

BEFORE THE IDAHO PUBLIC UTILITIES COMMISSION

IN THE MATTER OF THE JOINT)	
PETITION OF IDAHO POWER COMPANY,)	CASE NO. GNR-E-10-04
AVISTA CORPORATION, AND)	
PACIFICORP DBA ROCKY MOUNTAIN)	
POWER TO ADDRESS AVOIDED COST)	ORDER NO. 32212
ISSUES AND TO ADJUST THE PUBLISHED)	
AVOIDED COST RATE ELIGIBILITY CAP.)	
_____)	

On February 7, 2011, the Commission issued final Order No. 32176 temporarily reducing the eligibility cap for published avoided cost rates from 10 average megawatts (aMW) to 100 kilowatts (kW). On February 28, 2011, the Northwest and Intermountain Power Producers Coalition (NIPPC or Coalition) filed a timely Petition for Reconsideration.

NIPPC requests that the Commission issue an order granting reconsideration of Order No. 32176 by: (1) taking official notice of the documents and records cited by NIPPC during oral argument and in its petition; (2) holding an evidentiary hearing on the issues addressed in Order No. 32176; (3) requiring the utilities to immediately implement changes to the Integrated Resource Planning (IRP) Methodology and calculate new avoided cost rates; and (4) reinstating the 10 aMW eligibility cap for the published avoided cost rates for wind and solar qualifying facilities (QFs).

Idaho Power Company, Avista Corporation, and PacifiCorp dba Rocky Mountain Power all filed timely Answers urging the Commission to deny reconsideration on the latter three issues. They did not address the official notice issue. Based upon our review of the Petition for Reconsideration, the Answers and our record, we partially grant reconsideration and partially deny reconsideration as set out in greater detail below.

BACKGROUND

On November 5, 2010, the three utilities filed a Joint Petition requesting that the Commission initiate an investigation to address various avoided cost issues related to the Commission's implementation of the Public Utility Regulatory Policies Act of 1978 (PURPA). While the investigation is under way, the Petitioners also moved the Commission to "lower the published avoided cost rate eligibility cap from 10 aMW to 100 kW [to] be effective immediately. . . ." Petition at 7.

After reviewing the Joint Petition and the Answers, the Commission declined the Motion to immediately reduce the eligibility cap for the published avoided cost rates. Instead, the Commission determined that it would expeditiously consider the Petitioners' request to reduce the eligibility cap through the use of "Modified Procedure" (written comments)¹ and oral argument. The Notice established an intervention deadline of December 17, 2010; set deadlines for initial comments and reply comments of December 22, 2010, and January 19, 2011, respectively; and scheduled an oral argument for January 27, 2011. Order No. 32131.

The Commission specifically requested written comments and oral argument regarding three issues: (1) the advisability of reducing the published avoided cost eligibility cap; (2) if the eligibility cap is reduced, the appropriateness of exempting non-wind qualifying facility (QF) projects from the reduced eligibility cap; and (3) the consequences of dividing larger wind projects into 10 aMW projects to utilize the published rate. The Commission also communicated its intent to consider the other avoided cost issues identified by the Petitioners and other interested parties in subsequent proceedings. *Id.* at 5.

Written comments and reply comments were submitted by numerous parties. Oral argument was held on January 27, 2011. Based upon the record, the Commission found that a convincing case had been made to temporarily reduce the eligibility cap for published avoided cost rates from 10 aMW to 100 kW but only for wind and solar QFs. The Commission also decided to open a new investigation into the implications of disaggregated QF projects. *See* Case No. GNR-E-11-01; Order No. 32176 at 11. NIPPC requests reconsideration from final Order No. 32176.

ISSUES ON RECONSIDERATION

A. *Legal Standards*

Reconsideration provides an opportunity for a party to bring to the Commission's attention any question previously determined and thereby affords the Commission with an opportunity to rectify any mistake or omission. *Washington Water Power Co. v. Kootenai Environmental Alliance*, 99 Idaho 875, 879, 591 P.2d 122, 126 (1979). The Commission may grant reconsideration by reviewing the existing record, by written briefs, or by evidentiary hearing. IDAPA 31.01.01.332. If reconsideration is granted, the Commission must complete its

¹ In instances where the public interest may not require a formal hearing to consider the presented issues, "the proceeding may be processed under modified procedure, i.e., by written submissions rather than by hearing." Rule 201, IDAPA 31.01.01.201.

reconsideration within 13 weeks after the deadline for filing petitions for reconsideration. *Idaho Code* § 61-626(2).

