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IDAHO PUBLIC  
UTILITIES COMMISSION

ORIGINAL

BEFORE THE IDAHO PUBLIC UTILITIES COMMISSION

IN THE MATTER OF THE PETITION OF  
IDAHO POWER COMPANY FOR AN  
ORDER TEMPORARILY SUSPENDING  
IDAHO POWER'S PURPA OBLIGATION TO  
ENTER INTO CONTRACTS TO PURCHASE  
ENERGY GENERATED BY WIND-  
POWERED SMALL POWER PRODUCTION  
FACILITIES.

**Case No. IPC-E-05-22**

**ANSWER OF MAGIC AND CASSIA  
TO WINDLAND'S PETITION FOR  
RECONSIDERATION AND  
PETITION FOR STAY**

COME NOW Magic Wind LLC, Cassia Wind Park LLC and Cassia Wind LLC  
(collectively referred to as "Magic and Cassia") and Answers the Petitions of Windland  
Incorporated ("Windland") for Reconsideration and Stay as follows:

**INTRODUCTION**

In both the Petition for Reconsideration and the Petition for Stay Windland advances  
three arguments to support its request that the Commission abandon the policy regarding  
"grandfathering" adopted in Order No. 29839 ("Suspension Order") issued on August 4, 2005.  
In the Suspension Order, the Commission adopted the following policy:

**ANSWER OF MAGIC AND CASSIA TO WINDLAND'S PETITION FOR RECONSIDERATION AND  
PETITION FOR STAY - 1**

This Commission finds it reasonable to establish the following criteria to determine the eligibility of PURPA qualifying wind generating facilities for contracts at the published avoided cost rates. For purposes of determining eligibility we find it reasonable to use the date of the Commission's Notice in this case, i.e., July 1, 2005. For those QF projects in the negotiation queue on that date, the criteria that we will look at to determine project eligibility are: (1) submittal of a signed power purchase agreement to the utility, or (2) submittal to the utility of a completed Application for Interconnection Study and payment of fee. In addition to finding of existence of one or both of the preceding threshold criteria, the QF must also be able to demonstrate other indicia of substantial progress and project maturity, e.g., (1) a wind study demonstrating a viable site for the project, (2) a signed contract for wind turbines, (3) arranged financing for the project, and/or (4) related progress on the facility permitting and licensing path. Suspension Order, pp 9-10.

Windland argues:

—With respect to wind generation, the current PURPA rates are above avoided cost.

—The grandfathering policy protects projects that have no contractual or legal right to protection.

—The Suspension Order limits Idaho Power's ability complete an RFP process and to possibly acquire cheaper resources.

As demonstrated below, each of these arguments is wrong, either as a matter of fact or law and accordingly, both the Petition for Reconsideration and Petition for Stay should be denied.

## ARGUMENT

A. Until modified by a competent Order following hearing, the current PURPA rates are, by definition, fair, just and reasonable.

The current avoided cost rates were established pursuant to law following appropriate administrative process. *See* Order No. 29646 (December 1, 2004), Order No. 29124 (September 26, 2002). Windland did not participate in the proceedings to establish those rates. Windland's

belief, never previously asserted in a proper proceeding, that current rates are unreasonable, does not make them so.

The Commission has determined there are enough facts to warrant investigation of PUPRA rates, but it has not yet found them to be unjust or unreasonable. And, it may be that upon full investigation the current rates, which are based heavily on 2004 natural gas prices, will appear to be a bargain. (*See e.g.* Case No. INT-G-05-2, Notice of Application, August 26, 2005, advising that Intermountain Gas believes its Weighted Cost of Gas has increased 27.2%).

Further, Windland suggests price comparisons that are misleading. By comparing the current levelized PURPA rate<sup>1</sup> of \$61/mwh to Idaho Power's anticipated RFP price of \$55/mwh<sup>2</sup> Windland fails to account for the discount that results from the "90/110" reduction contained in standard form Idaho Power Purchase Power Agreements. Magic and Cassia's consultants have estimated that the "90/110" discount will result in effective rate approximately 10% lower than the published rate, leading to an effective PURPA rate very near the anticipated RFP price. Moreover, the use of a PURPA rate of \$61/mwh is misleading. Wind generation projects universally opt for payment under IPCo's non-levelized rate schedule. Under that schedule the first year rate for a 2005 contract is \$50.34/mwh. *See* Order No. 29646, Appendix B. When reduced by the "90/110" discount the current effective PURPA rate is closer to \$45/mwh. Accordingly, Windland's calculation of supposed overpayments by IPCo (Petition for Stay, pg 3) is erroneous.

