

TITLE 61
PUBLIC UTILITY REGULATION

CHAPTER 15
ENERGY COST RECOVERY BONDS

61-1501. LEGISLATIVE INTENT. It is the intent of the legislature in enacting this chapter to provide a process by which the recovery of large energy rate increases caused by fuel or power cost adjustments, purchased gas adjustment tracker rates, commodity tracker rate adjustments or purchased power tracker rates will be facilitated by the issuance of bonds. This legislation will provide electric and gas utilities with a mechanism for recovery of their increased costs while leveling the rate impact of such increase on the utilities' customers. The legislature believes that this type of securities legislation is in the public interest but should not be considered as an endorsement of, or intended to provide, a mechanism for restructuring of the utility industry in the state of Idaho.

[61-1501, added 2001, ch. 380, sec. 1, p. 1326.]

61-1502. DEFINITIONS. For purposes of this chapter, the following terms shall have the following meanings:

(1) "Assignee" means any corporation, limited liability company, trust, partnership or other entity to which a public utility assigns, sells or transfers, other than as security, all or a portion of the public utility's interest in or right to energy cost property. The term also includes any such entity to which an assignee assigns, sells or transfers, other than as security, the assignee's interest in or right to energy cost property.

(2) "Chapter 9" means chapter 9, title 28, Idaho Code, as from time to time amended, including any successor provisions.

(3) "Commission" means the Idaho public utilities commission, as it may be constituted from time to time, and any successor agency exercising functions similar in purpose thereto.

(4) "ECA" means any of the following, as authorized by the commission and reflected in a usage-based charge of a public utility: a fuel or power cost adjustment; a purchased gas adjustment tracker rate; a commodity electric or gas tracker rate adjustment; or a purchased power tracker rate.

(5) "Energy cost amounts" means the amounts that a public utility, assignee or other issuer has been authorized to recover by the commission pursuant to an energy cost financing order, including without limitation:

(a) Amounts recoverable by a public utility pursuant to an ECA;

(b) Expenditures incurred to refinance or retire existing debt or existing equity capital of the public utility through the issuance of energy cost recovery bonds and any costs related thereto;

(c) Amounts necessary to recover federal or state taxes actually paid by a public utility, which tax liability is modified by the transactions approved in an energy cost financing order issued by the commission pursuant to this chapter; and

(d) Reasonable costs, as approved by the commission, relating to the issuance, servicing or refinancing of energy cost recovery bonds under the provisions of this chapter including, without limitation, principal and interest payments and accruals, sinking fund payments, debt service and other reserves, costs of credit enhancement, indemnities, if any, owed to an assignee or other issuer or the trustee for the en-

ergy cost recovery bonds, issuance costs and redemption premiums, if any, and all other reasonable fees, costs and charges with respect to the energy cost recovery bonds.

(6) "Energy cost bond charge" means a nonbypassable usage-based charge that the commission authorizes in an energy cost financing order as a separate line item for recovery on a public utility's bill to all of its customers, whether such amounts are billed and/or collected by the public utility, any subsidiary or affiliate thereof, or any third party that may assume the responsibility for billing or collecting such charges.

(7) "Energy cost financing order" means an order of the commission issued in accordance with this chapter that authorizes the imposition and collection of energy cost amounts and the issuance of energy cost recovery bonds. If requested by an electric or gas public utility in its application for an energy cost financing order, energy cost bond charges shall be in an amount sufficient to recover federal and state taxes associated with the recovery of energy cost amounts described therein.

(8) "Energy cost property" means the irrevocable, vested property right created pursuant to this chapter and one (1) or more energy cost financing orders including, without limitation, the right, title and interest of a public utility, assignee or other issuer of energy cost recovery bonds to all revenues, collections, claims, payments, money or proceeds of or arising from an energy cost recovery charge or constituting the costs of recovering, reimbursing, financing or refinancing energy cost amounts and acquiring energy cost property (including the costs of issuing, servicing and retiring energy cost recovery bonds) and all rights to obtain adjustments to such energy cost recovery charge pursuant to the terms of this chapter and any energy cost financing order; provided that any right that a public utility has in the energy cost property before the sale or other transfer of such property or any other rights created under this chapter or created in any energy cost financing order and assignable under section 61-1504, Idaho Code, or assignable pursuant to an energy cost financing order shall be only a contract right. Energy cost property shall, upon its sale or other transfer, constitute a current and irrevocably vested property right notwithstanding the fact that the value of such property right will depend upon consumers using electricity and/or the public utility performing certain services.