Consistent with the purpose of reconsideration, the Commission's Procedural Rules require that petitions for reconsideration "set forth specifically the ground or grounds why the petitioner contends that the order or any issue decided in the order is unreasonable, unlawful, erroneous or not in conformity with the law." Rule 331.01, IDAPA 31.01.01.331.01. Rule 331 further requires that the petitioner provide a "statement of the nature and quantity of evidence or argument the petitioner will offer if reconsideration is granted." *Id.*

B. Taking Official Notice

At oral argument, NIPPC distributed a document entitled "Request for Official Notice" and asked the Commission to take official notice of a host of documents listed in the "Request" including approximately 14 PUC Orders, several FERC orders and notices, and the "Filings, Testimony, Exhibits and Orders" in 24 different PUC dockets. The case caption or title (i.e., the case description) of each PUC Order and PUC case was not provided. In addition, NIPPC orally asked the Commission to take official notice of "three documents related to coal costs that support our comments." Tr. at 7. NIPPC's counsel described the three documents as follows:

One is the settlement agreement that the Environmental Protection Agency reached with the parties in the final rulemaking. The other is the Oregon Senate Natural Resources Committee report on greenhouse gas emissions, and the final is Rocky Mountain Power's parent corporation's the MidAmerican Holdings Company, comments in the Coal Combustion Residual Rulemaking, all of which support our comments related to the ability of renewable energy projects to allow the utilities to reduce generation from coal-fired power plants allowing them to – actually, it impacts the avoided cost rate and the cost of renewable energy.

Tr. at 7-8 (emphasis added). In response, the Chairperson of the hearing then asked:

Commissioner Smith: Well, Mr. Richardson, I'm getting confused because this is not a proceeding today to argue about the cost. I mean, the Commission clearly outlined in its Order that we wanted comments on three things: the advisability of reducing the eligibility cap; if the eligibility cap is reduced, the appropriateness of exempting non-wind QF projects from that reduced eligibility cap; and the consequences of dividing larger wind projects into 10 average megawatt projects in order to take advantage of the published avoided cost rate.

Mr. Richardson: . . . As pointed out in our comments, the advisability of reducing the eligibility cap is crucial to understanding what happens when the eligibility cap is reduced, meaning the integrated resource procedure, process is used by all three utilities and that process does not calculate an accurate or even nearly accurate avoided cost rate. . . .

...

Commissioner Smith: On your motion for the Commission to take official notice, I will note that I believe, . . . We can take official notice after giving parties appropriate opportunity to respond, so I think your passing this [Request] out gives people notice of what you want us to take notice of and certainly we can take notice of [(1)] our own orders and those of any other regulatory agency, state or federal, [(2)] matters of common knowledge, technical, financial or scientific facts, matters judicially noticeable and[, (3)] data contained in periodic reports of regulated utilities filed with the Commission or federal agencies. So as long as they fall within one of those categories, there's no problem with us taking notice.

Mr. Richardson: Thank you, Madam Chairman, and I believe all of the points that have been cited in our motion fall into those categories.

Tr. at 8-10 (scattered, emphasis added). No party voiced objection to NIPPC's request.

In final Order No. 32176, the Commission acknowledged taking official notice of its own Notices and Orders, but the Commission denied "NIPPC's request to take official notice of the remainder of its listed documents, including the three additional documents regarding coal costs." Order No. 32176 at 5.² The Commission noted that its Rule 263 (IDAPA 31.01.01.263) distinguishes between when it takes official notice on its own motion, and when parties request that the Commission take official notice. Rule 263.02. The Commission explained that when parties seek official notice they "must submit those documents to the Commission in the manner prescribed for documents in Rule 262."³ The Commission declined to take judicial notice of the requested documents (other than the Commission's own Notices and Orders) primarily for two reasons. First, NIPPC did not actually provide copies of the requested documents to the Commission or parties as required by Rule 263.02. Order No. 32176 at 5. Second, the

² The presiding officer's ruling on motions presented at hearing "may be reviewed by the full Commission in determining the matter on its merits." Rule 253, IDAPA 31.01.01.253.

³ Rule 262 generally provides that documentary evidence is to be submitted in the form of copies or excerpts. "When a party offers in evidence any portion of a transcript, exhibit, or other record from any other proceeding before the Commission, the portion offered must be specifically described. . . ." IDAPA 31.01.01.262.

