



State of Utah
Department of Commerce
Division of Public Utilities

FRANCINE GIANI
Executive Director

THOMAS BRADY
Deputy Director

CHRIS PARKER
Director, Division of Public Utilities

GARY HERBERT.
Governor
SPENCER J. COX
Lieutenant Governor

ACTION REQUEST RESPONSE

REDACTED

TO: Public Service Commission

FROM: Division of Public Utilities:
Chris Parker, Director,
Artie Powell, Energy Manager
Charles Peterson, Technical Consultant

DATE: October 20, 2015

DOCKET: Docket No. 15-035-70, Power Purchase Agreement between PacifiCorp and Three Peaks Power, LLC

RECOMMENDATIONS (Approve)

The Division of Public Utilities (Division) recommends that the Commission approve the Power Purchase Agreement (Agreement or PPA) between PacifiCorp (Company) and Three Peaks Power, LLC (Three Peaks or Seller).

ISSUE

On August 27, 2015, PacifiCorp filed an Application for Approval of Power Purchase Agreement between the Company and the Seller. Following a scheduling conference on September 8, 2015, the Commission issued an order on September 10, 2015 that set a filing deadline for initial comments of October 20, 2015. This memorandum serves as the Division's comments and recommendations in this matter.

ANALYSIS

General

The Agreement covers a period of 20 years from the online date,¹ which is expected to be December 1, 2016². Three Peaks is a proposed [REDACTED] solar project³ with a single axis tracking system⁴ located near PacifiCorp transmission facilities in Iron County, Utah.⁵

Generally the Agreement appears to be patterned after other PPAs that the Division has previously reviewed for renewable QFs. The language therefore appears to be mostly generic for this type of contract.

Pricing Terms and Issues

The Division has reviewed the pricing terms set forth in the PPA and Exhibit 5.1 of the PPA and has determined them to be consistent with the Commission's orders issued prior to the June 2015 orders in Docket No. 14-035-140. Particularly, the PPA pricing is consistent with the Commission's Order in Docket No. 12-035-100 in which issues related to wind QFs were extensively litigated and some issues related to wind and solar QFs were also determined. The Division believes that the Company has correctly applied the Proxy/PDDRR method approved by the Commission along with the 84 percent capacity contribution the Commission approved in Docket No. 12-035-100 on an interim basis.

However, the Division found errors related to the annual total megawatt-hour (MWh) output and the degradation of production of MWh over the term of the contract.⁶ The corrected prices would result in an increase approximating 75 cents (\$0.75) per MWh on a levelized basis. The Division would normally consider a difference of this magnitude to be material and would recommend an adjustment to the Agreement. However, the Seller directly informed the Division at a meeting

¹ Power Purchase Agreement, Section 2.1.

² Ibid., page 12.

³ Ibid., page 1.

⁴ Ibid., Exhibit 6.1.

⁵ Ibid., page 1.

⁶ Degradation refers to the gradual deterioration in the efficiency, and consequently the output, of a solar panel over time. It is usually estimated to occur at the rate of 0.5 to 1.0 percent (0.005 to 0.01) per year.

held on October 14, 2015 that the Seller did not wish to amend the Agreement at this point to correct the pricing errors. Given the Seller's position on this issue, the Division does not recommend correcting or rejecting these Agreements based upon the error described.

Timing and Procedural Issues

As noted above, this PPA is presented based upon capacity contribution pricing terms that were superseded with the Commission order of June 26, 2015 in Docket No. 14-035-140. The Commission had previously approved parties' stipulation in Docket No. 14-035-140 on June 9, 2015 that made significant modifications to Schedule 38, and subsequently approved new tariff sheets for Schedule 38 on August 3, 2015, with an effective date of August 8, 2015 in Docket No. 15-035-T10. One of the significant changes to Schedule 38 was the requirement that a PPA be signed within six months of the developer receiving indicative pricing or the pricing would necessarily be updated using the latest information. (See Schedule 38 Preface 5 (j) and Section I.B.9).

Scatec Solar North America, Inc. (Scatec) is the developer of Three Peaks. Scatec filed to intervene in Docket No. 14-035-140 on November 19, 2014; intervention was granted by the Commission on December 9, 2014. Scatec participated in the settlement discussions in Docket No. 14-035-140 and was one of the signatories to the stipulation in that docket. The Division believes that at all relevant times Scatec (along with PacifiCorp) was aware of the issues and proposed solutions in Docket No. 14-035-140.

The Company delivered indicative pricing to Three Peaks on January 16, 2015.⁷ The signature page of the PPA shows that it was signed on August 12, 2015 by the Company and August 13, 2015 by Three Peaks. The PPA was therefore signed 209 days after indicative pricing was received, i.e. one day shy of seven months.⁸ Indicative prices were not updated. An update occurred after July 15, 2015, i.e. after 180 days, and should have included, among other things,

⁷ Company response to OCS DR 2.1.

⁸ Schedule 38 specifically defines one month to equal 30 days. See Preface para. 5.

the new capacity contribution values approved by the Commission on June 26, 2015 in Docket No. 14-035-140.

