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ACTION REQUEST RESPONSE

TO: Public Service Commission

FROM: Division of Public Utilities:
Chris Parker, Director,
Artie Powell, Energy Manager
Justin Christensen, Utility Analyst
Charles Peterson, Technical Consultant

DATE: March 2, 2016

DOCKET: Docket No. 16-035-04, In the Matter of the Application of Rocky Mountain Power for Approval of Power Purchase Agreement between PacifiCorp and Thayn Hydro, LLC.

RECOMMENDATIONS (Approve, in Part)

The Division of Public Utilities (Division) recommends that the Commission approve the pre-September 18, 2015 Schedule 37 prices for the purchase agreement (Agreement) between PacifiCorp (Company) and Thayn Hydro, LLC (Thayn Hydro). For the contract term issue, as discussed below the Division makes no recommendation.

ISSUE

On February 4, 2016 PacifiCorp filed with the Commission an application for the approval of a power purchase agreement between itself and Thayn Hydro, LLC. Unusual to this case the Company is requesting that the Commission make the determination of the pricing and term of the Agreement, which pricing and term has been left blank in the contract. Also unusual to this

matter is that this is a Schedule 37 contract, which usually is not brought before the Commission for approval.

On February 4, 2016, the Commission issued an action request to the Division to investigate and report back on this matter by March 7, 2016. However, a scheduling conference was held on February 16, 2016, which set the due date for comments on March 10, 2016. This memorandum represents the Division's response.

DISCUSSION

Thayn Hydro contacted the Division last November and on November 27th, 2015 it filed an informal complaint against PacifiCorp. The Company responded to the informal complaint on December 4, 2015. As part of the informal complaint process the Division sent data requests to both Thayn Hydro and the Company. Then on February 4, 2016 the Company filed with the Commission a proposed purchase power agreement with Thayn Hydro, but requested that the Commission adjudicate the question of which date of Schedule 37 pricing should be used and which term limit, 20 years or 15 years, is applicable to the Agreement. In answering these two questions before the Commission, the Division believes that the relevant information is best presented in the form of a timeline. Based upon information provided to the Division both in the informal complaint and in this docket, the Division believes the following are the most relevant dates and events and additionally provide context to those events.

- April 30, 2015, PacifiCorp files with Commission to change Schedule 37 prices (Docket No. 15-035-T06).
- July 7, 2015, Thayn Hydro asks for a new PPA to replace the one expiring on December 31, 2015.
- July 14, 2015, PacifiCorp submits a draft contract to Thayn Hydro.
- July 14, 2015, e-mail from PacifiCorp's representative to Thayn Hydro informs Thayn Hydro that PacifiCorp estimates that the prices on Schedule 37 will change "sometime in August."
- July 17, 2015, Thayn Hydro sends redlined version of PPA to Bruce Griswold of

PacifiCorp and expresses need for expedited treatment.

- July 21, 2015, Thayn Hydro makes request to change the insurance requirements.
- July 22, 2015, Thayn Hydro sends an e-mail to PacifiCorp stating “As per our phone conversation today, Thayn Hydro LLC would like to commit to a 20 year non-levelized contract based on the Schedule 37 (EFFECTIVE: February 20, 2015) rates.”
- August 4, 2015, PacifiCorp representative indicates the contract is ready for management review, but in DPU 1.2 (December 17, 2015), the Company asserts that the contract review was held up “because later that day Thayn Hydro expressed a desire to continue negotiating the contract concerning the insurance requirements.”
- August 29, 2015, Thayn Hydro informed that its contact at PacifiCorp was leaving the Company as of September 1.
- September 1, 2015, Thayn Hydro contacts Bruce Griswold at PacifiCorp indicating it wants to finish up the contract renewal with and requests a specific insurance limit.
- September 18, 2015, new Schedule 37 rates go into effect.
- October 1, 2015, Thayn Hydro and PacifiCorp agree to new insurance limits.
- October 13, 2015, PacifiCorp informs Thayn Hydro that it will not honor the pre-September 18, 2015 Schedule 37 rates.
- January 7, 2016, the Commission issues its Order in Docket No. 15-035-53 lowering the maximum QF contract term from 20 years to 15 years, generally for any QF contract signed after the date of its Order.
- February 4, 2016, PacifiCorp files the proposed Agreement in this docket requesting that the Commission determine which vintage of Schedule 37 rates apply and what the maximum contract term should be.

