

- BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH -

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In the Matter of the Application of Rocky Mountain Power for Approval of the Power Purchase Agreement between PacifiCorp and Three Peaks Power, LLC

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DOCKET NO. 15-035-70

ORDER

ISSUED: December 2, 2015

**1. PROCEDURAL HISTORY**

On August 27, 2015, PacifiCorp, doing business in Utah as Rocky Mountain Power (“PacifiCorp”), filed with the Commission an application (“Application”) for approval of a power purchase agreement (“PPA”) between PacifiCorp and Three Peaks Power, LLC (“Three Peaks”). The PPA provides Three Peaks will sell electric energy to PacifiCorp from Three Peak’s solar generation project (“Facility”) in Iron County, Utah for 20 years. Three Peaks represents in the PPA that it is a qualifying facility (“QF”) under the Public Utility Regulatory Policies Act of 1978 (“PURPA”).

On October 20, 2015, the Division of Public Utilities (“Division”), the Office of Consumer Services (“Office”), and Three Peaks filed comments addressing the Application. On October 30, 2015, PacifiCorp, the Office and Three Peaks filed reply comments.

On November 10, 2015, the Commission’s designated Presiding Officer held a hearing to consider the Application. At hearing, PacifiCorp and the Division provided testimony in support of the Application. The Office participated in the hearing but abstained from taking a position as to whether the Commission should approve the Application. During the hearing, the Office’s counsel moved to strike certain portions of PacifiCorp’s and Three Peak’s comments, which the Presiding Officer took under consideration.

**2. REPRESENTATIONS AND POSITIONS OF THE PARTIES**

**a. The Division**

The Division recommends the Commission approve the PPA. The Division represents the pricing appears to be consistent with the Proxy/PDDRR method the Commission has approved along with the capacity contribution values the Commission approved in Docket No. 12-035-100 (“August 2013 Order”).<sup>1</sup>

The Division notes PacifiCorp delivered indicative pricing to Three Peaks on January 16, 2015, and the parties signed the PPA on August 13, 2015, just under seven months later. The Division observes indicative prices should have been updated after six months elapsed pursuant to tariff revisions the Commission approved in its June 9, 2015, Order in Docket No. 14-035-140 (“June Order”).<sup>2</sup> The Division met with representatives from PacifiCorp, Three Peaks and the Office on October 14, 2015 to discuss this issue. At the meeting, PacifiCorp and Three Peaks maintained they had substantially agreed to the PPA’s terms on or before June 1, 2015 (*i.e.*, within the six-month timeframe), and PacifiCorp explained it was processing an abnormally high volume of QF projects at that time.

While the Division expresses reservations concerning the delay in execution of the contract and questions whether PacifiCorp should be allowed to recover through rates the difference between the prices in the PPA and the prices effective at the time it was executed, the

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<sup>1</sup> See August 16, 2013 Order on Phase II Issues, *In the Matter of the Application of Rocky Mountain Power for Approval of Changes to Renewable Avoided Cost Methodology for Qualifying Facilities Projects Larger than Three Megawatts*, Docket No. 12-035-100.

<sup>2</sup> See June 9, 2015 Order Approving Settlement Agreement on Schedule 38 Procedures, *In the Matter of the Review of Electric Service Schedule No. 38, Qualifying Facilities Procedures, and Other Related Procedural Issues*, Docket No. 14-035-140.

Division states “there appear to be mitigating circumstances that warrant approval of the contract.” (Division Comments at 6.) The Division quotes Schedule 38 in noting the tariff expressly allows the Commission to extend deadlines under extenuating circumstances. (*Id.* at 5.) The Division also notes “there is an issue of FERC’s interpretation of what is a ‘legally enforceable obligation,’ [“LEO”] which may force [PacifiCorp] to pay the original indicative prices anyway.” (Division Comments at 4-5.) Ultimately, “the Division recommends that the Commission approve the [PPA] as just and reasonable and in the public interest.” (*Id.* at 6.)

The Division also found errors related to the Facility’s estimated annual output and projected degradation of production capacity. But for these errors, Three Peaks would have received a slightly higher levelized price. However, the Division represents Three Peaks informed the Division that it did not wish to amend the agreement to correct the errors. In light of Three Peak’s preference, the Division recommends approval of the PPA without any adjustment to correct for these issues.

