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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

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 October 31, 2005.

Part 1

The Report and Order is not a Final Order.

The Report and Order is not the end of the Commission's decision-making process in this Docket. The Report and Order is intermediate to a final determination of a method that PacifiCorp must apply to calculate the avoided cost/indicative price to be paid a Qualifying Facility under the Public Utility Regulatory Policies Act of 1978 (PURPA), 16 U.S.C. §824a-3, pursuant to Schedule No. 38. Among the elements of an avoided cost that PURPA and Federal Energy Regulatory Commission (FERC) rules require be considered are transmission and line loss costs and savings due to the utility's interconnection with a particular QF. *See 18 C.F.R. 292.304(e)*. The Report and Order leaves the question of how the Commission's adopted avoided cost method considers such elements, to a working group's report and either additional hearing or the entry of a subsequent Report and Order. The Report and Order states:

We direct the Company to convene a work group to recommend a method to identify the costs, savings and timing of avoidable transmission costs, for QFs subject to Schedule No. 38, within 21 days of this order. *Order, ¶5, Page 33.*

Under the principles established in *Barker v. Utah Public Service Com'n*, 970 P.2d 702 (Utah 1998), interpreting *Utah Code §63-46b-16(1)*, the Report and Order is not final because it reserves for a later time, agency action on an issue without which the purpose

of the Docket cannot be fulfilled.¹ That purpose is to consider and approve an avoided cost method for pricing contracts for power purchases from Qualifying Facility projects larger than one megawatt for cogeneration facilities and three megawatts for small power production facilities. An order is not final if the Commission reserves a necessary element of avoided costs for further decision. See *Sloan v. Board of Review of Indus. Com'n of Utah*, 781 P.2d 463 (Utah 1989), *a remand for further proceedings is not a final order*. A party seeking reconsideration or appealing such an order need not do so until the reserved issue is determined.²

Furthermore, an avoided cost method that does not consider all elements of avoided cost under PURPA may not be judicially reviewed, or a pending judicial review will disrupt the pending administrative decision that must follow the working group. Without the Commission's determination of whether and how transmission and line loss costs or benefits are to be included in the avoided cost paid to a QF and charged to ratepayers, rights and obligations remain undecided, and the Report and Order is not final. See *Union Pacific R.R. Co. v. Utah State Tax Com'n*, 999 P.2d 17 (Utah 2000).

The Committee respectfully contends that the Commission should avoid requiring parties to file and the Commission to consider a series of reconsideration requests. Rather, the Committee contends that the Commission should withdraw the final

¹ See Utah Code §63-46b-16(4)(c), providing that the appellate court may grant relief when the agency has not decided all of the issues requiring resolution, substantially prejudicing the party seeking judicial review.

² The *Barker* opinion does expand the time to request reconsideration of *seriatim* orders to the last day to appeal the last order in the series. However, the Committee does not believe the holding applies in this Docket because the avoid cost method is incomplete unless it excludes or includes and calculates, each element of the avoided cost that PURPA and FERC rules require be considered.

paragraph of its October 31, 2005 Report and Order, pending a decision upon the working group's recommendation.

Part 2

Request for Reconsideration.

The Committee respectfully requests that the Commission review and modify its October 31, 2005 Report and Order, the discussion, findings and conclusions in Part D WIND QUALIFYING FACILITIES GREATER THAN THREE MEGAWATTS, beginning on Page 18, and Paragraph 6 of the Order, Part III.³ Paragraph 6 states:

We approve a market price proxy for determination of avoided costs for wind QFs up to the Company's IRP target megawatt level of wind resources. The Company's most recent executed wind contract from its Renewable RFP will serve as the proxy against which project specific adjustments are made to produce an indicative price for wind QFs in Utah. *Order, ¶6, Page 33.*

The findings and conclusion upon which the Commission bases its decision are:

Administratively determined cost estimates are necessary for planning but in the end are simply the best estimates available at a point in time; a market-determined price should provide a better reflection of an actual, cost-effective wind resource. Further, in hearing, the Company testified that in future renewable RFPs, it will have a Company built next best alternative as a benchmark cost for other wind projects to compete against. Since the payment to a wind QF is the same as a wind resource procured through competitive bidding, the ratepayer indifference standard is addressed yet simplicity in identifying the cost of a wind resource is achieved. *Order, Page 21.*

³ The Committee does not waive its contention explained in Part 1. However, in the event that the Commission or appellate court concludes that the Report and Order is final, the Committee wishes also to preserve its request for reconsideration of the substantive order. At the same time, the Committee reserves the right to supplement, amend or modify the scope and substance of this Request for Reconsideration Part 2 in the event the Commission or an appellate court agrees with Part 1.

