- BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH -

Formal Complaint under Schedule 38, Clenera, LLC on behalf of 1.21 GW LLC against Rocky Mountain Power	DOCKET NO. 17-035-52 ORDER

ISSUED: February 6, 2018

The Public Service Commission ("PSC") denies Clenera, LLC on behalf of 1.21 GW LLC's ("Clenera") request for a "day for day" extension of Schedule 38 deadlines.

1. Procedural Background

On September 22, 2017, Clenera filed a formal complaint ("Complaint") against PacifiCorp dba Rocky Mountain Power ("RMP"), requesting an indefinite, "day for day" extension with respect to certain timeframes enumerated in Schedule 38 of RMP's tariff. On October 23, 2017, RMP filed a Response and Motion to Dismiss and the Division of Public Utilities ("DPU") filed comments. On November 21, 2017, the PSC issued an order denying RMP's motion to dismiss and setting the Complaint for hearing. The PSC heard the Complaint on December 21, 2017. RMP, DPU and Clenera appeared through counsel and offered testimony.

2. Factual Background

Clenera represents it is manager of 1.21 GW LLC, which is seeking to develop a number of solar qualified facilities ("QFs") in Utah County, totaling 1480 megawatts. (Hr'g Tr. at 8:19-21.) Clenera categorizes its projects into two groups, the "Faraday Projects" and the "Goshen Valley Projects" (collectively, the "Projects"). (*Id.* at 8:24-9:1.)

Clenera testified it submitted requests for indicative pricing on the Faraday and Goshen projects on November 2, 2016 and November 15, 2016, respectively.[1] (Hr'g Tr. at 9:5-12.) Clenera first received indicative pricing for the Goshen projects on December 22, 2016. (*Id.* at 10:14-15.) On January 17, 2017, Clenera received indicative pricing for the Faraday projects. (*Id.* at 10:18.) On February 1, 2017, Clenera requested to change the point of interconnection for the Goshen projects, and consequently Clenera received revised indicative pricing for the Goshen projects on March 16, 2017. (*Id.* at 10:22-11:17.)

On February 15, 2017, Clenera executed Interconnection Feasibility Study Agreements with PacifiCorp's transmission function ("PacTran") for the Faraday and the Goshen projects. (*See id.* at 15: 9-11.) Based on its review of correspondence between the parties, the DPU notes "there appears to have been additional information that PacTran needed from Clenera, but [the] issue appears to have been cleared up by around March 1, 2017." (DPU Comments at 2.)

Clenera requested power purchase agreements ("PPAs") from RMP for the Faraday projects on March 13, 2017 and for the Goshen projects on May 12, 2017. (Hr'g Tr. at 12:18-23.) On March 21, 2017, RMP responded, with respect to the request for Faraday, representing it found the request to be "complete." (Complaint at 2; Hr'g Tr. at 63:15-64:4.) On April 18, 2017, RMP requested an additional update with respect to the Studies, asserting it needed to have the results prior to issuing a proposed PPA. (*Id.*) "In the latter part of March 2017, PacTran contacted Clenera saying that it had determined that Clenera's projects would impact a larger area and that this would push back the date for completion of the interconnection studies." (DPU

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[1] Some disagreement appears to exist as to the date Clenera submitted a request for pricing on the Faraday projects with RMP representing to the DPU it did not receive the request until December 14, 2016. (DPU Comments at 3.)

Comments at 4.) "On March 27, 2017, PacTran confirmed that it would be early 2018 before the interconnection studies would be done," later citing "the large number of interconnection study requests that it had as an additional reason for the delay in performing Clenera's interconnection studies." (*Id.*)

As of the date of hearing, Clenera had not received completed Studies for Faraday or Goshen, and RMP, citing the failure to procure Studies, has refused to provide PPAs to Clenera for the Projects.

In its Complaint, Clenera seeks an extension of two Schedule 38 deadlines with respect to the Projects. First, § I.B.9 requires the indicative pricing a QF receives from RMP be recalculated using the most recent inputs and method "if the QF Developer and the Company have not executed a [PPA] within six (6) months after indicative pricing was provided … 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." Similarly, under § I.B.10(e), a QF project must be removed from the QF pricing queue if a PPA "has not been executed by both parties within five (5) months after the proposed PPA was provided by the Company to the [QF] Developer, except to the extent delays are caused by Company actions or inactions." This Order refers to these two requirements collectively as the "Deadlines." Clenera seeks an extension of both Deadlines "on a day-for-day basis," arguing RMP is responsible for an unusual delay in completing the Studies for its Projects and has failed to provide Clenera with a proposed PPA.

