



**INCORPORATION BY REFERENCE OF PRIOR ARGUMENTS AND  
FACTUAL STATEMENTS**

The Petitioners hereby incorporate by reference all of the legal arguments and factual assertions made in their original Petition for Reconsideration and their Reply to PacifiCorp's Answer to Petition for Reconsideration and reassert all said arguments and assertions here as if set out in full.

**THE COMMISSION'S ORDER ON RECONSIDERATION MISSES THE  
FUNDAMENTAL POINT OF NOTICE**

The essence of Petitioners' Petition for Reconsideration is that they had no prior notice of the change in avoided cost rates. Notice is fundamental not only for purposes of allowing the affected parties an opportunity to address the accuracy of a proposed rate change, but also for purposes of allowing the affected parties an opportunity to rearrange their business affairs in response to the proposed rate change. This is true in the context of the Public Utility Regulatory Policies Act of 1978 ("PURPA") as well as in the context of setting generally applicable rates charged by a utility. As pointed out in Petitioners' prior pleadings, the Idaho Supreme Court has ruled that the notice statute in play -- I.C. § 61-307 --applies to avoided cost rate changes. *See A. W. Brown Co., Inc. v Idaho Power Co.*, 121 Idaho 812, 818, 828 P.2d 841, 847 (1992) (holding that when engaged in avoided cost rate setting, rather than the more onerous provisions of Idaho's Administrative Procedures Act, the Commission "need only fulfill the notice requirements imposed on it by the public utility regulation statutes," including I.C. § 61-307).

Without addressing a single legal argument raised by Petitioners, the Commission ruled that:

Petitioners contend that the manner in which the published avoided cost rates were changed resulted in a denial of due process in contradiction of statutes, rules and constitutional rights. We find the revision and recalculation of the published avoided cost rates in this case to be an administrative and ministerial act. As set out in the Attachment, the calculation of new avoided cost rates is a simple process. We further find that no violation of notice or due process has occurred and that no cure is necessary. We find Petitioners' arguments to the contrary to be unpersuasive and without merit.

Order No. 31057, at p. 6. Even if the Commission were to consistently follow a process whereby the recalculation of the published avoided cost rates was merely an administrative and ministerial act, that fact would not excuse or abrogate the notice requirements contained in I.C. § 61-307.<sup>1</sup> There are no exceptions to the notice statute for "administrative and ministerial" acts by the Commission. Indeed, much of the Commission's business may be characterized as administrative and ministerial in nature, yet it must still comply with the notice provisions in the Code when engaged in activities of that nature.

The Commission routinely issues rate changing orders that are administrative and ministerial in nature while complying with the notice requirements found in the Code. For example, when changing rates for natural gas utilities to account for changes in wholesale natural gas prices, the Commission applies the new gas rates to a Purchased Gas Adjustment ("PGA") formula and publishes notice of the rate change. Just last

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<sup>1</sup> Petitioners strongly disagree that the Commission regularly follows such a ministerial process, and reiterate that the Commission allows implementation of the new avoided cost rates to be significantly delayed when the gas forecast calls for increased rates. *See Petition for Reconsideration*, at pp. 8-9 (discussing how the Commission allowed substantial delays in increases in the avoided cost rates to fully consider utility concerns in Order Nos. 30744 and 30480).

summer the Intermountain Gas Company filed an application to reduce its rates by \$72.4 million on August 19, 2009 in Docket No. INT-G-09-02. The Commission duly issued a Notice of Application and took comments on the proposed rate reduction. The rate reduction was made effective on October 1, 2009 by Order No. 30913. Despite the fact that the ratepayers were paying more than they should, the Commission took the time to follow notice provisions in I.C. § 61-307.

The Commission's concern about ratepayer neutrality in this case appears to be discriminatorily applied given the assertion that "[i]t is well established that a utility cannot be required to pay more for qualifying facilities ("QFs") power than its avoided costs." Order No. 31057, at pp. 6-7. It is also well established that a utility cannot charge ratepayers more than its cost of service -- but that is what the Commission allowed Intermountain Gas Company to do pending notice and opportunity to comment. That the Commission can perform a true-up of the natural gas rates at a later date does not change the fact that ratepayers were paying more than they "should" pending the Commission's compliance with the notice provisions of I.C. § 61-307. Truing up rates does not hold the ratepayer harmless because the ratepayers have a much higher cost of money than a utility and hence, more lost opportunities due to the timing difference in receiving their rate reduction.

Notice means more than just being provided an opportunity to comment on a proposed rate. Notice is necessary so that parties may put their affairs in order in anticipation of the new rate. This is true not just for ratepayers but also for the QF industry. There is nothing untoward with a QF reacting to a notice of a pending avoided cost rate decrease, by seeking to finalize its preparations for a new QF project in order to

obtain the existing rate before it is reduced. During the notice and comment period necessary to satisfy due process, the existing rate is still valid and should be made available to any QF positioned to assert entitlement to a contract.

