

- BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH -

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In the Matter of the Request of Rocky Mountain Power for a Limited Stay of Schedule 38, Qualifying Facility Procedures )  
DOCKET NO. 14-035-65 )  
ORDER DENYING REQUEST FOR LIMITED STAY OF SCHEDULE 38 )  
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ISSUED: June 23, 2014

**SYNOPSIS**

The Commission denies PacifiCorp's request for limited stay of Schedule 38.

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**PROCEDURAL HISTORY**

This matter is before the Public Service Commission of Utah ("Commission") on Rocky Mountain Power's, dba PacifiCorp ("PacifiCorp") May 22, 2014, request ("Request") for limited stay of certain provisions of Electric Service Schedule No. 38, Qualifying Facility Procedures ("Schedule 38"). Specifically, PacifiCorp requests the Commission grant PacifiCorp a limited stay (90 days) of the provisions of Schedule 38, paragraph I.B.3, that requires PacifiCorp to provide indicative pricing to prospective qualifying facilities ("QF") seeking power purchase agreements ("PPA") within 30 days of the completion of all requirements of paragraph I.B.2.

Pursuant to the Commission's May 23, 2014, notice of filing and comment period, the Division of Public Utilities ("Division") filed comments on June 4, 2014, and the following parties filed comments on June 6, 2014: the Office of Consumer Services ("Office"), Ellis-Hall Consultants, LLC ("EHC"), Energy of Utah ("EOU") and Utah Clean Energy ("UCE"). PacifiCorp filed reply comments on June 13, 2014.

**DISCUSSION, FINDINGS AND CONCLUSIONS**

**I. Parties' Positions**

**A. Applicant**

The Request states since the Commission's August 16, 2013, Order in Docket No. 12-035-100 ("Phase II Order"),<sup>1</sup> PacifiCorp has been asked to provide indicative prices for over 25 different Utah qualifying facility ("QF") projects totaling over 1,700 megawatts ("MW") of nameplate capacity, predominantly made up of solar projects located in southern Utah. During this same timeframe PacifiCorp indicates it also received indicative pricing requests from several QFs located outside Utah that also require the preparation of prices utilizing PacifiCorp's Generation and Regulation Initiatives Decision ("GRID") model. As of the date of the Request, PacifiCorp indicates it has eleven outstanding requests for indicative pricing in Utah and has been contacted by developers requesting pricing for additional projects totaling approximately 350 MW of nameplate capacity.

PacifiCorp provides the following explanation in support of its Request:

Due to the volume of requests past and currently-outstanding requests, the Company will not be able to complete the requested pricing studies within the timeframe contemplated in Schedule 38, which calls for prices to be returned to a QF developer within 30 days of submission of all required project-related information. Despite the Company's best efforts, the 30-day clock has already elapsed for three of these requests and will expire shortly for the remaining projects. The Company continues to process the requests and will provide indicative prices as soon as possible; it is

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<sup>1</sup> *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 (Order on Phase II Issues; August 16, 2013)

anticipated that all outstanding requests can be completed no later than August 20, 2014.<sup>2</sup>

PacifiCorp asserts its requested stay “is in the best interests of the Company and its ratepayers.”<sup>3</sup> PacifiCorp further claims that although it is committed to following the requirements of its tariffs, it has become impossible to keep up with the current volume of requests for pricing received over the past several months. As such, PacifiCorp contends “[a] brief, limited stay of the requirements of Schedule 38 will allow the Company to clear the backlog and will not cause harm to the Company’s customers.”<sup>4</sup>

In its reply comments, PacifiCorp provides further explanation and clarification regarding its Request. PacifiCorp clarifies it will not wait until the expiration of the 90 days to provide indicative pricing if the Request is granted. Rather, PacifiCorp represents it is currently working to respond to indicative pricing requests and expects that both the Parowan Solar project being developed by EOU and the Monticello II project being developed by EHC will receive indicative pricing before the end of June 2014. PacifiCorp further explains that in addition to a high volume of indicative pricing requests, delays are further exacerbated by the necessity to incorporate changes into the GRID model used for indicative prices associated with its 2013 Integrated Resource Plan (“IRP”) Update and an identified transmission constraint located in Utah.

