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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 Clean Energy – Post-Hearing Brief
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INTRODUCTION

The Public Utility Regulatory Policy Act (PURPA) was enacted in 1978 to encourage the development of electricity generation by independent energy producers, specifically by sidestepping monopoly utilities’ reluctance to purchase electricity from, and overcoming regulatory obstacles for, independent producers. In addition, Utah Code Annotated Title 54, Chapter 12 (Utah PURPA) was subsequently enacted in response to PURPA in order to encourage electricity development by independent energy producers and to remove unnecessary barriers to energy transactions between qualifying facilities (QFs) and the monopoly utility in Utah. Under both statutes, the Utah Public Service Commission (the Commission) is tasked with implementing these policies and the rules and regulations enacted to fulfil them.

In this docket, Rocky Mountain Power (the Company) requested permission to reduce the maximum contract term for PURPA Power Purchase Agreements (PPAs) with QFs from 20 to three years. The Commission should deny the Company’s application. A decision granting the

application would violate the Commission's statutory obligation to implement the policy, rules, and regulations of PURPA and the policy and mandates of Utah PURPA.

ARGUMENT

I. FEDERAL AND STATE LAW DO NOT PERMIT THE REDUCTION OF THE MAXIMUM PURPA PPA CONTRACT TERM FROM 20 TO THREE YEARS.

When acting to implement PURPA and Utah PURPA, the Commission has three concurrent considerations to balance: (1) the "must-purchase obligation;" (2) the "ratepayer indifference standard;" and (3) the policies underpinning the statutes. These considerations and the relevance of each to the outcome of the current docket is explained in turn, below.

A. The Commission should not grant the Company's application to reduce the maximum PURPA PPA contract term from 20 to three years because such a decision would violate the Commission's duties to implement the must-purchase obligation of PURPA and to set reasonable terms and conditions for PPAs with QFs.

Federal law requires state utility regulatory bodies to implement rules requiring utilities to purchase electricity from QFs. Section § 210(a) of PURPA directs FERC to promulgate rules requiring utilities to purchase electricity from qualifying cogeneration and small power production facilities. *See* 16 U.S.C. § 824a-3(a)(2) (2005); *see also FERC v. Miss.*, 456 U.S. 742, 751 (1982). "Section 210(f), 16 U.S.C. § 824a-3(f), requires each state regulatory authority and nonregulated utility to implement FERC's rules." *FERC v. Miss.*, 456 U.S. at 751.

In response to this statutory directive, FERC promulgated a rule requiring electric utilities to purchase the capacity and energy made available by QFs. *See* 18 C.F.R. § 292.303(a) (2014). This rule is commonly known as the must-purchase obligation. As required by PURPA Section 210(f), the Utah Commission must implement this rule. This means that the Commission's regulations and orders implementing FERC's rules must uphold the must-purchase obligation.

As many experts in this docket testified, reduction of the contract term to three years would make it difficult, risky, and costly for QFs to secure financing and would effectively stop QF development in Utah. *See, e.g.*, Harris Dir. Test. 34-37, 48-51; Isern Dir. Test. 40-44, 56-59, 68-72. Furthermore, it is impossible for the Commission to simultaneously issue an order that will have the effect of stopping QF development in the state *and* implement PURPA's and FERC's must-purchase obligation. In other words, if the Commission were to grant the Company's request, the Commission would violate Federal law by not fulfilling its duty to implement this must-purchase obligation.

In addition, Utah law states that "(2) [t]he commission *shall* establish *reasonable rates, terms, and conditions* for the purchase or sale of electricity or electrical generating capacity, or both, between a purchasing utility and a qualifying power producer." U.C.A. § 54-12-2 (2008) (emphasis added). Of significance here is the fact that Utah law requires the Commission to establish terms and conditions for PURPA purchases that are *reasonable*. As explained above, reduction of the PURPA PPA contract term from 20 to three years will likely stop QF development in Utah. Furthermore, any Commission ruling that has the effect of stopping QF development is not reasonable. Therefore, because a reduction of the contract term would likely stop QF development in Utah, it is unreasonable and would violate Utah law.

B. The Commission must balance the PURPA must-purchase obligation with the ratepayer indifference standard, which is protected by the avoided cost method.

Of course, the PURPA must-purchase obligation must be balanced with the requirement that rates be just and reasonable, in the public interest, and not discriminate against QFs

(commonly known as the “ratepayer indifference standard”). Section 210(b) of PURPA states that:

The rules prescribed under subsection (a) of this section shall insure that, in requiring any electric utility to offer to purchase electric energy from any qualifying cogeneration facility or qualifying small power production facility, the rates for such purchase--

(1) shall be just and reasonable to the electric consumers of the electric utility and in the public interest, and

(2) shall not discriminate against qualifying cogenerators or qualifying small power producers.

No such rule prescribed under subsection (a) of this section shall provide for a rate which exceeds the incremental cost to the electric utility of alternative electric energy.