Thus, the Commission's Order, Paragraph 6 assumes that a market price for QF wind energy that is determined by a properly designed, renewable resource RFP that contains a Company built benchmark, will comply with PURPA.

What concerns the Committee about this part of the Report and Order is that Order, Paragraph 6 as written does not incorporate the record evidence, and is not sufficiently conditioned by the findings and conclusions. Omitted from Order, Paragraph 6 is the requirement that the most recent executed wind contract, which is to determine the indicative price/avoided cost for a wind QF, is the product of a properly designed, renewable resource RFP that contains a Company built benchmark, and that incorporates PURPA and FERC standards for determining avoided costs.

Accordingly, the Report and Order is against the weight of the evidence and not supported by substantial evidence; does not comply with PURPA and FERC rules and therefore, is not in compliance with law; and, results in an arbitrary and capricious decision that substantially prejudices the Committee's constituents by charging electric rates that are not just and reasonable, not in the public interest, and in excess of the electric utility's avoided cost.

Argument

I. PURPA and FERC rules for determining avoided costs must be incorporated into the Commission's Report and Order.

The price to be paid a QF, wind or non-wind, may be no more than the “incremental cost of alternative electric energy” defined in *16 U.S.C. §824a-3(d)*.

(d) "Incremental cost of alternative electric energy" defined. For purposes of this section, the term "incremental cost of alternative electric energy" means, with respect to electric energy purchased from a qualifying cogenerator or qualifying small power producer, the cost to the electric utility of the electric energy which, but for the purchase from such cogenerator or small power producer, such utility would generate or purchase from another source.

Under the rules adopted by the FERC, when determining the incremental cost of the electric energy from a QF, the Commission must consider specified factors. *18 CFR 292.304(e)* Factors affecting rates for purchases, states:

In determining avoided costs, the following factors shall, *to the extent practicable, be taken into account [emphasis added]*:

- (1) The data provided pursuant to Sec. 292.302(b), (c), or (d), including State review of any such data;
- (2) The availability of capacity or energy from a qualifying facility during the system daily and seasonal peak periods, including:
 - (i) The ability of the utility to dispatch the qualifying facility;
 - (ii) The expected or demonstrated reliability of the qualifying facility;
 - (iii) The terms of any contract or other legally enforceable obligation, including the duration of the obligation, termination notice requirement and sanctions for non-compliance;
 - (iv) The extent to which scheduled outages of the qualifying facility can be usefully coordinated with scheduled outages of the utility's facilities;
 - (v) The usefulness of energy and capacity supplied from a qualifying facility during system emergencies, including its ability to separate its load from its generation;
 - (vi) The individual and aggregate value of energy and capacity from qualifying facilities on the electric utility's system; and
 - (vii) The smaller capacity increments and the shorter lead times available with additions of capacity from qualifying facilities; and

(3) The relationship of the availability of energy or capacity from the qualifying facility as derived in paragraph (e)(2) of this section, to the ability of the electric utility to avoid costs, including the deferral of capacity additions and the reduction of fossil fuel use; and

(4) The costs or savings resulting from variations in line losses from those that would have existed in the absence of purchases from a qualifying facility, if the purchasing electric utility generated an equivalent amount of energy itself or purchased an equivalent amount of electric energy or capacity.

In Part D, the Commission concludes that “[a]ll parties agree a Proxy approach for determining the avoided generation capacity and energy costs associated with a wind QF is appropriate for meeting the IRP planned acquisition of cost effective wind resource, the IRP target amount.” *Order, Page 18*. With one exception, Pioneer Wind, the parties’ proposed avoided cost methods for wind QFs analyzed proxy avoided costs in terms of contracts, IRP models, and comparisons, averages, or calculations of production costs. It is only such a method that complies with PURPA requirements for calculating an avoided cost and assures that the ratepayer is indifferent to the price paid by the utility.⁴

The Division of Public Utilities agreed with the use of a proxy for avoided costs when, and the Committee contends *only* when:

1) the operating characteristics of the proxy plant closely match those of the QF being evaluated; 2) the QF exactly replaces the entire capacity and energy of the proxy plant; and 3) the QF does not significantly affect other plant additions or system operations. *Order, Page 19*.

⁴ Because the utility’s power purchase contract with the QF is compelled by PURPA, the contract will not be the result of negotiations between a willing seller and willing buyer, an essential element to an enforceable contract. By establishing specific factors by which the contract price is determined, not by the parties but by the statute and rules, and by capping the price by the ratepayer impact, indifference, PURPA infuses the QF contract with the mutuality the law demands. Thus, any avoided cost method that does not expressly consider these factors and respect ratepayer indifference, violates PURPA.

