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BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH

In the Matter of the Application of Rocky Mountain Power for Modification of Contract Term of PURPA Power Purchase Agreements with Qualifying Facilities	Docket No. 15-035-53 **UTAH DIVISION OF PUBLIC UTILITIES' POST HEARING BRIEF**

Pursuant to Utah Code Ann. §54-7-1 and Utah Admin. Code r746-100, the Utah Division of Public Utilities ("Division") submits this Post Hearing Brief. The Public Service Commission of Utah ("Commission") has legal authority to shorten the contract terms of qualifying small power production facilities ("QF") contracts to 5 years under federal and state law and the Division recommends that the Commission adopt the Division's 5 year term proposal.

INTRODUCTION

On May 11, 2015 Rocky Mountain Power ("Company") filed an Application for QF Contract Term Modification. Parties to this docket submitted multiple rounds of prefiled testimony. A hearing on the matter was held on November 12, 2015. At the conclusion of the hearing the Commission permitted post hearing briefing. The Division's brief addresses the question that has been raised of whether a shorter contract term would violate federal or state laws.

ARGUMENT

The Division will address one legal issue in response to matters that were presented during the hearing. The issue is whether it is consistent with the federal Public Utility Regulatory Policies Act of 1978, 16 U.S.C. § 2601–2645 et seq. ("PURPA") or Utah law to shorten the term of contracts for QFs. There is no fixed term that is required by PURPA or Utah law, nor do either prescribe a minimum term. The ability of a QF to successfully develop a project is one of many considerations that must be balanced in the decision of contract terms. It is not and should not be considered a requirement that a contract term is sufficiently long that current financing terms will remain available regardless of market conditions. Additionally there is recent precedent in Idaho of the use of a significantly shorter term that has not been found to violate the PURPA requirements.

The Division does not dispute that Utah must allow some form of contracts for purchase of QF energy. As FERC has recently stated "[u]nder section 292.304(d) of the Commission's regulations, a QF also has the unconditional right to choose whether to sell its power 'as available' or at a forecasted avoided cost rate pursuant to a legally enforceable obligation."[1] Where the parties differ is with respect to the question of how long the contract term must be.

There is no minimum term that has been set by federal law. While it may be argued that 18 CFR § 292.304(d)(2)(ii) creates a requirement for long-term contracts, the language when read as a whole does not support this interpretation. §292.304(d) states in relevant part that

> (d) Purchases "as available" or pursuant to a legally enforceable obligation. Each qualifying facility shall have the option either:

[1] *Hydrodynamics Inc., et al.,* 146 FERC P 61193, 61844.

> (1) To provide energy as the qualifying facility determines such energy to be available for such purchases, in which case the rates for such purchases shall be based on the purchasing utility's avoided costs calculated at the time of delivery; or
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> (2) To provide energy or capacity pursuant to a legally enforceable obligation for the delivery of energy or capacity over a <u>specified term</u>, in which case the rates for such purchases shall, at the option of the qualifying facility exercised prior to the beginning of the specified term, be based on either:
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> (i) The avoided costs calculated at the time of delivery; or
>
> (ii) The avoided costs calculated at the time the obligation is incurred.

The clause relied upon in this language for the requirement that a long-term contract must be available is "specified term." It does not define what that term must be.

A "specified term" does not require 20 year contract terms or any other minimum length of term. While not directly controlling, the FERC's interpretation of what access to "long-term" markets means is instructive. In its Orders 688 and 688-A FERC interpreted the new language in 16 USCA § 824a-3(m) also known as 210(m) that created a must buy exception for those QFs with access to competitive wholesale markets. FERC held that access to "Day 2" markets was sufficient to demonstrate "long-term" contract availability.[2] Specifically FERC stated that:

> Long-term contracts are defined for EQR purposes as having a term of <u>one year or more</u> and, thus, the Commission's findings regarding long-term contracts in the Final Rule incorporated that definition. While some petitioners argue that a longer-term should have been used, we continue to believe that contracts of a year or more are sufficiently long-term to meet the statutory requirement that there be

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[2] *New PURPA Section 210(m) Regulations Applicable to Small Power Production and Cogeneration Facilities,* Order No. 688, FERC Stats. & Regs. ¶ 31,233 (2006), *order on reh'g,* Order No. 688-A, FERC Stats. & Regs. ¶ 31,250 (2007).