Commission found that the majority of the “filings, testimonies and exhibits” in the PUC cases listed in NIPPC’s Request were not “documents or information subject to official notice per Rule 263.” *Id.*

In its Petition for Reconsideration, NIPPC requests that the Commission take official notice of all the items listed in its request as well as the “three documents related to coal costs.” Tr. at 7; Petition at 5-6. Citing Idaho Rule of Evidence 201, NIPPC asserts that “filings in the Commission dockets are judicially noticeable, and therefore fall within the confines of Rule 263.” NIPPC maintains that because a court may take judicial notice of records in cases before the trial court, “there is no reason the Commission may not do the same for records in its own proceedings.” *Id.* at 6; citing *Larson v. State*, 91 Idaho 908, 909, 435 P.2d 248, 249 (1967). The Coalition also argues that failing to take official notice of the requested documents is particularly unfair in this case because NIPPC was precluded from calling a witness to introduce these documents. “At a minimum, therefore, the Commission should reconsider its decision, and take official notice of the FERC orders.” Petition at 5.

Commission Findings: After reviewing NIPPC’s Petition and our record, we grant reconsideration in part and deny reconsideration in part. We grant the Coalition’s request to take official notice of those FERC filings, rules, and orders listed in its “Request” that was handed out at the oral argument. Although NIPPC did not comply with that provision of Rule 263 that requires the party requesting official notice to supply copies of the documents to the Commission and other parties, we note that most of the FERC documents were cited in NIPPC’s comments.

Taking official notice of documents in our proceedings is an exercise of discretion. When reviewing an exercise of discretion, our Supreme Court considers whether the Commission: (1) correctly perceived the issue as one of discretion; (2) acted within the boundaries of such discretion and consistently with applicable legal standards; and (3) reached its decision by an exercise of reason. *Sun Valley Shopping Ctr. v. Idaho Power Co.*, 119 Idaho 87, 94, 803 P.2d 993, 1000 (1991); *Newman v. State*, 149 Idaho 225, 233 P.3d 156 (Ct.App. 2010).

We deny reconsideration regarding the request to take official notice of the “Filings, Testimony, [and] Exhibits” that pertain to the 24 PUC cases identified only by case number. Despite NIPPC’s declaration to the contrary, all the “Filings, Testimony, and Exhibits” of the 24 PUC cases are not admissible for two reasons. First, all filings, testimony and exhibits in the

PUC cases are not the types of facts that are subject to official or judicial notice. Our Rule 263 is similar to Idaho Rule of Evidence 201 (“Judicial Notice of Adjudicatory Facts”). Although the Idaho Rules of Evidence do not apply to Commission proceedings, *Idaho Code* § 61-601, the concepts of taking notice are similar. I.R.E. 201 provides that a “judicially noticed fact must be (1) not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.” I.R.E. 201(b) (emphasis added). Similar to our Procedural Rule 263.02, I.R.E. 201(d) provides that the party seeking the court to take judicial notice of “records, exhibits or transcripts from the court file in the same or a separate case, . . . shall identify the specific document or item . . . and serve on all parties copies of such documents or items.” We find the purpose behind the requirement of providing copies of the documents for which a party seeks official notice is to provide the Commission with all relevant information of the documents. This includes the actual documents themselves.

In examining NIPPC’s reconsideration request, we need look no further to determine whether it was appropriate to take official notice of the filings, testimony and exhibits in the PUC cases, than the recent Rocky Mountain rate case No. PAC-E-10-07. This case contains nearly 3,000 pages of transcript from 47 technical witnesses and approximately 100 public witnesses. There were about 240 public comments (“filings”) in the case. The subject of these documents and the testimony range from: simple opposition to the proposed rate increase to keeping Monsanto’s rates low; from the weatherization program for low-income customers to the appropriate return on equity; and from a conservation program for irrigators to calculating the value of “interruptibility” for Monsanto.

After reviewing the filings, testimony and exhibits of the PacifiCorp rate case, we find the one thing that these documents and testimony have in common is that they are disputed facts. We find that many of the documents and testimony are subject to reasonable dispute and do not contain the types of facts that are undisputed matters of common knowledge or facts capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned. Rule 263.01(b) and I.R.E. 201(b); *Martin v. Camas County*, ___ Idaho ___, ___ P.3d ___, 2011 WL 538750 (Idaho 2011); *Santa Monica Food Not Bombs v. City of Santa Monica*, 450 F.3d 1022, 1025 n.2 (9th Cir. 2006).

