



contract conditional. In other words, if in the future, retail access becomes a reality and retail customers obtain direct access to wholesale markets, then both Rosebud and Idaho Power must have the ability (with reasonable notice) to terminate their respective purchase and sale obligations. Alternatively, the contract could allow adjustment of the purchase prices in the Rosebud contract to conform to then current market prices. Such provisions would protect both customers that are unable to leave the system and therefore must absorb the higher cost of mandatory above-market purchase obligations and QF developers locked into long-term contracts with below-market prices. While it is impossible to predict when retail access may become a reality, a failure to recognize this possibility in a long-term contract like the one at issue could ultimately be viewed as an imprudent act by Idaho Power (see attachment B-EPA-92 Order).

Rosebud contends that since issuance of the Supreme Court Opinion, it has diligently pursued a long-term contract with Idaho Power for the Mountain Home project. Rosebud states its proposed plant remains unchanged in all material respects, excepting a change in site that reflects the preference of the Mayor, City Council and Environmental Advisory Board of the City of Mountain Home. Idaho Power's ratepayers, Rosebud contends, are not damaged by requiring Idaho Power Company to purchase at the rates established in Case No. IPC-E-92-31, if Rosebud adheres to the original scheduled on-line date of January 1, 1999.

### **Idaho Power**

Rosebud filed its Notice of Appeal from the Commission's Orders in Case No. IPC-E-92-31 on December 12, 1994. Rosebud continued, however, to negotiate. Idaho Power contends that it provided Rosebud with an ultimatum on January 6, 1995, interpreting Rosebud's subsequent negotiations as a counter offer and rejection of the Company's Commission approved October 7, 1994 offer. The Company states that it offered to extend its October 7 purchase offer until January 13, 1995, to allow Rosebud time to reconsider its rejection, after which date the offer would be withdrawn. Formal notice of withdrawal was provided by letter dated January 23, 1995.

Idaho Power notes that the Commission on January 31, 1995, in Order No. 25884 in Case No. IPC-E-93-28 determined that the avoided costs that had formed the basis for Idaho Power's October 7, 1994, purchase offer were no longer fair, just and reasonable and moved to an Integrated Resource Plan (IRP) based methodology for projects greater than 1 MW. In more recent Order No. 26576 in Case No. IPC-E-95-9, the Commission reduced the standard contract term for large QFs to five years.

Idaho Power contends that the Idaho Supreme Court in its decision did no more than uphold the Commission's Orders and confirm that Idaho Power's October 7 purchase offer had been in compliance with PURPA and Commission Orders. The Supreme Court decision, the Company states, reconfirms that Idaho Power's October 7, 1994 rate offer represented Idaho Power's avoided

costs as of the dates that the purchase offer was made and rejected.

Idaho Power contends that the Commission is precluded under federal law from requiring that it contract at purchase rates higher than its avoided costs. *Citing Connecticut Light & Power Company*, 70 FERC 61, 012 (January 11, 1995), and *Southern California Edison Co and San Diego Gas & Electric Company (So Cal Ed)*, 70 FERC 61, 215 (February 23, 1995).

Idaho Power contends that Rosebud's failure to obtain a stay prohibits enforcement of the superseded Orders. Reference *Idaho Code* 61-636. *Citing UP&L v. IPUC*, 107 Idaho 47, 685 P.2d 276 (Idaho 1984) and Idaho Supreme Court Decision No. 60 Rosebud-Twin Falls appeal. Rosebud, Idaho Power states, cannot have its cake and eat it too. As interpreted by Idaho Power, under the cited Supreme Court opinion once a Commission Order establishes rates or a rate methodology, unless the Order is stayed during an appeal, the ordered rates and/or rate methodology remain in full force and effect. As such the rates and/or rate methodology are subject to later review and revision by the Commission.

The Company further contends that enforcement of the superseded Orders is not in the public interest. The Company estimates that if it is required to purchase at the superseded rates, Idaho Power and its customers will pay an additional \$243 million over a 20-year contract term.

The Commission, Idaho Power contends, must also consider the issue of stranded costs. The Company notes the Commission's language in Order No. 26576 recognizing the need for flexibility in a time of change in the utility industry. At least, in the near term, the Company posits, it makes no sense for the Commission to obligate utilities and ratepayers to enter into long-term obligations that are likely to result in additional stranded costs.

The Company contends that it is important to note that Idaho Power did not cross appeal the Commission's Orders. It was Rosebud's decision, it states, not to accept the rates. It was Rosebud's decision not to seek to stay the Commission's Orders during the appeal process. Rosebud's own actions, Idaho Power concludes, now preclude it from obtaining the rates it once rejected.

Both Rosebud and Idaho Power Company contend that no further hearing or briefing is required. Both parties agree that the matter is fully submitted. Rosebud states that an expedited Order is required if it is to meet the January 1, 1999, on-line date.

