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State of Utah
Department of Commerce
Division of Public Utilities

FRANCINE GIANI
Executive Director

THAD LEVAR
Deputy Director

PHILIP J. POWLICK
Director, Division of Public Utilities

MEMORANDUM

TO: Public Service Commission

FROM: Division of Public Utilities
Philip Powlick, Director
Energy Section
Artie Powell, Energy Manager
Charles Peterson, Technical Consultant
Abdinasir Abdulle, Technical Consultant

DATE: April 26, 2010

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.

RECOMMENDATION

The Division recommends that the Commission open a new Docket to address the issue of REC ownership in a forum broader than the informal adjudication requested by Cottonwood Hydro’s application. Cottonwood Hydro’s request could be either placed on hold, consolidated with the new docket, or determined as part of the outcome of the new docket. The Division also recommends that the Commission reject Cottonwood Hydro’s proposed addition of language to Schedule 37 intended to clarify the ownership of RECs.

ISSUE

On March 10, 2010, Cottonwood Hydro LLC (“Cottonwood Hydro”) filed a request for agency action with the Utah Public Service Commission (“Commission”) requesting that the Commission declare Cottonwood Hydro the owner of the RECs generated by that Company’s

renewable generation facilities. The request for agency action grew out of a contractual dispute between Cottonwood Hydro and the Company over who owns those RECs. In its filing, Cottonwood Hydro also requested that the Commission resolve the dispute by adding language to PacifiCorp's Utah Schedule 37 tariff intended to clarify the ownership of RECs. The Commission issued an Action Request to the Division requesting that the Division analyze the complaint and file its findings and recommendation with Commission by April 12, 2010. This Action Request due date was later extended to April 26, 2010. This Memorandum is the Division's response to the Commission's Action Request.

BACKGROUND

In 2009, Cottonwood Hydro and PacifiCorp (collectively "Parties") signed a Power Purchase Agreement (PPA) that did not contain a provision regarding REC ownership. However, for 2010 PacifiCorp proposed a PPA wherein PacifiCorp owns the RECs. Cottonwood hydro rejected the proposed PPA and the Parties executed an alternative PPA that provides that either, or both, parties may petition the Commission for a declaration of which party owns the RECs.

Consequently, on March 10, 2010, Cottonwood Hydro filed a request for agency action with the Commission requesting that the Commission declare Cottonwood Hydro shall be the owner of the RECs generated by its facilities. In this filing, Cottonwood Hydro also requested that the Commission resolve the dispute between Cottonwood Hydro and PacifiCorp regarding the ownership of RECs by adding the following language to PacifiCorp's 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."

Cottonwood Hydro cites the language of Electric Service Schedule No. 135, item number 7 to justify its claim that the ownership of the RECs it generates must remain with the generator.¹ Cottonwood Hydro further indicates that the RECs, which would amount to more than \$35,000 in sales, are vital for its survival and would not impact PacifiCorp's operations.

¹ Schedule No. 135 reads, "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."

On April 12, 2010, PacifiCorp filed a letter with the Commission responding to the Cottonwood Hydro's request for agency action. In its letter, PacifiCorp rejected Cottonwood Hydro's action requests. PacifiCorp argues that by purchasing energy from a particular qualifying facility (QF), PacifiCorp and its ratepayers acquire the right to claim to have bought the energy from a specific renewable energy. Thus, PacifiCorp's position appears to be that the RECs from a QF should be transferred to the Company unless the Company agrees otherwise.

Regarding the proposed additional language to Schedule 37, PacifiCorp rejects Cottonwood's proposal and indicates that Commission intervention in a negotiation of a contract between two private companies by changing a tariff would open the door for all vendors to all utilities under its jurisdiction to seek such an intervention to compel results on issues that may concern its interest.

DISCUSSION

The Division agrees with PacifiCorp's assertion that RECs represent the environmental attributes of renewable energy generation. The Division also agrees that under the Public Utility Regulatory Policy Act or PURPA, that the utility is required to purchase power from a QF. However, this does not necessarily resolve the issue of ownership. The Division notes that RECs can be both bundled with the energy and sold together, or they can be unbundled and sold separately from the electricity that created it. Thus, it is possible to purchase RECs from an entity other than the electricity provider or generator that produced or caused the creation of the REC. Additionally, the Federal Energy Regulatory Commission (FERC) has 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.²

The issue of who owns the RECs has come before the Commission before in Docket No. 03-035-14.³ However, the Commission's Order in that Docket did not definitively indicate who owns the RECs. Rather the Order stated that, "Therefore, 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." (Order at page 25) The Division also notices that 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 135 properly addressed the specific issue at hand.

Furthermore, PURPA defines two types of QF: (1) small power production facilities whose primary fuel source is renewable resources and (2) co-generation facilities that sequentially produce electricity and another form of thermal energy such as heat or steam. Of these two types of QF, RECs pertain only to the first or small power production facilities. Therefore, it would not be appropriate to introduce language into Schedule 37 to resolve a contractual dispute since that tariff and its use is not limited to generation facilities that simultaneously produce RECs. The primary or original purpose of Schedule 37 was to provide a posted price for these facilities to relieve the administrative burden of contract negotiation and implementing a QF agreement for small facilities.

Additionally, the use of Schedule 37 is not limited to specifying payments for small QFs. Rather, the posted prices contained in the schedule provide general information on the Company's current avoided costs and are useful in a variety of regulatory applications. For

² "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.

³ In the Matter of Application of PacifiCorp for Approval of an IRP-Based Avoided Cost Methodology for QR Projects Larger Than One Megawatt.

example, net metering customers can take payment options under Schedule 37 posted rates. Recently, the Commission ordered that these rates be updated annually for that purpose.

For the reasons stated herein, the Division believes that an informal adjudication process such as that requested by Cottonwood Hydro is not the proper way to address this issue. Therefore, the Division recommends that the Commission open a new Docket to address this issue and notice it appropriately. This will provide all interested parties with the opportunity to respond appropriately.

However, if the Commission determines that the RECs should remain with the production owner, in this case Cottonwood Hydro, 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 Hydro's request to modify the language of Schedule 37 in that regard.

CC: Susannah Williams, Cottonwood Hydro
Dave Taylor, RMP
Michele Beck, OCS