

- BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH -

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In the Matter of the Power Purchase )  
Agreement between Cottonwood Hydro, ) DOCKET NO. 12-035-90  
LLC and PacifiCorp, dated December 14, ) ORDER ON REQUEST  
2011 ) FOR AGENCY ACTION  
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ISSUED: October 1, 2012

SYNOPSIS

This order denies the request of Cottonwood Hydro, LLC for agency action that would unilaterally change the terms of certain power purchase agreements.

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By The Commission:

This matter is before the Commission on the request for agency action (“Request”) of Cottonwood Hydro, LLC (“Cottonwood”) filed August 3, 2012. Cottonwood asks the Commission to require PacifiCorp, a public utility doing business in Utah as Rocky Mountain Power, to amend two power purchase agreements (“PPAs”) Cottonwood executed with PacifiCorp, effective on December 14, 2011. The requested amendments would extend Cottonwood’s time to perform certain obligations specified in the PPAs. In general terms, the obligations at issue require Cottonwood to provide to PacifiCorp, within a specified time period, a Federal Energy Regulatory Commission (“FERC”) hydroelectric license or exemption for the two generating units that are the subject of the PPAs.

On August 30, 2012, the Division of Public Utilities (“Division”) filed a memorandum entitled “Action Request Response,” summarizing the factual basis of the Request and recommending the Commission schedule briefing and hearings on the question of the Commission’s jurisdiction to resolve a contractual matter of this nature.

On September 4, 2012, PacifiCorp filed a letter recommending the Commission deny the Request, principally because Cottonwood's time to perform under the PPAs has not yet expired. Alternatively, PacifiCorp supports the Division's recommendation that a scheduling conference be set to determine what further process is appropriate for considering the Request.

BACKGROUND

Cottonwood is a small, family-owned hydroelectric plant comprised of two generating units located in Little Cottonwood Canyon. In December 2009, Cottonwood interconnected one of its two generators, the lower facility, to PacifiCorp's grid as a qualifying facility ("QF") and signed a two year PPA. Cottonwood states PacifiCorp accepted the QF FERC self-certify number formerly associated with the facility as evidence of Cottonwood's jurisdictional status.

In 2011 Cottonwood rehabilitated the second generating unit, the upper facility, and created a separate interconnection with the PacifiCorp grid. Also in 2011, Cottonwood and PacifiCorp renewed the lower facility PPA and signed a second PPA pertaining to the upper facility. Each PPA has an effective date of December 14, 2011. Each PPA requires Cottonwood to provide to PacifiCorp, within six months of the effective date, a "Federal Power Act hydroelectric license or exemption issued by the ...FERC... for the Facility or a written statement from FERC explaining why the Facility does not require such a license or exemption" (referred to hereafter as the "license or exemption requirement").<sup>1</sup> Each PPA further provides for Cottonwood to receive a six month extension in meeting the license or exemption

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<sup>1</sup> Rocky Mountain Power's Response to Cottonwood Hydro, LLC's Request for Agency Action, September 4, 2012, p.1 (quoting Section 1.4 of the PPA for the lower facility and Section 1.2.4 of the PPA for the upper facility).

requirement deadline “so long as Seller [Cottonwood] has applied for and is diligently pursuing a FERC hydroelectric license or exemption.”<sup>2</sup>

In July 2011, Cottonwood sought an order from FERC declaring Cottonwood’s two units to be non-jurisdictional and therefore not to require a FERC license or exemption. In May 2012, FERC denied Cottonwood’s request. In June 2012, Cottonwood filed a request for rehearing which is pending. In light of these events, Cottonwood requested PacifiCorp to extend the six month deadline for satisfying the license or exemption requirement. On June 21, 2012, PacifiCorp provided Cottonwood a letter extending the deadline (by six months) to December 14, 2012, in accordance with the aforementioned terms in the PPAs.