The Division, the Office of Consumer Services, Three Peaks/Scatec, and the Company met on October 14, 2015 to discuss the pricing and update issues related above. The Company and Three Peaks asserted that the PPA was substantially agreed to verbally on or before June 1, 2015. There were apparently minor wording adjustments made to the PPA after that date. The Company represented to the parties at that meeting and subsequently confirmed in discussions with the Division that delays at the Company ultimately resulted in a signed PPA not being completed prior to a July 15 update deadline. The Company explained that during the time period of the negotiations, it was dealing with 107 different QF projects, whereas the normal volume is around 10 to 20. Under the Stipulation, dated May 5, 2015 in Docket No. 14-035-140, the Company was obligated to notify developers in the pricing queue of the new requirements, the status of their projects and the amount of time to complete the next step. The Company admits that it did not formally provide such notice to Three Peaks.⁹ The Company and Three Peaks assert that they had an oral agreement on or about June 1, 2015 and that therefore the Commission should approve the PPA.

Based on the evidence presented, the Division, somewhat reluctantly, recommends approval of this PPA. The Division notes again that the PPA as signed is not in compliance with the Schedule 38 tariff and Commission orders in effect at the time. This appears primarily due to the Company's delays. Likely, the pricing in the PPA is higher than it would be under a pricing update made on or around July 15, 2015. However, in addition to the representations of the Company and Three Peaks, there is an issue of FERC's interpretation of what is a "legally

⁹ Stipulation paragraph 25 states: "Upon Commission approval of this Stipulation, the Company will promptly notify each QF project currently in the QF pricing queue for which a power purchase agreement has not yet been executed of the requirements of this Stipulation and the new tariff provisions, of such project's status under the new tariff provisions, and of the amount of time remaining for such project to complete the next step to remain in the QF pricing queue under the new tariff requirements, which time shall be a minimum of thirty (30) additional days from the date of notice."

enforceable obligation,” which may force the Company to pay the original indicative prices anyway. This issue could be the subject of legal briefs requested by the Commission. At a minimum, the Division believes that the Company did not follow its pricing queue management as set forth Schedule 38 that it helped develop in Docket No. 14-035-140. The Company’s delays are not justifiable. It must perform better. Tariffs are binding and the Company’s failure to follow them should not be excused. The Commission may consider whether to reduce the Company’s recovery for expenses under this contract by the absolute value¹⁰ of the difference in price between the PPA and what an updated price would have been. This could be done in this case or reserved for a subsequent rate proceeding involving energy from this project.

Finally the Division notes that the updated Schedule 38 provides some allowance for extending deadlines for extenuating circumstances. The Preface language states that;

The Company must use its reasonable commercial efforts to meet all Company deadlines specified herein, and shall attempt to make up any Company delays in meeting subsequent Company deadlines. QF Developer deadlines will be extended to reflect Company delays beyond Company deadlines specified herein. Under extenuating circumstances, the Company or a QF Developer may request an extension of any deadlines from the Commission.

Section I.B.9 states that;

[I]f the QF Developer and the Company have not executed a power purchase agreement within six (6) months after indicative pricing was provided by the Company under Section I.B.4, except to the extent delays are caused by Company actions or inactions, which may include delays in obtaining legal, credit or upper management approval by the Company.

The Division believes that these provisions should be narrowly construed and only used in unusual cases. If the Commission does allow an extension of the 6 month deadline it should clarify that this instance is an anomaly due to the change in the process during the negotiation of the final PPA and extensions will not be freely granted.

¹⁰ The absolute value of the difference is intended to mean the mathematical absolute value. That is, whether or not any updated pricing is higher or lower than the original pricing, the price difference would set the amount of reduction faced by the Company for this type of tariff violation.

Green Tags

Green tags, also known as renewable energy credits (RECs), [REDACTED]
[REDACTED]
[REDACTED]

Transmission Interconnection Agreement

As a “milestone” the PPA requires that the Sellers enter into a final transmission interconnection agreement by [REDACTED]

[REDACTED] Based on discussions with the Company in this and other recent QF dockets, the Division understands that this interconnection agreement milestone was put in place to protect the Company and its ratepayers, and to provide some assurance that the project was viable and capable of completion by the scheduled online date. This requirement for a transmission agreement to be in place is one factor demonstrating to the Division that the developer is capable of performing on the Agreement.

CONCLUSION

As discussed above, the PPA is not in compliance with Schedule 38 and existing Commission orders as they existed at the time the PPA was signed. However, there appear to be mitigating circumstances that warrant approval of the contract, if not the acceptance of ratepayer liability for the full contract amount. The Division will likely seek adjustments to hold ratepayers harmless from Company delays in future cases with similar facts. The Commission may wish to do so in this case. Based upon the forgoing analysis, the Division recommends that the Commission approve the Agreement as just and reasonable and in the public interest.

cc: Michele Beck, Committee of Consumer Services
Cheryl Murray, Committee of Consumer Services
Bob Lively, PacifiCorp
Paul Clements, PacifiCorp
Daniel Solander, PacifiCorp

Three Peaks Power, LLC