

Peter J. Richardson  
RICHARDSON & O'LEARY PLLC  
515 N. 27<sup>th</sup> St  
Boise, Idaho 83702  
Telephone: (208) 938-7901  
Fax: (208) 938-7904  
peter@richardsonandoleary.com

RECEIVED  
FILED  
2005 AUG 30 PM 3: 24  
IDAHO PUBLIC  
UTILITIES COMMISSION

Attorneys Exergy Development Group of Idaho LLC

**BEFORE THE IDAHO PUBLIC UTILITIES COMMISSION**

IN THE MATTER OF THE PETITION OF	)	CASE NO. IPC-E-05-22
IDAHO POWER COMPANY FOR AN	)	
ORDER TEMPORARILY SUSPENDING	)	EXERGY DEVELOPMENT
IDAHO POWER'S PURPA OBLIGATION TO	)	GROUP OF IDAHO'S
ENTER INTO CONTRACTS TO PURCHASE	)	ANSWER TO WINDLAND'S
ENERGY GENERATED BY WIND-	)	MOTIONS TO STAY AND
POWERED SMALL POWER PRODUCTION	)	FOR RECONSIDERATION
<u>FACILITIES</u>	)	

**COMES NOW** Exergy Development Group of Idaho, LLC ("Exergy") by and through its attorneys of record and hereby lodges its answer to Windland Incorporated's ("Windland") Petitions to Stay and for Reconsideration of Order No. 29839 issued by the Idaho Public Utilities Commission ("Commission") in the above captioned docket. In support of this Answer, Exergy says as follows:

II

Background

Windland seeks a stay of this Commission's decision to permit a certain class of potential wind developers to seek grandfather status from the Commission from its decision to reduce the

threshold for entitlement to the published avoided cost rates from 10,000 kW to 100 kW in Order No. 29839. The Commission declared, in that Order that:

Based on the record established in this case the Commission finds reason to believe that wind generation presents operational integration costs to a utility different from other PURPA qualified resources. We find that the unique supply characteristics of wind generation and the related integration costs provide a basis for adjustment to the published avoided cost rates . . .

Order No. 29839 p. 8.

The Commission then determined that certain potential wind projects that had reached a certain stage of maturity would be eligible for the published rates if they can demonstrate they had achieved certain milestones as of July 1, 2005, the date of the Commission's Notice in this docket. These potential projects are referred to as "grandfathered" projects if they can successfully demonstrate that they have achieved those milestones. The exact number of projects that will ultimately be entitled to grandfathered status is unknown at this time and may not be known for quite some time to come. In fact, if past experience repeats itself, we can expect the issue of grandfathered status to be contentious and litigious and may take several years before final resolution of that question is determined.

Windland seeks a stay of the Commission's decision to allow those potential projects to seek grandfather status based on the following three grounds:

1. The Order requires Idaho Power to enter into contracts at rates exceeding avoided cost and such requirement is contrary to the public and the law.
2. The Order sets criteria for "grandfathering" certain proposed QF projects that do not have established contractual rights to old, clearly outdated avoided cost rates, contrary to the public interest and law.
3. The Commission's implementation of "grandfathering" will detrimentally impact and potentially eliminate Idaho Power's acquisition of wind resource generating options that are more cost effective.

Windland Petition at pp 1-2.

Windland also filed a Petition for Reconsideration using identical arguments. This Answer to the Motion to Stay should also be considered an Answer to the Petition for Reconsideration pursuant to Rule 331(05). References to Windland's Petition throughout this Answer are to the Petition to Stay.

Windland's petition for stay should be denied by this Commission because it is (1) not ripe; (2) Windland lacks standing; (3) Windland fundamentally misconstrues the Commission's Order; (4) Windland's Petition is an impermissible collateral attack on a final Commission order; (5) Windland's Petition inaccurately asserts that the avoided cost rates for wind are too high.

### III

#### WINDLAND'S PETITION IS NOT RIPE

Windland seeks a stay of the Commission's order setting parameters to determine whether any particular project is eligible for grandfathered status. The Commission's decision merely sets the stage to determine whether any individual project is, indeed, entitled to grandfathered status. No one knows, at this point, whether any potential project will be able to satisfy the criteria to be able to legitimately claim they are grandfathered. Given that uncertainty it is impossible to gauge what impact, if any, the Commission's ruling will have on Idaho Power's "acquisition of wind resource generating options that are more cost effective." Windland Petition at p. 2.