FERC has recognized that the rates in a long term contract with a QF will not always match a utility's avoided cost rate at every moment over the duration of the contract. FERC very recently reaffirmed "the right of QFs to long-term avoided cost contracts or other legally enforceable obligations with rates determined at the time the obligation is incurred, even if the avoided costs at the time of delivery ultimately differ from those calculated at the time the obligation is originally incurred." *JD Wind 1, LLC*, "Order Denying 'Request for Rehearing, Reconsideration or Clarification,'" 130 FERC ¶ 61,127, at p. 10 (February 19, 2010). "[I]n order to be able to evaluate the financial feasibility of a cogeneration or small power production facility, an investor needs to be able to estimate, with reasonable certainty, the expected return on a potential investment before construction of a facility." *Id.* (quoting Order No. 69, 45 Fed. Reg. 12,214 (Feb. 25, 1980)). FERC has concluded "in the long run, 'overestimations' and 'underestimations' of avoided costs will balance out." Order No. 69, 45 Fed. Reg. at 12,224.

Furthermore, Order No. 31057 overstates the case when it states the notice requirement should be ignored on the ground that "[a] delay in changing avoided cost rates means that ratepayers are saddled with rates that are too high and therefore unreasonable." Order No. 31057, at p. 6. In addressing a similar issue regarding PURPA contracts' impact on ratepayers, FERC stated "[i]f part of the savings from cogeneration and small power production were allocated among utilities ratepayer, any rate reductions

will be insignificant for any individual customer.” Order No. 69, 45 Fed. Reg. at 12,222. FERC went on to state “[o]n the other hand, if these savings are allocated to the relatively small class of qualifying cogenerators and small power producers [by providing them with rates at the full avoided costs], they may provide a significant incentive for a higher growth rate of these technologies.” *Id.*

The Commission’s singular focus on minimizing the amount utilities pay for PURPA contracts overlooks that in addition to not exceeding the utilities’ avoided costs, FERC regulations require that the avoided cost rate must compensate QFs for the utilities’ full avoided cost. *See* 18 C.F.R. § 292.304(a). In promulgating that regulation, FERC directly rejected proposals to provide QFs with rates of less than the full avoided cost. *See* Order No. 69, 45 Fed. Reg. at 12,222-12,223. The Commission, however, allowed substantial delays in increases in the avoided cost rates to provide the utilities with proper notice and then fully consider utility concerns over avoided cost rate increases in Order Nos. 30744 and 30480. During the time that the Commission accorded the utilities with their statutory and constitutional due process rights, qualifying facilities could only enter into PURPA contracts at rates that later proved to be far lower than the full avoided cost rates. This one-sided approach to the avoided cost ratemaking procedure is discriminatory ratemaking, and therefore violates FERC regulations. *See* 18 C.F.R. § 292.304(a)(1)(ii) (prohibiting avoided cost rates that discriminate against QFs).

**THE COMMISSION’S IMPLICIT FINDING OF  
“GOOD CAUSE SHOWN” IS FATALY FLAWED**

Apparently addressing Petitioners’ argument that “good cause shown” must mean something more than the Commission’s standard for finding a rate to be no longer

prudent, Order No. 31057 simply asserts that, “[o]ur explicit findings in Order No. 31025 can be read in no other way than but an implicit finding of ‘for good cause shown.’” Order No. 31057, at p. 7. The Idaho Code provisions applicable to the Commission do not define the phrase “for good cause shown.” When faced with similar circumstances, courts that have examined the standard, “for good cause shown” have held that it must be construed in the context of the statute in which it appears.<sup>2</sup> Here the statute in question requires notice of a rate change and the Idaho Supreme Court has explicitly ruled that it applies in the QF context. *See A. W. Brown Co., Inc.*, 121 Idaho at 818, 828 P.2d at 847. Despite the obvious contradiction in the concept of an *implicit finding of good cause shown*, the sole fact the Commission believes a rate change is reasonable is not sufficient to eliminate the notice requirement in I.C. § 61-307. Indeed, such a concept eviscerates the very purpose of the statute. Under the Commission’s reasoning, whenever a utility files for a rate change that the Commission finds to be reasonable, there would be an implicit finding of good cause shown for no notice. This would be tantamount to reading out of the statute the requirement for a showing of good cause for providing less than thirty days notice, which clearly this Commission may not do.

### **PRAYER FOR RELIEF**

For all the foregoing reasons and for the reasons set forth in Windland’s and AgPower Jerome’s Petition for Reconsideration and Reply to PacifiCorp’s Answer to Petition for Reconsideration of Order No. 31025, the Commission is respectfully urged to declare that Order No. 31025 is null and void for violating I.C. § 61-307 and the

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<sup>2</sup> *In Re David Lucus* \_\_\_ Cal.Rptr.3d\_\_\_, 182 Cal.App.4<sup>th</sup> 797, 809-810 (March 5, 2010); *California Portland Cement Co. v. Cal. Unemployment Insurance Appeals Bd.*, 3 Cal.Rptr. 37, 178 Cal.App.2d 263, 272-73 (1960).

Procedural Due Process Clauses of the Idaho and United States Constitution, and declare the rates currently in effect to be the rates in Order No. 30744 until full compliance with these legal provisions.

Respectfully submitted this 28<sup>th</sup> day of April 2010,

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

Peter Richardson  
Attorney for Windland, Inc. and  
AgPower Jerome, LLC  
ISB No: 3195

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on the 28<sup>th</sup> day of April, 2010, a true and correct copy of the within and foregoing **COMMENTS ON "LIMITED RECONSIDERATION" BY WINDLAND, INC., AND AGPOWER JEROME, LLC, OF ORDER NO. 31025** was served in the manner shown to:

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