(9) "Energy cost recovery bond" means any instrument, pass-through certificate, note, bond, debenture, certificate of participation, collateral trust certificate, beneficial interest or other evidence of indebtedness or ownership issued by a public utility, assignee or other issuer pursuant to an energy cost financing order and an executed indenture, security agreement or other similar agreement of a public utility, assignee or other issuer that is secured by or payable from energy cost bond charges or energy cost property.

(10) "Energy cost recovery bondholder" means any holder of an energy cost recovery bond or any trustee, collateral agent or other entity acting for the benefit of or on behalf of any such holder.

[61-1502, added 2001, ch. 380, sec. 1, p. 1327.]

61-1503. ENERGY COST RECOVERY BONDS. An electric or gas public utility may apply to the commission for an energy cost financing order requesting that certain energy cost amounts be recovered through the sale of energy cost recovery bonds.

(1) A public utility may apply to the commission at any time and from time to time for an authorization that it may recover ECA amounts and other energy cost amounts through the issuance of energy cost recovery bonds. The public utility may apply to the commission for such an authorization either in a separate proceeding or in a proceeding considering the authorization of an ECA. Upon such an application, if the commission finds that the public interest would be better served if the energy cost amounts were recovered through the issuance of energy cost recovery bonds over the term of such bonds than if the ECA amounts were recovered over a period of one (1) year, assuming a conventional financing of such amounts, the commission shall issue an energy cost financing order to allow the public utility to recover energy cost amounts.

(2) The energy cost financing order shall detail the energy cost amount to be recovered and the period of time in which the energy cost recovery is to occur. The commission shall not issue an energy cost financing order unless the total of the then (a) existing ECAs, (b) existing energy cost bond charges, and (c) the amount identified by the electric or gas public utility in its application for such financing order as the additional ECA that would be required absent an issuance of energy cost recovery bonds pursuant to such financing order, exceeds a minimum amount (expressed in cents per kilowatt-hour or cents per therm) approved by the commission and in effect at the time of the issuance of such energy cost financing order. Each public utility shall, at least thirty (30) days prior to its first application for an energy cost financing order and at five (5) year intervals thereafter, file with the commission a proposal as to what such minimum amount should be and the commission shall, within twenty-eight (28) days of such filing, issue an order regarding its determination of such proposed minimum amount. Energy cost recovery bonds shall have an expected maturity date no later than five (5) years after the date of issuance, and scheduled principal payments on such bonds shall, to the extent practicable, be scheduled to be made in approximately equal amounts during each year of the term of such bonds. Energy cost recovery bonds shall have a legal maturity date no later than seven (7) years after the date of issuance. Energy cost bond charges shall remain in effect until all energy cost recovery bonds and all energy cost amounts have been paid in full. The commission may issue successive energy cost financing orders permitting subsequent issuances of energy cost recovery bonds.

(3) An energy cost financing order may be issued only upon the application of a public utility and shall become effective only in accordance with its terms and conditions. The public utility may withdraw its application if it disagrees with any of the terms and conditions of the energy cost financing order or any modification thereof within fourteen (14) days of issuance of the energy cost financing order or of such modification. The energy cost financing order shall specify the estimated amount of the energy cost bond charge and the formula for determining the amount of the charge that from time to time will be sufficient to recover all energy cost amounts.

(4) After issuance of an energy cost financing order, the public utility may sell, assign or otherwise transfer or pledge energy cost property or cause the energy cost recovery bonds to be issued, provided it may defer, postpone or refrain from effecting the sale, assignment, transfer, pledge or issuance, in which case no energy cost bond charge shall be imposed unless and until such energy cost recovery bonds are issued. If energy cost recovery bonds are not issued within one (1) year after the energy cost financing order becomes final and nonappealable, the authorization contained in the

energy cost financing order shall expire, provided that a public utility may apply for an extension or renewal of an energy cost financing order.