**b. PacifiCorp**

PacifiCorp represents it is required to purchase power from QFs as a “purchasing utility” under PURPA, Utah Code Ann. § 54-12-2 and applicable Commission orders. PacifiCorp also represents the purchase prices set forth in the PPA are derived from the method the Commission adopted in the August 2013 Order and that all interconnection requirements will be met and the Facility will be fully integrated with PacifiCorp’s system.

PacifiCorp represented in its reply comments and at hearing that PacifiCorp and Three Peaks reached agreement on the PPA’s material terms within six months of the date PacifiCorp provided indicative pricing. PacifiCorp emphasized the Commission adopted the revised, newer

version of Schedule 38 at the approximate time that negotiations between the parties were concluding. Adding to the complexity, PacifiCorp represents that during the negotiation period it was processing 107 QF pricing requests and negotiations, five to ten times its typical workload.

PacifiCorp “acknowledges the existence of [FERC] orders on the LEO issue but does not believe a review of that issue by the Commission is necessary at this time in order to approve” the PPA. (PacifiCorp Reply Comments at 5.) Instead, PacifiCorp argues “the new Schedule 38 contemplates and allows for extensions of timelines in the event of extenuating circumstances” and asks the Commission to exercise its discretion to grant such an extension here. (Hr’g Tr. at 9:4-6.) Specifically, PacifiCorp asserts the large volume of QF requests PacifiCorp was processing and the revisions to Schedule 38 the Commission instituted at the end of the negotiation constitute extenuating circumstances that merit an extension of the deadline.

PacifiCorp disagrees with the Division that it should be denied any cost recovery as a result of the delay in contract execution, asserting it “should not be rewarded or penalized based on its implementation of Commission avoided cost orders” and that “[i]f the Commission determines the ... PPA is compliant with the applicable tariffs ... [it] should be approved with no further conditions or adjustments relative to the Company’s recovery of any incurred expenses.” (PacifiCorp Reply Comments at 5.)

PacifiCorp testified it “believes the just and reasonable outcome in this proceeding is to approve the [PPA] as filed.” (Hr’g Tr. at 15:7-9.)

**c. Three Peaks**

While Three Peaks contends PacifiCorp was responsible for the delay in contract execution, it agrees “the parties reached agreement on all material terms and conditions [before

the June Order issued] during the last week of May 2015.”<sup>3</sup> (Three Peaks Comments at 2.) In its Initial Comments, Three Peaks cites one FERC order and suggests a LEO existed at the end of May that precluded a downward adjustment in pricing even though the parties failed to execute a written contract within six months. Alternatively, like PacifiCorp, Three Peaks also argues the Commission should exercise its discretion to allow an extension of time. Three Peaks points to two provisions in the tariff. First, Three Peaks references Section I.B.9 of Schedule 38, which allows for extensions of time for contract execution where PacifiCorp causes delay. Three Peaks asserts this provision applies because PacifiCorp caused the delay in contract execution. Second, Three Peaks agrees with the Division and PacifiCorp that Schedule 38 allows the Commission to extend any deadline under extenuating circumstances and asserts the circumstances here warrant such an extension.

**d. The Office**

The Office submitted comments and provided testimony at hearing but took no position in this docket, representing that “[d]ue to ... uncertainties regarding compliance with regulatory requirements, the Office cannot make a recommendation on the [PPA].” (Hr’g Tr. at 47:2-5.)

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<sup>3</sup> Relying on attached emails between the parties, PacifiCorp asserts Three Peaks’ “suggestion that negotiation delays were solely a result of Company actions is inaccurate.” (PacifiCorp Reply Comments at 7.) PacifiCorp asserts that, although “the parties had agreed to the material terms of the PPA by late May 2015, [Three Peaks] was requesting certain changes between early June and the time the PPA was executed in early August.” (*Id.*) PacifiCorp maintains it “responded to these requested changes quickly and was not responsible for any delays that occurred during this time period.” (*Id.*)

### **3. Findings and Conclusions**

#### **a. The Commission Makes No Finding as to Whether a Legally Enforceable Obligation Existed Prior to Execution of the PPA and Finds Extenuating Circumstances Exist Warranting an Extension of the Deadline for Contract Execution.**

