

- BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH -

)
In the Matter of the Application of Rocky) DOCKET NO. 13-035-115
Mountain Power for Approval of the Power)
Purchase Agreement between PacifiCorp and)
Blue Mountain Power Partners, LLC)
)
In the Matter of the Application of Rocky) DOCKET NO. 13-035-116
Mountain Power for Approval of the Power)
Purchase Agreement between PacifiCorp and) ORDER APPROVING APPLICATIONS
Latigo Wind Park, LLC) AND DENYING INTERVENTION OF
) MRS. CORINNE RORING
)

ISSUED: October 3, 2013

SYNOPSIS

The Commission approves the Power Purchase Agreement between PacifiCorp and Blue Mountain Power Partners, LLC and the Power Purchase Agreement between PacifiCorp and Latigo Wind Park, LLC and denies the petition to intervene of Mrs. Corinne Roring.

By The Commission:

INTRODUCTION

These matters are before the Public Service Commission of Utah (“Commission”) on the applications of PacifiCorp, doing business as Rocky Mountain Power (“PacifiCorp”), for approval of: (1) a power purchase agreement (“PPA”) between PacifiCorp and Blue Mountain Power Partners, LLC (“Blue Mountain”), in Docket No. 13-035-115 (“Blue Mountain Application”); and (2) a PPA between PacifiCorp and Latigo Wind Park, LLC (“Latigo”), in Docket No. 13-035-116 (“Latigo Application”). The Blue Mountain and Latigo Applications are

collectively referred to hereafter as the “Applications” and the Blue Mountain PPA and Latigo PPA are collectively referred to hereafter as the “PPAs”.

PROCEDURAL HISTORY

The PPAs were executed on July 3, 2013, and PacifiCorp filed the Applications with the Commission on July 9, 2013. Pursuant to the Commission’s August 6, 2013, Scheduling Order, the following parties filed comments on August 26, 2013: Latigo, in Docket No. 13-035-116; the Division of Public Utilities (“Division”), in Docket Nos. 13-035-115 and 116; the Office of Consumer Services (“Office”), in Docket Nos. 13-035-115 and 116; Utah Clean Energy (“UCE”), in Docket Nos. 13-035-115 and 116; and Ellis-Hall Consultants, LLC (“EHC”), in Docket Nos. 13-035-115 and 116.¹

On August 12, 2013, the Commission granted intervention to Blue Mountain and EHC in Docket No. 13-035-115 and to Latigo and EHC in 13-035-116.

On August 20, 2013, Latigo filed a motion in Docket No. 13-035-116 to restrict application of the non-disclosure agreement. On August 26, 2013, EHC filed the following motions: motion and memorandum to disqualify counsel, in Docket No. 13-035-115; motion for leave to file overlength objection, in Docket Nos. 13-035-115 and 116; statement of discovery issues and motion and memorandum to compel Rocky Mountain Power, in Docket Nos. 13-035-115 and 116; statement of discovery issues and motion and memorandum to compel Blue Mountain, in Docket No. 13-035-115; and statement of discovery issues and motion and memorandum to compel Latigo, in Docket No. 13-035-116.

¹ EHC’s August 26, 2013, comments were styled as “objections to approval” of the Blue Mountain PPA and Latigo PPAs.

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PacifiCorp, Latigo and Blue Mountain filed responses to the respective motions of EHC to compel on September 5, 2013, in Docket Nos. 13-035-115 and 116 and EHC filed an opposition to Latigo's motion to restrict the application of the non-disclosure agreement on September 5, 2013, in Docket No. 13-035-116.

Reply comments were filed September 9, 2013, by: PacifiCorp, in Docket Nos. 13-035-115 and 116; Blue Mountain, in Docket No. 13-035-115; and UCE, in Docket Nos. 13-035-115 and 116. Latigo filed reply comments in Docket No. 13-035-116 on September 10, 2013.

On September 11, EHC filed replies in support of motions to compel Blue Mountain and PacifiCorp in Docket No. 13-035-115 and replies in support of motions to compel Latigo and PacifiCorp in Docket No. 13-035-116.