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<sup>2</sup> Request at p. 3.

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

**B. Division**

The Division's comments reiterate PacifiCorp's claims regarding being overwhelmed by the volume of recent requests for indicative pricing and PacifiCorp's assertion that it is unable to comply with such requests within the 30 days required under Schedule 38. The Division further reiterates PacifiCorp's representation that PacifiCorp should be able to address the pending requests for indicative pricing within the requested 90 day stay period and thereafter resume the normal processing times under Schedule 38. Because the requested stay is limited in time and to the specific timing provision under paragraph I.B.3, the Division asserts PacifiCorp's Request is just and reasonable, and should be granted.

**C. Office**

Like the Division, the Office reiterates PacifiCorp's representations regarding its inability to provide indicative pricing to QFs within 30 days due to the high volume of requests from projects and the associated demand on PacifiCorp's GRID modeling process. Due to the large volume of pricing requests, the Office asserts PacifiCorp's Request is reasonable and recommends approval.

**D. EHC**

EHC objects to the Request and asserts it is a violation of Schedule 38. EHC further represents PacifiCorp already has refused to provide EHC with indicative pricing since May 2, 2014, notwithstanding the fact that PacifiCorp notified EHC it had completed all the requirements of paragraph I.B.2 no later than April 2, 2014. As such, EHC claims PacifiCorp has already granted itself a *de facto* stay of the requirements of Schedule 38 section I.B.3 for approximately 45 days and now seeks to have its previous improper delays legitimized and

extended pursuant to its request for a stay for an additional 90 days. Additionally, EHC describes challenges and delays in obtaining indicative pricing from PacifiCorp for two of its wind projects.

**E. EOU**

EOU objects to the Request and asserts it is unjust to entities that have pending indicative price requests. EOU further claims PacifiCorp's failure to provide indicative pricing threatens the continued planning of EOU's proposed solar project that must be completed by December 31, 2016, to receive the full benefits of the Federal Investment Tax Credit ("ITC"). Thus, EOU asserts the delay to date in approval of the Request may harm EOU's ability to develop a financially viable project.

**F. UCE**

UCE provides five reasons why the Commission should deny the Request. First, in UCE's view the Request is ambiguous and uses inconsistent language, making it unclear whether PacifiCorp is requesting a stay of only paragraph I.B.3 of Schedule 38, or Schedule 38 in its entirety. As such, UCE recommends the Commission require PacifiCorp to clarify the scope of its Request.

Second, UCE asserts PacifiCorp has not demonstrated the Request is warranted. UCE states that although the Request indicates PacifiCorp cannot keep up with the current volume of pricing requests, PacifiCorp has not provided any evidence of why it cannot do so. Additionally, PacifiCorp has not described the efforts it has made to try to comply with Schedule 38 requirements.

Third, UCE asserts the Request violates the Public Utility Regulatory Act of 1978 (“PURPA”) because it allows PacifiCorp to delay entering into PPAs and interconnection agreements with QFs. UCE notes PURPA and its implementing regulations recognize monopoly utilities generally have an incentive not to contract with QFs and therefore are designed to prohibit delays by utilities in the PPA process. In support of this assertion, UCE cites the following language from 18 C.F.R. § 292.304(d):

Each qualifying facility shall have the option either (1) To provide energy as the qualifying facility determines such energy to be available for such purchases . . . or (2) To provide energy or capacity pursuant to a legally enforceable obligation for the delivery of energy or capacity over a specified term...

