitioners' argument. In Oregon Advice No. 09-012, PacifiCorp filed its application to lower the avoided cost rates on July 9, 2009, and the effective date of the rate change was not until August 26, 2009. *See* OPUC Docket No. UM 1442, Staff Report, p. 1 (August 20, 2009). During July and August, multiple QFs commented on the proposed rate change prior to the effective date of the rate change. *Id.* at p. 2. Moreover, the Staff Report advised the Commission that even with that advance notice of the rate change, "a hearing is appropriate upon a valid written complaint . . . as a matter of the parties being able to exercise their rights to due process." *See id.* at p. 3.

Counsel for PacifiCorp should be commended for attempting to cure the obvious due process infirmity in the rate change process here by providing counsel for Windland and AgPower with Staff's March 9 letter. But this theoretical, two-day window to object to the rate change in a docket the Commission had not yet opened, even with a post-rate change hearing, does not come close to satisfying the requirements of due process.²

² PacifiCorp's reliance on a Pennsylvania Supreme Court opinion is likewise unavailing. *See PacifiCorp's Answer*, at p. 12 (citing *Allegheny Ludlum Steel Corp. v. Penn. Pub. Util. Comm'n*, 501 Pa. 71, 459 A.2d 1218 (1983)). The majority decision there, which drew a persuasive dissent from two of the five Justices, is not binding on this Idaho case and cannot overcome the federal case law cited above. *See Alaska Airlines, Inc.*, 951 F.2d at 986 (invalidating ordinance providing no prior notice and opportunity to challenge flight allocation reductions).

C. Order No. 31025 violated I.C. § 61-307.

1. PacifiCorp misreads the requirement for 30-day notice to the “public” in I.C. § 61-307.

PacifiCorp argues that the requirement for 30-day notice to the public prior to a rate change applies only when a utility changes the rates on its own initiative, and not, as occurred here, when the Commission initiates the rate change. PacifiCorp’s interpretation reads out of the statute the requirement that no rate be changed “except after thirty (30) days notice to the Commission *and to the public.*” I.C. § 61-307 (emphasis added). PacifiCorp is simply incorrect that the statute allows a rate change without a 30-day notice period for the public to inspect the proposed rate schedules, and the Idaho Supreme Court has underscored the importance of 30-day public notice period. *See Intermountain Gas Co. v. Idaho Pub. Util. Comm’n*, 98 Idaho 718, 723, 571 P.2d 1119, 1124 (1977).

2. Section 61-307 applies to avoided cost rate changes.

PacifiCorp questions the applicability of § 61-307 to avoided cost rate changes. *See PacifiCorp’s Answer*, at p. 5 n. 6. But the Idaho Supreme Court held that, rather than the more onerous requirements of the Idaho Administrative Procedures Act, the modest 30-day notice requirement in the Commission-specific § 61-307 applies to avoided cost rate changes. *See A.W. Brown Co.*, 121 Idaho at 819, 828 P.2d at 848. The Commission may not ignore with this 30-day notice requirement.

3. PacifiCorp misconstrues the “good cause exception” to the 30-day notice requirement such that the exception swallows the rule.

PacifiCorp also misreads I.C. § 61-307 to allow the Commission to dispense with that section’s requirement to “keep open for public inspection new schedules stating

plainly the change or changes to be made,” simply by stating a good cause reason at the time it changes the rates. *See PacifiCorp’s Answer*, at pp. 5-6. The statute allows for dispensing with the public’s right to 30-day notice to inspect proposed rate schedules only for “good cause *shown*.” I.C. 61-307 (emphasis added).

Order No. 31025 fails even PacifiCorp’s interpretation of the statute because the order provided no good cause reason to dispense with notice to the public. But even if it had, PacifiCorp’s reading cuts against the purpose of the statute, which is obviously to allow interested parties to examine the proposed rates to either take steps to challenge them or plan for how the new rates may affect them. The Commission must always find good cause to approve a rate change, even after the required 30-day notice. Allowing the Commission to judge the rate-change case before allowing the public with notice for any good cause reason would read the notice provision out of the statute. Thus, the good cause exception should apply only when the Commission shows good cause to determine in advance of an upcoming rate-change why it will not provide for public inspection of the precise rate schedules for 30 full days. Here, even according to PacifiCorp, the good cause reason and the rate change occurred at the same time. Finding such a practice permissible would effectively erase the the 30-day notice requirement from the statute. Public notice is a fundamental purpose of I.C. § 61-307. *See Intermountain Gas Co.*, 98 Idaho at 723, 571 P.2d at 1124. Good cause must be so interpreted such that the fundamental purpose of the legislation is not destroyed.

Further, as explained above, the lack of notice violated due process requirements. A procedure that violates due process cannot constitute good cause.

D. The petition for reconsideration is not a pretense to secure the old rates, and Petitioners substantive rights are at issue.

Petitioners have raised issues challenging the avoided cost rate calculation methodology, and the lack of procedures followed to implement it. *See Petition for Reconsideration*, at p. 10 (suggesting that the Commission increase the avoided cost rate for renewables with no risk of gas price variability). Despite PacifiCorp's assertion that Petitioners filed this petition for reconsideration as a pretext for securing the old rates in Order No. 30744, Staff is the party that raised the grandfathering issue. Staff's decision memorandum in this docket expressly recommended that "the Commission not adopt grandfathering criteria for entitlement to existing rates." *Decision Memorandum*, at p. 2. Staff's decision memorandum is dated March 15, 2010 – the same date the Commission held its decision meeting. The legal status of a decision memorandum as a pleading by a party is unclear. Nevertheless, for Staff to be allowed to address the grandfathering issue in what it portrays to be a docket to "automatically" update the avoided costs without providing an opportunity for QFs to respond highlights the infirmity with the procedure the Commission used to change the avoided cost rates.

As set forth in detail in the original petition for reconsideration, the current rate change process of providing notice only to the utilities results in delay whenever increased gas prices call for an increase in the avoided cost rate, and immediate drops in the avoided cost rates when gas prices drop. *See Petition for Reconsideration*, at p. 9 (citing Order No. 30480, at pp. 2, 10-12; Order No. 30744, at pp. 2, 4-5). This non-parallel treatment to ratemaking is simply discriminatory. It chills the QF market in Idaho, and contrary to federal law it discourages PURPA development. This docket should have involved the public, including the QF community, from the start, and at least

allowed the public with the opportunity to demonstrate that the drastic drop in the avoided cost rates called for in Order No. 31025 could be mitigated by reconsidering arguments that QFs have raised in the past.

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.

Respectfully submitted this 15th day of April 2010,

A handwritten signature in cursive script, reading "Peter Richardson", written over a horizontal line.

Peter Richardson
Attorney for Petitioners
ISB No: 3195

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 15th day of April, 2010, a true and correct copy of the within and foregoing **REPLY TO PACIFICORP'S ANSWER TO 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

Jeffrey S Lovinger
Kenneth E Kaufmann
Lovinger Kaufmann LLP
825 NE Multnomah Ste 925
Portland OR 97232

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

Daniel E Solander
Rocky Mountain Power
201 South Main St Ste 2300
Salt Lake City UT 84111

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


Nina Curtis