The fact is, Windland has no idea whether or not the Commission's decision to establish grandfather criteria will actually result in any projects being grandfathered. In addition, Windland has no idea whether, if some potential projects are grandfathered, that fact will impact Idaho Power's decision to "acquire resource generating options that are more cost effective." Windland Petition at p. 2. In order to be ripe for adjudication a party must:

raise issues that are definite and concrete, and must involve a real and substantial controversy as opposed to an advisory opinion based upon hypothetical facts. Ripeness asks whether there is any need for court action at the present time." 116 Idaho at 642, 778 P.2d at 764.

Boundary Backpackers v. Idaho County, 128 Idaho 371, 376 (1996).

Windland's Petition is based on hypothetical "facts" at best. It hypothesizes that the Commission will grant grandfathered status to enough potential wind developers such that Idaho Power may then decide to take action that might reduce the amount of power it acquires from a source of power that might be less expensive than the rate paid to the, as yet unknown, grandfathered projects. This is hardly a "real and substantial" controversy worthy of the Commission's action.

#### IV

#### WINDLAND LACKS STANDING

Windland alleges no direct interest in the level of avoided cost rates paid by Idaho Power, other than a generalized concern that the public interest may be harmed. In order to have standing a party must meet the following test:

The essence of the standing inquiry is whether the party seeking to invoke the court's jurisdiction has "alleged such a personal stake in the outcome of the controversy as to assure the concrete adversariness which sharpens the presentation upon which the court so depends for illumination of difficult constitutional questions." As refined by subsequent reformation, this requirement of "personal stake" has come to be understood to require not only a "distinct palpable injury" to the plaintiff, but also a "fairly traceable" causal connection between the claimed injury and the challenged conduct. (citations omitted)

Miles v. Idaho Power Company 116 Idaho 635, 641 (1989).

Windland never asserts that it is directly harmed, not even as a ratepayer, by Idaho Power's purchase of allegedly overpriced QF power. It is not clear from its pleading whether or

not Windland even is an Idaho Power ratepayer. In Miles *Id.* the Idaho Supreme Court made it clear that “when the asserted harm is a generalized grievance” there is an insufficient nexus to assert standing. *Id.* Here Windland’s grievance is that Idaho Power’s purchase of allegedly overpriced QF power may harm the “public interest.” Clearly Windland has no “personal stake” in protecting the “public interest” such that it has standing to challenge the Commission’s decision to set criteria by which a potential wind project may seek grandfathered status.

Even assuming Windland asserts a direct personal interest because it may be a ratepayer, which it has not, it would still lack standing due to the lack of a connection between its alleged injury and the challenged conduct. This is true because a second aspect of standing is that the plaintiff must show or allege an “injury in fact” that is “fairly traceable” to the challenged conduct. *Id.* Here Windland’s only “injury in fact” is the fear that (1) the Commission will grant grandfather status to a certain unspecified number of potential wind projects; (2) that the number of grandfathered wind projects will be sufficient to induce Idaho Power to rethink the possibility that it might award a wind power purchase agreement to a bidder in its wind RFP process; (3) that Windland’s bid into the RFP process meets all of Idaho Power’s technical requirements to be considered; (4) that Windland’s bid price is the winning bid price; (5) that Idaho Power will independently decide to award Windland a contract pursuant to the RFP process; and (6) that but for the granting of grandfather status to the unspecified number of potential wind projects, Windland would have been the successful bidder. The uncertainties abound. There is simply no “fairly traceable” connection between the Commission’s action and Windland’s alleged injury.

In addition to a connection between the Commission’s action and the alleged injury, there has to be an alleged injury in the first place. In order to have standing the plaintiff must show or claim that it has suffered a “distinct or palpable injury.” *Id.* Windland has not demonstrated, or

asserted, that even if the Commission grants grandfather rights to the unknown number of potential wind projects, that it has any justifiable hope that it will be awarded a contract in the RFP process. That process is managed completely at the discretion of Idaho Power Company. In other words, even if grandfather status were granted, Windland has no claim or right to be awarded the winning bid in the RFP process. Therefore Windland cannot claim to be injured as a result of this Commission's establishment of criteria for consideration in a possible grandfathering claim. Windland is asking this Commission to stay consideration of grandfather status based on what is essentially a throw of the dice by Windland. Mere speculation that it might be harmed is simply that, mere speculation. It does not rise to the level of legal standing to avail itself of the jurisdiction of this Commission.

V.