(5) The energy cost financing orders, the energy cost amounts and the energy cost bond charges that have been determined by the commission shall be irrevocable and binding upon the commission. The commission shall not have authority either by rescinding, altering or amending the energy cost financing order or otherwise to, either directly or indirectly, revalue or revise for ratemaking purposes the energy cost amounts. Once the commission determines the energy cost bond charge, it cannot determine in a later proceeding that the energy cost bond charge is unjust or unreasonable or in any way reduce or impair the value of energy cost property either directly or indirectly by taking the energy cost bond charge into account when setting other rates for the public utility; nor shall the amount of revenues arising with respect thereto be subject to reduction, impairment, postponement or termination. The state of Idaho does hereby pledge to and agree with the owners of energy cost property and with any energy cost recovery bondholders that neither the state nor any of its agencies, including the commission, shall (by legislative action, ballot initiative or other similar process) limit, alter, restrict or impair the energy cost amounts, the energy cost bond charge, the energy cost property, the energy cost financing orders or any rights thereunder or ownership thereof or security interest therein or in any way impair the rights or remedies of any energy cost recovery bondholders until the energy cost recovery bonds, including all principal, interest, premium, costs, expenses and arrearages thereon, are fully met and discharged, provided nothing contained in this chapter shall preclude such a limitation, alteration, restriction or impairment if and when adequate provision (including without limitation provision for the payment of principal and interest when due) shall be made by law for the protection of the energy cost recovery bondholders. The state of Idaho does hereby acknowledge that any energy cost recovery bondholders may and will rely on this pledge and agreement and that they would be irreparably harmed by any such limitation, alteration, restriction or impairment without such adequate provision. The public utility and any assignee or other issuer are authorized to include this pledge and agreement in the energy cost recovery bonds and the documents relating thereto. Notwithstanding any other provision of this subsection, the commission shall approve such adjustments to the energy cost bond charges as may be necessary to ensure timely recovery of all energy cost amounts that are the subject of the pertinent energy cost financing order.

(6) Energy cost recovery bonds issued under this chapter and any energy cost financing orders do not constitute a debt or liability of the state or of any political subdivision thereof and do not constitute a pledge of the full faith and credit of the state or any of its political subdivisions, but are payable solely from the funds provided therefor. All the bonds shall contain on the face thereof a statement to the following effect: "Neither the full faith and credit nor the taxing power of the state of Idaho is pledged to the payment of the principal of, or interest on, this bond." This paragraph shall in no way preclude bond guarantees or enhancements pursuant to this chapter, nor shall it preclude the payment of compensation for any breach of the state's pledge contained in subsection (5) of this section or for any action or failure to act by the commission in contravention of this chapter.

(7) The commission shall establish procedures for the expeditious processing of any application for energy cost financing orders, including the approval or disapproval of any such orders within forty-five (45) days of

the application. In addition, each energy cost financing order shall specify a procedure for making adjustments to the energy cost bond charge that is the subject of the order, such adjustments to be expeditiously approved by the commission, so as to ensure the timely payment of principal and interest on the related energy cost recovery bonds and the recovery of all other energy cost amounts. Such procedure shall provide for adjustments to be made, upon application by the affected public utility, assignee or other issuer, at least annually and at such additional intervals, if any, as are specified in the order. The public utility, assignee or other issuer shall file its application for any such adjustment with the commission at least thirty (30) days before the date on which the adjustment is requested to become effective, and the commission shall approve or disapprove such application no later than thirty (30) days after the date of such filing. In addition, upon application by a public utility, assignee or other issuer after an energy cost financing order has been issued and has become effective, the commission may:

(a) Authorize the making of adjustments to the energy cost bond charge at more frequent intervals than those specified in such order; and/or

(b) Authorize a change in the method for calculating the energy cost bond charge from that specified in such order so as to better ensure the timely recovery of all energy cost amounts.

(8) The energy cost bond charge shall be treated as a charge for utility services for purposes of determining both the credit and collection standards to which customers (including, for purposes of this subsection, any parties that provide billing or collection services for energy supplied to another customer) may be held subject under applicable state law and the remedies for nonpayment that are available to a public utility under applicable state law, and such treatment shall not alter the tax, accounting or other intended characteristics of any energy cost bond financing.