On August 28, 2013, the Commission issued an order denying EHC's motion to disqualify counsel in Docket No. 13-035-115. On September 16, 2013, the Commission held a duly-noticed pre-hearing conference at which it granted EHC's motions to file overlength objections and denied EHC's motions to compel PacifiCorp, Blue Mountain, and Latigo, in Docket Nos. 13-035-115 and 116.

On September 17, 2013, the Commission issued an order granting intervention to UCE in Docket Nos. 13-035-115 and 116.

The Commission convened a duly-noticed hearing on September 19, 2013, to consider the Applications, at which time it denied Latigo's motion to restrict the application of the non-disclosure agreement. All parties participated in and provided testimony at the hearing.

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On September 27, 2013, in Docket No. 13-035-116, the Commission received the emergency petition to intervene of Mrs. Corinne Roring, Trustee of the John Edward Roring and Corinne Nielson Roring Revocable Living Trust dated December 28, 1992, and objection to approval of the PPA between PacifiCorp and Latigo (“Roring Petition”). Mrs. Roring also filed a notice of intent to file the Roring Petition, in Docket No. 13-035-115 and request for time to file erratum to the Roring Petition in Docket No. 13-035-116 on October 1, 2013. PacifiCorp and Latigo filed responses to the Roring Petition in Docket No. 13-035-116 on October 2, 2013, and Blue Mountain filed an objection to the notice of intent to file the Roring Petition in Docket No. 13-035-115 on October 3, 2013.

The Commission’s August 6, 2013, Scheduling Order set an intervention filing deadline of August 26, 2013. As of the date of the Roring Petition, the parties have concluded their participation in this matter, except for the opportunity to seek reconsideration or rehearing. Moreover, as discussed in more detail below, the Commission’s consideration of whether the PPAs in these dockets are in the public interest rests primarily on the question of whether the rates paid under the PPAs will be just and reasonable to ratepayers because they do not exceed the utility’s avoided cost of acquiring or producing the same energy and capacity through other means. The issues raised in the Roring’s Petition are not relevant to this question. Based on the foregoing, we find that the interests of justice and orderly and prompt conduct of this proceeding will be materially impaired by allowing Mrs. Roring to intervene at this late stage, therefore, the Roring Petition is denied.²

² The Commission observes that Mrs. Roring was present at the September 19, 2013, hearing and that her son, Mike Roring, was called as a witness by EHC at the hearing.

REGULATORY FRAMEWORK

I. Public Utility Regulatory Policies Act of 1978

A. Rates Paid to Qualifying Facilities for Energy and Capacity

The Public Utility Regulatory Policies Act (“PURPA”) was passed by the United States Congress in 1978 to encourage, among other things: (1) the conservation of electric energy; (2) increased efficiency in the use of facilities and resources by electric utilities; (3) equitable retail rates for electric consumers; (4) expeditious development of hydroelectric potential at existing small dams; and (5) conservation of natural gas while ensuring that rates to natural gas consumers are equitable.³

One of the ways PURPA accomplishes these goals is through the establishment of a class of generating facilities that receive special rate and regulatory treatment. Generating facilities in this group are known as qualifying facilities (“QFs”) and fall into two categories: qualifying small power production facilities and qualifying cogeneration facilities. Latigo and Blue Mountain are proposed small power production QFs.

The Federal Energy Regulatory Commission’s (“FERC”) regulations implementing PURPA provide that rates paid to QFs must “be just and reasonable to the electric consumer of the electric utility” and “not discriminate against qualifying cogeneration and small power production facilities,” and that “nothing in [FERC’s regulations] requires any electric utility to pay more than the avoided costs for purchases.”⁴ FERC’s regulations further define avoided costs as “the incremental costs to an electric utility of electric energy or capacity or both

³ See 16 U.S.C. §2601

⁴ 18 C.F.R. § 292.304(a)(1)-(2).

which, but for the purchase from the qualifying facility or qualifying facilities, such utility would generate itself or purchase from another source.”⁵

