

SCOTT D. WOODBURY
DEPUTY ATTORNEY GENERAL
IDAHO PUBLIC UTILITIES COMMISSION
PO BOX 83720
BOISE, IDAHO 83720-0074
(208) 334-0320
IDAHO BAR NO. 1895

RECEIVED
FILED
2005 AUG 31 PM 2:01
IDAHO PUBLIC
UTILITIES COMMISSION

Street Address for Express Mail:
472 W. WASHINGTON
BOISE, IDAHO 83702-5983

Attorney for the Commission Staff

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) COMMISSION STAFF'S
ENERGY GENERATED BY WIND-) PETITION FOR
POWERED SMALL POWER PRODUCTION) RECONSIDERATION OF FINAL
FACILITIES) ORDER NO. 29851
) CROSS-PETITION FOR
) RECONSIDERATION OF FINAL
) ORDER NO. 29851**

COMES NOW Commission Staff, by and through its attorney of record, Scott D. Woodbury, Deputy Attorney General, and hereby requests pursuant to *Idaho Code* § 61-626 and Commission Rule of Procedure 331.01 (Petition for Reconsideration) and RP 331.02 (Cross-Petition for Reconsideration) that the Commission reconsider final Order No. 29851 issued on August 23, 2005.

INTRODUCTION

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

COMMISSION STAFF'S PETITION
FOR RECONSIDERATION OF FINAL
ORDER NO. 29851
CROSS-PETITION FOR RECONSIDERATION
OF FINAL ORDER NO. 29851

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.

Also pursuant to Order No. 29851, the August 5, 2005 Petition for Reconsideration of Windland Incorporated is viewed for statutory and procedural purposes as filed on August 24, 2005. Reference *Idaho Code* § 61-626; RP 331.01. Windland requested that the Commission reconsider its decision regarding "grandfathering," contending the published avoided cost rates for wind QFs do not accurately reflect the costs of alternative energy and are unjust and unreasonable. Citing PURPA, Section 210(b)(2).

ARGUMENT

A utility's avoided cost, as defined by FERC regulations, is the incremental cost of energy or capacity or both to the utility which, but for the purchase from the QF, the utility would generate itself or purchase elsewhere. 18 C.F.R. § 292(b)(6). The underlying premise of Windland's Petition is that the Commission in Order No. 29839 "requires Idaho Power to enter into contracts [for grandfathered projects] at rates exceeding avoided cost, contrary to law." Windland Reconsideration Petition, p. 2. Windland contends that the evidence demonstrates that the current avoided cost rate established in Order No. 29646 (December 1, 2004) is too high, at least for wind powered QFs. Windland's argument is based in part on a self-serving belief that the published levelized avoided cost rate available to wind QFs must not exceed the rate for wind established in Idaho Power's wind Request for Proposals (RFP), a bidding method that Windland contends produces the "incremental cost of wind-generated alternative electric energy." The

Idaho Commission has not established the RFP resource procurement process as a benchmark for avoided cost. Instead, the utility avoided cost is based on a hypothetical Surrogate Avoided Resource (SAR), presently a natural gas combined cycle combustion turbine (CCCT).

Contrary to Windland's contention at Reconsideration Petition page 3, the Commission did not find that avoided cost rates are set too high for wind QFs. The Commission language cited 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, "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.* Of significance, the published avoided cost rates remain in place; they have not been changed; they have not been found to be unjust or unreasonable. As indicated by the Commission in *Earth Power v. Washington Water Power*, "the posted rates are approved by the Commission, are presumed just and reasonable, and remain the effective avoided cost rates until determined otherwise by Commission Order." Case No. WWP-E-96-6, Order No. 27231. In this case the Commission authorized an investigation, lowered the published rate eligibility cap to 100 kW for certain wind QFs and required individual negotiation for larger wind QFs.

It is from its faulty reading of the Commission's findings that Windland reached the conclusion that "this being the case, the current avoided cost rate is unjust and unreasonable as applied to the parties and matters before the Commission in the instant case." Windland Reconsideration Petition, p. 3. Drawing from its conclusion, Windland objects to the "grandfathering" of eligible wind QFs under the published rates.

Windland's argument in part, however, is also that "in so doing, the Commission requires Idaho Power to enter into contracts with which it has no legal obligation under contract law." Windland Reconsideration Petition, p. 4. Windland cites the Idaho Supreme Court's pronouncement of the Commission's standard for locking-in a rate, i.e.,

In *A.W. Brown Co.*, this Court ruled that IPUC has authority, under state and federal law, to require that before a developer can lock-in a certain rate, there must be either a signed contract to sell at that rate or a meritorious complaint alleging that the project is mature and that the developer has attempted and failed to negotiate a contract with the utility; that is, there would be a contract “but for” the conduct of the utility. *A.W. Brown v. Idaho Power*, 121 Idaho 812, 816, 828 P.2d 841, 845 (1992).