B. As a matter of regulatory policy the Commission may adopt a exemption policy independent of contract law.

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<sup>1</sup> \$61 /mwh is actually the rate for 2006 contracts. To reflect today's conditions Windland should have used the 2005 rate of \$59.62. *See* Order No. 29646, Appendix B.

<sup>2</sup> It is not clear whether the \$55/mwh rate includes or does not include transmission and ancillary services.

Windland incorrectly asserts that only projects with signed contacts are eligible for exemption and that the grandfathering policy to that effect adopted by the Commission in *A.W. Brown* is required by law. In *A.W. Brown* the Commission adopted a policy that to be entitled to existing rates a project must show there is a signed contract to sell at that rate or a meritorious complaint alleging that the project was mature and that the developer had attempted, and failed, to negotiate a contract with the utility. See Order No. 24192. On appeal, the Supreme Court upheld the Commission's authority to adopt such a policy as against a claim the Commission was preempted by federal law from adopting such a limitation. See *A.W. Brown v. Idaho Power*, 112 Idaho 812, 816, 828 P.2d 841 (1992).

A critical distinction, however, is that the Court in *A.W. Brown* held only that the limitation established by the Commission was within its authority; the Court did not hold the limitation was legally required or that it was the only limitation that could be adopted. The precise question before the Supreme Court was:

“We first consider whether the Commission *had authority to establish* the requirement that, before a CSPP can lock-in a certain rate, there must be a signed contract to sell at that rate or a meritorious complaint alleging that the project was mature and that the developer had attempted, and failed, to negotiate a contract with the utility.” 112 Idaho at 816.

Put differently, as a matter of policy, the Commission can adopt any grandfathering policy which, based on evidence, is reasonable in the circumstance. The policy adopted in *A.W. Brown* is not mandated by law.

The subsequent case of *Rosebud Enterprises Inc., v. Idaho Public Utilities Commission and Idaho Power Company*, 131 Idaho 1, 951 P.2d 521 (1997) does not change this analysis. *Rosebud* affirmed the holding in *A.W. Brown* and confirmed the Commission was not preempted by federal law from adopting a policy requiring the existence of a legally enforceable

obligation as a condition to grandfathering. 131 Idaho at 6. *Rosebud* did not hold that such a policy was required by law or that the Commission could not adopt some other standard.

While it is not precisely the policy advocated by Magic and Cassia, the exemption standard adopted by the Commission in Order No. 29839 is reasonable in today's circumstances. In the *A.W. Brown* context the only issue was which projects were entitled to older, higher, rates. Here, more sweeping changes to the entire regulatory structure for wind generation are proposed. It is not unreasonable to exempt a larger category of potential projects, who have relied on the continuance of the existing structure, than would be exempted under the *A.W. Brown* rule. It cannot be said that the exemption policy in Order No. 29839 is "unreasonable, unlawful, erroneous or not in conformity with the law." IPUCRP 331.

Idaho Power, itself, recognizes that the *A.W. Brown* policy is not required by law. In this case, Idaho Power proposed an exemption for those projects "in the final stages of contract negotiation." (Gale, Direct, Tr., pg. 47). This, obviously, is a broader exemption than that approved in *A.W. Brown and Rosebud*. Idaho Power acknowledges that neither the existence of a signed contract or some other form of legally enforceable obligation is a legally necessary predicate for exemption from the Suspension Order.

C. Windland's suggestion to permit no exemptions to the Suspension Order is extreme.

There is admittedly tension between the RFP process for wind acquisition and the PURPA process for wind acquisition. Each method has its merits, which need not be discussed here. Windland, motivated obviously by its self-interest, however, suggests an extreme position which completely favors the RFP process over the PURPA process—it would permit no exemptions from the Suspension Order. It is often the case that the Commission must balance

competing interests, each of which is good in its own right. It is rarely the case that, as suggested by Windland, an absolute preference of one over the other is the best choice.

Here, the Commission exemption policy from the Suspension Order, while not precisely the policy advocated by Magic and Cassia, is a reasoned balancing of interests: It prospectively guards against perceived excesses of the PURPA process, but provides appropriate relief to those who relied on the PURPA process regulatory framework to being projects close to maturity.

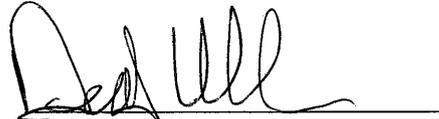
### CONCLUSION

Based on the reasons and authorities cited herein, both Windland's Petition for Reconsideration and Petition for Stay should be denied.

DATED this 31 day of August, 2005.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that on the 30<sup>th</sup> day of August, 2005, I caused to be served, via the method(s) indicated below, true and correct copies of the foregoing document, upon:

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