While PURPA directed the FERC to prescribe regulations governing the implementation of PURPA, it gave individual states the responsibility to implement FERC’s regulations.⁶ This mandate is consistent with Utah Code Ann. § 54-12-2, which requires purchasing utilities such as PacifiCorp to offer to purchase power from QFs and the Commission to establish rates for such purchases based on the utility’s avoided costs. The statute also allows the Commission to adopt further rules which encourage the development of QFs. To this end, the Commission has determined through a series of fully-litigated dockets the appropriate method for calculating avoided cost rates for large wind QFs (i.e., wind facilities with greater than three megawatts of capacity) subject to Rocky Mountain Power’s Electric Service Schedule No. 38, Qualifying Facility Procedures (“Schedule 38”).⁷ Blue Mountain and Latigo are both wind QFs subject to Schedule 38.

II. Schedule 38

Schedule 38 sets forth procedures for negotiating PPAs and interconnection agreements between PacifiCorp and QFs seeking to make energy and capacity sales to

⁵ 18 C.F.R. § 292.101(b)(6).

⁶ See 16 U.S.C. 824a-3(f); accord, *FERC v. Mississippi*, 456 U.S. 742, 751 (1982).

⁷ See *In the Matter of Blue Mountain Power Partners, LLC's Request that the Public Service Commission of Utah Require PacifiCorp to Provide the Approved Price for Wind Power for the Blue Mountain Project*, Docket No. 12-2557-01 (Order on Request for Agency Action; September 20, 2012); *In the Matter of the Application of PacifiCorp for Approval of an IRP-based Avoided Cost Methodology for QF Projects Larger than One Megawatt*, Docket No. 03-035-14 (Report and Order; October 31, 2005); and *In the Matter of the Application of Rocky Mountain Power for Approval of Changes to Renewable Avoided Cost Methodology for Qualifying Facilities Projects Larger than Three Megawatts*, Docket No. 12-035-100 (Report and Order; August 16, 2013).

PacifiCorp.⁸ The Commission explained the impetus for Schedule 38 as follows when it was originally approved in 2003:

The introduction of this schedule addresses an impediment to non-utility generation identified in an informal investigation undertaken by the Commission at the request of the Utah Legislative Energy Policy Task Force. In that investigation, potential developers cited the lack of a clear process for discovering both the rate a QF is likely to be paid and the steps required to obtain a timely purchase power contract.⁹

In other words, the purpose of Schedule 38 is to prevent barriers to the execution of PPAs between PacifiCorp and prospective or existing QFs. Preventing barriers to QF development is consistent with PURPA and Utah's policy to encourage QF development. As set forth in UCA § 54-12-1(2):

It is the policy of this state to encourage the development of independent and qualifying power production and cogeneration facilities, to promote a diverse array of economical and permanently sustainable energy resources in an environmentally acceptable manner, and to conserve our finite and expensive energy resources and provide for their most efficient and economic utilization.

A. Power Purchase Agreements

Once certain conditions are met by a QF, PacifiCorp is obligated to provide an indicative pricing proposal for capacity and energy to the QF based upon the Commission-approved QF rate methodology. The proposal may also include other indicative terms and conditions, tailored to the individual characteristics of the proposed project. Such a proposal

⁸Schedule 38 applies to owners of existing or proposed QFs located in PacifiCorp's Utah service territory with a design capacity greater than one megawatt for a cogeneration facility or greater than three megawatts for a small power production facility that desire to make energy and capacity sales to PacifiCorp. Blue Mountain and Latigo are both proposed QFs that would be located in PacifiCorp's Utah service territory with design capacities greater than three megawatts.

⁹*In the Matter of Proposed PACIFICORP Tariff P.S.C.U. No. 44, for Schedule 38 Qualifying Facility Procedures*, Docket No. 02-035-T11 (Order; February 24, 2003 at p.1)

may be used by the QF to make determinations regarding project planning, financing and feasibility.

Once an indicative pricing proposal is provided, Schedule 38 provides further procedures pertaining to the execution of a PPA between PacifiCorp and a QF. These procedures allow PacifiCorp to require additional information from the QF as part of its due diligence but prohibit PacifiCorp from unreasonably delaying negotiations.