### **Commission Findings**

The Commission has reviewed and considered the filings of record of Rosebud and Idaho Power in Case No. IPC-E-96-16 and the cited references. The Commission has also reviewed and considered the underlying Commission Orders and Idaho Supreme Court Opinion which form the basis

for Rosebud's filing, i.e., Commission Order Nos. 25454, 25706 and 25787 in Case No. IPC-E-92-31, and the Idaho Supreme Court's Opinion No. 61 dated May 31, 1996. The Commission has further reviewed and considered the Public Utility Regulatory Policies Act of 1978 (as amended) and the implementing rules, regulations and decisions of the Federal Energy Regulatory Commission (FERC).

Rosebud requests that the Commission confirm its continued right to avoided cost rates established and approved as reasonable nearly two years ago. The approved rates were calculated using as a starting point the firm rates in existence on December 14, 1992, the complaint filing date, with adjustments as needed for project specifics. Order No. 25454 p. 16. In Case No. IPC-E-93-28, Rosebud represented that it was seeking rates to ascertain project viability. Order No. 25454 p. 1. The Commission provided Rosebud with such a rate. The case was not an application to compel a purchase. Rather than accept the rates approved by the Commission, Rosebud appealed the Commission's Orders. The Idaho Supreme Court affirmed the Commission's decision.

This Commission has long indicated that a PURPA qualified facility is not entitled to a lock-in of an avoided cost rate until it has entered into a legally enforceable obligation for the delivery of energy/capacity and the Commission approves the contract. We find that Rosebud still does not have a power purchase contract and has incurred no legally enforceable obligation to provide power.

Commission established rates and methodology remain in place until changed. In our Order No. 25454 at pages 14 and 15, we noted that the Commission establishes policy after appropriate public process with an opportunity for appeal. Once a policy becomes final, it is the obligation of the regulated utility to act in accord with the policy until such time as changed circumstances lead the Commission to adopt new policy. In that Order, we also noted that utilities and parties rely on policies as they are adopted by the Commission. Those relying on existing policy have a right to participate in appropriate proceedings if change to existing policy is contemplated or proposed.

Much of the discussion in the underlying case, as reflected in the Commission's Orders, concerns the appropriate methodology for calculating rates for large QFs. We approved and required utilization of the Surrogate Avoided Resource (SAR) methodology base rates as the starting point for calculation. Idaho Power wanted the Commission to move to an Integrated Resource Plan (IRP) based methodology. We rejected use of the IRP methodology in specific negotiations for large QF projects until the existing SAR methodology was changed and the IRP method approved as the basis for QF negotiations. In Order Nos. 25454 at page 14 and 25787 at page 3, we noted, however, that suggested changes to the avoided cost methodology were appropriate for consideration in the Company's avoided cost case (Case No. IPC-E-93-28).

The avoided cost rates the Commission approved for Rosebud in final Order No. 25706 issued September 16, 1994 and final Order on Reconsideration, Order No. 25787 issued

November 2, 1994 in Case No. IPC-E-92-31 were grandfathered rates. In a companion, contemporaneous and related case (*See Rosebud v. PacifiCorp dba Utah Power & Light Company*, Case No. UPL-E-92-6; Idaho Supreme Court Docket 21964) the Commission stated:

We must clarify that this Commission never intended to provide Rosebud an open-ended option. Our assumption was that Rosebud would use the rates to assess project viability and if viable, the parties would thereupon enter into good faith and reasonable negotiations for a contract. An important consideration in our deliberation in this case and in any future deliberation of the contract must necessarily be whether the authorized purchase rates are (and continue to be) in the public interest and are just and reasonable to [the utility s] ratepaying customers.

Order No. 25922 pp. 3, 4, (March 14, 1995).

There are three parties to any PURPA power purchase agreement, i.e., the QF, the purchasing utility, and the ratepayer. The first parties are contract signatories. The interest of the third party, the ratepayer, however, must also be considered in any regulatory contract approval process. When a utility is compelled to purchase QF energy and capacity (18 CFR 292.303(a)), that cost is routinely passed on dollar-for-dollar to ratepayers.

The Commission in Order No. 25361, Case No. IPC-E-93-28 issued January 14, 1994, expressed doubt as to whether a coal-fired plant remained the appropriate SAR for Idaho Power. Based on evidence presented to the Commission in an avoided cost hearing for The Washington Water Power Company (Case NO. WWP-E-93-10), it appeared that use of a natural gas Combined Cycle Combustion Turbine (CCCT) as a surrogate would significantly reduce rates. We therefore found it reasonable to implement an interim form of protection against rates that might ultimately prove to be too high. We allowed utilities to include in subsequently executed contracts a provision to the effect that the contract rates were subject to our final rate determination in Case No. IPC-E-93-28. The Commission on January 31, 1995, in Order No. 25884 Case No. IPC-E-93-28 changed the methodology for calculating avoided cost rates for large QFs to an IRP-based methodology and lowered the threshold for posted avoided cost rates under the SAR methodology from 10 MW to 1 MW. In subsequent Case No. IPC-E-95-9 the Commission refined the methodology for avoided cost rate negotiations with QFs larger than 1 MW and in Order No. 26576 issued September 4, 1996 reduced the standard contract length for QF power purchase agreements from 20 years to 5 years. In that Order we noted:

