- BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH -

In the Matter of the Complaint of Cottonwood Hydro, LLC vs. Rocky Mountain Power	)))))	DOCKET NO. 10-035-15 REPORT AND ORDER

ISSUED: May 27, 2010

By The Commission:

This matter is before the Commission on the complaint of Cottonwood Hydro, LLC (Cottonwood) against PacifiCorp (Company). Cottonwood, as defined under the Public Utilities Regulatory Policy Act (PURPA)[1] is a qualifying facility (QF)[2].

In 2009, the Company and Cottonwood executed a Power Purchase Agreement (2009 PPA). The 2009 PPA did not contain any provision regarding the ownership of renewable energy credits (RECs). In December 2009, the Company sent Cottonwood a proposed PPA for 2010 (2010 PPA), identical to the 2009 PPA except that the 2010 PPA contained an added provision stating the RECs now belonged to the Company. Objecting to this additional language, Cottonwood refused to sign the 2010 PPA. The Parties subsequently executed a 2010

[1] PURPA was implemented to encourage, among other things, the conservation of electric energy, increased efficiency in the use of facilities and resources by electric utilities, equitable retail rates for electric consumers, expeditious development of hydroelectric potential at existing small dams, and conservation of natural gas while ensuring that rates to natural gas consumers are equitable. *See Federal Energy Regulatory Commission, What is a Qualifying Facility?* at http://www.ferc.gov/industries/electric/ gen-info/qual-fac/what-is.asp

[2] One of the ways PURPA set out to accomplish its goals was through the establishment of a new class of generating facilities which would receive special rate and regulatory treatment. Generating facilities in this group are known as qualifying facilities (QFs), and fall into two categories: qualifying small power production facilities and qualifying cogeneration facilities. A small power production facility is a generating facility of 80 MW or less whose primary energy source is renewable (hydro, wind or solar), biomass, waste, or geothermal resources. . . . A cogeneration facility is a generating facility that sequentially produces electricity and another form of useful thermal energy (such as heat or steam) in a way that is more efficient than the separate production of both forms of energy. . . . There is no size limitation for qualifying cogeneration facilities. *See id.*

PPA which provided that either or both parties may petition the Commission for a declaration of which party owns the RECs. The Parties further agreed to abide by the Commission's decision regarding ownership of the RECs and to cooperate fully to allocate the 2010 PPA RECs in accordance with the Commission's final determination.

On March 10, 2010, Cottonwood filed a request for agency action requesting the Commission determine ownership of RECs associated with Cottonwood's net output of power purchased pursuant to the Company's Schedule 37, *Avoided Cost Purchases from Qualifying Facilities* (Schedule 37).

Upon receipt of the complaint, the Commission issued to the Division of Public Utilities (Division) an action request to analyze the complaint with a due date of April 12, 2010. On April 12, 2010, the Company filed a letter with the Commission responding to Cottonwood's request and the issue of ownership of RECs. In addition, the Division filed a request for an extension of time, until April 26, 2010, to complete its analysis of the complaint. On April 26, 2010, comments on the complaint were filed by the Division and the Office of Consumer Services (OCS).

Cottonwood, the Company, Division, and OCS made comments as follows, which are only summarized.

Cottonwood

Cottonwood cites the language contained in the Company's Schedule 135, *Net Metering Service* (Schedule 135), Condition #7 for support: "Unless otherwise agreed to by a separate contract, the owner of the renewable energy facility retains ownership of the non-energy

attributes associated with electricity the facility generates." Cottonwood points out the 2009 PPA did not identify which party was entitled to claim ownership of the RECs. However, the Company's 2010 PPA was identical to the 2009 PPA in all respects except that it allocated REC ownership to the Company. Cottonwood argues the RECs, which could amount to upwards of $35,000 in sales, are critical to its survival and success. Conversely, however, the value of the RECs will not make much, if any, impact on the Company's operation. Accordingly, it submitted it should be allowed to claim ownership of the RECs that it generates.