The parties have raised the specter of whether a “legally enforceable obligation” or “LEO,” as the term is used in the Code of Federal Regulations and applicable FERC orders, existed prior to the execution of the PPA in a manner that does not aid our analysis. Either a LEO existed prior to the execution of the written contract or one did not, and no party has made a serious attempt to make a showing either way. In its initial comments, Three Peaks declares a LEO existed as of “the last week of May 2015” but offers only a cursory discussion of the law supporting this conclusion and no affidavit or other evidence to support it. (Three Peaks Comments at 5.) The Division notes this “is an issue” but takes no position on the matter. (Division Comments at 4-5.) For its part, PacifiCorp “acknowledges the existence of [FERC] orders on the LEO issue but does not believe a review of that issue ... is necessary” while at the same time conceding that it “agrees ... the concept of a LEO established under federal law is consistent with the PPA approval [PacifiCorp] is seeking herein.” (PacifiCorp Reply Comments at 5.) Given that no party has made an earnest attempt to demonstrate the existence or non-existence of a LEO, we find the record is insufficient to support a finding on the issue.

As the parties noted, the preface to Schedule 38 provides that “[u]nder extenuating circumstances, the Company or a QF Developer may request an extension of any deadlines from the Commission.” Additionally, we are mindful Section I.B.9 of Schedule 38 allows for

extensions to the six-month timeframe “to the extent delays are caused by Company actions or inactions.”

The record does not support a finding that PacifiCorp’s “actions or inactions” were the primary cause for delay in execution. Rather, we find persuasive the testimony showing the parties were finalizing the negotiations for this PPA concurrent with negotiations to revise Schedule 38, resulting in some uncertainty that, when coupled with the unusually high number of QF inquiries and applications PacifiCorp was endeavoring to process, resulted in the parties failing to execute a contract within the newly established six-month timeframe.

We find these circumstances constitute “extenuating circumstances” under Schedule 38. Specifically, because the contract was being finalized concurrently with the pertinent revisions to Schedule 38 and because PacifiCorp was contending with an uncharacteristically high workload, the Commission finds extenuating circumstances warrant extending the deadline for execution of the PPA. However, we generally agree with the Division that “this instance is an anomaly [largely] due to the change in the process during the negotiation of the final PPA.” (Division Comments at 5.)

**b. The Commission’s Approval of the PPA Does Not Alter Any Pre-Existing Commission Order, and the PPA’s Erroneous Reference to the Defunct “Inter-Jurisdictional Cost Allocation Revised Protocol” will Have No Bearing on How the Commission Treats the Allocation of Costs Associated with the PPA.**

Section 2.2 of the PPA erroneously states the PPA is subject to the “Inter-Jurisdictional Cost Allocation Revised Protocol (‘Revised Protocol’)” and describes an allocation protocol that

has been superseded by what is commonly referred to as the “2010 Protocol.”<sup>4</sup> PacifiCorp’s Application, however, references the correct protocol for interjurisdictional allocation. (*See* Application at 3.)

The Commission expects PacifiCorp’s reference to the Revised Protocol was inadvertent and does not believe this mistake should interfere with the parties’ ability to move forward on the contract. In fact, the Commission does not understand why the interjurisdictional allocation issue is addressed in the contract at all because it appears to have no bearing on PacifiCorp’s contractual relationship with Three Peaks. In any event, the Commission puts PacifiCorp on notice that by approving the PPA the Commission does not alter existing Commission orders concerning interjurisdictional allocation of costs. The Commission will treat the costs associated with the PPA in a manner consistent with the governing 2010 Protocol notwithstanding any language in the contract providing otherwise.

**c. PacifiCorp’s Recovery of Costs Associated with the PPA is Not at Issue in this Docket.**

In approving a power purchase agreement, the Commission makes a determination that the pricing and terms of the contract are consistent with PacifiCorp’s tariff and governing statutes and regulations. In evaluating PacifiCorp’s applications to approve power purchase agreements, the Commission does not ordinarily make any findings or decisions pertaining to cost recovery.

The Commission generally agrees with PacifiCorp that it “should not be rewarded or penalized” for purchasing power in compliance with its obligation under PURPA and applicable

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<sup>4</sup> *See In the Matter of the Application of PacifiCorp for an Investigation of Inter-Jurisdictional Issues*, Docket No. 02-035-04.

Utah law. Here, we have found extenuating circumstances excuse the parties' failure to finalize their written contract within six months and that the PPA is otherwise compliant with regulatory requirements. We do not anticipate that the delay in formalizing the contract alone, on these facts, would warrant a punitive reduction in PacifiCorp's recovery of costs in a future proceeding. However, the scope of this Order is limited to the Application before the Commission, which concerns the Commission's approval of the PPA and does not extend to cost recovery.