3. Positions of the Parties

a. Clenera

Clenera asserts it is entitled to an extension of the Deadlines on a "day-for-day" basis until PacTran completes the Studies. (Complaint at 3.) Clenera argues PacTran should have completed the Studies within 45 days after they were requested, *i.e.* after the Interconnection Feasibility Study Agreements were executed. (*See, e.g.,* Hr'g Tr. at 15:20-16:3.) Clenera submitted its executed Interconnection Feasibility Study Agreements on February 15, 2017, but had not received completed studies as of the hearing date, approximately 10 months later. Clenera maintains this is an unreasonable "Company caused delay" as contemplated under the Deadlines and, therefore, requests a "day-for-day" extension of the Deadlines until it receives completed Studies from PacTran.

b. RMP

RMP emphasizes that interconnection studies are a function PacTran, not RMP, performs and is "independent and separate" from the QF pricing queue, managed by RMP.[2] (Hr'g Tr. at 103:16-22.) RMP called a witness from PacTran who testified "the influx of large number[s] of higher megawatt projects in 2016 and '17 have increased the complexity of the process and the time to complete the [interconnection] studies." (Hr'g Tr. at 71:14-18.) The witness further testified PacifiCorp "currently [has] more megawatts in [its] interconnection queue than [it has] existing generation . . . a 200 percent increase in excess of current PacifiCorp east network load."

[2] PacifiCorp's transmission function, PacTran, generally must operate independently of its retail utility business. PacTran may serve PacifiCorp's other business divisions, including its public utility, but must provide nondiscriminatory transmission service to outside customers. PacTran provides these services pursuant to its OATT, which is approved and regulated by the Federal Energy Regulatory Commission ("FERC").

(*Id.* at 73:24-74:3.) The witness represented PacTran is "using all reasonable efforts … to complete these [interconnection] studies in a timely manner." (*Id.* at 76:1-3.) According to testimony, PacTran does not treat a QF's interconnection request any differently than a "FERC jurisdictional request," *i.e.* a non-QF's request. (*Id.* at 83:10-12.)

RMP maintains Clenera's failure to obtain Studies is not a "Company caused" delay as the term is used in the Deadlines. RMP emphasizes PacTran has no control over the surge in interconnection requests and that Clenera ought to have heeded language in Schedule 38 advising it to begin the interconnection study process as early as possible by, for example, beginning the interconnection process prior to requesting indicative pricing.

c. DPU

The DPU "concludes that the delays in meeting the Schedule 38 timelines are due to PacTran, which, of course, is part of PacifiCorp." (DPU Comments at 5.) The DPU recommended in its written comments that the Deadlines "be put on hold for the Clenera projects until PacTran provides the interconnection studies that in contracted in February 2017 to perform at which time the Schedule 38 'clock' will resume at the point where Clenera requests a proposed purchase power agreement from [RMP.]" (*Id.* at 5-6.) The DPU added, however, "[c]ontinued support from the [DPU] . . . may become problematic if the on-line date much exceeds what was assumed when indicative pricing was provided, *regardless of the cause*." (*Id.* at 5. Emphasis added.) The DPU reasoned it is charged with "looking out for the broader public interest, which may come into play if the indicative prices become too out of date and detached from actual on-line dates of the Clenera projects." (*Id.*) At hearing, the DPU represented it "is

not recommending a day-per-day extension of the commercial on-line date" but "is not opposed to some deviation of the commercial on-line date." (Hr'g Tr. at 107:2-6.)