(9) An energy cost bond charge shall constitute energy cost property when, and to the extent that, an energy cost financing order authorizing such energy cost bond charge has become effective in accordance with this chapter, and the energy cost property shall thereafter continuously exist as property for all purposes with all of the rights and privileges of this chapter for the period and to the extent provided in the energy cost financing order, but in any event until the energy cost recovery bonds are paid in full, including all principal, interest, premium, costs and arrearages thereon.

(10) Any surplus energy cost bond charge collections in excess of the amounts necessary to pay principal, premium, if any, interest, credit enhancement and all other fees, costs and charges with respect to energy cost recovery bonds shall be used to benefit customers in such manner as the commission may reasonably determine except to the extent that such use would result in a recharacterization of the tax, accounting or other intended characteristics of the financing.

[61-1503, added 2001, ch. 380, sec. 1, p. 1328.]

61-1504. PROCEDURE FOR ISSUANCE OF BONDS. (1) Public utilities, assignees or other issuers may issue energy cost recovery bonds upon approval by the commission in an energy cost financing order.

(2) Public utilities and assignees may sell and assign all or portions of their interest in energy cost property. Public utilities and assignees may sell or assign their interests to one (1) or more assignees or other issuers that make that property the basis for issuance of energy cost recovery

bonds to the extent approved in the pertinent energy cost financing order. To the extent approved in the pertinent energy cost financing orders, public utilities and assignees may also pledge energy cost property as collateral, directly or indirectly, for energy cost recovery bonds providing for a security interest in the energy cost property, in the manner as set forth in section 61-1505, Idaho Code. Energy cost property may be sold or assigned by:

(a) The public utility, assignee or other issuer or a trustee for the holders of energy cost recovery bonds in connection with the exercise of remedies upon a default; or

(b) Any person acquiring the energy cost property after a sale or assignment pursuant to this subsection.

(3) To the extent that any interest in energy cost property is so sold or assigned, or is so pledged as collateral, the commission shall authorize the public utility to contract with an assignee or other issuer that it will continue to operate its system to provide service to its customers, will collect amounts with respect to the energy cost bond charges for the benefit and account of the assignee or other issuer, and will account for and remit these amounts to or for the account of the assignee or other issuer. Contracting with the assignee or other issuer in accordance with that authorization shall not impair or negate the characterization of the sale, assignment or pledge as an absolute transfer, a true sale or security interest, as applicable.

(4) Notwithstanding any other provision of law to the contrary, any requirement under this chapter or an energy cost financing order that the commission take action with respect to the subject matter of an energy cost financing order shall be binding upon the commission, as it may be constituted from time to time, and any successor agency exercising functions similar to the commission. The commission shall have no authority to rescind, alter or amend any such requirement under this chapter or an energy cost financing order; provided however, that nothing in this subsection shall preclude adjustments of the energy cost bond charges in accordance with the provisions of section 61-1503, Idaho Code. The issuance of energy cost recovery bonds, any related transfer or pledge of energy cost recovery property and any other transactions incidental to such issuance shall be exempt from the provisions of sections 61-901 through 61-908, Idaho Code, upon approval by the commission in an energy cost financing order. The commission shall include in any energy cost financing order any additional approvals that may be required in connection with such issuance under applicable law.

(5) An assignee or other issuer shall not be considered to be a public utility solely by virtue of the transactions described in this chapter.

[61-1504, added 2001, ch. 380, sec. 1, p. 1331.]

61-1505. SECURITY INTEREST. (1) To the extent the provisions of this section conflict with chapter 9 as from time to time in effect, including any successor provisions, this section shall apply.

(2) A security interest in energy cost property is valid, is enforceable against the pledgor and third parties, subject to the rights of any third parties holding security interests in the energy cost property perfected in the manner described in this section, and attaches when all of the following have occurred:

(a) The commission has issued an energy cost financing order authorizing the energy cost bond charges, the right to the imposition and collection of which is included in the energy cost property;

(b) Value has been given by the pledgees of the energy cost property; and

(c) The pledgor has signed a security agreement covering the energy cost property.