16 U.S.C. § 824a-3(b) (2005). Also, as stated above, Utah law requires the Commission to set rates for PURPA purchases that are reasonable. *See* U.C.A. § 54-12-2.

The Commission-approved avoided cost pricing method ensures that rates are just and reasonable to ratepayers, in the public interest, and non-discriminatory to QFs, consistent with the requirements of PURPA. This IRP-based pricing method has been litigated at length and, over the years, *has been built around the assumption that QF contracts with terms up to 20 years are permissible*. As explained in the surrebuttal testimony of Sarah Wright:

[T]he Commission-approved avoided cost pricing method accounts for the type and timing of identified resource needs, as based on PacifiCorp’s bi-annual integrated resource plan. If there is no capacity need over the contract horizon, then the avoided cost price is lower because it does not include a capacity payment. To the extent capacity is not needed until a date in the future, or if there are a number of QFs ahead of a given project in the pricing queue, then the capacity payment is adjusted to compensate for this lack of need for capacity in the near term. Furthermore, the addition of QFs into the resource portfolio impacts future resource planning by offsetting the need for front office transactions or additional capacity—which further reduces the avoided cost price. *The avoided cost pricing method, which is based on integrated resource planning projections, is an iterative and dynamic tool, and is designed to protect customers based on the Company’s IRP and more regularly updated forecasts.*

Wright Sur. Test. 94-105 (emphasis added); *see also* Vastag Reb. Test. 71-74 (explaining that “[t]he intervenors also agree with the Office that if avoided cost pricing is set properly, ratepayers will be indifferent to the cost of QF power and be protected from too many QFs executing PPAs with the Company.”).

Because the avoided cost method is in place, and is designed in a manner that protects ratepayers when additional resources are not needed, the Commission does not need to grant the Company’s request in order to uphold the requirements of PURPA or Utah PURPA. In fact, the grant of such an order would *violate* PURPA because it would discriminate against renewable QFs by making it difficult, risky, and costly for them to secure financing, and would not be in the public interest because it would prevent ratepayers from taking advantage of the clean, fuel-free, low cost energy that renewable QFs provide. *See e.g.*, Wright Dir. Test. 290-98.

In addition, FERC is aware that there are benefits and risks associated with long-term PURPA contracts, which bind the parties to avoided cost rates at the time the obligation is incurred. However, FERC stresses the need for certainty with regard to return on investment in new technologies and believes that risks and benefits borne on both sides of PURPA transactions “will balance out.”

In a case brought before FERC by the New York State Electric & Gas Corporation, FERC declined to grant a petition to alleviate the utility of its obligation to purchase power under an existing 15 year PURPA PPA at the avoided cost rate established by the New York State Public Service Commission. In making its ruling, FERC explained:

[W]e take this opportunity to explain the import of, and the underlying reasons for, these regulations [implementing PURPA]. The regulations specifically allow rates for the purchase of QF energy or capacity pursuant to a contract over a specified term to be based on avoided costs calculated, at the option of the QF, at the time of delivery or at the time the obligation is incurred. Furthermore, the

regulations make clear that, if rates are based on avoided cost estimates at the time the obligation is incurred, the rates are consistent with PURPA's requirements even if they differ from avoided costs at the time of delivery:

“In the case in which the rates for purchases are based upon estimates of avoided costs over the specific term of the contract or other legally enforceable obligation, the rates for such purchases do not violate this subpart if the rates for such purchases differ from avoided costs at the time of delivery.” 18 C.F.R. §292.304(b)(5) (1994).

At the time these regulations were promulgated, the Commission anticipated that avoided costs could change over time and balanced the relevant competing interests. *The Commission intended the regulations described above “to reconcile the requirement that the rates for purchases equal the utilities' avoided cost with the need for [QFs] to be able to enter into contractual commitments based, by necessity, on estimates of future avoided costs.”* The Commission recognized that, if the avoided cost of energy at the time it is delivered is less than the price provided in the contract, a utility may be required to pay a rate for purchases that would subsidize the QF at the expense of the utility's other ratepayers. However, the Commission also was:

cognizant that in other cases, the required rate will turn out to be lower than the avoided costs at the time of purchase. The Commission does not believe that the reference in the statute to incremental cost of alternative energy was intended to require a minute-by-minute evaluation of costs which would be checked against rates established in long term contracts between [QFs] and electric utilities.

Many commenters have stressed the need for certainty with regard to return on investment in new technologies. The Commission agrees with these latter arguments, and believes that, in the long run, “overestimations” and “underestimations” will balance out.

N.Y. Gas and Elec. Corp., 71 FERC P 61027, 14-15 (April 12, 1995) (emphasis added)

(footnotes omitted).