B. Interconnection Agreements

In addition to PPA negotiations, Schedule 38 describes the process for negotiating interconnection agreements required for the physical interconnection of a QF to PacifiCorp's distribution system, or in the case of Blue Mountain and Latigo, PacifiCorp's transmission system. Under Schedule 38, PacifiCorp reserves the right to condition execution of a PPA upon simultaneous execution of an interconnection agreement. Schedule 38 further provides that PacifiCorp's obligation to make purchases from a QF is conditioned upon all necessary interconnection arrangements being consummated.

As described in Schedule 38, interconnections impacting PacifiCorp's transmission system are processed through a PacifiCorp work group that is separate from the work group that provides indicative pricing and negotiates PPAs, in accordance with FERC's functional separation requirement. Such interconnection applications are processed through PacifiCorp Transmission Services, fall under FERC's jurisdiction, and are governed by the procedures set forth in PacifiCorp's FERC-approved Open Access Transmission Tariff ("OATT").

C. Dispute Resolution

Finally, Schedule 38 provides the address of a website that outlines the Commission's informal and formal dispute resolution processes for QFs with potential complaints against PacifiCorp regarding the PPA negotiation process.

DISCUSSION, FINDINGS AND CONCLUSIONS

I. Parties' Positions

A. PacifiCorp

PacifiCorp requests the Commission approve the Applications and find the terms of both PPAs to be just, reasonable and in the public interest. PacifiCorp asserts it has complied with all relevant Commission orders and applicable schedules in the negotiation and execution of the PPAs.

B. Blue Mountain

Blue Mountain urges the Commission to approve its PPA and asserts it has complied with all applicable Utah laws in connection with its efforts to obtain a PPA from PacifiCorp.

C. Latigo

Latigo also urges the Commission to approve its PPA and asserts it has complied with all applicable Utah laws in connection with its efforts to obtain a PPA from PacifiCorp.

D. Division

The Division asserts the Commission can approve both PPAs because both comply with the Commission orders establishing the QF rate avoided cost methodology in effect

at the time the PPAs were executed and because the PPAs have been negotiated in good faith relying on such Commission orders.¹⁰

E. Office

The Office takes issue with the Commission-approved QF rate methodology in effect at the time the PPAs were executed and therefore does not recommend approval. The Office, however, does not dispute that PacifiCorp followed the Commission-ordered methodology in establishing pricing for both PPAs, raises no issues regarding compliance with Schedule 38, and does not expressly oppose approval of the PPAs.

F. UCE

UCE asserts the PPAs are based on the Commission-approved QF price methodology in effect at the time of execution and recommends approval of the PPAs as just and reasonable and in the public interest. UCE further asserts the PPAs will mitigate risks to ratepayers by allowing for a diversified resource mix and locking in reasonable prices for a fixed time in the face of volatile and rising power generation fuel prices and environmental compliance costs.

G. EHC

EHC is currently in the process of negotiating a PPA and interconnection agreement with PacifiCorp for its own project and is the only party opposing approval of the PPAs in these proceedings.

In support of its objection, EHC argues the Applications should be denied because the PPAs represent unenforceable contracts lacking sufficient specificity in material terms. In

¹⁰ Notwithstanding the Division's assertion that the Commission can approve the PPAs, the Division takes issue with the Commission-approved QF rate methodology in effect at the time the PPAs were executed.

support of this argument EHC claims the PPAs: (a) allow Blue Mountain and Latigo to designate different wind turbine types after execution of the PPAs; (b) do not require Blue Mountain or Latigo to establish site control or a route for transmission interconnection as required by PacifiCorp's OATT; (c) permit execution of the PPAs prior to execution of interconnection agreements; and (d) contain mis-statements regarding land use permits required under the PPAs.

Additionally, EHC argues the PPAs are the product of discriminatory treatment by PacifiCorp. EHC's claim of discriminatory treatment is based on a series of allegations. First, EHC alleges PacifiCorp executed the PPAs without requiring Blue Mountain or Latigo to first obtain interconnection agreements in contrast to other proposed QFs (including EHC) that were required to execute interconnection agreements prior to execution of a PPA. Second, EHC alleges PacifiCorp engaged in discriminatory treatment by expediting approval of the Blue Mountain and Latigo PPAs while at the same time delaying the execution of EHC's interconnection agreement and PPA.