(3) A valid and enforceable security interest in energy cost property is perfected when it has attached and when a financing statement has been filed in accordance with chapter 9, naming the pledgor of the energy cost property as "debtor" and identifying the energy cost property. Any description of the energy cost property shall be sufficient if it refers to the energy cost financing order creating the energy cost property. A copy of the financing statement shall be filed with the commission by the pledgor or transferor of the energy cost property, and the commission may require the pledgor or transferor to make other filings with respect to the security interest in accordance with procedures it may establish, provided that the filings shall not affect the perfection of the security interest. A financing statement filed pursuant to this section shall remain effective until a termination statement is filed.

(4) A perfected security interest in energy cost property is a continuously perfected security interest in all revenues and proceeds arising with respect thereto, whether or not the revenues or proceeds have accrued. Conflicting security interests shall rank according to priority in time of perfection. Energy cost property shall constitute property for all purposes, including for contracts securing energy cost recovery bonds, whether or not the revenues and proceeds arising with respect thereto have accrued.

(5) Subject to the terms of the security agreement covering the energy cost property and the rights of any third parties holding security interests in the energy cost property perfected in the manner described in this section, the validity and relative priority of a security interest created under this section is not defeated or adversely affected by the commingling of revenues arising with respect to the energy cost property with other funds of the public utility that is the pledgor or transferor of the energy cost property, or by any security interest in a deposit account of that public utility perfected under chapter 9, into which the revenues are deposited. Subject to the terms of the security agreement, the pledgees of the energy cost property shall have a perfected security interest in all cash and deposit accounts of the public utility in which revenues arising with respect to the energy cost property have been commingled with other funds, but the perfected security interest shall be limited to an amount not greater than the amount of the revenues with respect to the energy cost property received by the public utility within twelve (12) months before: (a) any default under the security agreement, or (b) the institution of insolvency proceedings by or against the public utility, less payments from the revenues to the pledgees during that twelve (12) month period.

(6) If an event of default occurs under the security agreement covering the energy cost property, the pledgees of the energy cost property, subject to the terms of the security agreement, shall have all rights and remedies of a secured party upon default under chapter 9, and shall be entitled to foreclose or otherwise enforce their security interest in the energy cost property, subject to the rights of any third parties holding prior security interests in the energy cost property perfected in the manner provided in this section. In addition, the commission may require, in the energy cost financing order creating the energy cost property, that, in the event of default by the public utility in payment of revenues arising with respect to the en-

ergy cost property, the commission and any successor thereto, upon the application by the pledgees or transferees, including transferees under section 61-1506, Idaho Code, of the energy cost property, and without limiting any other remedies available to the pledgees or transferees by reason of the default, shall order the sequestration and payment to the pledgees or transferees of revenues arising with respect to the energy cost property. Any order shall remain in full force and effect notwithstanding any bankruptcy, reorganization, or other insolvency proceedings with respect to the debtor, pledgor or transferor of the energy cost property.

(7) Energy cost recovery property shall constitute an account as that term is defined under chapter 9.

(8) Sections 28-9-204 and 28-9-205, Idaho Code, as from time to time amended, including any successor provisions, shall apply to a pledge of energy cost property by a public utility, assignee or other issuer.

