

April 12, 2010

Public Service Commission of Utah
Heber M. Wells Building, 4th Floor
160 East 300 South
Salt Lake City, UT 84111

Attn: Julie Orchard
Commission Secretary

RE: Docket No. 10-035-15; Cottonwood Hydro LLC Request for Agency Action –
Ownership of RECs Associated With Net Output Purchased Pursuant to PacifiCorp’s
Utah Schedule 37 Tariff

This letter responds to the Cottonwood Hydro LLC (“Cottonwood Hydro”) letter dated January 26, 2010, and filed March 10, 2010, asking the Public Service Commission of Utah (the “Commission”) to (1) declare that Cottonwood Hydro shall be the owner of all renewable energy credits (“RECs”) generated by their company from generation subject to a proposed power purchase agreement with PacifiCorp and (2) resolve a dispute between PacifiCorp and Cottonwood Hydro regarding REC ownership by adding the following language to PacifiCorp Utah Schedule 37 Tariff, “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”.

Summary

A REC is the exclusive right to claim to have bought energy from a specific renewable resource or otherwise financially caused that increment of renewable energy to have been delivered to the electricity grid, that may be separated from and sold separately from the energy itself. Under the Public Utilities Regulatory Policy Act (“PURPA”), a Qualifying Facility (“QF”) can require the local electric utility to contract with it to buy energy because the resource meets certain requirements. Cottonwood Hydro has asked the Commission to get involved in specific terms of such a contract by changing the tariff.

PacifiCorp's position is that as a matter of law and common sense, when PacifiCorp buys energy from a particular QF under a contract with that particular QF to buy the energy from that particular QF, PacifiCorp and its ratepayers acquire with that energy the right to say they are buying that energy from that particular QF. Therefore, the right to claim to have bought the energy from a specific renewable resource or otherwise financially caused that increment of renewable energy to have been delivered to the electricity grid, cannot be taken away from the energy and sold separately without PacifiCorp’s agreement to do so. PacifiCorp submits that it is

not in the interests of its ratepayers to have to pay something extra to keep or otherwise be deprived of the right to truthfully claim something that is actually taking place, which is PacifiCorp's purchase of energy from a particular QF.

PURPA requires that utilities purchase from QFs, and QFs are afforded that designation because of fuel use or efficiency criteria. A utility must purchase from a QF that is also an eligible renewable energy resource because of the very type of resource attributes that are represented by RECs. In other words, it is only by virtue of the existence of these types of attributes that facilities are deemed QFs and utilities become obligated to purchase their power. In the case of eligible renewable energy resource QFs, these environmental attributes are the essence of what enables the QF to require the utility's agreement to purchase the output. A requirement to pay separately for RECs—as Cottonwood Hydro suggests—would require further payment for the very characteristic that enabled the facility to achieve its QF status, and which thereby triggered the utility's obligation to purchase the output from the facility. Any PURPA power purchase agreement securing power from an eligible renewable energy resource should therefore credit the associated RECs to the purchasing utility.

Discussion

As will be discussed in more detail below, there is some existing legal guidance concerning ownership of RECs with QFs. For existing contracts, the Federal Energy Regulatory Commission ("FERC") has determined it is a matter of state law, which defines contracts.¹ PacifiCorp submits that under Utah state law, PacifiCorp (a) should not be required to pay a seller of a thing twice for the same thing and (b) should be permitted to make public, truthful statements.

According to the National Association of Attorneys General ("NAAG"), RECs "refers to a system of tracking environmental attributes of electricity generation in which the electricity, and the environmental attributes of the generating sources of the electricity, are distinct commodities and are sold or traded separately. Under such a system, a retail provider of electricity can buy electricity in one place and environmental attributes in another. The 'tag' is the right to claim the attributes of the electricity."² NAAG also states that "[u]nder a tagging system, the environmentally preferable attributes of specific power generation—the 'premium' associated with preferred generation—are available to be sold separately from the power itself."³

¹ Accord, FERC Docket No. EL03-133-000, Petition for Declaratory Order and Request for Expedited Consideration, American Ref-Fuel Company, Covanta Energy Group, Montenay Power Corporation, and Wheelabrator Technologies, Inc. June 16, 2003 (which noted that state law, not PURPA, would determine whether RECs go to the purchasing utility).