Determining whether the wind QF satisfactorily compares with the proxy under these conditions requires that the proxy is the result of a properly designed, renewable resource RFP that contains a Company built benchmark, and that incorporates PURPA and FERC standards for determining avoided costs. Proposals from the Committee and Wasatch Wind contained similar standards. *Order, Pages 19-20.*

II. Pioneer Wind's avoided cost method does not comply with PURPA and FERC rules for determining avoided costs.

The exception, Pioneer Wind, contends that the most objective, simplest and most transparent avoided cost method is the most recent market-based wind contract executed pursuant to PacifiCorp's renewable resource RFP. *Order, Page 19.* The Commission appears to have adopted, although unintentionally, Pioneer Wind's proposal. However, this avoided cost method does not necessarily require testing the most recent contract price against PURPA or FERC rules. The unacceptable result of such a method is apparent in the evidence Pioneer Wind presented. Pioneer Wind asked, and *Order, Paragraph 6* directs, that the avoided cost be determined by nothing more than reference to a commercial contract of unknown origin. By providing the most recent executed contract in confidential testimony, Pioneer Wind in effect, asked the Commission to determine a specific illustrative price; something the Commission said it would not do. *Order, Pages 30-31.* Further, the contract from which the price comes has not been scrutinized or approved by the Commission. Such an avoided cost determination violates

PURPA, FERC rules and causes electric customers to pay unjust and unreasonable rates in excess of the avoided cost. This avoided cost is not the product of the properly designed, renewable resource RFP upon which the Commission depends to comply with PURPA.

III. Order, Paragraph 6 cannot be upheld without express requirements that the most recent executed wind contract result from a properly designed, renewable resource RFP that contains a Company built benchmark, and that incorporates PURPA and FERC standards for determining avoided costs.

The Commission concluded that a “market-determined price should provide a better reflection of an actual, cost-effective wind resource.” *Order, Page 21*. However, the shortcoming of simply adopting the price in a commercial contract as the measure of incremental cost under PURPA is apparent in the very contract that Pioneer Wind held up as a panacea. In the course of the working group on transmission issues, PacifiCorp forcefully warned against even using the name of the project.⁵ The working group did not know the project’s size, wind profile, location in relation to load, interconnection voltage – virtually any information about site specific characteristics and information necessary to adjustments was withheld. PacifiCorp claimed, no doubt accurately, that the contract was confidential.

Absent a properly designed, renewable resource RFP, neither the regulatory agencies or other QF wind projects have any means of analyzing the most recent

⁵ The working group resorted to calling the project the Badger or Small Mammal project.

executed contract for compliance with the Commission's adopted avoided cost method or PURPA. The regulatory agencies or other QF wind projects cannot scrutinize the contract in terms of the arms-length or good faith of its negotiation, additional terms or conditions unrelated to energy that influenced the price, the financial, legal, or political factors influencing the contract, the bids or the bid evaluation or the absence of such a process.⁶

Most importantly, the most recent executed contract says nothing about the price components (integration costs, line losses, transmission impacts, for example) except what the two parties choose to say. In the case of the *CONFIDENTIAL* contract, the parties said nothing about the price in relation to any of the factors that PURPA requires the utility and the Commission to consider. The fundamental flaw to Order, Paragraph 6 as it is written is that it unreasonably assumes a commercial contract will in all respects comply with PURPA and FERC rules.⁷

IV. Order, Paragraph 6 conflicts with PURPA.

The part of the Report and Order the Committee is challenging does not demonstrate that the avoided cost method selected for wind projects calculates an incremental cost, nor does it demonstrate that the incremental cost will not be exceeded.

⁶ Senate Bill 26, Utah Code 54-17 *et seq.*, the Energy Resource Procurement Act, provides a measure of confidence in the fair and competitive quality of resource procurements. However, the Act may or may not even apply to the most recent executed wind contract described in Order, Paragraph 6 as it is written. Furthermore, because Order, Paragraph 6 does not specify any conditions on the determinative contract, it may be one that no regulatory agency must approve or even review.

⁷ Pioneer Wind's testimony excluded an analytical approach because it required assumptions and estimates. However, PURPA requires such an analysis. *See 18 CFR 292.304 (e) Factors affecting rates for purchases.*

16 U.S.C. §824a-3(b)(2).⁸ The Commission adopted an analytical avoided cost method for wind resources exceeding the 1400 MW IRP target - a proxy and Partial Displacement Differential Revenue Requirement (PDDRR) method. *Order, ¶7, Page 33.* However, the Commission's Report and Order does not contain sufficient factual findings or conclusions upon which one can justify a non-analytical avoided cost method for up to 1400 MW of wind resources.⁹

The Division's criteria for an acceptable proxy as the avoided cost method for wind projects, which the Commission favorably cites, requires that there be a consideration of the operating characteristics, capacity and energy replacement values and system impact measures of the wind project in relation to PacifiCorp's system. These criteria logically follow from and are consistent with FERC rules. However, Order, Paragraph 6 as written does not require the most recently executed wind contract to comply with PURPA and FERC rules.