To resolve this dispute, Cottonwood requests the Commission declare it the owner of the RECs and the addition of the following to Schedule 37: "Unless otherwise agreed to by a separate contract, the owner of the renewable energy facility retains ownership of the non-energy attributes associated with electricity the facility generates."

The Company

The Company suggests Cottonwood's requests asks the Commission to intervene in the terms of a private contract through alteration of a tariff and also opens the door for all vendors to all utilities under its jurisdiction to seek such an intervention to compel results on other issues they may demand from the utilities in their myriad of contract negotiations.

The Company notes that the Federal Energy Regulatory Commission (FERC) stated that ownership of RECs was "a matter of state law, which defines contracts." Under state law, the Company argues, finding Cottonwood owns the RECs would mean that it would be required to pay Cottonwood twice for the same thing and also require the Company to not make public, truthful statements. The Company also provided support from a definition of a REC

according to the National Association of Attorneys General (NAAG) to show that there was a premium associated with renewable generation. The Company argued that the "RECs represent the 'bragging rights' to the zero-or-low emissions characteristics of renewable generation" and if the utility enters into a contract to buy energy from a QF, it alone, and not another party, should be able to claim the purchase of the energy and accompanying RECs from the QF. The Company argues it is required to purchase energy from a QF because of the very type of resource attributes that are represented by RECs. Requiring the Company to pay separately for RECs would require further payment for the very characteristic that triggered the utility's obligation to purchase Cottonwood's output. Therefore, any PURPA PPA securing power from an eligible renewable energy resource should credit the associated RECs to the purchasing utility.

The Company makes other arguments supporting its position. It claims utilities have always been receiving RECs from QFs producing renewable generation, and that attestations verifying RECs have always been required to ensure compliance with PURPA. This shows the utility's right to claim the renewable attributes. In addition, Company meters between the QF and the utility's system measure energy from that renewable resource flowing to the utility, again showing that the attributes cannot be severed. Utilities report the output of existing renewable QFs as "renewable energy" in various reporting programs, including corporate environmental reporting, based on the reasonable assumption that QF contracts with renewable generation represents renewable energy for ratepayers.

The Company also contends that if the REC subsequently acquires a separate market value, it does not now warrant separate compensation, just as it does not mean that said

attribute has or is being transferred without consideration. A purchasing utility under a QF contract is not buying undifferentiated energy from the grid. It is buying energy that is very particularly differentiated, and energy which the utility is required by law to purchase. The Company argues a seller may convey that characteristic only once.

The Company asserts Cottonwood's Schedule 135 argument is not relevant. The Company maintains the standard QF under Schedule 37 is different from Schedule 135 customer. The net metering customer consumes the renewable energy generated on-site to offset site usage and does not sell or deliver the net output to the utility. A QF has a contract to sell its net output to the utility. The Company contends the rules for net-metering are not readily transferred to a QF PURPA contract and should not be included in Schedule 37.

The Company requests the Commission determine that only the Company has the right to claim that it is buying the energy from the QFs. If not, the Company must be relieved of the obligation to enter into a PPA, which it contends no longer qualifies as a QF transaction.

The Division

The Division argued that the issue of ownership of RECs is still unclear. It noted that RECs can be both bundled with the energy, or be unbundled and sold separately from the electricity that created it. The Division believes it is possible to purchase RECs from an entity other than the electricity generator that created the REC. It said that FERC has specifically stated that purchasing the output from a QF at avoided cost rates designed to compensate the producer for capacity and energy, cannot be construed to compensate the producer for other products or attributes under PURPA:

> [C]ontracts for the sale of QF capacity and energy entered into pursuant to PURPA do not convey RECs to the purchasing utility (absent express provision in a contract to the contrary). While a state may decide that a sale of power at wholesale automatically transfers ownership of the state-created RECs, that requirement must find its authority in state law, not PURPA.[3]

The Division noted that the Commission has dealt with the issue of REC ownership in Docket No. 03-035-14. *In the Matter of Application of PacifiCorp for Approval of an IRP-Based Avoided Cost Methodology for QF Projects Larger Than One Megawatt, Docket No. 03-035-14.* It stated that the Commission's October 31, 2005, Report and Order in that Docket did not definitively indicate who owns the RECs. The Division further indicates this issue was addressed in Schedule 135, which contains language specifying that the RECs remain with owner of production facilities. However, the Division believes that neither Docket No. 03-035-14 nor Schedule No. 135 specifically addressed the specific issue at hand.