Rosebud Enterprises, Inc. v. Idaho Public Utilities Commission and Idaho Power Company, 131 Idaho 1 at 9, 951 P.2d 521 (1997). Staff agrees with this standard – there must be a “legally enforceable obligation” or a demonstration that the QF was “ready, willing and able” to sign a firm energy sales contract and that “but for” the actions of the utility would have had a contract at the published rate. Staff differs from Windland in that Staff believes the determination of project eligibility and entitlement for a contract at the published avoided cost rates should go forward.

In *A.W. Brown* (IPC-E-88-9, Order No. 23271) the Commission made the following findings:

- QF status alone confers only eligibility for avoided cost rates; it does not automatically entitle a QF to lock-in avoided cost rates.
- A signed power purchase contract for sale of QF power to regulated utilities must be presented to the Commission for review, approval and lock-in of avoided cost rates. Alternatively, a meritorious complaint must be filed with the Commission showing “but for” the actions of the utility, the QF is otherwise entitled to a contract and avoided cost rates. The Commission requirements are valid regulatory policies and have been affirmed by the Idaho Supreme Court. *See Empire Lumber v. Washington Water Power*, 114 Idaho 191, 755 P.2d 1229 (1988) and *Afton Energy, Inc. v. Idaho Power Co.*, 107 Idaho 781, 693 P.2d 427 (1984). *Accord A.W. Brown, Inc. v. Idaho Power Co.*, 121 Idaho 812, 828 P.2d 841 (1992).

Since its initial implementation of PURPA in 1980, the Commission has required that signed contracts be submitted for review, approval and lock-in of effective rates. Case No. P-300-12, Order No. 15746. A lock-in of rates does not occur until the Commission approves the contract and the developer assumes a legally enforceable obligation to provide power. Reference 18 C.F.R. § 292.304(d); *Earth Power* (WWP-E-96-6, Order No. 27231).

In Earth Power the Commission stated “to qualify for the grandfathered rate, Earth Power must demonstrate that it was ‘ready, willing and able’ to sign the contract, that it demonstrated a commitment to enter into a ‘legal enforceable obligation’ and that ‘but for’ the actions of Water Power, Earth Power would have otherwise secured a contract prior to the rate change.” Earth Power, Order No. 27231.

The concept of a “legally enforceable obligation” does not appear in PURPA. Rather it arises from the implementing regulations promulgated by the Federal Energy Regulatory Commission (FERC). 18 C.F.R. Section 292.304(d) gives the qualifying facility the right

To provide energy or capacity pursuant to a legally enforceable obligation for the delivery of energy or capacity over a specified term, in which case the rates for such purchases shall, at the option of the qualifying facility exercised prior to the beginning of the specified term, be based on either:

- (i) The avoided cost calculated at the time of delivery; or
- (ii) The avoided cost calculated at the time the obligation is incurred.

The Idaho Supreme Court in *Afton v. Idaho Power* recognized that “legally enforceable obligations” are the rights accruing to a QF and utility when a QF has obligated itself to deliver at a future date the energy and capacity to an electric utility. *Afton v. Idaho Power*, 107 Idaho 781, 788 (1984). Cited in Rosebud Case No. IPC-E-96-16, Order No. 26795.

The Commission has also provided the following sampling of guidance regarding eligibility and entitlement to avoided cost rates:

A QF must assume responsibility for initiating and pursuing negotiations, for developing and perfecting its entitlement to a contract. (Island Power, Case No. UPL-E-93-4, Order No. 25647.)

The standard we established as a general rule of guidance was whether “but for” the refusal, the obdurance or the intransigence of the utility, the QF would be otherwise entitled to sell its power and receive posted rates. *Id.*

Eligibility is to be distinguished from entitlement. *Id.*

An expressed desire to sell does not equate with a commitment to sell. Nor does requesting a draft power purchase contract. Active negotiation is a prerequisite to qualifying for a contract. *Id.*

Entitlement to rates under a “legally enforceable obligation” carries with it a concomitant QF obligation to provide sufficient assurance that the energy or capacity will in fact be delivered, a requisite mutuality of obligation. . . . While not mandating that contract negotiation follow a particular form, we nevertheless require that essential elements be addressed. There is no substitute for active negotiations, for developing and perfecting its entitlement to a contract. We will not infer the requisite commitment from a QF’s actions in beginning construction. *Id.*

When the Commission determines a utility’s avoided costs have changed, the rights of all parties are affected, not just the right of (potential) contract signators. The public interest is seeing that ratepayers or customers assume only a reasonable level of expenses is also implicated and must accordingly be balanced. *Id.*

A [QF] 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 reasonable specificity, design and size characteristics and indicating a willingness to rely on proposed contract terms and proceed there under. (Forest Fuel, Case No. U-1008-248, Order No. 20486.)