II. Findings and Conclusions

EHC claims the Commission cannot approve the PPAs because they are unenforceable contracts lacking sufficient specificity in material terms. EHC further argues that the Commission has a duty to ensure that PPAs are enforceable and in the public interest. We agree that Commission approval of the Applications must be based on a finding of public interest; however, consistent with PURPA, FERC regulations and state law, the public interest in this instance is a determination of whether the rates paid under the PPA will be just and reasonable to ratepayers because they do not exceed the utility's avoided cost of acquiring or producing the same energy and capacity through other means.

In making this determination, the Commission's primary consideration is whether the PPA reflects pricing consistent with our approved avoided cost methodology. In other words, in evaluating an executed PPA the question of approval turns on whether under the PPA's terms the QF will be paid no more than the utility's avoided cost. No party in this proceeding (including EHC) disputes that the pricing reflected in the PPAs is consistent with the Commission-approved avoided cost methodology in effect at the time of the PPAs' execution. Based on the evidence before us, we find the PPAs are in the public interest because their pricing is consistent with our approved orders.

EHC further argues that under Schedule 38 PacifiCorp is required to perform due diligence and that PPAs allegedly lacking specificity in material terms are evidence of PacifiCorp's failure to perform required due diligence. As previously noted, one of Schedule 38's purposes is to define the process by which QFs can identify the rate it will likely be paid for its power and the steps required to obtain a PPA with the utility. As such, Schedule 38 does not prescribe the due diligence that PacifiCorp *must* perform but rather acts as a check on the due diligence PacifiCorp *may* perform. Our review of Applications requesting approval of executed PPAs helps us assure Schedule 38 is being properly administered to provide QFs an appropriate process for obtaining indicative pricing and PPAs at avoided cost pricing. Based on the testimony and the evidence presented by PacifiCorp, Latigo, Blue Mountain, the Division and Office, we find the PPAs at issue in these dockets were negotiated and executed consistent with the requirements of Schedule 38.

EHC's claims of discrimination rest on assertions it has received different treatment under Schedule 38 than Blue Mountain and Latigo. These claims are outside the scope

of our consideration of the Blue Mountain and Latigo PPAs in these proceedings. The current proceedings are not the forum to address allegations regarding PacifiCorp's conduct toward EHC in the PPA and interconnection agreement negotiation processes. Importantly, Schedule 38 provides a Commission process to address EHC's grievances. We note that EHC has not availed itself of that process. Further, as described above, transmission interconnections are governed by the procedures set forth in PacifiCorp's FERC-approved OATT and are for FERC's consideration.

Based upon the Applications, our review of the PPAs, the comments filed in these dockets, and the testimony provided at the hearing, we find the prices, terms and conditions of both PPAs are consistent with applicable state laws, relevant Commission orders, and Schedule 38. Therefore, we conclude the PPAs are just and reasonable and in the public interest.

ORDER

Pursuant to the foregoing discussion, findings and conclusions, we order:

1. The Power Purchase Agreement between PacifiCorp and Blue Mountain Power Partners, LLC is approved.
2. The Power Purchase Agreement between PacifiCorp and Latigo Wind Park, LLC, is approved.
3. The petition to intervene of Mrs. Corinne Roring is denied.

DATED at Salt Lake City, Utah, this 3rd day of October, 2013.

/s/ Jordan A. White
Presiding Officer

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Approved and Confirmed this 3rd day of October, 2013, as the Order of the Public Service Commission of Utah.

/s/ Ron Allen, Chairman

/s/ David R. Clark, Commissioner

/s/ Thad LeVar, Commissioner

Attest:

/s/ Gary L. Widerburg
Commission Secretary
DW#247642

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 CERTIFY that on the 3rd day of October, 2013, a true and correct copy of the foregoing ORDER APPROVING APPLICATIONS AND DENYING INTERVENTION OF MRS. CORINNE RORING was served upon the following as indicated below:

By U.S. Mail:

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