The Division recommended the Commission not introduce Cottonwood's language into Schedule 37. It stated that Schedule 37's use is not limited to generation facilities that simultaneously produce RECs, i.e. small facility QFs. Schedule 37 prices provide general information on the Company's current avoided costs and are useful in a variety of regulatory applications. For example, net metering customers can take payment options under Schedule 37 posted rates. Introducing language into Schedule 37, as requested by Cottonwood, would not be proper.

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[3] "American Ref-Fuel Company, Convanta Energy Group, Montenay Power Corporation, and Wheelabrator Technologies Inc., United States of America Federal Energy Regulatory Commission, Docket No. EL03-133-001, November 17, 2003, p.2.

The Division proposes another docket be opened to consider these issues. It said that Cottonwood's request could be placed on hold, consolidated with the new docket, or determined as part of the outcome of the new docket. In the alternative, it said that if the Commission determines the RECs should remain with Cottonwood, the Division does not believe that Schedule 37 is the appropriate vehicle to resolve the contractual dispute between the parties and recommends that the Commission deny Cottonwood's request to modify the language of Schedule 37 in that regard.

The OCS

The OCS also argued that Schedule 37 was developed to provide standard avoided cost energy and capacity rates for purchases from QFs based on the Company's avoided cost of generating or acquiring power. Under PURPA, the Company is obligated to purchase all output generated by a QF at published Schedule No. 37 avoided cost rates. Cottonwood, however, has no reciprocal legal obligation to sell power to the Company.

The OCS opined that if a QF elects to sell power to the Company under Schedule 37 avoided cost rates, then all RECs should be transferred to the Company and its customers for the duration of the PPA. It argues that the renewable aspect of the project qualifies the producer as a PURPA QF. Thus, the RECs are inseparably tied to the output which a PURPA QF voluntarily agrees to generate and sell to the utility. It argues that no other buyer should be able to claim an additional renewable benefit through a separate purchase of RECs from Cottonwood.

The OCS contends that if Cottonwood believes the avoided cost rate does not fully compensate it for the value of the output delivered to the utility, it has other options, like

negotiating a contract with the Company not based on Schedule 37 rates or shopping its renewable output on the market for a better price.

The OCS also explains that Schedule 135 is available to net metering customers that own or lease a customer-operated renewable generating facility, subject to capacity restrictions. It is intended to primarily offset part or all of a customer's own electrical requirements. The OCS believes there is an important and necessary distinction between a PURPA QF (whose primary business is to supply power to a utility at avoided cost rates) and a net metering customer that is simply offsetting part or all of its demand with output from a renewable facility. A QF producer's motive is to earn a profit as a seller of energy and capacity to a utility. A net metering customer's motive is to self-supply at least a portion of its energy requirements and reduce monthly utility bills. The OCS urges the Commission to recognize this important distinction and not adopt Cottonwood's proposal to modify Schedule 37.

ANALYSIS

As noted by some of the parties, the Commission dealt with RECs in Docket No. 03-035-14, *In the Matter of the Application of PacifiCorp for Approval of an IRP-based Avoided Cost Methodology for QF Projects Larger than One Megawatt*. In its February 2, 2006 Order on Reconsideration and Clarification (Order), the Commission discussed the severability of a QFs output into two distinct commodities: 1) the power generated by the facility itself, and 2) the environmental attributes of that power, i.e. RECs.