Significant changes have swept through the electric industry since we last examined the issue of contract length. The FERC has mandated open access to the transmission system, thermal technologies have improved, gas prices are low, there is a considerable surplus of energy available in this region resulting in very low spot market prices for electricity and, finally, even the continued existence of PURPA is being called into question. We find that as the industry as a whole continues to transform to a more free market model, we cannot

justify obligating utilities to 20-year contracts for PURPA power. As the utilities in this case note, such an obligation does not reflect the manner in which they are currently acquiring power to meet new load; through short-term (five years or less) purchases. Consequently, it would be nothing more than an artificial shelter to the QF industry to provide those projects with contract terms not otherwise available in the free market. We can find no justification for insisting that Idaho's investor-owned utilities and their ratepayers assume such an obligation simply to foster one particular segment of an increasingly competitive industry.

Rosebud Enterprises Inc. formally participated in Case Nos. IPC-E-93-28 and IPC-E-95-9. In light of these continuous changes in policy, it is unreasonable for Rosebud to expect that the 1994 Commission approved rate for the Mountain Home facility would continue to be available despite the intervening cases, evidence and findings. A lock-in of rates does not occur until the Commission approves a contract and the developer assumes a legally enforceable obligation to provide power.

PURPA provides that rates for purchase of QF power shall not exceed the utility's avoided costs, i.e., the incremental cost of the power supply to the purchasing utility; shall be both just and reasonable to electric utility customers; and shall be in the public interest. 16 USC 824 a-3; 18 CFR 292.304(a). FERC announced in the *So Cal Ed* case that once a contract for power sale is signed, it thereafter is too late to challenge whether a particular power sale rate exceeds a utility's avoided cost. In this case, there is no signed contract. Idaho Power represents that the rate approved by the Commission in Case No. IPC-E-93-28 now exceeds the Company's avoided costs. FERC in *So Cal Ed* stated that Congress did not intend QFs to enjoy a rate benefit requiring payments above a market rate level, and has reiterated the primacy of federal law in governing the duties of the states to administer PURPA. Idaho Power estimates that if it is required to purchase at the previously approved Commission rates for Rosebud rather than at its current avoided cost, then Idaho Power and its customers will be required to pay an additional \$243 million over a 20-year contract term. Based on prior findings and determinations in Case Nos. IPC-E-93-28 and IPC-E-95-9, we find that the rates approved by the Commission in Case No. IPC-E-92-31 no longer represent Idaho Power's avoided costs, and are no longer just and reasonable. We find now that it is not in the public interest nor in the interest of the Company's ratepayers to require Idaho Power to offer unreasonable rates. Rosebud assumed a risk in not accepting the rates and not pursuing and entering into a legally binding obligation to sell power after the Commission issued its final Order on Reconsideration. We find that Rosebud's appeal did not operate to exempt Rosebud from the effect of subsequent rate changes based on changes in Idaho Power's avoided cost. Had Rosebud entered into a contract subject to the outcome of the appeal, the rates approved by the Commission in Case No. IPC-E-92-31 as affirmed could now apply. The risk that rates change over time must lie with Rosebud, not the utility or its customers. We accordingly find it necessary to deny Rosebud's requested relief.

## **CONCLUSIONS OF LAW**

The Idaho Public Utilities Commission has jurisdiction over Idaho Power Company, an electric utility, 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 Idaho Public Utilities Commission has authority under the Public Utility Regulatory Policies Act of 1978 and the implementing regulations of the Federal Energy Regulatory Commission (FERC) to set avoided costs, to order electric utilities to enter fixed term obligations for the purchase of energy from qualified small power production facilities, and to implement FERC rules.

## **ORDER**

In consideration of the foregoing and as more particularly described above, IT IS HEREBY ORDERED that Rosebud's request for an Order requiring Idaho Power Company to purchase energy and capacity from its Mountain Home facility at rates approved by the Commission in Order Nos. 25454, 25706 and 25787 is denied.

THIS IS A FINAL ORDER. Any person interested in this Order may petition for reconsideration within twenty-one (21) days of the service date of this Order. Within seven (7) days after any person has petitioned for reconsideration, any other person may cross-petition for reconsideration. See *Idaho Code* 61-626.

DONE by Order of the Idaho Public Utilities Commission at Boise, Idaho this                    day  
of October 1996.

RALPH NELSON, PRESIDENT

MARSHA H. SMITH, COMMISSIONER

DENNIS S. HANSEN, COMMISSIONER

ATTEST:

Myrna J. Walters  
Commission Secretary

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