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STATE OF UTAH

Public Service Commission

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

SIERRA CLUB BRIEF

Pursuant to the direction of the Utah Public Service Commission at the conclusion of evidentiary hearings on November 12, 2015 in the above-captioned proceeding, Sierra Club hereby submits this post-hearing brief. In its filings and testimony, Rocky Mountain Power ("RMP" or the "Company") failed to show that its proposal to shorten the contract term for PURPA qualifying facilities ("QFs") is in the public interest. In testimony and hearings, Sierra Club and other parties thoroughly rebutted RMP's assertions that shorter QF terms were in the public interest, and parties instead provided substantial evidence demonstrating that customers would be harmed if the Commission adopted the proposals of RMP or the Division of Public Utilities ("DPU") to shorten the minimum contract term for QFs from twenty years to three or five years, respectively. Sierra Club does not repeat those arguments here. This brief instead addresses specific legal issues under PURPA.

In summary, PURPA limits the Commission's discretion to approve PacifiCorp's or DPU's proposals to shorten the standard QF contract term so severely because doing so would controvert the clear language and intent of PURPA's must-purchase obligation. Specifically, QF's have a legal right to long term fixed rates for energy and capacity under Section 210 of PURPA.

I. Legal Standard Under PURPA

Section 210 of PURPA (16 U.S.C. 824a-3) and FERC's regulations implementing that section prescribe the responsibilities of state regulatory authorities, such as this Commission, to encourage cogeneration and small power production, including rules requiring utilities to offer to purchase electricity from qualifying cogeneration and small power production facilities("QFs"). The Commission retains authority and discretion over many aspects of implementing PURPA, including, within reason, the authority to determine appropriate specific terms of the must purchase obligation. *FERC v. Mississippi*, 456 U.S. 742, 751 (1982) ("[FERC's regulations] afford state regulatory authorities and nonregulated utilities latitude in determining the manner in which the regulations are to be implemented."). However, the Commission's discretion is not unbounded. Any action by the Commission must be "reasonably designed…*in accordance with* [FERC's rules]." *Id.* at 755 (emphasis added).

FERC has consistently reiterated the need for states to implement policies and practices that are in accordance with FERC's rules. *Jd Wind,* 129 FERC ¶ 61148, 61632 (Nov. 19, 2009) ("a state may take action under PURPA only to the extent that that action is in accordance with the [FERC's] rules"); *Connecticut Light & Power Co.*, 70 FERC ¶ 61012, 61027-28 (Jan. 11, 1995) ("PURPA gave the states responsibility *only* for 'implement[ing]' the Commission's rules. That is, a state may [implement] *only* if it does so in accordance with the Commission's rules.") (emphasis in original); *Allco Renewable Energy Ltd*., 146 FERC ¶ 61107 (Feb. 20, 2014) ("As a result, a state may take action under PURPA only to the extent that that action is in accordance with the Commission's rules.").

Each electric utility is required under Section 210 of PURPA to offer to purchase available electric energy from cogeneration and small power production facilities that obtain QF status under Section 210 of PURPA. For such purchases, electric utilities are required to pay rates that are just and reasonable to the ratepayers of the utility, are in the public interest, and do not discriminate against cogenerators or small power producers. *See,* North Carolina Utilities Commission, *Order Setting Avoided Cost Input Parameters* (Docket No. E-100 Sub-140, issued December 31, 2014), at p.3. The FERC regulations require that the rates electric utilities pay to purchase electric energy and capacity from qualifying cogenerators and small power producers reflect the cost that the purchasing utility can avoid as a result of obtaining energy and capacity from these sources, rather than generating an equivalent amount of energy itself or purchasing the energy or capacity from other suppliers. *Id.*

II. FERC's Legally Enforceable Obligation Rule Guarantees Qualified Facilities the Right to Sell Capacity

The proposals by RMP and DPU to shorten standard QF contract terms to three and five years, respectively, would run afoul of FERC's legally enforceable obligation rule because contract terms of such a limited duration would not compensate QFs for their capacity contributions to RMP's system. FERC's regulatory language implementing the must purchase obligation is clear. 18 C.F.R. § 292.304(d) provides:

> Each qualifying facility shall have the option either:
>
> (1) To provide energy as the qualifying facility determines such energy to be available for such purchase, 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

> (2) To provide energy or capacity pursuant to a legally enforceable obligation for the delivery of energy or capacity over a specified term, 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:
>
> > (i) The avoided costs calculated at the time of delivery; or
> >
> > (ii) The avoided costs calculated at the time the obligation is incurred.

If a QF enters into a contract or provides "legally enforceable" assurance that it will be available on the date that the utility would otherwise make a commitment to construct new generation capacity, then the QF is entitled to payments based on the avoided cost of constructing the new generating unit. *See*, *also*, *Regulations Implementing Section 210 of the Public Utility Regulatory Policy Act of 1978,* Order No. 69, 45 Fed. Reg. 12,214, 12,225 (Feb. 25, 2980) ("Order No. 69") ("If a qualifying facility provides [contractual or other legally enforceable assurances that capacity will be available to displace future new capacity], it is entitled to receive rates based on the capacity costs that the utility can avoid as a result of its obtaining capacity from the qualifying facility.").

