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Attorneys for Three Peaks Power, LLC

Submitted October 20, 2015

BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH

In the Matter of the Application of)	Docket No. 15-035-70
Rocky Mountain Power for Approval of)	
the Power Purchase Agreement between)	COMMENTS OF THREE
PacifiCorp and Three Peaks Power, LLC)	PEAKS POWER, LLC
)	

Pursuant to the Scheduling Order issued by the Commission on September 10, 2015, Three Peaks Power, LLC (“Three Peaks”) submits the following Comments regarding the application of Rocky Mountain Power for approval of the power purchase agreement (“PPA”) between PacifiCorp (“RMP”) and Three Peaks.

INTRODUCTION

Three Peaks has been in the process of developing a solar-powered electric generation project in Iron County, Utah (the “Project”) since 2010. Three Peaks has expended all necessary funds to complete all pre-construction development activities. The Project is, as of the date of this filing, fully permitted. Three Peaks has acquired all necessary rights to the real property and

is in a position to start construction upon approval of the PPA by the Commission and the closing of the Project financing.

RMP is a “purchasing utility” under Utah Code Ann. § 54-12-2, and the Three Peaks Project is a “qualifying facility” (“QF”) under the terms of the Public Utility Regulatory Policies Act of 1978 (“PURPA”),¹ and Utah Code Ann. § 54-12-1 et seq. and related Commission orders. Three Peaks and RMP have negotiated a PPA for the purchase and sale of electric power from the Project. Three Peaks and PacifiCorp have entered into an interconnection agreement for delivering power to RMP’s transmission system, and Three Peaks has paid all required deposits under the interconnection agreement.

On August 27, 2015, RMP submitted an application for Commission approval of the PPA between PacifiCorp and Three Peaks in connection with the Project. These Comments are being filed in support of RMP’s application for approval.

COMMENTS

The PPA approval procedure before the Commission is set forth under the terms of the Commission’s prior orders and RMP’s applicable tariff provision. Pursuant to the procedure set forth in Electric Service Schedule No. 38 “Qualifying Facility Procedures” (“Schedule 38”), Part 1, Three Peaks negotiated a PPA with RMP. The purchase price set forth in the PPA was calculated using the Commission-approved methodology applicable at the time RMP and Three Peaks agreed to the indicative pricing on January 16, 2015.

RMP and Three Peaks negotiated and exchanged comments on the draft PPA on a consistent basis from the date of indicative pricing until the parties reached agreement on all material terms and conditions during the last week of May 2015. At no time during the negotiation period did the Project become stale, and neither RMP nor Three Peaks ever

¹ See 18 C.F.R. § 292.204 (2015).

abandoned the negotiations or the intent to reach final agreement on the PPA. The parties intended for the PPA to be executed prior to June 9, 2015.² Notwithstanding the parties' intentions, RMP delayed executing the PPA until August 13, 2015.

During the period of negotiation of the PPA, PacifiCorp d/b/a Rocky Mountain Power, filed a quarterly compliance filing for Schedule 38 in Docket No. 14-035-140. A series of settlement discussions amending Schedule 38 commenced in February 2015 and continued through mid-April 2015. On June 9, 2015, the Commission issued an order ("Order") approving a settlement agreement that resulted from the negotiation and a hearing ("Settlement Agreement").³ The Settlement Agreement, among other things, provided that "indicative prices must be updated unless a PPA is executed within six (6) months after indicative pricing was provided by [RMP]."⁴ The Order also provided that PacifiCorp file a revised Schedule 38 tariff.

RMP and Three Peaks agreed to all material terms and conditions of the PPA within six months of the date Three Peaks received indicative pricing from RMP. However, RMP failed to execute the agreement until five days after the tariff was effective. RMP admits that it was solely responsible for the delay in executing the PPA.

A. RMP did not provide notice to Three Peaks, contrary to the Commission's Order.

In the Settlement Agreement and Order, the Commission attempted to protect the interests of all parties that were in the RMP QF pricing queue by affording timely notice and a period of at least 30 days from the date of the notice to complete steps necessary to remain in the QF pricing queue under the new tariff. RMP failed to comply with the Settlement Agreement and Order.