The second reason to deny reconsideration is that NIPPC failed to show how the “filings, testimony and exhibits” of the 24 PUC cases were relevant to our inquiry in this case. Although the Commission may officially notice a variety of documents and adjudicatory facts, only relevant material may be noticed and admitted into evidence. In other words, for us to take official notice of documents and other facts, the evidence must be relevant to be admissible. *State v. Van Sickle*, 120 Idaho 99, 103, 813 P.2d 910, 914 (Ct.App. 1991); I.R.E. 401. Even “if taking judicial notice of the [documents] is otherwise proper, the question remains whether the [documents] noticed were relevant” to the inquiries before the Commission. *California v. Superior Court of California*, 482 U.S. 400, 408, 107 S.Ct. 2433, 2439 (1987); *see Cuellar v. Joyce*, 596 F.3d 505, 512 (9th Cir. 2010); *Santa Monica*, 450 F.3d at 1025 n.2; *Flick v. Liberty Mut. Ins. Co.*, 205 F.3d 386, 393 (9th Cir. 2000).

Again examining the filing, testimony and exhibits in the Rocky Mountain rate case, we find many if not all of the requested documents and testimony have no bearing or relevancy to the avoided cost issues in this proceeding. Consequently, we find that NIPPC has failed to meet its burden of demonstrating that the filings, testimony and exhibits of the 24 PUC cases are noticed facts appropriate for official notice and relevant to the matters in this case. Our findings are consistent with the applicable legal standards for admission of judicially noticeable facts under Idaho law. *Newman*, 149 Idaho at 227, 233 P.3d at 158; I.R.E. 201(b).⁴

We next turn to the three coal cost documents. Even though these documents may properly be the subject of official notice,⁵ they are not relevant to the three questions posed by the Commission in this proceeding. As Commissioner Smith noted at the hearing, “This is not a proceeding today to argue about the [avoided] cost. I mean, the Commission clearly outlined in its order that we wanted comments on three things: the advisability of reducing the eligibility cap; . . . the appropriateness of exempting non-wind QF projects from the reduced eligibility cap; and the consequences of dividing larger wind projects into 10 average megawatt projects. . . .”

⁴ In its official notice request, NIPPC lists 16 PUC cases that are Firm Energy Sales Agreements between Idaho Power and various QFs. NIPPC references the 16 PUC cases in a footnote in its reply comments. Reply at 17, n.9. The footnote pertains to NIPPC comments regarding the calculation or comparison of avoided cost rates. While we take official notice of the Orders and Notices in these cases, we find that the Coalition failed to demonstrate the relevancy of the “files, testimony and exhibits” in these cases. Moreover, the footnote containing the reference to these cases relates to avoided costs – an issue we find that is beyond the scope of this docket.

⁵ Two were issued by regulatory agencies and the “Settlement” was entered into by a regulatory agency (EPA) and various States.

Tr. at 8. Mr. Richardson described them as “three documents related to coal costs that support our comments.” Tr. at 7.

In NIPPC’s reply comments, the Coalition links the coal documents to alleged shortcomings of the IRP Methodology in accurately reflecting avoided costs. Reply Comments at 8, 21-25. However, the alleged impact of coal costs on the use of the IRP Methodology in calculating avoided costs was not part of the GNR-E-10-04 case. In Order No. 32176, we stated that we are not changing the avoided cost rates: lowering the eligibility cap “does not change the published avoided cost rates established in Order No. 31025 (March 16, 2010).” Order No. 32176 at 9. To put it simply, we find that the issues of coal costs and their relationship to the IRP Methodology is beyond the subject matter of this case. Our final Order No. 32176 states the issues concerning “the IRP Methodology will be considered after a determination regarding disaggregation” in the GNR-E-11-01 case. Order No. 32176 at n.4 (emphasis added); *see also* n.3.

In the disaggregation case (GNR-E-11-01) we recently issued a Bench Order regarding a party’s discovery dispute with NIPPC. In our Bench Order we found that the issue of using the IRP Methodology to calculate avoided costs “is specifically reserved for a subsequent proceeding.” “Thus, we find that evidence regarding the IRP Methodology is beyond the scope of the [GNR-E-11-01] case and thus not relevant. . . .” Bench Order at 1-2 (March 23, 2011). As explained more fully below, the issues of the IRP Methodology will be examined in a subsequent case.

Thus, we find that the three coal documents are not relevant to our inquiry in this case. In addition, we further find that NIPPC has failed to meet its burden of showing that MidAmerican’s comments (the holding company of PacifiCorp) is not subject to reasonable dispute. *Martin*, 201 WL 538750; I.R.E. 201(b); *Santa Monica*, 450 F.3d at 1025 n.2.

