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BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH

IN THE MATTER OF THE APPLICATION OF PACIFICORP FOR APPROVAL OF AN IRP-BASED AVOIDED COSTS METHODOLOGY FOR QF PROJECTS LARGER THAN ONE MEGAWATT	Docket 03-035-14
IN THE MATTER OF THE PETITION OF PIONEER RIDGE, LLC AND MOUNTAIN WIND, LLC FOR APPROVAL OF A CONTRACT FOR THE SALE OF CAPACITY AND ENERGY FROM THEIR PROPOSED QF FACILITIES	Docket No. 05-035-09
IN THE MATTER OF THE PETITION OF SPRING CANYON FOR APPROVAL OF A CONTRACT FOR THE SALE OF CAPACITY AND ENERGY FROM ITS PROPOSED QF FACILITIES	Docket No. 05-035-08

REQUEST FOR RECONSIDERATION

Pursuant to Utah Code § 54-7-15 and 63-46b-12, the Utah Committee of Consumer Services (Committee) requests review or rehearing of the Utah Public Service Commission's (Commission) Report and Order dated April 1, 2005.

The Committee respectfully requests that the Commission review and modify its April 1, 2005 Report and Order, by revising and thereby limiting its conclusion of law on Page 14, Part 3 to the Discussion and Findings, that "basic principles of fairness and due process lead us to conclude a reasonable course is to apply the "first in line" approach advocated by Spring Canyon".

SUMMARY OF THE REPORT AND ORDER

On June 28, 2004, the Commission approved a Stipulation setting avoided cost prices for QF projects meeting certain operating criteria. The Stipulation provided an interim period avoided cost price that would be binding upon PacifiCorp for up to 275 MW of QF generation, provided the QF project was in-service no later than June 1, 2007. In combination with a September 23, 2004 Commission Order suspending the requirement that PacifiCorp provide indicative pricing to QF projects that requested it, the Stipulation denied existing or contemplated QF projects access to a power sales agreement with PacifiCorp except through the Stipulation.[1]

[1] The Commission stated at Page 16 of the Report and Order: "In Docket No. 04-035-T10, we granted PacifiCorp's request to suspend the Electric Service Schedule 38 thirty-day time period within which PacifiCorp must provide indicative pricing one a request has been received. We did so in recognition of the fact that no agreed avoided cost method had yet been approved with which PacifiCorp could calculate indicative pricing."

Of the total 275 MW available under the Stipulation, 175 MW or 64% was either applied for by a project in development or was committed to three operating QF facilities. As a consequence, all other contemplated or existing QF projects were required to compete for 100 MW at the Stipulation price, which was the only QF electricity PacifiCorp was obligated to buy.[2]

The quandary created by the Stipulation and suspension order necessitated some means of selecting among those competing proposals for the limited and remaining MW that PacifiCorp was obligated to buy. Thus, the Commission asked: if the Stipulation reflected PacifiCorp's avoided costs, "how should the order of eligibility for the remaining megawatts be determined and what is that order?"

The Report and Order did not answer this question as the Committee recommended. However, the Committee does not seek review of the Commission's practical answer to the question, allowing Spring Canyon the first opportunity to negotiate a QF power sales agreement. The Committee does request review and rejection of the "first in line" or "first to file" standard for determining priority for a QF agreement at the then applicable avoided cost, to the exclusion of all other criteria, *in any context except the anomalous Stipulation.*

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[2] Some parties have suggested that the Order suspending Schedule 38 together with the Stipulation violated the Public Utility Regulatory Policies Act of 1978 (PURPA). PURPA requires electric utilities such as PacifiCorp to provide indicative pricing (based on avoided costs) to any QF generator who requests it and to purchase electricity from the generator at that price. Obligations under PURPA to enter power purchase agreements are not conditioned upon any size limits, operational constraints, or timing issues. Only the avoided cost will vary.

ARGUMENT

I. THE COMMISSION'S "FIRST IN LINE" OR "FIRST TO FILE" CRITERIA CONFLICTS WITH UTAH CODE TITLE 54, CHAPTER 12.

Independent energy producers competitively developing new electric energy sources, and the removal of unnecessary barriers to energy transactions involving independent energy produces and electrical corporations, are considered necessary to the Utah economy and to promote "the efficient utilization and distribution of energy." *Utah Code §54-12-1(1).* The State's policy is "to encourage small power production and cogeneration facilities, to promote a diverse array of economical and permanently sustainable energy resources in an environmentally acceptable manner, and to conserve our finite and expensive energy resources and provide for their most efficient and economic utilization." *Utah Code §54-12-1(2*). Accordingly, an electric utility such as PacifiCorp "shall offer to purchase power from independent energy produces" either by a procedure for competitive bids or at an avoided cost.[3] *Utah Code 54-12-2(1) and (2).*

Requiring PacifiCorp to purchase power from any QF facility because of the date on a letter describing a general concept does not promote diverse, economical, permanently sustainable, environmentally acceptable, competitively developed new sources of electric energy. For example, Spring Canyon's July 30, 2004 letter and

[3] On page 16 to the Report and Order, the Commission points out that at the time the Commission suspended Schedule 38 indicative pricing, causing the Stipulation to be the exclusive means for a QF facility to contract with PacifiCorp, "no agreed avoided cost method had yet been approved with which PacifiCorp could calculate indicative pricing." Accordingly, at the time Spring Canyon contacted PacifiCorp or filed requests with the company or the Commission, there was no Commission established procedure for either competitive bids or avoided cost pricing as required by Utah Code §54-12-2.