As can be seen from the timeline, Thayn Hydro (and PacifiCorp) knew that Schedule 37 rates

were changing soon, perhaps as early as sometime in August. In this regard it makes sense that Thayn Hydro would ask for expedited treatment of its contract soon after it learned of this likelihood. Thayn Hydro claims however, that shortly after requesting expedited treatment, it was verbally told by PacifiCorp to send its acceptance of the current Schedule 37 prices in writing, which, it was told, would lock-in the existing prices. Since PacifiCorp had already filed to change the Schedule 37 prices, what those new (much lower) prices would likely be was known. While it is true, as PacifiCorp points out in its informal complaint response, that there is no direct documentation of what the PacifiCorp representative told Thayn Hydro, the Division believes there is circumstantial evidence supporting this claim. First, on July 22, 2015 Thayn Hydro accepts the then existing prices referencing “as per our phone conversation.” Second, it appears from the documentation that Thayn Hydro felt that it was no longer urgent to receive expedited treatment to conclude the contract in a few days or weeks following its “acceptance” of the Schedule 37 prices that existed prior to September 18, 2015.

For its part, in its response to the informal complaint, the Company cites the plain language in the draft contract it submitted to Thayn Hydro warning that the draft contract does not constitute a binding offer and that terms, including pricing, are not final until all the necessary management and necessary regulatory approval have been given.¹ The Company also suggests that if its representative advised Thayn Hydro to submit its acceptance of the pricing in order to lock in the pricing, then that representative exceeded his authority.

The Company represents in its filing in this docket that with the exception of the insurance issue, all material terms of the contract had been negotiated prior to September 18, 2015, when the new rates went into effect. In its filing the Company claims that “the parties would have worked to resolve the insurance provision prior to the SCH 37 Order had they known the date the order was to be issued.”² The Company repeated this claim in its February 19, 2016 response to OCS data request 1.4. The Division notes that on July 29, 2015 the Commission issued an Amended

¹ This is reiterated in the Company’s February 4, 2016 filing in this docket. See paragraph 6 on page 4.

² Ibid., paragraph 7, page 5.

Scheduling Order and Notice of Hearing in Docket No. 15-035-T06, the docket that was to decide issues related to updating the Schedule 37 pricing. The hearing date was set for September 14, 2015. The hearing was held as scheduled. Although there were clear indications that the updating of Schedule 37 prices was reaching a conclusion, there appears to have been no sense of urgency by either the Company or Thayn Hydro to conclude negotiations by or before the September 14 hearing date, which may have been the prudent thing to do. It appears the parties were relying on an expectation that the Commission would not issue an order for several weeks, even months, following the hearing.

Additionally, Thayn Hydro and to an extent, perhaps, the Company, may have been relying on Thayn Hydro's commitment to accept the earlier pricing as indicated in its July 22 e-mail. This claim on the earlier, and higher, Schedule 37 prices may be based upon the idea of legally enforceable obligations (LEO) for qualifying facilities (QFs) as defined by FERC.^{3,4} That is, based upon an interpretation of a FERC ruling, as soon as Thayn Hydro accepted a proposed pricing if it has, in fact, established that it has actually committed to deliver energy, then it receives that pricing even if no other terms are agreed to. In other words pursuant to the FERC opinion on formation of LEOs the QF has near absolute control over what pricing it gets once a price is on the table. The Division does not necessarily agree with this interpretation. The Division is particularly troubled by the absence of actual "commitment" made by QFs that the FERC has determined are sufficient to create a LEO. However, the Division is not going to litigate the point in this matter. In this matter, unlike green field proposed projects, Thayn Hydro operates an existing facility with a current connection to PacifiCorp's system and has the ability to offer a certain level of commitment.

