

BEFORE THE IDAHO PUBLIC UTILITIES COMMISSION

IN THE MATTER OF THE PETITION OF)
IDAHO POWER COMPANY FOR AN) **CASE NO. IPC-E-05-22**
ORDER TEMPORARILY SUSPENDING)
IDAHO POWER'S PURPA OBLIGATION TO)
ENTER INTO CONTRACTS TO PURCHASE)
ENERGY GENERATED BY WIND-) **ORDER NO. 29872**
POWERED SMALL POWER PRODUCTION)
FACILITIES)

On June 17, 2005, Idaho Power Company (Idaho Power; Company) filed a Petition with the Idaho Public Utilities Commission (Commission) requesting a temporary suspension of the Company's obligation under Sections 201 and 210 of the Public Utility Regulatory Policies Act of 1978 (PURPA) and various Commission orders, to enter into new contracts to purchase energy generated by qualifying wind-powered small power production facilities (QFs). On July 1, 2005, the Commission issued Notices of Petition and Intervention Deadline in Case No. IPC-E-05-22. A public hearing and oral argument were held on July 22, 2005 in Boise, Idaho to address, in part, the requested temporary suspension of Idaho Power's PURPA purchase obligation, the need for and appropriateness of such relief and related procedural and jurisdictional matters.

On August 4, 2005, the Commission issued Interlocutory Order No. 29839. The Commission's Order reduces the published rate eligibility cap for non-firm wind projects from 10 aMW to 100 kW, requires individual negotiation to secure rates for larger wind QFs, establishes grandfathering criteria for assessing contract and published rate entitlement and discusses further procedure. The Commission's Order, in part, contains the following findings:

At the beginning of hearing on July 22, the Commission adjourned to allow the parties to explore whether any consensus could be reached regarding those PURPA projects that were in various stages of negotiation with Idaho Power. The parties were unable to reach consensus. Accordingly, 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)

submission to the utility of a completed Application for Interconnection Study and payment of fee. In addition to a 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.

On August 23, 2005, pursuant to a Petition request of Windland Incorporated (Commission Rules of Procedure 321.01; 323.03) the Commission designated the interlocutory Order No. 29839 language set out above as a final Order No. 29851 for purposes of reconsideration and appeal. The Commission in Order No. 29851 also for statutory and procedural purposes stated that the August 5, 2005 Petition for Reconsideration filed by Windland Incorporated was to be regarded as filed on August 24, 2005.

Since its issuance of final Order No. 29851 on August 23, 2005, the Commission has noticed and/or received the following Petitions for Reconsideration (*Idaho Code* § 61-626 and Commission Rule of Procedure 331.01), Cross-Petition for Reconsideration (RP 331.02), Petitions for Stay (RP 324) and related Answers:

Windland Incorporated – Petitions for Reconsideration and Stay

Windland Incorporated (Windland) in its August 24, 2005 Petition for Reconsideration of interlocutory Order No. 29839 (final Order No. 29851) requests that the Commission reconsider its decision regarding “grandfathering,” contending the published avoided cost rates for wind QFs are above avoided cost, do not accurately reflect the cost of alternative energy and are unjust and unreasonable. Citing PURPA, Section 210(b)(2). Windland contends that the grandfathering policy established by the Commission extends published rate entitlement to QFs that have no legal obligation under contract law and no contractual or legal right to protection. Citing *A.W. Brown v. Idaho Power*, 121 Idaho 812, 816 (1992); *Rosebud Enterprises v. IPUC et al.*, 128 Idaho 609, 620 (1996) and *Rosebud Enterprises v. IPUC and Idaho Power*, 131 Idaho 1, 9 (1997); rehr denied (1998).