Recognizing that FERC would not consider its request for rehearing until October, 2012, Cottonwood in July 2012 requested PacifiCorp to extend again the license or exemption requirement deadline, this time to December 2013. PacifiCorp responded on July 30, 2012 that the PPAs do not provide for such an extension. PacifiCorp also stated, however, that Cottonwood would not be in default until at the earliest December 17, 2012, and that the PPAs afford Cottonwood an additional 120 days to cure the default. Thus, according to PacifiCorp no termination of the PPAs would occur until at least April 17, 2013. In response to PacifiCorp’s denial of the additional deadline extension, Cottonwood filed the Request and asks the Commission to resolve this dispute by unilaterally amending the PPAs to allow Cottonwood an additional three years, i.e., until December 14, 2015, to obtain a license or exemption from FERC.

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<sup>2</sup> Id.

PARTIES' POSITIONS

Cottonwood argues PacifiCorp is unfairly refusing to extend the license or exemption requirement deadline. Cottonwood states:

FERC processes are complicated, expensive and time consuming, and requiring Cottonwood Hydro to obtain a license in such a short time frame is not in conformity with known standards in the electric industry in the American west... For the past year, Cottonwood Hydro has worked diligently to obtain a determination regarding its jurisdictional status and has been forthcoming with PacifiCorp about the situation with FERC. In turn, without any compelling reason for so doing, PacifiCorp has unreasonably denied Cottonwood Hydro's request for additional time to resolve its jurisdictional status. PacifiCorp will not be harmed in any way by allowing Cottonwood Hydro additional time to resolve its jurisdictional status with FERC. Conversely, Cottonwood Hydro, and the family that owns the business, will be financially devastated if PacifiCorp places Cottonwood Hydro in default and terminates the PPAs.<sup>3</sup>

Cottonwood's discussions with FERC lead Cottonwood to conclude meeting the license or exemption requirement in each PPA may take another two or even three years. Cottonwood believes it is unreasonable and unfair for PacifiCorp to deny Cottonwood the requested contract extension in light of the FERC timetable. PacifiCorp responds to Cottonwood's Request with three arguments.

First, PacifiCorp asserts the Request is not ripe for Commission action. PacifiCorp notes it will have no right to terminate the PPAs for Cottonwood's failure to obtain the required license or exemption until April 17, 2013, as long as Cottonwood continues to diligently pursue them.

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<sup>3</sup> Request for Agency Action of Cottonwood Hydro, LLC, August 1, 2012, p. 2.

Second, PacifiCorp argues the PPAs are the product of several months of negotiation during which PacifiCorp and Cottonwood recognized the uncertainty of regulatory proceedings. Cottonwood's opportunity to receive a six month extension of the license or exemption requirement deadline is the result of the parties' negotiations concerning that uncertainty. PacifiCorp contends Cottonwood had the responsibility to know the timeline for accomplishing the regulatory requirements. The fact that Cottonwood misjudged the timeline, and now may find itself unable to meet the license or exemption requirement, is not a basis for the Commission to amend unilaterally the PPAs.

Third, PacifiCorp entered the Cottonwood PPAs on the basis Cottonwood was a QF pursuant to the Public Utility Regulatory Policies Act and the implementing regulations found in 18 CFR 292. PacifiCorp notes QF status affords the generator the advantage of receiving avoided cost rates. Moreover, according to PacifiCorp, for a small hydroelectric facility like Cottonwood, QF status depends, among other things, on the facility obtaining a FERC exemption or license.<sup>4</sup> PacifiCorp states:

PacifiCorp included the requirement that Cottonwood Hydro obtain the FERC exemption or license within a fairly short period of time in order to allow PacifiCorp to confirm that it was in fact contracting with a qualifying facility. Until such time as Cottonwood Hydro obtains the required FERC exemption or license, it is not a qualifying facility and therefore does not qualify to receive avoided cost rates... It is not appropriate to require the customers of Rocky Mountain Power to pay the expenses associated with the avoided cost rates for power from a facility that is not a qualifying facility. Instead, given the questions now raised by FERC, it is appropriate to allow the power purchase agreement to be terminated (should Cottonwood Hydro not obtain the required license or exemption by the required date), require Cottonwood Hydro to obtain those approvals required under federal law to be a qualifying facility and