In summary, we grant reconsideration and take official notice of those FERC filings, rulings and orders set out in NIPPC’s request. We deny reconsideration regarding the “Filings, Testimony, [and] Exhibits” for the 24 PUC cases cited in the request. Finally, we deny reconsideration to take official notice of the three coal cost documents as not relevant and beyond the scope of this proceeding.

C. The Request for a Technical Hearing

NIPPC next contends that, by denying its request for a “technical” hearing to present witnesses, the Commission did not allow NIPPC to establish an evidentiary record. NIPPC further argues that, because the Commission’s decision was based on factual findings, “the Commission must hold an evidentiary hearing.” Petition at 7. NIPPC alleges that due process would require the Commission to conduct an evidentiary hearing and that “the Commission’s order is indefensible without at least some evidence supporting the relief granted to the Utilities.” *Id.* at 8-9.

Utilities’ Answers

Idaho Power argues that NIPPC received notice and had an opportunity to be heard. Idaho Power further states that a technical hearing is not required for the Commission to make factual findings. Rule of Procedure 201, IDAPA 31.01.01.201. Idaho Power argues that “[t]he standard of review as to whether the Commission has made valid findings of fact is not whether a technical/evidentiary hearing was held. The standard of review is whether those findings of fact are supported by substantial and competent evidence in the record.” Answer at 5. The utility observed that discovery was available to all parties and that NIPPC propounded extensive discovery of the Joint Petitioners. Answer at 3. All parties were able to file direct and rebuttal comments and participate at oral argument. Ultimately, Idaho Power argues that the Commission’s decision was a proper exercise of its discretion in its implementation of PURPA. *Id.* at 19.

Avista maintains that NIPPC’s request for an evidentiary hearing should be denied as moot. Avista notes that Case No. GNR-E-11-01, the subsequent (or second) phase of the Commission’s avoided cost investigation, provides for a technical hearing. Because, presumably, the GNR-E-11-01 technical hearing will provide an opportunity for NIPPC to present witnesses and testimony, its request for a technical hearing during reconsideration of the first phase is moot. Answer at 4.

Rocky Mountain Power asserts that the Commission was not required to conduct a technical hearing prior to reducing the eligibility cap for published avoided cost rates. Rocky Mountain further notes that in a similar case the California PUC supports the Idaho Commission’s decision to reduce the eligibility cap without an evidentiary hearing. Answer at 4 *citing* 1996 Cal. PUC LEXIS 1016* 44-45.

Commission Findings: NIPPC cites *Intermountain Gas Co. v. Idaho PUC*, 97 Idaho 113, 540 P.2d 775, for its proposition that a hearing is required. However, the *Intermountain Gas* case expressly approved the use of written comments (i.e., submissions) in gathering evidence. The Court states, “[t]he procedure chosen by the Commission must of course give the parties fair notice of exactly what the Commission proposes to do, together with an opportunity to comment, to object, and to make written submissions; and the final order of the Commission must be based upon substantial evidence.” *Intermountain Gas*, 97 Idaho at 129, 540 P.2d at 791 (1975) (emphasis added), citing, *American Public Gas Asso. v. Federal Power Comm.*, 162 U.S.App.D.C. 176, 498 F.2d 718, 722 (1974).

In *American Public Gas* the D.C. Circuit held that the Federal Power Commission (FPC)⁶ is not required to process all cases coming before it with formal hearings, to include witnesses and cross examination. “Evidentiary submissions in written form may be sufficient.” 498 F.2d at 180. The Circuit Court further explained that:

The ability [of the FPC] to choose with relative freedom the procedure it will use to acquire relevant information gives the Commission power to realistically tailor the proceedings to fit the issues before it, the information it needs to illuminate those issues and the manner of presentation which, in its judgment, will bring before it the relevant information in the most efficient manner.

The procedure chosen by the Commission must of course give the parties fair notice of exactly what the Commission proposes to do, together with an opportunity to comment, to object, and to make written submissions; and the final order of the Commission must be based upon substantial evidence.

Id. at 723 (emphasis added), citing *City of Chicago v. FPC*, 458 F.2d 731, 743-44 (D.C. Cir. 1971), *cert denied*, 405 U.S. 1074, 92 S.Ct. 1495 (1972).

In this case, the Commission provided notice to NIPPC and other interested persons by publishing its Notice of Joint Petition and by personally serving NIPPC with the Notice. NIPPC submitted both initial comments and reply comments in this case. NIPPC also actively participated at oral argument. NIPPC’s comments and exhibits, along with those of the numerous other parties to the case, make up the evidentiary record considered by the Commission prior to issuing its final Order.