Windland on August 9, 2005 petitioned for stay of the Commission’s interlocutory Order No. 29839 (final Order No. 29851) until such time as Windland’s Petition for Reconsideration regarding “grandfathering” is resolved and/or until such time as the Commission issues an Order regarding the law governing grandfathering and the parties’ relationships concerning wind powered QF contracts. Windland contends that “if the

Commission does not reverse its decision regarding grandfathering, the consequence is that Idaho Power's ratepayers will pay at least \$3.3 million dollars more for a PURPA 10.5 MW nameplate capacity project as opposed to the same amount of energy being procured through the average RFP bid [\$55MWh]." Windland contends the Commission's Order detrimentally impacts Idaho Power's ability to acquire least cost resources and is not in the public interest and is contrary to law.

Energy Vision LLC – Petition for Reconsideration

EnVision requests that the Commission reconsider its Order by changing the power contract cut-off date from July 1, 2005 to August 4, 2005, the effective date of interlocutory Order No. 29839. EnVision states its belief that a utility's obligation to enter into PURPA contracts under existing prices and terms continues until those prices or terms are changed by subsequent Commission Order, not by Commission notice and that the relevant Order is No. 29839 issued on August 4, 2005.

Commission Staff – Cross-Petition and Petition for Reconsideration

By way of Petition for Reconsideration of Order No. 29851 and Cross-Petition to Windland's Petition for Reconsideration, Staff contends that requiring anything other than a legally enforceable obligation and/or a demonstration of the "but for" test to qualify for grandfathering eligibility and entitlement for a contract at published avoided cost rates is not in conformity with the requirements and procedures previously established by the Commission for obtaining qualifying facility status and eligibility for rates and exemptions. (Cited authority omitted.) Specifically, Staff contends that the second threshold criteria enumerated by the Commission in Order No. 29851, i.e., "(2) submittal to the utility of a completed Application for Interconnection Study and payment of fee" is not properly a threshold criteria for determining entitlement to published avoided cost rates. Staff contends that an interconnection study application is not an enforceable, binding QF commitment to provide power and submittal of same should not provide the QF with a non-binding option to secure a contract and lock-in an avoided cost rate. Submittal of an interconnection study application, Staff contends, should be regarded instead as an additional indicia of substantial progress and project maturity.

Contrary to Windland's contention at Petition for Reconsideration page 3, Staff contends that the Commission did not find that avoided cost rates are set too high for wind QFs. The Commission language cited, Staff contends, speaks for itself:

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, a calculated figure that may be different for each regulated utility.

Order No. 29839, p. 8. As the Commission further states, Staff notes, "the procedure to determine the appropriate amount of adjustment, we find, and the identification of what studies, if any, need to be performed to provide such a number is a matter appropriate for further proceedings." *Id.*

Idaho Power Company – Petitions for Reconsideration and Stay

Idaho Power requests that the Commission reconsider its determination that one of the primary criteria the Commission will consider in deciding whether or not to exempt a QF project from application of the 100 kW published rate eligibility cap is whether or not, prior to July 1, 2005, the QF had filed an interconnection study application and paid the interconnection study fee. Idaho Power believes that the filing of an interconnection study application and paying the engineering fee should not be a primary criterion, but, instead, should be included on the list of secondary criteria indicating progress toward QF project completion. A QF is entitled to be grandfathered, the Company contends, only if the QF can demonstrate (1) that it has entered into a contract or "legally enforceable obligation" binding itself to perform in accordance with the agreement or alternatively it must demonstrate that, "but for" the actions of the utility, it would have entered into such a legally enforceable obligation.

Idaho Power also petitions the Commission for an Order staying the Company's obligation to enter into contracts with wind QFs that claim an exemption from the 100 kW size limit based on the fact that the QF had filed an interconnection application and paid the interconnection study fee on or before July 1, 2005. While there is no question that completion of the interconnection process is one of the major milestones on the critical path toward developing a QF project, the Company contends that submittal of an application for an

interconnection study does not commit the QF to anything. Submittal of a request for an interconnection study is, the Company states, only the first step in the interconnection process. It can be withdrawn or abandoned at any time at the sole discretion of the developer and does not commit the QF to any project development activities.