² Resolution Adopting Environmental Marketing Guidelines for Electricity, National Association of Attorneys General, Winter Meeting, 1999, p. 6. For more background on RECs, see FERC, <http://www.ferc.gov/whats-new/comm-meet/100103/E-1.pdf>; NAAG, http://www.naag.org/issues/pdf/Green_Marketing_guidelines.pdf; BEF, https://www.greentagsusa.org/GreenTags/faq_pages/about_greentags.cfm.

³ Id. at 25.

In a voluntary market, RECs represent the "bragging rights" to the zero- or low-emissions characteristics of renewable generation, that may be alienated separately from the energy. The Commission should not allow a situation in which the purchasing utility has entered into a contract to purchase energy from a specified resource, the QF, but another party can, by paying money to the developer and not buying the energy, claim that it has purchased the energy from, or financially caused the delivery of energy from, that same resource. To permit such a situation would run afoul of basic fair trade, truth-in-advertising, and anti-fraud legislation that are the underpinnings of the conclusions of the National Association of Attorneys General as set forth by them in the NAAG Guidelines. PacifiCorp is not aware of any legal authority pursuant to which it can be required to renounce that it is purchasing energy from the resource from which it is purchasing energy and say that it bought undifferentiated energy from the grid, which is what would be required for a third party to own the RECs. Cottonwood Hydro's argument that this should be so because PacifiCorp is rich while Cottonwood Hydro is poor is not a cognizable legal or equitable argument.

Indeed, by the very structure of PURPA, utilities have always been receiving RECs from QFs producing renewable generation. Section 210 of PURPA requires utilities to buy power from generation fueled by specific resources (biomass, solar, wind, waste, geothermal) or in specific configurations (e.g., cogeneration). Utilities have therefore required proof that QFs fulfill these eligibility requirements. Attestations—i.e., RECs from those QFs based on renewable generation—have always been required to ensure compliance with PURPA, essentially representing the utility's right to claim the renewable attributes. Likewise, the meters between the QF and the utility's system have always shown the energy from that renewable resource flowing to the utility. 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.

RECs have emerged in two types of markets: (1) compliance markets created by state Renewable Portfolio Standards ("RPSs"); and (2) voluntary markets in which customers choose to pay a premium for renewable energy. Different markets have different rules on whether the RECs can be alienated separately from the energy. In compliance markets, numerous states permit purchase of "unbundled RECs" (RECs separated from the underlying power) for compliance with mandated targets for renewable energy supply. Some states consider RECs to embody environmental attributes (e.g., New York), though the specific nature of these attributes can be unclear, while others simply consider them to represent proof of renewable energy generation (e.g., Texas). Some states (e.g. California), require electricity under new PURPA contracts to be counted towards the purchasing utility's RPS requirements and do not permit RECs to be separated from the electricity.⁴ In voluntary markets, RECs enable market mechanisms to promote the development of renewable resources by allowing the transfer of bragging rights for use of renewable resources without having to tie up a transmission path from a potentially remote buyer directly to that renewable resource. There are many facilities other

⁴ California Public Utilities Code Section 399.16(a)(6) (post-2005 contracts and pre-2005 contracts that do not otherwise specify ownership).

than QFs that benefit from the existence of credible mandatory and voluntary RECs markets, whether or not they choose to sell RECs into those markets.

Irrespective of PURPA, if PacifiCorp is buying energy from a specified resource, no one else should be able to claim that it is buying the renewable energy from that resource. RECs represent that claim; PacifiCorp is in all instances entitled to be truthful concerning the resources from which it purchases its energy. Additionally, PURPA contains no requirement that a purchasing utility pay again for what it has already bought.

