

- BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH -

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

DOCKET NO. 16-035-04
PROVISIONAL CONCLUSION OF
LAW

ISSUED: March 4, 2016

On February 4, 2016, PacifiCorp dba Rocky Mountain Power (“RMP”) filed its Application and Request for Expedited Approval (“Application”) in this matter. In the Application, RMP makes various representations relating to its efforts to negotiate a qualifying facility (“QF”) power purchase agreement (“PPA”) with Thayn Hydro LLC (“Thayn”). RMP notes the Commission issued two orders altering Schedule 37 prices and the allowable contract duration for QF PPAs during the process of these negotiations. Specifically, on September 18, 2015, the Commission issued an order adjusting pricing under Schedule 37 (“Pricing Order”)¹ and on January 7, 2016, the Commission issued an order decreasing the maximum QF contract term from 20 to 15 years (“Contract Duration Order”).² In light of these changes, RMP asks the Commission to “issue an order determining the price and contract terms” for Thayn’s PPA. (Application at 7.)

With respect to the pricing issue, RMP represents “the parties had agreed to all of the material terms with the exception of the insurance [requirement] provisions prior to the date of the [Pricing Order].” (*Id.* at 5.) RMP acknowledges Schedule 37 provides that prices “shall be

¹ Report and Order dated September 18, 2015, *In the Matter of Rocky Mountain Power’s Proposed Revisions to Electric Service Schedule No. 37, Avoided Cost Purchases from Qualifying Facilities*, Docket No. 15-035-T06.

² Order dated January 7, 2016, *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.

those in effect at the time a written contract is executed,” but nevertheless represents RMP “would support a finding that it is just and reasonable for Thayn ... to receive the Schedule 37 pricing that was in effect immediately prior to the date of the [Pricing Order].” (*Id.*) The Application suggests the parties would have executed a PPA before the Commission issued its Contract Duration Order but for the parties’ disagreement about whether the pricing the Commission adopted in its Pricing Order applied to the PPA. Again, RMP asserts that notwithstanding the “ongoing dispute of the pricing issue ... it is just and reasonable for Thayn ... to obtain a 20 year contract term.” (*Id.*) Nowhere in its Application does RMP assert a legally enforceable obligation or “LEO” was established as the term is used in the Code of Federal Regulations and orders of the Federal Energy Regulatory Commission interpreting the term. *See, e.g.,* 18 CFR 292.304; *Grouse Creek Wind Park, LLC* 142 FERC P61, 187 (2013).

On March 2, 2016, Thayn filed comments with respect to the Application. Thayn’s comments offer some details as to the negotiation process it experienced with RMP, represent that it may enter an “interim agreement” with RMP pending the Commission’s decision in this matter, and ask the Commission approve a PPA “with the Schedule 37 rates in effect immediately prior to the [Pricing Order] ... and with a 20 year term.” (Thayn Direct Comments at 4.) Thayn represents “[s]uch an order would be just and reasonable, would not have a material impact on [RMP’s] finances or its ratepayers, and is well-supported by the facts of this case.” (*Id.* at 4.) Like RMP, Thayn does not assert that it incurred a legally enforceable obligation prior to the Commission issuing either its Pricing Order or its Duration Order.

The Division of Public Utilities (“Division”) also filed comments on March 2, 2016. The Division acknowledges that Thayn and/or RMP’s claim to the earlier, higher Schedule 37 pricing

“may be based upon the idea of [a] legally enforceable obligation ... as defined by FERC.” (Division Comments at 5.) However, the Division states it “is not going to litigate the point in this matter” and concludes “that it is in the public interest in this matter to grant Thayn ... the [earlier] Schedule 37 pricing.” (*Id.* at 6.) With respect to the issue of contract duration, the Division “does not make a recommendation on the term.” (*Id.*)

Finally, the Office of Consumer Services (“Office”) filed comments on March 3, 2016. The Office asserts “PPAs under Schedule 37 must follow the requirements of the tariff; and therefore, PPAs must include those prices in effect at the time a written contract is executed.” (Office Comments at 3.) The Office does not specifically refer to the notion of a LEO but disputes the parties had agreed to all material terms prior to the Commission issuing its Pricing Order. (*Id.* at 2.)

DISCUSSION AND PROVISIONAL CONCLUSION OF LAW

As a general matter, RMP is obliged to follow its tariff. Schedule 37 provides “[t]he prices applicable to a Utah Qualifying Facility shall be those in effect at the time a written contract is executed by the parties.” The Commission is aware the Code of Federal Regulations uses the term “legally enforceable obligation” in addition to the term “contract” and that FERC has held under certain circumstances something less than a written contract may constitute a LEO and thereby entitle a QF to terms that would otherwise be outdated in the absence of a written contract. As we noted in our Contract Duration Order, we have not had occasion to consider whether and how a party might establish the existence of a LEO prior to execution of a written contract but we acknowledge parties may bring the issue before the Commission to the extent it arises. (Contract Duration Order at 21, n. 5.) In this docket, to date, no party has asserted

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a LEO was established prior to the Commission's issuance of its Pricing Order or its Contract Duration Order.

In the absence of a showing that a LEO existed that entitles Thayn to otherwise outdated terms or prices, the Commission will not order RMP to enter into a PPA using pricing or terms contrary to the applicable tariff. The Commission offers this provisional conclusion of law to guide the parties in their preparation for the hearing. The schedule was accelerated in this docket at the parties' request, and we acknowledge time is short. If the parties would like additional time to prepare their evidence and arguments or to submit legal briefing in light of this provisional ruling, the Commission will entertain such requests. We expect Thayn's representation that they may be entering into an "interim agreement" with RMP may serve to alleviate problems otherwise associated with extending the schedule.

DATED at Salt Lake City, Utah, March 4, 2016.

/s/ Michael J. Hammer
Presiding Officer

Attest:

/s/ Gary L. Widerburg
Commission Secretary
DW#272162

CERTIFICATE OF SERVICE

I CERTIFY that on March 4, 2016, a true and correct copy of the foregoing was served upon the following as indicated below:

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