Magic Wind LLC, Cassia Wind Park LLC, and Cassia Wind LLC (collectively Magic and Cassia) – Answers

In answer to Staff's Petition for Reconsideration, Magic and Cassia contend that the Commission has discretion in fashioning grandfathering criteria and that the *A.W. Brown* requirement of a legally enforceable obligation or a meritorious complaint at the time of a proposed change in rates is not mandatory and is not required under principles of *stare decisis*. Citing *A.W. Brown*, 121 Idaho 812 (1992). By lowering the published rate eligibility cap to 100 kW from 10 aMW, the present circumstance is different, Magic and Cassia contend, from the circumstance in *A.W. Brown*, justifying a different exemption policy.

In answer to Idaho Power Company's Petition for Reconsideration, Magic and Cassia dispute Idaho Power's assertion that a request for an interconnection study is only the first step in the interconnection process. IPCo Petition, p. 5. In fact, Magic and Cassia state submission of an interconnection application is not just the "first step" in the interconnection process but as evidenced in transcript Exhibit 605 Idaho Power describes the interconnection application this way:

Receipt of the completed application and the associated fee will be considered the official notification to Idaho Power of your intention to interconnect.

This official notification of intent to interconnect, Magic and Cassia contend, becomes the basis for notification to the public of the amount of capacity Idaho Power considers being committed for supply to the Company. As reflected in its Answer to Staff's Petition, QF projects that are willing to follow the directions of Idaho Power and pay thousands of dollars for interconnection applications are just as sincere and committed as those QFs signing and submitting a Purchase Power Agreement.

In Answer to Windland's Petition for Reconsideration, Magic and Cassia contend that PURPA rates continue until changed by a competent Order following hearing and by definition are fair, just and reasonable. The Commission in its Order, Magic and Cassia contend,

determined there were enough facts to warrant an investigation and made no finding that the published avoided cost rates were too high for wind QFs. Magic and Cassia support the Commission's grandfathering criteria as a reasonable balancing of interests and contend that the signed contract or meritorious complaint requirement of *A.W. Brown* is not a legally required limitation mandated by law. Nor also, they argue, is the legally enforceable obligation grandfathering requirement affirmed by the Court in *Rosebud*, 131 Idaho 1 (1997).

Idaho Power – Answer

Idaho Power by way of answer to Windland's Petition for Stay agrees with Windland's conclusion that the rates in grandfathered QF wind contracts will exceed the Company's current avoided costs, interpreting the Commission's language "the unique supply characteristics of wind generation and related integration costs provide a basis for adjustment to the published avoided cost rates" as evidencing a Commission determination that the published avoided cost rates should be adjusted. Idaho Power cites two FERC decisions both issued in 1995 for Commission consideration. In *Connecticut Light & Power*, 70 FERC 61,012 (1995) and *Southern California Edison Co., San Diego Gas & Electric Co.*, 70 FERC 61,215 (1995), the Federal Energy Regulatory Commission (FERC) noted that if utilities are required by state law or policy to sign contracts that reflect rates for QF sales at wholesale that are in excess of avoided costs, those contracts will be considered to be void *ab initio* (*Connecticut Light & Power*, 70 FERC 61,012, 61,030 (1995)).

In considering the issues associated with "grandfathering" of QF projects, the Company cites an extensive body of Idaho law on this issue. See, *Empire Lumber v. Washington Water Power*, 114 Idaho 191 (1988); *A.W. Brown*, 121 Idaho 812 (1992); *Rosebud*, 131 Idaho 1 (1998); *Rosebud*, 128 Idaho 609 (1996). In the above-cited cases, Idaho Power states that the Idaho Supreme Court upheld the Commission's establishment of criteria based on contract commitment by the QF, to guide its determination as to whether or not a particular QF project was grandfathered to the prior rates. In *A.W. Brown*, 121 Idaho 812, 828 (1992), the Idaho Supreme Court quoted the Commission's description of the criteria adopted by the Commission:

The QF must be able to exhibit that it has laid a proper foundation entitling it to contract consideration and the current avoided cost rates. There must be an indication that the QF pursued a power contract with some diligence . . . indeed this Commission has stated a CSPP is not entitled to contract rates until it is ready, willing and able to sign a contract. It must show that but for the actions of the utility it was otherwise entitled to a contract. In most cases

this will entail making a comprehensive binding offer showing with the reasonable specificity, design and size characteristics and indicate a willingness to rely on proposed contract terms and proceed there under. (*A.W. Brown*, 121 Idaho 812, 817 (1992))

Review of the above referenced *Empire*, *A.W. Brown* and *Rosebud* cases, Idaho Power contends, demonstrates that the Commission has established QF contract commitment as the principle test to be applied to the individual facts that are unique to each QF project seeking grandfather status.

Exergy Development Group of Idaho LLC – Answer

By way of answer to Windland's Petitions for Reconsideration and Stay, Exergy contends that Windland fundamentally misconstrues the Commission's Order as requiring Idaho Power to enter into contracts and as determining that the published avoided cost rates are too high for wind QFs. Instead, Exergy contends that the Commission found only that there was sufficient evidence to investigate the costs of integrating wind into Idaho Power's system. Those costs, it states, have not been fully explored. Exergy characterizes Windland's Petition as not ripe for adjudication and an impermissible collateral attack on prior avoided cost rate Order No. 29646 (December 2004). Reference *Idaho Code* § 61-625. Exergy contends that in the ensuing investigation, integration costs will have to be balanced with any identified benefits and include a consideration of the Order No. 29632 90/110 band requirement.

Commission Findings

The Commission has reviewed and considered the filings of record in Case No. IPC-E-05-22 including the transcript of the July 22, 2005 proceedings, the prehearing legal briefs, interlocutory Order No. 29839 and final Order No. 29851. We have also reviewed and considered the Petitions for Reconsideration filed by Windland Incorporated, Commission Staff and Energy Vision LLC, the Cross-Petition for Reconsideration filed by Commission Staff, the Petitions to Stay filed by Idaho Power and Windland Incorporated, and the related and respective answers filed by Magic Wind LLC, Cassia Wind Park LLC and Cassia Wind LLC, Idaho Power Company and Exergy Development Group LLC.

On August 23, 2005, the Commission in Order No. 29851 designated the following language set forth in prior interlocutory Order No. 29839 a final Order for purposes of reconsideration and appeal:

At the beginning of hearing on July 22, the Commission adjourned to allow the parties to explore whether any consensus could be reached regarding those PURPA projects that were in various stages of negotiation with Idaho Power. The parties were unable to reach consensus. Accordingly, 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 a 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.

Order No. 29839, pp. 9-10.

The underlying premise of Windland's Petition for Reconsideration is that the published avoided cost rates exceed the incremental cost of wind-generated alternative electric energy. Windland contends that it is unlawful for the Commission to require Idaho Power to enter into contracts with eligible wind QFs at the published avoided cost rate. *Citing* PURPA Section 210(b)(2). Although the Commission in Order No. 29839 (and Order No. 29851) recognized that "wind generation may present operational integration costs to regulated electric utilities different from other PURPA qualified resources," we have made no determination that the published avoided cost rates established in Order No. 29646 (December 1, 2004) are unjust and unreasonable or are set too high for wind QFs. Indeed, we find there is as yet no established record to support such a determination. As defined by FERC regulations, a utility's avoided cost is the incremental cost of energy or capacity or both which, but for the purchase from the QF, the utility would generate itself or purchase from another source. 18 C.F.R. § 292.101(b)(6). Idaho Power's avoided cost and published rates are not based on the current market price of a particular renewable generation technology. Nor are the rates benchmarked on utility Request for Proposal (RFP) bids for renewable resources, Integrated Resource Plan (IRP) estimates or contract prices for similar resources in neighboring states. The published rates instead are based on a hypothetical Surrogate Avoided Resource (SAR), presently a natural gas combined cycle