> "wholesale markets for long-term sales of capacity and energy" within the meaning of section 210(m)(1)(A)(ii).[3]

FERC has not addressed what a minimum term might be directly in setting a minimum limit for PURPA contracts in those markets that remain subject to the must buy requirement. It would however be inconsistent for FERC to interpret PURPA as obligating contract terms for even 10 or 20 years to promote QF development when FERC has plainly stated that one year contracts are "long-term" with respect to §210(m)(1)(A)[4]. Furthermore, it would be a stretch of logic to conclude that 1 year terms in competitive wholesale markets satisfy the subsection's statutory goals of "encourag[ing] cogeneration and small power production" and ensuring that rates do "not discriminate against qualifying cogenerators or qualifying small power producers" and also conclude that a 5 year contract as proposed by the Division is at the same time violating those same principles.[5]

Contract terms less than 20 years have been found consistent with PURPA by other state utility commissions. In Order No. 33357 the Idaho Public Utility Commission ("Idaho PUC") held that, with respect to Idaho, 20 year contracts are "unreasonable because the length exacerbates overestimations to a point that avoided cost rates are inconsistent with the public interest."[6] After reaching this conclusion the Idaho PUC held that avoided cost rates would remain most accurate through the use of successive short term contracts. In addressing similar concerns raised by the Division with respect to the capacity value in short term contracts the Idaho PUC implemented a system where capacity payment is based off of the projection at the time the project comes online.

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[3] Order No. 688, FERC Stats. & Regs. ¶ 31,233 at P 17 (*emphasis added).*

[4] 16 USCA § 824a-3(m)(1)(A).

[5] 16 USCA § 824a-3(a)-(b).

[6] *In the Matter of the Idaho Power Company's Petition to Modify Terms and Conditions of PURPA Purchase Agreements,* Case No. IPC-E-15-01 et al., Order No. 33419 at p. 6.

> For example, if the QF comes on-line in 2017 and the utility [becomes] capacity deficient in 2020, the QF would be eligible for capacity payments in the second year of its second contract [(i.e., 2020)] and thereafter if in continuous operation. This adjustment recognizes that in ensuing contract periods, the QF is considered part of the utility's resource stack and will be contributing to reducing the utility's need for capacity. [7]

The Idaho PUC Order under the same PURPA statutes and FERC regulations is instructive in the instant case. The Idaho PUC shortened the contract terms to 2 years within the limits of PURPA. The Commission in the instant matter may similarly reduce the contract terms to any of the proposed periods advanced by parties in this docket as they are all longer than the 2 year term adopted by the Idaho PUC.

The 5 year contract term proposed by the Division is permissible under Utah law. Utah Code Ann. §54-12-1(1) states that:

> 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 to provide for their most efficient and economic utilization.

This legislative policy certainly offers support for encouragement of the development of renewable energy sources. However it does not direct the Commission to do so by the implementation of contract terms so long that they far exceed the ability of our current information to accurately predict avoided costs. The efforts to encourage development are tempered by competing policy goals such as just and reasonable rates and economic utilization of the renewable energy. The Commission is only directly required to "establish reasonable rates,

[7] *Id*. at 9 *citing to* Order No. 33357 at 25-26.

terms, and conditions for the purchase or sale of electricity or electrical generating capacity, or both…”[8] The establishment of such rates, terms, and conditions may be through a competitive bid process or “an alternative method which considers the purchasing utility’s avoided costs…”[9] The shortening of a contract term to more accurately forecast avoided costs is not an “unnecessary barrier” to achievement of the statute’s goals.

Nothing in Utah’s statutes provide or even suggest that there are minimum contract terms. It does not suggest that financing companies may dictate the terms that are reasonably necessary for the protection of Utah rate payers. Nor does it require that the term be such that QFs are developed regardless of market conditions. The Utah statute “encourage[s] the development of independent and qualifying power production and cogeneration facilities” through the provisions it enacted, not the ones it didn’t. The Utah statute requires that the term be reasonable. That balance of reasonableness varies with conditions and experience. The Commission has wide latitude under Utah law to determine the appropriate contract term. Setting the contract term at 5 years as in the Division’s proposal is well within the Commission’s statutory authority.

CONCLUSION

There are no minimum contact terms for QFs. PURPA does not prescribe any minimum term and FERC has held that with respect to wholesale market access “long-term” contracts are one year or greater. A neighboring state currently uses a term of two years that is shorter than any of the proposed contract terms by parties to this docket. Utah law does not set any minimum term for QF contracts, and has no requirement that the term be subject to the financing companies’ desires. The policy reasons and evidence for shortening the terms of large QF

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[8] Utah Code Ann. § 54-12-2.

[9] *Id.*

contracts have been fully presented through the prefiled testimony and evidence presented at hearing. The Commission should, and has legal authority to, reduce Schedule No. 38 contract terms to 5 years.

Submitted this 9th day of December, 2015.

/s/ Justin C. Jetter

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