September 28, 2004 memorandum to the Commission asking that PacifiCorp be required to contract for 500 MW and 400 MW respectively, ignores the Stipulation. Furthermore, as of the date of the hearing, Spring Canyon had yet to provide the information required by Schedule 38 permitting PacifiCorp to conduct an analysis of the QF project and, presumably, determine whether it complies with Utah law. Testimony of Bruce Griswold, Tr. Vol. 1, p. 257, line. 23 to p. 258, line. 14. If the "first in line" or "first to file" standard were to apply to any circumstance but the Stipulation, any QF developer, no matter how unrealistic the project, gains priority to fill Utah's energy needs because the developer writes a letter.

The "first in line" or "first to file" rule must be limited to only the resolution of the incompatible and otherwise irreconcilable requests from three QF facilities to sell the same 100 MW of energy to PacifiCorp pursuant to the Stipulation terms, conditions and price. Otherwise, the Commission's Report and Order conflicts with Utah law.

II. THE COMMISSION'S "FIRST IN LINE" OR "FIRST TO FILE" CRITERIA CONFLICTS WITH THE PUBLIC UTILITY REGULATORY POLICES ACT OF 1978.

In requiring that utilities offer to buy electrical power from QF, PURPA requires that the purchase rates must be just and reasonable to electric consumers of the electric utility and in the public interest. *16 U.S.C. §824*. Because the Commission's Report and Order relies exclusively on a "first to file" rule to select between competing QF

developers' petitions to contract with PacifiCorp without considering these essential ratepayer protections, the Report and Order conflicts with PURPA.

PURPA intends that the avoided cost pricing scheme for purchases from QF projects is to make the utilities' ratepayers economically indifferent between utility power plant additions and utility purchases of QF power. *Pennsylvania Electric Company v. Pennsylvania Public Utility Commission*, 648 A.2d 63, 79 (Pa.Cmwlth. 1994). As the Stipulation contains a price agreed by its signers and ordered by the Commission, this standard of ratepayer indifference, and public interest, is met. However, this fact does not relieve PacifiCorp or the Commission from evaluating other rate related and public interest considerations when determining which QF developer will be awarded a contract with a utility when more than one QF petitions for a contract.

In *Pennsylvania Electric*, the Court rejected a QF developer's argument that under PURPA regulations the developer's tendering a contract to the utility or petitioning the utility commission, where only the utility's acceptance or commission approval remains, entitles the QF to priority in selling power. 648 A.2d at 81-82. The Court approved the Pennsylvania Commission's conclusion that preliminarily, first, a QF must demonstrate that it is somewhat developed rather than merely being a concept. 648 A.2d at 81. Evidence of design, engineering studies, site location, fuel type, operating size range, and an identified steam host are factors in determining the stage of development. *Id.* Second, the QF must have contacted the utility and attempted to reach an agreement.

The priority assessment between those QFs that meet the preliminary requirements then considers the experience of the proposed developer, viability of the proposed project,[4] benefits of the proposed project, quality of existing utility service to a host, project size, and time of initiation of commission proceedings. 648 A.2d at 80. The Court agreed with the Pennsylvania Commission that only when competing QF projects are the same in virtually all respects is it fair to consider the date that a QF made a *bona fide* offer to the utility. 648 A.2d at 82.

The Court further held that utilizing a "first to file" rule as the determining factor conflicts with the purpose of PURPA.

> [I]t would be pointless to require a utility to contract with a QF that did not actually have a viable project or was interested in building a facility which would produce far more power than was actually needed. Without the ability to provide the needed capacity and energy, the QF project would be defeating the purpose of PURPA – to require the utility to enter into a contract with the QF for the purchase of power when the QF has the ability to provide it with power and the utility has a specific need for that power. We decline to agree with Cambria that the determining factor of priority is the date a QF makes a *bona fide* offer to the utility, regardless of whether the QF can provide what is needed, because in order to do so, we would be ignoring the mandate of PURPA, FERC and the PUC's regulations. *Id.*

The QF that first seeks a contract with the purchasing utility, or that first files a petition for the commission to compel a contract, but that is less viable than others, has no greater potential of becoming a reality for having won the race to the commission's door. The rule announced in the Report and Order favors the swifter, overly optimistic

[4] In *Pennsylvania Electric*, a QF developer's failure to identify a steam host made the project less viable.

conceptual developer over the viable project that can actually provide needed energy.[5] The "first in line" or "first to file" rule must be limited to only the resolution of the incompatible and otherwise irreconcilable requests from three QF facilities to sell the same 100 MW of energy to PacifiCorp pursuant to the Stipulation terms, conditions and price. Otherwise, the Commission's Report and Order conflicts with Federal law.

RESPECTFULLY SUBMITTED this 28th day of April 2005.

/s/________________________

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Utah Committee of Consumer Services

[5]Which fleet-footed law firm runner first reaches the Commission's front desk is irrelevant to consideration of a QF facilities compliance with Utah and Federal law. Spring Canyon agrees that selecting a QF project as the energy source upon which customers must rely on the basis of the date of a written document is "fraught with potential problems." *Spring Canyon Energy, LLC's Response to ExxonMobil's Petition for Review*, page 6. The Committee contends that the "Gold Rush" to stake a claim to Stipulation pricing that unexpectedly and unfortunately resulted from the Stipulation is the quintessential example of a selection process to be avoided at all cost.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Motion to Dismiss was e-mailed April 28, 2005, to the following:

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