If one attribute of what has always been sold pursuant to PURPA contracts subsequently acquires a separate market value, this does not mean that particular attribute now warrants separate compensation, just as it does not mean that said attribute has or is being transferred without consideration. Nor does it mean that the utility is no longer purchasing the electricity from a specified resource when it has always been purchasing the electricity from that specified resource, and has a contract to purchase the electricity from that specified resource. RECs are the identifying tag of where the generation came from, separated out from the energy. A purchasing utility under a QF contract is not buying undifferentiated energy from the grid; it is buying energy that is very particularly differentiated that the utility is required by law to buy it at avoided costs. A seller may only convey that characteristic once.

Any value in these QF RECs, if any, would be for the benefit of PacifiCorp's ratepayers. Public policy and the ratepayers of Utah are best served by allowing the ratepayers to say they own what they in fact bought; i.e., energy from a particular QF. We believe that this is consistent with the Commission's Order in Docket 03-035-14.⁵ Were the Commission to rule otherwise, the laws potentially impacted would range far beyond PURPA, from those involving fraud and fair trade, to First Amendment rights to freely state a truthful fact, to the very laws of physics.

The Schedule 135 argument that Cottonwood Hydro raises is not relevant here. Schedule 135 concerns net metering. In a power purchase agreement, the buyer takes energy away; in net metering, the energy never leaves the site; rather a credit is generated. In Docket No. 08-035-78, issued February 12, 2009, the Company recommended that the Commission not adopt any change regarding REC ownership, asking that the ownership issue be addressed at a later date when more information is available. One of the key differentiating issues is the purchase and

⁵ Issued October 31, 2005. At pages 24-25:

The IRP 2004 recognizes the value of a Renewable Energy Credit ("REC"), a tradeable value in emerging markets, and includes this value as a credit in the evaluation of wind versus alternative supply-side resources. ... All parties agree that if PacifiCorp pays for the RECs, it owns the RECs. The Company additionally proposes that it own the RECs if pricing is based on either the IRP wind resource proxy or the RFP market based price proxy. Since we adopt the RFP market-based price proxy rather than any combination that would include the IRP wind resource proxy, we focus our consideration with respect to market-based wind contracts. In the RFP wind contract on record in this case, PacifiCorp paid for the RECs and therefore owns the RECs and the price includes the value of the RECs. ... In the end, we find the issue is a contractual matter between the QF and PacifiCorp.

receipt of power. The standard QF under Schedule 37 is different from the net-meter customer. Under net-metering, the retail customer consumes the renewable energy generated on-site to offset site usage and does not sell or deliver the net output to the utility. Therefore the RECs associated with the energy are not transferred to the utility, remaining on-site with the generation, which does not leave the site. A QF, whether a standard QF under Schedule 37 or non-standard under Schedule 38, has a contract with the utility to sell the net output from the generating plant to the utility and the utility pays the QF for physical delivery of the net output to its electric system. Thus, rules for net-metering are not readily shunted to a QF PURPA contract and should not be included in the Schedule 37 tariff.

Cottonwood Hydro is asking for a dramatic intervention by the Commission in the negotiation of a contract between two private companies by changing a tariff. PacifiCorp submits that Commission intervention in this instance 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.

Conclusion

For the reasons set forth above, PacifiCorp respectfully submits that the Commission should not determine that anyone other than PacifiCorp has the right to claim that it is buying the energy from the QFs with whom PacifiCorp enters into contracts to buy energy. PacifiCorp further respectfully submits that it is not in the best interests of PacifiCorp's Utah ratepayers for the Commission to insert language in Schedule 37 asserting that the owner of the renewable energy facility retains ownership of the non-energy attributes associated with electricity the facility generates. Rather those non-energy attributes should be conferred to the utility. Should the Commission unbundle the RECs from the resource, the Company must be relieved of the obligation to enter into a PPA, which no longer qualifies as a QF transaction.

Very Truly Yours,

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