#### WINDLAND FUNDAMENTALLY MISREPRESENTS

#### THE COMMISSION'S DECISION

Windland asserts that the Commission's order "requires Idaho Power to enter into new contracts with wind-powered QFs". Windland Petition p. 3. In fact the order does no such thing. The Order merely sets forth certain criteria by which a potential QF is to be judged as to entitlement for published avoided cost rates. After the criteria are applied by Idaho Power, some potential developers, or perhaps no developers, will be entitled to sign a contract with the company. Then those contracts will be submitted to the Commission for approval. The Commission may approve some of those contracts or it may approve none of those contracts. Windland's cry that the sky is falling is simply not credible – the Commission's grandfathering criteria do not obligate Idaho Power to enter into contracts; rather, it merely sets criteria by which possible contracts will be evaluated. Of course, that the Commission has not ordered Idaho

Power to enter into a single contract in Order No. 29839 underscores the arguments noted above relative to standing and ripeness.

V

WINDLAND'S PETITION IS AN IMPERMISSIBLE  
COLLATERAL ATTACK ON FINAL COMMISSION ORDERS

The assertion that avoided cost rates are too high by Windland is likewise a serious mischaracterization of the Commission's Order. The Commission found only that there was sufficient evidence to investigate the costs of integrating wind into Idaho Power's system – not that the avoided cost rates were too high. The current avoided cost rates were set by this Commission in Order No. 29646 in December of 2004. That order is final and was subject to petitions for reconsideration by Windland, had it believed that the rates in that order were too high.<sup>1</sup> It did not petition for reconsideration and should not now, by way of its Petition to Stay, be permitted to undermine the findings made by the Commission in that order that the avoided cost rates are fair, just and reasonable. Windland's Petition is by its very nature an impermissible collateral attack on a final Commission order. *See* Idaho Code § 61-625.

VI

ASSERTIONS THAT THE AVOIDED COST RATES  
ARE TOO HIGH ARE UNSUPPORTABLE

The Commission, in Order No. 29839 found only that the costs of integrating wind into Idaho Power's system has not been fully explored and that the avoided cost rates for wind should reflect those costs. However any investigation into the costs of integration will undoubtedly include *benefits* of doing so. Since the current mechanism for "banding" wind projects within a

90% to 110% target of monthly production already significantly lowers the rates effectively paid to wind projects, the ultimate result of the investigation of the costs of integration of wind may be that the rates are too low. Of course, we won't *know* if the rates paid wind projects are, indeed, too high until the investigation is completed. Indeed, it may be that overall the avoided cost rates need to be revisited in light of current events in energy markets. For example, today the non-firm spot market price for wholesale electricity at the Pacific Northwest wholesale trading hub was in excess of \$85 MWH and natural gas at the California Border was over \$9.50. *see [www.enerfaxdaily.com](http://www.enerfaxdaily.com)*. Certainly assertions that avoided cost rates in the \$60 range are too high in light of these market conditions should be examined with a very critical eye.

#### CONCLUSION

For all of the foregoing reasons, Exergy respectfully requests the Commission deny Windland's Petition to Stay and its Petition for Reconsideration.

RICHARDSON & O'LEARY PLLC

By:   
Peter J. Richardson, ISB #3195  
Attorneys for Exergy Development  
Group of Idaho LLC

---

<sup>1</sup> Although, for whatever reason, Windland did not participate in that docket it is still allowed to petition for reconsideration even if was not a party in the proceeding.

## CERTIFICATE OF SERVICE

I hereby certify that on this 30<sup>th</sup> day of August, 2005, the ANSWER OF EXERGY DEVELOPMENT GROUP, LLC, TO WINDLAND'S PETITION FOR STAY AND PETITION FOR RECONSIDERATION was sent to the following parties as shown:

Jean Jewell  
Commission Secretary  
Idaho Public Utilities Commission  
472 West Washington  
Boise, Idaho 83702  
[jjewell@puc.state.id.us](mailto:jjewell@puc.state.id.us)

U.S. Mail, Postage Prepaid  
 Hand Delivered  
 Overnight Mail  
 Facsimile  
 Electronic Mail

Monica B. Moen  
Barton L. Kline  
Idaho Power Company  
PO Box 70  
Boise ID 83707-0070  
[MMoen@idahopower.com](mailto:MMoen@idahopower.com)  
[BKline@idahopower.com](mailto:BKline@idahopower.com)

U.S. Mail, Postage Prepaid  
 Hand Delivered  
 Overnight Mail  
 Facsimile  
 Electronic Mail

Dean J. Miller  
McDevitt & Miller LLP  
420 West Bannock  
Boise, Idaho 83702  
[joe@mcdevitt-miller.com](mailto:joe@mcdevitt-miller.com)

U.S. Mail, Postage Prepaid  
 Hand Delivered  
 Overnight Mail  
 Facsimile  
 Electronic Mail

Glen Ikemoto  
Principal  
Energy Vision LLC  
672 Blair Avenue  
Piedmont, CA 94611  
[glenni@pacbell.net](mailto:glenni@pacbell.net)