Order, Paragraph 6 does not require that the most recent executed wind contract even be for a viable project. Only after a project is developed beyond the concept stage, evidenced by design, engineering studies, site location, wind studies, and operating

⁸ 18 CFR 292.304(b)(5) allows rates at the time of delivery to differ from those calculated at the time a contract is entered, but *only* if the rates are estimated or the avoided cost method applied, by taking into account, to the extent practicable, the factors in 18 CFR 292.304(e).

⁹ The Committee considered the proposition that a distinction between the IRP targeted wind resource and the wind resource in excess of the IRP target may be based upon a limited annual IRP resource addition as some parties suggested. However, the Commission declined to so limit the "last executed contract" method, in effect awarding all wind projects the admitted higher, some say unreasonably higher, price.

characteristics, can the proxy be compared with the wind QF using the factors designated by PURPA and the Commission.¹⁰

Under such circumstances, it cannot be said, and the Report and Order does not sufficiently explain, that the price paid in the most recent executed wind contract bears the required rational relationship to an incremental cost under PURPA considering the factors listed in FERC rules. The Committee believes that the Commission's findings and conclusions do not demonstrate that the payment to the most recent executed wind contract is the same as the avoided cost to be paid to a wind QF.

Conclusion and Remedy Requested.

The error of Order, Paragraph 6 is cured by expressly requiring that the most recent executed wind contract be one that results from a properly designed, renewable resource RFP that includes a Company built benchmark, and that incorporates PURPA and FERC standards for determining avoided costs. This express requirement will protect ratepayers from having to pay rates determined by the non-viable, not scrutinized, not comparable or total price, private power purchase contract. Ratepayer indifference is preserved only if the avoided cost is determined by a contract that results from an approved RFP, and that is itself a QF receiving an avoided cost consistent with PURPA and the Commission's orders, or by a non-QF contract with a price that has been scrutinized using PURPA standards and the Commission's orders.

¹⁰ The outcome in Docket No. 05-035-08 and 09 makes apparent the ratepayer risks inherent in compelling the utility to negotiate and enter a contract with a QF that is only a concept and perhaps ill conceived.

The Committee was informed during its participation in the working group that there is pending, a renewable RFP. However, at this time, the ***CONFIDENTIAL*** contract is the only executed contract from the RFP. This RFP, and indeed all requests for indicative pricing from wind QFs, date from the period during which the May 20, 2004 Stipulation in Docket No. 03-035-14, governed all pricing for QFs. This Commission has held that “[w]ith the issuance of our October, 31, 2005, Report and Order, use or reliance upon prior prices, terms and conditions for new qualifying facility contracts likely would be inappropriate.” *Order Denying and Dismissing Petition (ExxonMobil), Docket No. 05-035-86, November 14, 2005.*

The Committee also contends that the Report and Order may only be applied prospectively, as the Commission referred to “future” renewable RFP’s in the findings and conclusion supporting Order, Paragraph 6. *Order, Page 21.* In addition, the Committee contends that as a matter of substantive and procedural law, only the most recent wind contract executed as a result of a renewable resource RFP issued pursuant to and after the effective date of the Report and Order, can be used to determine the avoided cost for any wind QF that does not now have a contract with PacifiCorp. However, without waiving its right to assert this position in this Docket, the Committee believes that this issue is ripe only when a contract negotiated and entered under the Report and Order is presented for approval to the Commission. Only then will the RFP from which

the most recent executed wind contract be known and subject to scrutiny for compliance with PURPA and the Commission's amended report and order.

The Committee contends that the Commission should adopt an interim avoided cost method for Schedule 38 wind QF projects. The interim method should be that method proposed by the Committee, which, in summary, is to determine the avoided cost as the lower of the IRP wind resource cost or the market price. *Order, Page 20*. The Committee contends that this method most closely approximates, on an interim basis, the most recent executed wind contract, balanced by a calculated "incremental cost of alternative electric energy" defined in *16 U.S.C. §824a-3(d)*. The interim method should apply until the execution of a wind contract that results from a properly designed, renewable resource RFP that contains a Company built benchmark, that incorporates PURPA and FERC standards for determining avoided costs, and complies with the Commission's amended report and order.

RESPECTFULLY SUBMITTED this 30th day of November 2005.

/s/ _____

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Request for Reconsideration was served upon the following by e-mail November 30, 2005:

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