⁶ The FPC is now the Federal Energy Regulatory Commission (FERC).

A Ninth Circuit case reviewing a decision by the Interstate Commerce Commission (ICC) is also instructive. In *Amador Stage Lines, Inc. v. United States and Interstate Commerce Comm.*, 685 F.2d 333 (9th Cir. 1982), the ICC utilized modified procedure to consider an application filed by Quality Coach Lines, to operate as a carrier of passengers within the United States. Amador and other carriers opposed Quality's application and requested oral hearing on their objections. Amador argued that "where material facts are in dispute principles of administrative due process and fundamental fairness require that the Commission hold a hearing." 685 F.2d at 335. The Ninth Circuit reasoned that the Commission "in its discretion may deny an oral hearing even where material facts are disputed so long as the disputes may be adequately resolved by the written submissions." *Id.* (emphasis added).

The Commission's Rules of Procedure allow for the use of Modified Procedure, i.e., the consideration of issues based on written submissions (i.e., comments) rather than by hearing. Rule 201, IDAPA 31.01.01.201. Even if a hearing is requested, the Commission "may decide the matter and issue its order on the basis of the written positions before it." Rule 204, IDAPA 31.01.01.204 (emphasis added). Here the Commission acted within its discretion when it determined to gather evidence by written submissions.

The Commission did not issue its decision regarding QF eligibility to published avoided cost rates without a thorough review of the evidentiary record established in this case through the use of Modified Procedure. All parties had an opportunity to submit comments, reply to comments, and assert and defend a position at oral argument. Based upon the evidentiary record provided by the parties, the Commission determined "that a convincing case has been made to temporarily reduce the eligibility cap for published avoided cost rates from 10 aMW to 100 kW for wind and solar only while the Commission further investigates the implications of disaggregated QF projects." Order No. 32176 at 9; *American Public Gas*.

Sufficient notice of exactly what the Commission was considering was provided to allow all interested parties an opportunity to participate. Ample opportunity was given for the parties to provide evidence in support of their positions. The Commission utilizes Modified Procedure for the majority of cases that it considers. Modified Procedure has proven to be an effective means for obtaining public input and participation in cases. NIPPC has failed to demonstrate that the Commission's decision to process the issues presented in GNR-E-10-04 through the use of Modified Procedure was unreasonable or unlawful. There is substantial and

competent evidence in the record to support the Commission's findings. *In re Ryder*, 141 Idaho 918, 120 P.3d 736 (2005). Moreover, NIPPC has not proven that its position could not be adequately presented in writing. Consequently, we deny reconsideration on this issue.

D. The Issue of the IRP Methodology

NIPPC argues that federal law requires that the utilities contract with each QF at the "full avoided cost rates." Petition at 13. NIPPC states that the IRP Methodology violates federal law by dramatically understating actual avoided costs and producing "wildly inaccurate results." *Id.* at 11. NIPPC maintains that the Commission's failure to address NIPPC's assertions "is nothing short of arbitrary. . . ." *Id.* NIPPC further argues that the utilities "have not provided enough data for QFs to properly vet the individually provided [IRP Methodology] results, and are hence in violation of the 18 C.F.R. 292.302(b) by failing to provide for public inspection of basic system cost data listed in the regulation." *Id.* at 12. Finally, NIPPC claims that "[i]f the rates for the IRP Methodology were accurate and verifiable to the QFs, there would be no need to disaggregate an otherwise larger project into smaller projects to obtain the fair rate at which the project would be financially viable." *Id.* at 13.

Utilities' Answers

Idaho Power maintains that NIPPC's assertions regarding the flaws of the IRP Methodology are erroneous. IRP calculations do take into account both capacity and energy. Idaho Power also asserts that NIPPC's representations regarding "full avoided costs" are illusory. PURPA and FERC make no reference to a QF's entitlement to "full" avoided costs. Moreover, Idaho Power argues there is "nothing in the regulations to suggest that the IRP methodology does not comport with FERC rules." Answer at 16.