FERC’s statements in the New York Gas and Electric Corporation decision are relevant to the outcome of this docket for several reasons. First, FERC stresses the fact that it intended its regulations to address “the need for [QFs] to be able to enter into contractual commitments based . . . on estimates of future avoided costs,” and, “the need for certainty with regard to return on investment in new technologies.” *Id.* Also, FERC’s statements acknowledge that, due to the nature of a long-term contract, parties on both sides of the transaction bear risks and

opportunities to benefit. However, FERC stresses that, “in the long run, ‘overestimations’ and ‘underestimations’ will balance out,” *id.* at 15, and the certainty a QF achieves from such an agreement should not be sacrificed.

Therefore, because the Utah Commission is obligated to implement FERC’s regulations, it should similarly conclude that its avoided cost pricing method will ensure that any over- or under-estimations in avoided costs will balance out in the long run, and it should not compromise the QFs’ ability to secure financing by reducing the contract term and, thus, destroy the only certainty QFs can provide to their investors with regard to return on investment.

C. The Commission should not grant the Company’s application to reduce the PURPA PPA contract term from 20 to three years because such a decision would contravene the policies underpinning PURPA and Utah PURPA.

PURPA was enacted specifically to encourage the development of electricity generation from cogeneration and small power production facilities. The U.S. Supreme Court provides the following succinct and thorough summary of the purpose of PURPA:

Section 210 of PURPA's Title II, 92 Stat. 3144, 16 U.S.C. § 824a-3, seeks to encourage the development of cogeneration and small power production facilities. Congress believed that increased use of these sources of energy would reduce the demand for traditional fossil fuels. But it also felt that two problems impeded the development of nontraditional generating facilities: (1) traditional electricity utilities were reluctant to purchase power from, and to sell power to, the nontraditional facilities, and (2) the regulation of these alternative energy sources by state and federal utility authorities imposed financial burdens upon the nontraditional facilities, and thus discouraged their development.

FERC v. Miss., 456 U.S. at 750-51 (footnotes omitted). The statute provides a means to achieve this policy and overcome these problems. *See id.* at 751.

In addition, Utah PURPA includes a similar, if not more extensive, policy statement:

(1) The Legislature declares that in order to promote the more rapid development of new sources of electrical energy, to maintain the economic vitality of the state through the continuing production of goods and the employment of its people, and to promote the efficient utilization and distribution

of energy, it is desirable and necessary to encourage independent energy producers to competitively develop sources of electric energy not otherwise available to Utah businesses, residences, and industries served by electrical corporations, and to remove unnecessary barriers to energy transactions involving independent energy producers and electrical corporations.

(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.

U.C.A. § 54-12-1 (2008).

Of particular note in the foregoing with relevance to the current docket is Congress's and the Utah legislature's acknowledgement of the importance of encouraging a diverse array of independent power producers and *removing unnecessary barriers, both financial and regulatory*, to energy transactions between small power producers and traditional utilities, the reluctance of traditional utilities to purchase electricity from small power producers, and the resulting need to encourage small power production through laws and regulations.

A reduction in the contract term for renewable QFs from 20 years to three years would discourage independent power production in Utah and create an unnecessary financial and regulatory barrier to energy transactions between the Company and QFs by making it difficult, risky, and costly for renewable QFs to secure viable financing. *See e.g.*, Tr. 240: 3-10; Tr. 259: 1-7; Harris Reb. Test. 59-64; Isern Reb. Test. 69-71. Such an order by the Commission would deprive Utahns of the significant economic benefits of renewable energy development in contravention of the policy laid out in PURPA and Utah PURPA.

II. THE UTAH PUBLIC SERVICE COMMISSION SHOULD NOT GIVE DEFERENCE TO THE RECENT PURPA CONTRACT TERM DECISION IN IDAHO

The Utah Public Service Commission should not give deference to the recent PURPA contract term decision in Idaho because the Utah Public Service Commission is controlled by

Utah PURPA, and the Idaho Public Service Commission does not have a similar controlling statute. As stated above, Utah PURPA requires that the Utah Public Service Commission encourage the development of independent power production, promote a diverse array of economical and permanently sustainable energy resources in an environmentally acceptable manner, conserve our finite and expensive energy resources, and remove unnecessary financial and regulatory barriers to energy transactions involving independent energy producers and electrical corporations. *See* U.C.A. § 54-12-1.

In contrast, the State of Idaho does not have a state PURPA statute or a legislative policy statement explicitly proclaiming the policy of the State. This means that the Idaho Public Utility Commission is not bound by a state policy similar to that provided above, and therefore, it may have more latitude where the Utah Commission does not. Therefore, it is not appropriate to apply the decision in Idaho to this proceeding in Utah.

CONCLUSION

Utah Clean Energy recommends that the Commission deny the Company's application to reduce the maximum PURPA PPA contract term from 20 to three years. The Idaho decision has no bearing on the outcome of this docket, and a decision by the Commission granting the Company's application would violate the Commission's statutory obligation to implement the policy, rules, and regulations of PURPA and the policy and mandates of Utah PURPA.

RESPECTFULLY SUBMITTED,

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