Given the above discussion, and in particular since it appears that the only material issue that was outstanding at the beginning of August 2015 was the level of the insurance policy that

³ FERC stands for Federal Energy Regulatory Commission.

⁴ *Grouse Creek Wind Park, LLC Grouse Creek Wind Park II, LLC*, 142 FERC P 61187, 61892A (2013) ("[A] QF, by committing itself to sell to an electric utility, also commits the electric utility to buy from the QF; these commitments result either in contracts or in non-contractual, but binding, legally enforceable obligations.").

Thayn Hydro had to maintain, the Division believes that it is in the public interest in this matter to grant Thayn Hydro the Schedule 37 pricing that was in effect on or about August 1, 2015.

The second item that the parties wish the Commission to determine is the term of the contract. If the Commission were to award the previous Schedule 37 pricing that the Division recommended above, then there is consistency in awarding the maximum term--20 years--that was in effect at the same time. However, on January 7, 2016 the Commission's Order in Docket No. 15-035-53 set the maximum term of a QF contract at 15 years for all contracts signed after the date of the its Order (see page 21 of that Order). The Division believes that there is not a necessary connection between the term of a QF contract and the pricing. Indeed, a QF can negotiate the length of the contract up to the Commission-authorized maximum, but under Schedule 37 the QF takes the posted price. The Division supported shorter contract terms for QFs as being more in the public interest than longer terms in Docket No. 15-035-53; and indeed that would be the Division's preference in this case. However, as part of the issues litigated in Docket No. 15-035-53, the Division believes that it is within the Commission's discretion to set the term limits of a QF contract. Therefore, Division does not make a recommendation on the term and leaves it to the determination of the Commission.⁵

Finally, there are some issues related to the negotiation process. Rocky Mountain Power asserts that its representative was not authorized to give advice to Thayn Hydro on the pricing, something that appears to have happened on or about July 22, 2015. Thayn Hydro may have reasonably relied on that advice. The Company is responsible for the proper training and control of its employees. Additionally, there appears to have been a fairly lengthy delay between the time Thayn Hydro requested discussion of the insurance issue (on July 21, 2015 and apparently repeated about two weeks later on August 4, 2015) and when the Company acted on this request.

⁵ Thayn Hydro has asked for non-levelized prices; therefore, any capacity payments are built into the Schedule 37 payment stream for each individual year and thus the length of the term does not affect non-levelized prices set forth on Schedule 37. If however, there had been a request for levelized prices, then 20-year levelized prices set forth on Schedule 37 would have to be recalculated if a term for less than 20 years was determined due to the asymmetry in capacity payments over 20 years. Shortening the term to 15 years would require adjustment to the levelized price to prevent use of levelized payment that includes capacity value for years beyond the first 15.

(Apparently sometime in September, since the issue was resolved about October 1, 2015). This six or more week delay in attempting to resolve the insurance issue likely contributed to Thayn Hydro and PacifiCorp finding themselves in the pricing conundrum that is before the Commission in this docket. Consequently, for these reasons the Division may look at the prudence of PacifiCorp's actions in this matter in a future rate case.

CONCLUSION

Based on the foregoing discussion, the Division recommends that the Commission grant to Thayn Hydro, LLC the previous Schedule 37 pricing. With respect to the term issue, the Division leaves that to the discretion of the Commission based upon the facts in this case.

cc: Michele Beck, Committee of Consumer Services
Paul Clements, PacifiCorp
Bob Lively, PacifiCorp
Adam Long, attorney for Thayn Hydro