UCE quotes the following language from a recent Federal Energy Regulatory Commission (“FERC”) order addressing the FERC regulation above in the context of a dispute between an Idaho wind QF and PacifiCorp:

[T]he phrase legally enforceable obligation is broader simply than a contract between an electric utility and a QF and that *the phrase is used to prevent an electric utility from avoiding its PURPA obligations by refusing to sign a contract [or] from delaying the signing of a contract, so that a later and lower avoided cost is applicable.*<sup>5</sup>

UCE asserts that even a temporary stay of Schedule 38, whether in part or in whole, will prevent QFs from exercising their rights under PURPA. Therefore granting a stay is inconsistent with PURPA and FERC’s interpretations of PURPA regulations.

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<sup>5</sup> UCE response at p.5, *citing Cedar Creek Wind, LLC*, 137 FERC P 61006, at P 9 (2011) (emphasis added).

Fourth, UCE asserts granting the Request would not be in the public interest because it would signal Commission orders and utility tariffs are unstable and need not remain in place and effect when it becomes difficult or inconvenient for the utility to comply. UCE further states even a temporary stay of the 30 day deadline in paragraph I.B.3 of Schedule 38 is not in the public interest because it creates enormous market and regulatory uncertainty.

According to UCE, even a temporary stay of Schedule 38 may prevent viable near term (before 2016) solar projects from qualifying for the 30 percent ITC. Therefore, UCE asserts the Request is not in the public interest because it may prevent Utah ratepayers from acquiring a clean, non-polluting, fixed priced PPA at avoided cost rates, made possible by the ITC.

Finally, UCE asserts PacifiCorp must first make all efforts to strictly comply with Schedule 38 because such compliance is mandatory under Utah law. In support of this assertion, UCE cites to Utah case law and provisions of the Utah Code and Commission rules requiring each utility to strictly comply with tariffs approved by the Commission.<sup>6</sup>

UCE states Schedule 38 was approved by Commission order and the language of Schedule No. 38 paragraph I.B.3 is clear: “Within 30 days following receipt of all information required in Paragraph 2, the Company *will* provide the owner with an indicative pricing proposal...” (Emphasis added).<sup>7</sup> UCE asserts the mandatory language used in the sections of

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<sup>6</sup> See UCE comments at p. 7, citing *Josephson v. Mountain Bell*, 576 P.2d 850, 852 (Utah 1978); Utah Code Ann. § 54-3-23 and Utah Admin. Code. §§ R746-310-2 and R746-405-1. UCE also points to Utah Code Annotated § 54-7-25.

<sup>7</sup> UCE comments at p.7.

Utah Code, Commission rules and paragraph I.B.3 of Schedule 38 provide for PacifiCorp's mandatory compliance with the 30 day deadline to provide indicative pricing to QFs.<sup>8</sup>

According to UCE, if PacifiCorp is unable to keep up with the volume of indicative pricing requests, the solution is to allocate more resources in order to comply with the tariff, not to stay the tariff and effectively penalize QFs. UCE further asserts that if a utility is allowed to stay a tariff every time it is difficult or inconvenient to comply with its requirements, the tariff is, in effect, nonbinding.

UCE concludes its comments by recommending the Commission require PacifiCorp to provide a plan to secure compliance with Schedule 38 as currently filed, such that the requirements of PURPA may be fulfilled.

## **II. Findings and Conclusions**

The Commission is tasked with administering federal and Utah laws that require PacifiCorp to purchase QF power at PacifiCorp's avoided cost. *See* Utah Code Ann. § 54-12-2; 16 U.S.C. § 824a-3(f); *accord, FERC v. Mississippi*, 456 U.S. 742, 751 (1982). The Commission administers these laws in the context of Schedule 38,<sup>9</sup> which serves two primary purposes. First, Schedule 38 recognizes that PacifiCorp must balance its obligation to purchase wholesale QF power with its responsibility to hold its retail electric customers harmless for such purchases. As such, Schedule 38 requires prospective QFs to provide PacifiCorp with certain information and

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<sup>8</sup> *See* UCE at pp. 7-8. UCE points out PacifiCorp admits in paragraph 5 of its Request that the 30-day deadline required in paragraph I.B.3 of Schedule 38 has already expired for three QF projects. UCE notes that for these projects, whether or not a stay is granted by the Commission, PacifiCorp has already failed to comply with its tariff.