combustion turbine. The published avoided cost rate methodology produces generic rates applicable to Idaho Power, as well as Avista and PacifiCorp. Neither Idaho Power nor the other two utilities contend that the SAR methodology is no longer an appropriate methodology for calculating avoided costs. We have no record to support an alternate methodology. What we have done in this case docket based on the developed record to date and a Commission finding that “the unique supply characteristics of wind generation and the related integration costs provide a basis for adjustment to the published avoided cost rates” is to authorize an investigation and to reduce the QF size cap for published rate eligibility to 100 kW for wind QFs offering power on a non-firmed basis. 18 C.F.R. § 292.304(c)(1). We expect that the parties following workshops in this matter will file a report and recommendations with the Commission.

The Commission understands the predicament that Idaho Power faces with its current wind RFP and with its statutory PURPA purchase obligation. The Commission is obliged, however, to enforce PURPA and FERC rules and regulations that require utility purchases of QF capacity and energy. 18 C.F.R. § 292.303(a). Mandatory PURPA resources offered under the Commission approved avoided cost methodology cannot be declined by Idaho Power because the Company would prefer to acquire similar resources through a competitive non-PURPA IRP related RFP process.

Regarding Commission Staff and Idaho Power’s Petitions for Reconsideration, the Petitioners contend that the second threshold criteria enumerated by the Commission, i.e., “(2) submittal to the utility of a completed Application for Interconnection Study and payment of fee” is not properly a threshold eligibility criteria for determining entitlement to published avoided cost rates but should be regarded as an additional indicia of substantial progress and project maturity. The Petitioners remind the Commission that we have previously in complaint and grandfathering cases adopted a “legally enforceable obligation” standard for published rate entitlement, and/or a requirement that an eligible QF demonstrate that it was “ready, willing and able” to contract to deliver power, that it had attempted to secure a contract and that “but for” the actions of the utility would have had a signed and approved contract at the published rate.

The Commission agrees that the legally enforceable obligation to provide power requirement of QFs is a reasonable standard. We have always required that signed PURPA contracts be presented for review, approval and lock-in of rates. It is a tested standard that has withstood judicial scrutiny. It is certainly a reasonable standard to impose when avoided cost

rates are reduced, but it is not a standard that is required by PURPA or FERC rules. It is also, we find, not required in this instance when the underlying avoided cost rates have not changed or been determined to be unjust or unreasonable.

This Commission is not rigidly bound by principles of *stare decisis* to follow prior precedent so long as a record is developed and sufficient findings supported by the evidence show that our action is not arbitrary and capricious. We did so in this case. We are a regulatory agency that performs both legislative and quasi-judicial functions. Our change in published rate availability for certain wind QFs was based on a showing that there was a need to investigate the integration costs of intermittent wind generation to determine whether an adjustment to the published avoided cost rate for non-firm wind QFs was required. It was also recognition of the significant increase in the number of PURPA wind projects since our Lewandowski/U.S. Geothermal Orders and our December 2004 change in avoided cost rates. We did not eliminate the utility's obligation to purchase from wind QFs, but we established greater administrative control of contracts during the period of our investigation. For wind QFs greater than 100 kW offering power on an unfirmed basis, the door to a purchase contract is not closed. For projects not qualifying for the published rate, individual negotiation of rates under an IRP based methodology is required. Under such IRP based methodology, Company proposed rate adjustments, if any, are based on individual project characteristics and are separately considered by the Commission.

The change in published rate availability we established in Order No. 29839 and final Order No. 29851, however, was reason, we found, to consider the reasonable expectations of wind QFs in the negotiating queue for published rate contracts and to establish grandfathering criteria for those eligible projects actively engaged in contract negotiation with a utility and able to demonstrate project maturity and entitlement. The grandfathering criteria we established for published rate eligibility was fashioned in such manner as to recognize and not discount the considerable time, effort and energy expended by some QFs in developing their projects, a process for some that included not only required negotiations with the utility but also with financing entities, turbine suppliers and efforts to prove project viability and secure the rights to project sites. We also considered the equity arguments advanced by those QFs who relied on utility representations regarding the effect of interconnection study applications. Reference Exhibit 605. The degree of substantial progress and project maturity that we look for in projects

that have not submitted a signed power purchase agreement to the utility by our grandfathering cut-off date is a demonstration that the QF project can be brought on line in a timely manner and within a reasonable period following contract execution and approval.