² Any changes to the PPA after May were merely incidental cleanup changes to the agreement and exhibits.

³ *Rocky Mountain Power*, Electric Service Schedule No. 38 Procedures Decision, Docket No. 14-035-140 (June 9, 2015).

⁴ *Rocky Mountain Power Electric Service Schedule No. 38 ("Schedule 38")*, Sheet No. 38.2, Section 5(j) (effective Aug. 8, 2015).

RMP never sent Three Peaks the notice required by Paragraph 25 of the Settlement Agreement. Therefore, under the terms of Paragraph 25 of the Settlement Agreement, the minimum 30-day period has not yet commenced, and will not commence until RMP delivers notice to Three Peaks. The indicative price that the parties agreed to should still be in effect.

If the language of Paragraph 25 of the Settlement Agreement is not applied, Three Peaks, through no fault of its own, is placed in the untenable position of potentially losing the indicative pricing that is the defining commercial term of the PPA, and will be denied the benefits of the transition period required by the Settlement Agreement and the Commission's Order.

Alternatively, the six-month time frame specified in the Settlement Agreement should be extended by the Commission in accordance with Schedule 38. Schedule 38 expressly allows for an extension of time if the PPA is not executed as a result of delays caused by company actions or inactions.⁵

The delay in obtaining the signature was not the result of any action or inaction on Three Peaks' part. RMP has stated to representatives of the Division of Public Utilities and the Office of Consumer Services that the delays were contrary to the intent of the parties and the result of RMP's failure to obtain the company's signature. Therefore, Three Peaks requests that, if the six-month period is deemed expired, the Commission extend the period to allow the indicative pricing to remain in effect pursuant to Schedule 38.

B. The Federal Energy Regulatory Commission ("FERC") Regulation's Conflict with Schedule 38.

Schedule 38 is inconsistent with FERC's regulations and decisions implementing PURPA. Schedule 38 requires a proposed power purchase agreement to be executed within a certain time frame; otherwise, the underlying terms of the agreement are not effective. Under

⁵ See *id.* at Sheet 38.1, Section 4.

FERC's jurisprudence, the opposite is true: FERC has clearly held that a legally enforceable obligation under PURPA is reached not when an agreement is executed, but when the parties commit to sell and buy the power.⁶ Thus, a legally enforceable obligation does not require an executed agreement or even a written contract.

For example, in *Cedar Creek Wind LLC*, FERC stated that "when a state limits the methods through which a legally enforceable obligation may be created to only a fully-executed contract, the state's limitation is inconsistent with PURPA, and our regulations interpreting PURPA."⁷ Further, FERC stated that "a legally enforceable obligation may be incurred before the formal memorialization of a contract to writing."

Three Peaks and RMP agree that all material terms and conditions of the PPA were reached the last week of May 2015. Three Peaks committed itself to sell electric power to RMP, and RMP was legally obligated to purchase the power from Three Peaks. Consistent with FERC decisions, the agreement was binding before RMP executed the written PPA in August 2015. The Commission's requirement that the PPA be executed is inconsistent with FERC policy and decisions implementing PURPA, and should not serve as a limitation on the parties' mutual intent to buy and sell power at the indicative price quoted by RMP on January 16, 2015.

WHEREFORE, Three Peaks respectfully urges the Commission to issue its order approving the PPA between PacifiCorp and Three Peaks.

⁶ See, e.g., *Cedar Creek Wind, LLC*, 137 FERC ¶ 61,006 at P 32 (2011) (emphasis added).

⁷ *Id.*

RESPECTFULLY SUBMITTED this 20th day of October, 2015.

Ballard Spahr LLP

/s/ Jerold G. Oldroyd _____

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CERTIFICATE OF SERVICE

I hereby certify that on the 20th day of October, 2015, an original and ten (10) true and correct copies of the foregoing **COMMENTS OF THREE PEAKS POWER, LLC** were hand-delivered to:

Gary L. Widerburg
Commission Secretary
Public Service Commission of Utah
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and true and correct copies were electronically mailed to the addresses below:

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