<sup>9</sup> Schedule 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.



to be subject to conditions PacifiCorp determines, on a case-by-case basis, to be reasonably necessary to evaluate and process requests for PPAs. Second, Schedule 38 is intended to prevent barriers to the execution of PPAs between PacifiCorp and prospective or existing QFs.<sup>10</sup>

Preventing barriers to QF development is consistent with PURPA and Utah's policy to encourage QF development.<sup>11</sup> To that end, Schedule 38 contains certain mandatory duties imposed on PacifiCorp to provide timely and adequate responses to QFs' requests for pricing information and to not unreasonably delay PPA negotiations. For example, paragraph I.B.3 of Schedule 38 (the subject of PacifiCorp's Request) provides: "Within 30 days following receipt of all information required in Paragraph 2, the Company *will* provide the owner with an indicative pricing proposal..." (Emphasis added). The pricing proposal may also include other indicative terms and conditions, tailored to the individual characteristics of the proposed project. Such a proposal may be used by the QF to make determinations regarding project planning, financing and feasibility.<sup>12</sup>

Given the previously discussed impetus behind Schedule 38's mandatory deadlines, we are not persuaded the reasons provided by PacifiCorp are sufficient to justify a waiver (temporary or otherwise) of the 30 day indicative pricing deadline contained in paragraph

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<sup>10</sup> See *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) ("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.").

<sup>11</sup> 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."

<sup>12</sup> See Schedule 38, Sheet 38.3.

I.B.3. Although we recognize the challenges faced by PacifiCorp in meeting pricing deadlines in the face of increased request volume, we expect PacifiCorp to manage its staff and other resources to facilitate compliance with the requirements of its tariff, including Schedule 38. If circumstances warrant change to Schedule 38 requirements, we expect PacifiCorp would seek such changes prospectively. Emergency conditions could justify more immediate action but the heavier than normal workload described by PacifiCorp does not meet this standard, particularly in the absence of any information from PacifiCorp on what extraordinary efforts it has made to meet Schedule 38's 30-day timeframe, and what would be required to do so. We leave it to PacifiCorp's expertise as a utility operator to appropriately plan for and comply with its tariff obligations. Consistent with that policy, we decline to waive PacifiCorp's tariff obligation and therefore deny PacifiCorp's Request.

Additionally, the Commission simply does not have a sufficient record in this docket to evaluate the reasonableness of PacifiCorp's conduct with respect to any individual QF. Therefore, with this order the Commission makes no findings or conclusions with respect to potential violations of Schedule 38.

ORDER

Pursuant to the foregoing discussion, findings and conclusions, PacifiCorp's Request is denied.

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DATED at Salt Lake City, Utah, this 23<sup>rd</sup> day of June, 2014.

/s/ Ron Allen, Chairman

/s/ David R. Clark, Commissioner

/s/ Thad LeVar, Commissioner

Attest:

/s/ Gary L. Widerburg  
Commission Secretary  
DW#257188

Notice of Opportunity for Agency Review or Rehearing

Pursuant to §§ 63G-4-301 and 54-7-15 of the Utah Code, an aggrieved party may request agency review or rehearing of this Order by filing a written request with the Commission within 30 days after the issuance of this 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 does not grant a request for review or rehearing within 20 days after the filing of the request, 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 §§ 63G-4-401 and 63G-4-403 of the Utah Code and Utah Rules of Appellate Procedure.

CERTIFICATE OF SERVICE

I CERTIFY that on the 23<sup>rd</sup> day of June, 2014, a true and correct copy of the foregoing was served upon the following as indicated below:

By Electronic-Mail:

Data Request Response Center ([datarequest@pacificorp.com](mailto:datarequest@pacificorp.com))  
PacifiCorp

Dave Taylor ([dave.taylor@pacificorp.com](mailto:dave.taylor@pacificorp.com))  
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Administrative Assistant