Based on the foregoing discussion offered by way of clarification, the Commission finds it reasonable to deny the Petitions for Reconsideration filed by Windland and Idaho Power and the related Petitions to Stay and to re-affirm the grandfathering criteria established in interlocutory Order No. 29839 and final Order No. 29851. We similarly find it reasonable to deny the Petition and Cross-Petition for Reconsideration filed by Commission Staff.

Regarding Energy Vision LLC's Petition, based on the record developed in this case, we find it reasonable to grant reconsideration and to change the date for grandfathering eligibility from July 1, the date of our Notice, to August 4, 2005, the date of our interlocutory Order No. 29839. In so doing we note that until published rate eligibility was changed by Commission Order on August 4, 2005, Idaho Power had a continuing obligation under PURPA, FERC rules and the Orders of this Commission to offer to purchase QF power at the published rate and to engage in contract negotiations with eligible QFs.

CONCLUSIONS OF LAW

The Idaho Public Utilities Commission has jurisdiction over Idaho Power Company, Avista Corporation dba Avista Utilities, and PacifiCorp dba Utah Power & Light Company, electric utilities, pursuant to the authority and power granted it under Title 61 of the Idaho Code and the Public Utility Regulatory Policies Act of 1978 (PURPA).

The Commission has authority under PURPA and the implementing regulations of the Federal Energy Regulatory Commission (FERC) to set avoided costs, to order electric utilities to enter into fixed term obligations for the purchase of energy from qualified facilities (QFs) and to implement FERC rules.

ORDER

In consideration of the foregoing and as more particularly described above, IT IS HEREBY ORDERED that the Petition for Reconsideration of final Order No. 29851 filed by Energy Vision LLC is granted and the Commission for good cause shown and without further notice or hearing does hereby change the date for grandfathering eligibility from July 1, 2005, the date of our Notice of Petition, to August 4, 2005, the date of interlocutory Order No. 29839.

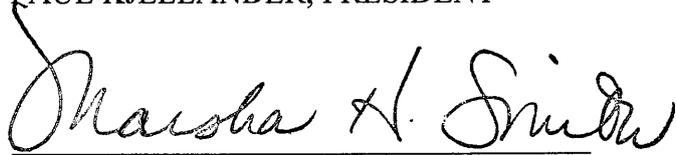
IT IS FURTHER ORDERED for reasons described above that the remaining Petitions and Cross-Petition for Reconsideration of final Order No. 29851 filed by Windland Incorporated, Idaho Power Company and Commission Staff and the related Petitions for Stay filed by Windland Incorporated and Idaho Power Company are denied.

THIS IS A FINAL ORDER ON RECONSIDERATION. Any party aggrieved by this Order or other final or interlocutory Orders previously issued in this Case No. IPC-E-05-22 may appeal to the Supreme Court of Idaho pursuant to the Public Utilities Law and the Idaho Appellate Rules. See *Idaho Code* § 61-627.

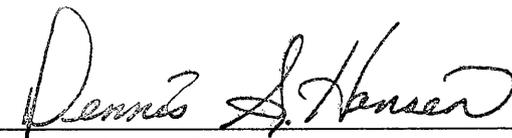
DONE by Order of the Idaho Public Utilities Commission at Boise, Idaho this 21st day of September 2005.



PAUL KJELLANDER, PRESIDENT

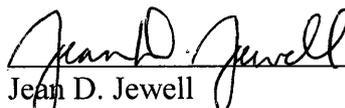


MARSHA H. SMITH, COMMISSIONER



DENNIS S. HANSEN, COMMISSIONER

ATTEST:



Jean D. Jewell
Commission Secretary

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