Avista argues that NIPPC's request for immediate changes to the IRP Methodology is beyond the scope of this proceeding. Avista notes that NIPPC claims "the record in this docket contains no evidence whatsoever" but then goes on to claim that it has proven that the IRP Methodology produces wildly inaccurate results. Answer at 5. "Simply stated, NIPPC cannot have it both ways." *Id.*

Rocky Mountain Power states that NIPPC's request to review the IRP Methodology should be denied as beyond the scope of these proceedings. Answer at 5. "If NIPPC wishes to challenge the adequacy of the IRP Methodology, the proper avenue for doing so is to file a separate petition with the Commission. Such action is not necessary here, however, because the

Commission has already stated that it will address concerns over the IRP Methodology after the Commission has an opportunity to investigate and make a determination regarding disaggregation.” *Id.*

Commission Findings: Use of an IRP methodology was first proposed by the utilities for QF projects in excess of the Commission’s stated eligibility for published rates in 1995. As originally proposed,

the utility would determine through its least cost planning model [IRP process] the cost of meeting load over the next 20 years. Whenever a proposed QF project were [sic] offered to the utility, it would insert the generation and capacity of that project into the model and determine what costs would be avoided over the 20 year period. That avoided cost would be the rate available to the developer.

Order No. 25882 at 6. The intervenors to the 1995 case opposed the IRP Methodology for calculation of QF avoided cost rates “contending that it places too much control over the avoided cost process into the hands of the utilities.” *Id.* Nevertheless, the Commission determined that

adoption of the [IRP Methodology] is consistent with our goal of maintaining a regulatory climate that allows our electric utilities to retain their advantageous posture in a marketplace that is likely to become increasingly competitive. This will ultimately work to the advantage of ratepayers in the form of rates lower than they would otherwise be in effect. By treating QFs in the same manner as utility acquired resources, we are further removing the shelter that has been constructed around the QF industry. Requiring those projects to prove their viability by market standards ensures that utilities will not be required to acquire resources priced higher than would result from a least cost planning [IRP] process. Ratepayers will not be disadvantaged and QFs will be treated fairly and consistently with the requirements and goals of PURPA.

Id. at 7. The Commission concluded that the least cost planning [IRP] process will provide the most logical, consistent and frequent review of the avoided cost rates and the issues that are raised in setting those rates.” *Id.*

This GNR -E-10-04 docket began with the utilities’ request that the Commission reduce QF eligibility to the published rates. From the outset, NIPPC has argued that the IRP Methodology is flawed and in violation of federal law. NIPPC asserts on reconsideration that the Commission must recalculate the avoided costs rates in this case. However, as mentioned previously, the Commission has expressly stated that other avoided cost issues, “including utilization and/or modification of the IRP Methodology will be considered after a

determination regarding disaggregation.” Order No. 32176 n.4 (emphasis added). The GNR-E-10-04 docket was limited to the three issues set out in the initial Notice: (1) the advisability of reducing the published avoided cost eligibility cap; (2) if the eligibility cap is reduced, the appropriateness of exempting non-wind qualifying facility (QF) projects from the reduced eligibility cap; and (3) the consequences of dividing larger wind projects into 10 aMW projects to utilize the published rate. Order No. 32131 at 5.

While the IRP Methodology is one of many avoided cost issues raised by the parties, it is not at issue in the present docket. Attacking the IRP Methodology approved by the Commission in 1995 and utilized for the past 16 years in an effort to stop the Commission from reducing the eligibility cap for wind and solar QFs represents a collateral attack of the Commission’s final Order adopting the IRP Methodology. *See* Order No. 25882; *Idaho Code* § 61-625. If NIPPC desired to challenge the viability of the IRP Methodology, it could have petitioned the Commission to open an investigation to evaluate the presently approved IRP Methodology. *Idaho Code* § 61-612; *Asso. Pacific Movers, Housemovers, Inc. v. Rowley*, 97 Idaho 663, 664, 551 P.2d 618, 620 (1976) (an application requesting that the Commission rescind, alter or amend an order pursuant to *Idaho Code* § 61-624 does not constitute a collateral attack of a Commission order). While the Commission acknowledged NIPPC’s challenge to the IRP Methodology, we specifically stated that “the IRP Methodology appropriately assesses when the QF is capable of delivering its resources against when the utility is most in need of such resources.” Order No. 32176 at 10. Moreover, the Commission intends to examine and address NIPPC’s concerns in a subsequent case. *Id.* at 9. The Commission’s decision to examine the various avoided cost issues raised by the parties in an orderly manner and on a case-by-case basis is reasonable and within the Commission’s discretion.

Final Orders of the Commission are final and conclusive and not subject to collateral attack. *Idaho Code* § 61-625. “A different rule would lead to endless consideration of matters previously presented to the Commission and confusion about the effectiveness of Commission orders.” *Utah-Idaho Sugar Co. v. Intermountain Gas Co.*, 100 Idaho 368, 373, 597 P.2d 1028, 1063 (1979).