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<sup>4</sup> See 18 CFR 292.203(c) and 292.208.

then allow Cottonwood Hydro to enter into new power purchase agreements that contain the then current avoided costs rates. This process ensures compliance with federal law and that the customers of Rocky Mountain Power in fact remain neutral with respect to the avoided cost rates paid to qualifying facilities.<sup>5</sup>

PacifiCorp contends unilaterally amending the PPAs to provide Cottonwood three additional years to obtain a FERC exemption or license would put PacifiCorp in the position of paying avoided cost rates to a generation facility that is not a QF. “Such a circumstance would be contrary to federal law and would create a perception in Utah that a qualifying facility can selectively lock in avoided cost rates well in advance of actually qualifying for such rates (a circumstance that is detrimental to the customers of Rocky Mountain Power).”<sup>6</sup>

#### DISCUSSION, FINDINGS, AND CONCLUSIONS

The relief Cottonwood seeks would require the Commission to set aside the license or exemption requirement in each of the two PPAs negotiated by Cottonwood and PacifiCorp, and substitute a new requirement, in effect allowing Cottonwood an additional three years to obtain the respective license or exemption. The only justifications offered for this action are that Cottonwood no longer considers the original license or exemption requirement to be fair in light of FERC’s timetable, and Cottonwood believes PacifiCorp will not be harmed by the new license or exemption requirement it advocates. Notably, Cottonwood’s satisfaction of the license or exemption requirement goes to the heart of its entitlement to the QF avoided cost rates it receives under the PPAs. Furthermore, the effect of the requested change in the license or exemption requirement may be to allow Cottonwood to receive for nearly three additional years

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<sup>5</sup> Rocky Mountain Power’s Response to Cottonwood Hydro, LLC’s Request for Agency Action, September 4, 2012, pp. 2-3.

<sup>6</sup> Id. p. 3.

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avoided cost rates for which its units may not be qualified. Whether the Commission has the authority to take such action is subject to question. Whether such action is appropriate in this instance and will lead to just and reasonable rates is also subject to question. We do not reach either of these questions in this order, however, because Cottonwood's Request is premature and is therefore denied. The issue of Cottonwood's need for, or entitlement to, a license or exemption for its upper and lower facilities is before FERC, and action is expected this month. Moreover, it is undisputed that Cottonwood still has more than six months to satisfy the license or exemption requirement in each PPA before PacifiCorp will consider the PPAs terminated.<sup>7</sup>

ORDER

The Request for Agency Action is denied. In accordance with Utah Code Annotated § 63G-4-201(3)(d)(ii), Cottonwood may request a hearing before the Commission to challenge this denial.

DATED at Salt Lake City, Utah this 1<sup>st</sup> day of October, 2012.

/s/ Ted Boyer, Chairman

/s/ Ric Campbell, Commissioner

/s/ Ron Allen, Commissioner

Attest:

/s/ Gary L. Widerburg  
Commission Secretary  
DH#234525

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<sup>7</sup> Id. p. 2.

Notice of Opportunity for Agency Review or Rehearing

Pursuant to Utah Code Ann. §§ 63G-4-301 and 54-7-15, a party may seek agency review or rehearing of this order by filing a request for review or rehearing with the Commission within 30 days after the issuance of the order. 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 fails to grant a request for review or rehearing within 20 days after the filing of a request for review or rehearing, 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 requirements of Utah Code Ann. §§ 63G-4-401, 63G-4-403, and the Utah Rules of Appellate Procedure.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 1<sup>st</sup> day of October, 2012, a true and correct copy of the foregoing Order on Request for Agency Action, was served upon the following as indicated below:

By Electronic-Mail:

Mark C. Moench ([mark.moench@pacificorp.com](mailto:mark.moench@pacificorp.com))  
Rocky Mountain Power

Susannah Williams ([susannah@cottonwoodhydro.com](mailto:susannah@cottonwoodhydro.com))  
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By Hand-Delivery:

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Administrative Assistant