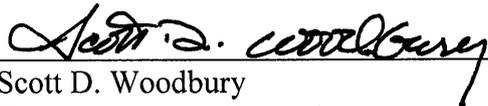
By way of Petition for Reconsideration of Order No. 29851 and Cross-Petition to Windland’s Reconsideration Petition, Staff contends that requiring anything other than a legally enforceable obligation and/or a demonstration of the “but for” test to qualify for grandfathering eligibility and entitlement 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. 18 C.F.R. §§ 292.203; 292.207; 292.401(a); PURPA Sections 210, 210(a), 210(f); 16 U.S.C. §§ 824a-3, 824a-3(a)(f); *accord: Afton v. Idaho Power*, 107 Idaho 781 (1984); *Empire v. Washington Water Power*, 114 Idaho 191 (1987; rehrg 1988); *cert. denied* 488 U.S. 892, 109 S.Ct 228, 102 L.Ed.2d 218 (1988). 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 complete application for interconnection study and payment of fee” is not properly a threshold eligibility criteria for determining entitlement to published avoided cost rates. An application for interconnection study 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 application for interconnection study should be regarded instead as an additional indicia of substantial progress and project maturity.

CONCLUSION

Staff recommends that the Commission reconsider and amend its Order No. 29851 as recommended above based on the filings of record in Case No. IPC-E-05-22 and pursuant to Commission Rule of Procedure 263.01.a, by taking official notice of its prior Orders and the Idaho Supreme Court opinions referenced herein above. Alternatively, Staff stands ready to provide further written briefing, comments or oral argument should reconsideration be granted and the Commission desire same. Reference Commission Rule of Procedure 331.03.

Respectfully submitted this 31st day of August 2005.



Scott D. Woodbury
Deputy Attorney General

bls/N:IPC-E-05-22_sw2

CERTIFICATE OF SERVICE

I HEREBY CERTIFY THAT I HAVE THIS 31ST DAY OF AUGUST 2005, SERVED THE FOREGOING **COMMISSION STAFF'S PETITION FOR RECONSIDERATION OF FINAL ORDER NO. 29851, CROSS-PETITION FOR RECONSIDERATION OF FINAL ORDER NO. 29851**, IN CASE NO. IPC-E-05-22, BY MAILING A COPY THEREOF, POSTAGE PREPAID, AND BY ELECTRONIC MAIL, TO THE FOLLOWING:

BARTON L KLINE
MONICA MOEN
IDAHO POWER COMPANY
PO BOX 70
BOISE ID 83707-0070
E-mail: bkline@idahopower.com
mmoen@idahopower.com

PETER J. RICHARDSON
RICHARDSON & O'LEARY, PLLC
515 N 27TH STREET
BOISE ID 83702
E-mail: peter@richardsonandoleary.com

RICHARD L STORRO
DIRECTOR, POWER SUPPLY
1411 E MISSION AVE
PO BOX 3727, MSC-7
SPOKANE WA 99220-3727
E-mail: dick.storro@avistacorp.com

R. BLAIR STRONG
PAINE, HAMBLÉN, COFFIN,
BROOKE & MILLER, LLP
717 W. SPRAGUE AVE, SUITE 1200
SPOKANE WA 99201-3505
E-mail: r.blair.strong@painehamblen.com

WILLIAM J BATT
JOHN R HAMMOND JR
BATT & FISHER LLP
101 S CAPITOL BLVD, SUITE 500 (83702)
PO BOX 1308
BOISE ID 83701
E-mail: wjb@battfisher.com
jrh@battfisher.com

MICHAEL HECKLER
DIRECTOR OF MARKETING &
DEVELOPMENT
WINDLAND INCORPORATED
7669 W RIVERSIDE DR, SUITE 102
BOISE ID 83714
E-mail: mheckler@windland.com

DEAN J MILLER
McDEVITT & MILLER LLP
420 W BANNOCK
BOISE ID 83702
E-mail: joe@mcdevitt-miller.com

JARED GROVER
CASSIA WIND LLC
CASSIA GULCH WIND LLC
3636 KINGSWOOD DR
BOISE ID 83704

ARMAND ECKER
MAGIC WIND LLC
716-B EAST 4900 NORTH
BUHL ID 83316

GLENN IKEMOTO
PRINCIPAL
ENERGY VISION LLC
672 BLAIR AVE
PIEDMONT CA 94611
E-mail: glenni@pacbell.net

BOB LIVELY
PACIFICORP
ONE UTAH CENTER, 23RD FLOOR
201 S MAIN
SALT LAKE CITY UT 84140
E-mail: bob.lively@pacificorp.com

LISA NORDSTROM
PACIFICORP
825 N MULTNOMAH, SUITE 1800
PORTLAND OR 97232
E-mail: lisa.nordstrom@pacificorp.com

DAVID HAWK
DIRECTOR, ENERGY NATURAL
RESOURCES
J.R. SIMPLOT COMPANY
PO BOX 27
BOISE ID 83707-0027
E-mail: dhawk@simplot.com

R SCOTT PASLEY
ASSISTANT GENERAL COUNSEL
J.R. SIMPLOT COMPANY
PO BOX 27
BOISE, ID 83707-0027
E-mail: spasley@simplot.com

WILLIAM M EDDIE
ADVOCATES FOR THE WEST
1320 W FRANKLIN ST (83702)
PO BOX 1612
BOISE ID 83701
E-mail: billeddie@rmci.net

TROY GAGLIANO
917 SW OAK ST, SUITE 303
PORTLAND OR 97205



SECRETARY