FERC does not provide an exact timeframe for the "specified term" required in § 292.304(d); however, the record in this proceeding demonstrates that a three or five year contract would not provide a QF compensation for capacity. RMP's witness, Mr. Clements, testified that the next currently identifiable resource need is a gas plant in 2027, but that "the Company will not have any action items to procure a new long-term resource in the next two to four years." (Direct Testimony of Paul Clements at p.24.) FERC Order 69 provides that a QF is entitled to payments when it can make a legally enforceable commitment that would allow a utility to "defer or cancel construction of new generating units." (Order 69, 45 Fed. Reg. at 12,225.) New solar and wind QF facilities in Utah, which have expected useful lives of 20 or more years, will almost certainly have the ability to provide legally enforceable commitments that would allow RMP to cancel or defer construction of the planned 2027 gas plant. The Commission therefore can and should accommodate contract terms that allow those QFs to be compensated for their ability to meet that capacity need. However, under RMP or DPU's proposal, the existence of a three or five year contract term would not impact the Company's decision making with respect to future avoided capacity because, according to RMP, it does not plan to have any action items related to new long-term resources during that time period.

Qualified facilities can only reasonably prompt the utility to defer or cancel future capacity projects if the QF is able to enter into contracts to provide capacity for at least that long. The record clearly shows that QF facilities are certainly willing to bind themselves to legally enforceable commitments for long term power. (*See*, Direct Testimony of Brian L. Harris at p.3 ("In nearly all cases of which I am aware, project financing of QF projects has involved PPAs with much longer terms, typically twenty years.").) However, where a qualified facility contract or legally enforceable obligation is limited to only three or five years, that power cannot be counted on to be available after three or five years, and RMP could not cancel planned generation based on such a short commitment. This result would clearly thwart the intent of the legally enforceable obligation rule's requirement to compensate QF for capacity by allowing RMP to avoid paying a price to defer or cancel new capacity. *See Virginia Electric Power Co.*, 151 FERC ¶ 61,038, P 24 (2015) ("the requirement that a QF can sell and a utility must purchase pursuant to a legally enforceable obligation were specifically adopted to prevent utilities from circumventing the requirement of PURPA that utilities purchase energy and capacity from QFs"); *Cedar Creek Wind, LLC*, 137 FERC ¶ 61,006, P32 (2011) (same); *Hydrodynamics Inc. et al*, 146 FERC ¶ 61,193, P 31 (2014) (same).

III. PURPA Entitles Qualified Facilities to Prices for Energy and Capacity that Are Determined at the Time the Obligation is Created

The proposals by RMP and DPU to shorten QF contract terms would fail to implement FERC's PURPA regulations because the shortened terms would deprive QFs of a contract price based on prices calculated at the time the contract is executed. As noted above, the plain language of FERC's legally enforceable obligation rule states that each QF shall have the option to enter into a legally enforceable obligation to sell both energy and capacity based upon the avoided costs calculated <u>at the time the obligation is incurred</u>. 18 C.F.R. § 292.304(d)(2)(ii); *Hydrodynamics Inc. et al,* 146 FERC ¶ 61,193, P 31 ("Under 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."). Both RMP and DPU ignore this requirement.

DPU in its testimony fails to recognize a QF's legal right to obtain pricing based on avoided cost calculations that are current at the time the obligation is made. Instead of giving effect to FERC's clear language, DPU expressly wants to limit the contract term so that prices paid to the QF are <u>**not**</u> based on currently calculated avoided costs. DPU witness Peterson explained his concern: "The prices might start out more or less 'as accurate as possible,' but within a couple of years or so they could be noticeably off..." (Rebuttal Testimony of Charles E. Peterson at 10.) Mr. Peterson went on to state that he believes other proposals are not "a practical solution without frequent 'course corrections' to the prices throughout the twenty year contract period." (*Id.* at 11.) DPU's recommendation for a "course correction" is directly contrary to the clear language of Section 292.304(d)(2)(ii) that provides the QF the option to choose to lock-in its prices based on current forecasts.

RMP also attempts to circumvent the requirements of Section 292.304(d) by arguing that a fixed-price contract is a "subsidy" to a QF. (Direct Testimony of Paul H. Clements at 9.) Parties responded factually to Mr. Clements' assertion by noting that prices are at least just as likely to go up compared to current forecasts as they are to go down. (*See, e.g.*, Direct Testimony of Thomas Beach at 25; Direct Testimony of Sarah Wright at 16-17.) However, even if Mr. Clements were correct and a fixed-price contract does constitute a "subsidy" – which Sierra Club disputes – PURPA nevertheless expressly provides for QFs to have this benefit. *Hydrodynamics Inc. et al,* 146 FERC ¶ 61,193, P 31. It would be beyond the bounds of a reasonable implementation of PURPA for the Commission to effectively eliminate a QF's right to obtain pricing based on the avoided costs calculated at the time the obligation is incurred, regardless of whether that right constitutes a subsidy. The Commission therefore must reject the suggestions of RMP and DPU to create a system that would require QFs to repeatedly seek to reset prices.

IV. Conclusion

The record in this proceeding provided ample evidence to refute the proposals of RMP and DPU to shorten QF contract terms to three and five years, respectively. Even if the Commission were to ignore PURPA's legal requirements, which it cannot legally do, RMP has failed to show that the public interest would be served by cutting QF contract terms in a manner that would almost certainly prevent future QF development in Utah. To the contrary, the parties in this docket provided substantial evidence showing that <u>maintaining</u> the twenty year term is in the public interest.

In addition to the factual record, the Commission must also consider PURPA's legal requirements discussed above. In its order on RMP's application, the Commission must reasonably design the contract terms for QFs in accordance with FERC's rules. For the reasons discussed above, RMP's and DPU's proposals would violate those rules and therefore must be rejected.

DATED this 9th day of December, 2015.

Respectfully submitted,

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