(9) This subsection sets forth the terms by which a consensual security interest can be created and perfected in the energy cost property. Unless otherwise ordered by the commission with respect to any series of energy cost recovery bonds on or prior to the issuance of the series, there shall exist a statutory lien as provided in this subsection. Upon the effective date of the energy cost financing order, there shall exist a first priority lien on all energy cost property then existing or thereafter arising pursuant to the terms of the energy cost financing order. This lien shall arise by operation of this subsection automatically without any action on the part of the public utility, any assignee or other issuer, or any other person. This lien shall secure all obligations, then existing or subsequently arising, to the holders of the energy cost recovery bonds issued pursuant to the energy cost financing order, the trustee or representative for the holders, and any other entity specified in the energy cost financing order. The persons for whose benefit this lien is established shall, upon the occurrence of any defaults specified in the pertinent energy cost financing order, have all rights and remedies of a secured party upon default under chapter 9, and shall be entitled to foreclose or otherwise enforce this statutory lien in the energy cost property. This lien shall attach to the energy cost property regardless of who shall own, or shall subsequently be determined to own, the energy cost property including any public utility, any assignee or other issuer, or any other person. This lien shall be valid, perfected, and enforceable against the owner of the energy cost property and all third parties upon the effectiveness of the energy cost financing order without any further public notice; provided however, that any person may, but shall not be required to, file a financing statement in accordance with subsection (3) of this section. Financing statements so filed may be "protective filings" and shall not be evidence of the ownership of the energy cost property. A perfected statutory lien in energy cost property is a continuously perfected lien in all revenues and proceeds arising with respect thereto, whether or not the revenues or proceeds have accrued. Conflicting liens shall rank according to priority in time of perfection. In addition, the commission may require, in the energy cost financing order creating the energy cost property, that, in the event of default by the public utility in payment of revenues arising with respect to energy cost property, the commission and any successor thereto, upon the application by the beneficiaries of the statutory lien, and without limiting any other remedies available to the beneficiaries by reason of the default, shall order the sequestration and payment to the beneficiaries of revenues arising with respect to the energy cost property.

[61-1505, added 2001, ch. 380, sec. 1, p. 1332.]

61-1506. TRANSFERS IN INTEREST. (1) A transfer of energy cost property by a public utility to an assignee, or by an assignee to another assignee, that the parties have in the governing documentation expressly stated to be a sale or other absolute transfer, in a transaction approved in an energy cost financing order, shall be treated as an absolute transfer of all of the transferor's right, title and interest, as in a true sale, and not as a pledge or other financing, of the energy cost property in each case notwithstanding any contrary treatment for federal and state income and franchise taxes, accounting or other purposes.

(2) A transfer of energy cost property shall be deemed perfected as against third persons and shall vest title in the transferee when both of the following have taken place:

(a) The commission has issued the energy cost financing order authorizing the energy cost bond charges included in the energy cost property.

(b) An assignment of the energy cost property in writing has been executed and delivered to the transferee.

(3) As between bona fide assignees of the same right for value without notice, the assignee first filing a financing statement in accordance with chapter 9, naming the assignor of the energy cost property as debtor and identifying the energy cost property has priority. Any description of the energy cost property shall be sufficient if it refers to the energy cost financing order creating the energy cost property. A copy of the financing statement shall be filed by the assignee with the commission, and the commission may require the assignor or the assignee to make other filings with respect to the transfer in accordance with procedures it may establish, but these filings shall not affect the perfection of the transfer.

(4) The interest of an assignee or pledgee in energy cost property and in the revenues and collections arising from such property are not subject to set-off, counterclaim, surcharge or defense by the public utility or any other person or in connection with the bankruptcy of the public utility or any other person.

[61-1506, added 2001, ch. 380, sec. 1, p. 1335.]

61-1507. SUCCESSORS. Any successor to the public utility, whether pursuant to any bankruptcy, reorganization or other insolvency proceeding, or pursuant to any merger, sale or transfer, by operation of law or otherwise, shall perform and satisfy all obligations of the public utility pursuant to this chapter in the same manner and to the same extent as was required of the public utility before such proceeding or merger, sale or transfer including, but not limited to, billing, collecting and paying to the energy cost recovery bondholders or their representatives or the applicable financing entity energy cost recovery charges and any other revenues arising with respect to the energy cost property sold to the applicable financing entity or pledged to secure energy cost recovery bonds and seeking energy cost bond charge adjustments, as necessary and permitted by the pertinent energy cost financing order, to recover all energy cost amounts designated in such energy cost financing order.

[61-1507, added 2001, ch. 380, sec. 1, p. 1335.]

61-1508. SEVERABILITY. If any provision of this chapter is held to be invalid or is invalidated, superseded, replaced or repealed, or expires for

any reason, that occurrence does not affect the validity or continuation of this chapter or any other provision of this title that is relevant to the issuance, administration, payment, retirement or refunding of energy cost recovery bonds or to any actions of the public utility, its successors, an assignee or other issuer or a collection agent, which shall remain in full force and effect.

[61-1508, added 2001, ch. 380, sec. 1, p. 1335.]