U.S. Mail, Postage Prepaid  
 Hand Delivered  
 Overnight Mail  
 Facsimile  
 Electronic Mail

Scott Woodbury  
Idaho Public Utilities Commission  
472 West Washington  
Boise, Idaho 83702  
[swoodbu@puc.state.id](mailto:swoodbu@puc.state.id)

U.S. Mail, Postage Prepaid  
 Hand Delivered  
 Overnight Mail  
 Facsimile  
 Electronic Mail

Data Request Response Ctr  
PacifiCorp  
825 NE Multnomah, Suite 800  
Portland, OR 97232

U.S. Mail, Postage Prepaid  
 Hand Delivered  
 Overnight Mail  
 Facsimile  
 Electronic Mail

William M. Eddie  
Advocates for the West  
PPO Box 1612  
Boise, Idaho 83701  
[billeddie@rmci.net](mailto:billeddie@rmci.net)

U.S. Mail, Postage Prepaid  
 Hand Delivered  
 Overnight Mail  
 Facsimile  
 Electronic Mail

Lisa Nordstrom  
PacifiCorp  
825 NE Multnomah, Suite 1800  
Portland, Oregon 97232  
[lisa.nordstrom@pacificorp.com](mailto:lisa.nordstrom@pacificorp.com)

U.S. Mail, Postage Prepaid  
 Hand Delivered  
 Overnight Mail  
 Facsimile  
 Electronic Mail

Bob Lively  
PacifiCorp  
One Utah Center, 23<sup>rd</sup> Floor  
201 S. Main Street  
Salt Lake City, UT 84140  
[Bob.lively@pacificorp.com](mailto:Bob.lively@pacificorp.com)

U.S. Mail, Postage Prepaid  
 Hand Delivered  
 Overnight Mail  
 Facsimile  
 Electronic Mail

Richard L. Storro  
Director Power Supply  
Avista Corporation  
P.O. Box 3727 /MSC-7  
Spokane, WA 99220-3727  
[dick.storro@avistacorp.com](mailto:dick.storro@avistacorp.com)

U.S. Mail, Postage Prepaid  
 Hand Delivered  
 Overnight Mail  
 Facsimile  
 Electronic Mail

William J. Batt  
John R. Hammond, Jr.  
Batt & Fisher, LLP  
P.O. Box 1308  
Boise, Idaho 83701  
[wjb@battfisher.com](mailto:wjb@battfisher.com)  
[jrh@battfisher.com](mailto:jrh@battfisher.com)

U.S. Mail, Postage Prepaid  
 Hand Delivered  
 Overnight Mail  
 Facsimile  
 Electronic Mail

Jared Grover  
Cassia Wind LLC  
Cassia Gulch Wind Park  
4219 N. Creswell Way  
Boise, Idaho 83613-2406

U.S. Mail, Postage Prepaid  
 Hand Delivered  
 Overnight Mail  
 Facsimile  
 Electronic Mail

Michael Heckler  
Director of Marketing & Development  
Windland, Inc.  
7669 W Riverside Dr. Ste 102  
Boise, Idaho 83714  
[mheckler@windland.com](mailto:mheckler@windland.com)

U.S. Mail, Postage Prepaid  
 Hand Delivered  
 Overnight Mail  
 Facsimile  
 Electronic Mail

David Hawk  
Director, Energy Natural Resources  
J.R. Simplot Company  
P.O. Box 27  
Boise, Idaho 83707-0027  
[dhawk@simplot.com](mailto:dhawk@simplot.com)

U.S. Mail, Postage Prepaid  
 Hand Delivered  
 Overnight Mail  
 Facsimile  
 Electronic Mail

R. Scott Pasley  
Assistant General Counsel  
J.R. Simplot Company  
P.O. Box 27  
Boise, Idaho 83707-0027  
[spasley@simplot.com](mailto:spasley@simplot.com)

U.S. Mail, Postage Prepaid  
 Hand Delivered  
 Overnight Mail  
 Facsimile  
 Electronic Mail

R. Blair Strong  
Paine Hamblen et al  
717 W. Sprague Ave., Ste 1200  
Spokane, WA 99201-3505  
[r.blair.strong@painehamblen.com](mailto:r.blair.strong@painehamblen.com)

U.S. Mail, Postage Prepaid  
 Hand Delivered  
 Overnight Mail  
 Facsimile  
 Electronic Mail

Troy Gagliano  
917 SW Oak Street, Ste 303  
Portland, OR 97205  
[renewables@rnp.org](mailto:renewables@rnp.org)

U.S. Mail, Postage Prepaid  
 Hand Delivered  
 Overnight Mail  
 Facsimile  
 Electronic Mail

Signed  \_\_\_\_\_  
Nina Curtis