In that Order, the Commission agreed in part with the Company that the "avoided cost of wind is linked to the value of the REC", but went further, stating that they "can be separated contractually." *See Order at.16.*

Here, even though the Company and the OCS argue the energy and associated environmental attributes of energy generated by a QF cannot be separated, the Commission's previous Order stated that the Commission "considers[s] the ownership of RECs to be a separable contractual issue." *Id.*

Further, that opinion also stated that "we approve Wasatch Wind and Pioneer's proposal allowing QFs to *buy back* the RECs at the IRP value if PacifiCorp owns the RECs in the last executed wind market-based RFP contract." *Id. at 25* (emphasis added). The phrase "buy back" implies the RECs are severable from the energy generated, and that absent a contract providing otherwise, the RECs remain with the QF even when the power generated is delivered to the utility.

The Commission also found its initial decision was consistent with state policy to promote small power production facilities, and also maintained ratepayer neutrality. The Commission stated:

> Ratepayers are indifferent to whether the Company contractually acquires ownership of the REC and then sells the REC to reduce the net cost of the resource or whether the Company contractually pays a price net of the REC to begin with. We are unaware of any Utah or federal law that eliminates the IRP described value of wind generation to ratepayers once the REC is sold. Indeed, our understanding of the RECs' value is to offset some of the cost of wind resource development, thus, promoting it relative to other alternatives.

Id. at 16.

This decision is consistent with the Commission's interpretation of the provisions of 2008 Senate Bill 202, "Energy Resource and Carbon Emission Reduction Initiative," now codified as Utah Code § 54-17-602. That statute permits unbundled RECs to be used for compliance with Utah's carbon emission reduction requirements.

Further, the Commission finds it would be discriminatory to treat smaller QFs (i.e., those QFs whose rates are determined under Schedule 37) different than larger QFs (i.e., those QFs whose rates are determined pursuant to Schedule 38) with respect to ownership of RECs.

Supporting the finding that the RECs can be separated from the energy produced, are the Company's own actions. In its 2009 PPA it made no mention of the RECs. Its 2010 PPA explicitly mentioned the RECs. The 2009 omission and 2010 addition of REC-specific language tend to show the Company itself treats the RECs and energy as severable.

The Commission also finds that even though it has reaffirmed that the RECs can severed as an attribute from the energy produced by a QF, it does not effect Cottonwood's status as a QF. Cottonwood remains a QF.

ORDER

Therefore, consistent with the Order in Docket No. 03-035-14, the Commission declares and further orders as follows:

1. The output of a generator of renewable energy contains two distinct commodities: 1) the power generated by the facility itself, and 2) the environmental attributes of that power, i.e. RECs. Those commodities can be severed;
2. Unless provided for otherwise in a contract, the RECs remain with the generator of renewable energy, and may be sold and valued separately from the energy produced or retained by the generator of the REC;
3. In this instance, since the 2009 PPA contained no provision for the RECs, Cottonwood's RECs remained with it. They may be sold and valued separately from the energy it generates and sells to the Company.
4. The Commission concurs with the reasons cited by the Company, the Division and OCS, that modification of Schedule 37 to settle the dispute between Cottonwood and the Company is improper. This decision on REC ownership and severability of energy and environmental attributes as presented above is adequate to resolve this issue. The Commission declines to order the modification of Schedule 37 as requested by Cottonwood.
5. Pursuant to Sections 63G-4-301 and 54-7-15 of the Utah Code, an aggrieved party may request agency review or rehearing within 30 days after issuance of this Order by filing a written request with the Commission. Responses to a request for agency review or rehearing must be filed within 15 days of the filing of the request for review or rehearing. If the Commission does not grant a request for review or rehearing within 20 days after the filing of the request, it is deemed

denied. Judicial review of the Commission's final agency action may be obtained by filing a petition for review with the Utah Supreme Court within 30 days after final agency action. Any petition for review must comply with the requirement of Sections 63G-4-401 and 63G-4-403 of the Utah Code and the Utah Rules of Appellate Procedure.

DATED at Salt Lake City, Utah, this 27th day of May, 2010.

/s/ Ruben H. Arredondo
Administrative Law Judge

Approved and confirmed this 27th day of May, 2010 as the Report and Order of the Public Service Commission of Utah.

/s/ Ted Boyer, Chairman

/s/ Ric Campbell, Commissioner

/s/ Ron Allen, Commissioner

Attest:

/s/ Julie Orchard
Commission Secretary
G#66899