NIPPC’s arguments regarding the IRP Methodology are outside the scope of this docket and amount to an impermissible collateral attack of Commission Order No. 25882. Until such time as we initiate a proceeding to investigate the IRP Methodology and possibly set new

avoided cost rates, the current methodologies and the rates are in effect. *Idaho Code* § 61-502. Based on the foregoing, NIPPC's request for reconsideration of a determination regarding the IRP Methodology is denied.

E. Reinstate the 10 aMW Published Avoided Cost Rate

NIPPC argues that “[b]ecause the IRP Methodology, as currently implemented, produces rates below the full avoided cost rates, the Commission should reconsider its decision and raise the eligibility cap to 10 aMW so that it will be properly implementing PURPA for at least some larger wind and solar QFs.” *Id.* at 14. The utilities generally oppose NIPPC's request on reconsideration to reinstate the 10 aMW published avoided cost rate for wind and solar.

Commission Findings: The Commission denies NIPPC's request to reconsider the Commission's decision to temporarily reduce the eligibility cap for published avoided cost rates from 10 aMW to 100 kW for wind and solar QFs. NIPPC's request is based entirely on the proposition that the IRP Methodology is unworkable and unreasonable. As noted above, the Commission finds that the use of IRP Methodology is: (1) beyond the scope of this docket; (2) a subject for a subsequent avoided cost proceeding after disaggregation; and (3) represents a collateral attack on the Commission's prior Order approving the use of the IRP Methodology in setting avoided cost rates.

In final Order No. 32176, the Commission clearly conveyed its intent that the reduced eligibility cap be temporary, until issues regarding disaggregation could be resolved. We directed parties to establish an expedited schedule for subsequent proceedings, culminating with a technical hearing to be held the week of May 9, 2011. Order No. 32176 at 11. The Commission specifically noted that other avoided cost issues, “including utilization and/or modification of the IRP Methodology, will be considered after a determination regarding disaggregation.” *Id.* at 9 (emphasis added).

In addition, the Commission recently issued a Bench Order on March 23, 2011, in Case No. GNR-E-11-01 (the second phase of the avoided cost investigation) reiterating that “evidence regarding the IRP Methodology is beyond the scope of the present case and thus is not relevant to the subject matter of the pending case.” The Commission ordered that discovery regarding the IRP Methodology be stayed, “but may be renewed in a subsequent case when the Commission investigates the challenges to the IRP Methodology.” Bench Order at 2. There is

substantial and competent evidence to support the Commission's decision to temporarily reduce the eligibility cap for the published avoided cost rates.

ORDER

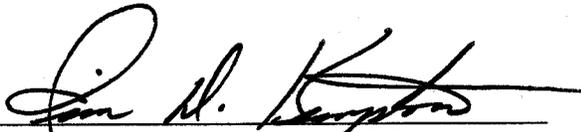
IT IS HEREBY ORDERED that Northwest and Intermountain Power Producers Coalition's Petition for Reconsideration is granted in part and denied in part. The Commission partially grants reconsideration on the issue of official notice. We take official notice of FERC filings, rules and orders as more fully set out in the body of this Order. We deny reconsideration on the issue of taking official notice of the three coal documents and the filings, testimony, and exhibits of the 24 PUC cases.

IT IS FURTHER ORDERED that Order No. 32176 is amended to reflect that the Commission takes official notice of the FERC documents pursuant to *Idaho Code* § 61-624.

IT IS FURTHER ORDERED that reconsideration regarding NIPPC's remaining issues of a request for a technical hearing, the IRP Methodology issue, and reinstatement of the 10 aMW published avoided cost rate eligibility cap for wind and solar are denied.

THIS IS A FINAL ORDER ON RECONSIDERATION. Any party aggrieved by this Order or other final or interlocutory Order previously issued in this Case No. GNR-E-10-04 may appeal to the Supreme Court of Idaho pursuant to the Public Utilities Law and the Idaho Appellate Rules. See *Idaho Code* § 61-627.

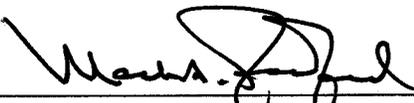
DONE by Order of the Idaho Public Utilities Commission at Boise, Idaho this 28th
day of March 2011.



JIM D. KEMPTON, PRESIDENT

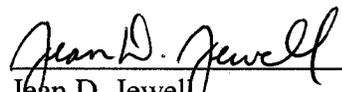


MARSHA H. SMITH, COMMISSIONER



MACK A. REDFORD, COMMISSIONER

ATTEST:



Jean D. Jewell
Commission Secretary

O:GNR-E-10-04_ks_Reconsideration