**d. The Office's Motions to Strike are Granted in Part and Denied in Part.**

During the hearing, the Office's counsel asked questions of Mr. Clements and Mr. Resta to which their respective counsels objected on the basis that the questions sought a legal conclusion. Specifically, the Office's counsel asked Mr. Clements about PacifiCorp's statement in its reply comments that "the concept for LEO established under federal law is consistent with [the] PPA approval the Company is seeking herein." (Hr'g Tr. at 16:8-10.) The Office's counsel asked Mr. Resta about statements in Three Peaks' initial comments pertaining to whether Schedule 38 of PacifiCorp's tariff is "inconsistent with FERC regulations and decisions implementing PURPA." (*Id.* at 53:25-54:4.)

The Presiding Officer sustained both objections and the Office's counsel moved to strike Mr. Clements' and Mr. Resta's pertinent statements from the record on the basis that the witnesses were not subject to cross-examination on these subjects and were not qualified to offer the legal opinions proffered in the written comments. (*Id.* at 16:20-22.)

While both witnesses testified at hearing that they "adopted" the written comments, it is not clear whether the witnesses thereby intended to swear to the veracity of any legal arguments

contained in those documents.<sup>5</sup> Notably, neither Mr. Clements nor Mr. Resta signed the written comments at issue.<sup>6</sup> The Commission agrees with the Office's counsel that insofar as it was either PacifiCorp's or Three Peak's intention to incorporate legal positions offered in their written comments as part of their sworn testimony, such testimony should be and is stricken. However, parties are certainly allowed to put forth legal arguments in their written comments and their fact witnesses should not be subject to cross-examination on those arguments at hearing. Accordingly, the legal arguments articulated in the parties' written comments will stand in the record as such.

**ORDER**

Based on our review of the Application, the PPA, the comments filed in this docket, the testimony provided at the hearing, and hearing no opposition to the Application, we find extenuating circumstances warrant an extension of the six-month deadline for contract execution and further find the prices, terms and conditions of the PPA to be consistent with applicable state and federal laws, relevant Commission orders, and Schedule 38. Therefore, we conclude the PPA is just and reasonable and in the public interest.

Pursuant to the foregoing, the Commission orders:

1. The Power Purchase Agreement between PacifiCorp and Three Peaks Power, LLC is approved.
2. The Office's motion to strike is denied with respect to PacifiCorp's and Three Peaks' respective written comments and granted insofar as either party's witness's

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<sup>5</sup> (Hr'g Tr. at 6:7-9, 49:10-11.)

<sup>6</sup> Jeffrey Larsen signed PacifiCorp's reply comments, and Mr. Oldroyd submitted the initial comments on behalf of Three Peaks.

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“adoption” of written comments was intended to constitute a sworn statement about the veracity of that party’s legal argument.

DATED at Salt Lake City, Utah, this 2<sup>nd</sup> day of December, 2015.

/s/ Michael J. Hammer  
Presiding Officer

Approved and confirmed this 2<sup>nd</sup> day of December, 2015, as the Order of the Public Service Commission of Utah.

/s/ Thad LeVar, Chair

/s/ David R. Clark, Commissioner

/s/ Jordan A. White, Commissioner

Attest:

/s/ Gary L. Widerburg  
Commission Secretary  
DW#270770

Notice of Opportunity for Agency Review or Rehearing

Pursuant to Utah Code Ann. §§ 63G-4-301 and 54-7-15, a party may seek agency review or rehearing of this order by filing a request for review or rehearing with the Commission within 30 days after the issuance of this written order. Responses to a request for agency review or rehearing must be filed within 15 days of the filing of the request for review or rehearing. If the Commission fails to grant a request for review or rehearing within 20 days after the filing of a request for review or rehearing, it is deemed denied. Judicial review of the Commission's final agency action may be obtained by filing a Petition for Review with the Utah Supreme Court within 30 days after final agency action. Any Petition for Review must comply with the requirements of Utah Code Ann. §§ 63G-4-401, 63G-4-403, and the Utah Rules of Appellate Procedure.

CERTIFICATE OF SERVICE

I CERTIFY that on the 2<sup>nd</sup> day of December, 2015, a true and correct copy of the foregoing was served upon the following as indicated below:

By Electronic-Mail:

Data Request Response Center ([datarequest@pacificorp.com](mailto:datarequest@pacificorp.com))  
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