4. Findings and Conclusions

The tariff makes clear QFs must "[i]n addition to negotiating a [PPA]," enter into an interconnection agreement. (Schedule 38 at 38.9.) The tariff advises "[t]he generation interconnection process is a critical and lengthy process that typically must be well underway before a power purchase agreement should be requested." (*Id.* at 38.1.) The tariff continues "QF Developers are strongly encouraged to gain a clear understanding of the transmission interconnection process and associated costs and timelines before requesting indicative pricing or a [PPA]." (*Id.*) As compared to the methodical process for obtaining a PPA, the tariff contains relatively little direction with respect to the negotiation of interconnection agreements. For interconnections greater than twenty megawatts, like Clenera's, the tariff simply provides PacifiCorp "will process the interconnection application through [PacTran] generally following the procedures for studying the generation interconnection described in [its] Open Access Transmission Tariff" ("OATT"). (*Id*. at 38.10.)

The OATT, in turn, provides "[PacTran] shall use Reasonable Efforts to complete the Interconnection Feasibility Study no later than forty-five (45) Calendar Days after [it] receives the fully executed Interconnection Feasibility Study Agreement." (OATT at 153.) The OATT continues that if PacTran "determines that it will not meet the required time frame for completing the Interconnection Feasibility Study, [it] shall notify [the customer] as to the schedule status." (*Id.* at 154.) Additionally, "[i]f [PacTran] is unable to complete the [Study]

within that time period, it shall notify [the customer] and provide an estimated completion date with an explanation of the reasons why additional time is required." (*Id.*)

Therefore, the OATT requires PacTran to use reasonable efforts to complete the Studies in 45 days, but it is not a hard deadline. The OATT plainly contemplates a longer period may be necessary but requires PacTran to provide an explanation as to why the additional time is required.

In a recent order, the PSC articulated its regulatory role with respect to QFs under the Public Utility Regulatory Policies Act ("PURPA"):

> Generally, the transmission and wholesale of electricity fall within the jurisdiction of the Federal Energy Regulatory Commission ("FERC"). *See, e.g.,* 16 U.S.C. § 824(b). However, federal law delegates certain responsibilities to state regulators in the administration of PURPA that would otherwise fall under FERC's jurisdiction. For example, PURPA expressly charges state regulators with establishing the "avoided cost" (wholesale) pricing that utilities must pay to QFs for their output.[3]

In that order, the PSC noted "[t]he parameters of state and federal jurisdiction are not everywhere unambiguously defined under PURPA," but observed "[i]t is not our role to interpret transmission rights … or any other matter reserved to FERC."[4] The PSC similarly concluded, it is not for the PSC "to interpret and compel a utility or its transmission service provider to take action under a FERC-jurisdictional document that governs transmission service."[5] Without question, the OATT is a FERC-jurisdictional document that governs transmission service.

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[3] *Glen Canyon Solar A, LLC and Glen Canyon Solar B, LLC's Request for Agency Action to Adjudicate Rights and Obligations under PURPA, Schedule 38 and Power Purchase Agreements with Rocky Mountain Power*, Docket No. 17-035-36, Consolidated Order issued December 22, 2017 at 3.

[4] *Id.* at 3, 14.

[5] *Id.* at 22.

Here, the dispositive issue is whether an extension of the Deadlines is appropriate under Schedule 38 because of delays "caused by [the] Company." However, the alleged material delays relate exclusively to PacTran's processing of the interconnection studies, and Schedule 38 wholly relies on the OATT to regulate that process. Which is to say, the PSC cannot find these delays to be "Company caused" without interpreting and enforcing the pertinent provisions of the OATT. Specifically, to find in favor of Clenera, the PSC must (i) interpret the OATT's 45-day guideline and standard for reasonable compliance; (ii) determine whether PacTran has used reasonable efforts to comply; and (iii) interpret and enforce, to the extent it has the ability to do so, the ramifications of PacTran's alleged failure to comply. Clenera essentially makes this argument, asserting PacTran has not experienced as large a surge in applications as RMP suggests and that the delays are unreasonable. The DPU similarly suggests that such protracted delays are not reasonable. RMP, on the other hand, has presented evidence showing a surge in the amount of energy for which interconnection is sought and asserts that, despite its reasonable and best efforts, significant delays in completing Clenera's studies were unavoidable. The PSC concludes it is not within its jurisdiction to decide the question.

It is not for the PSC to assess whether PacTran is complying with the OATT or whether its efforts to process interconnection studies are "reasonable" as understood under the OATT. PacTran processes QF applications and studies in the same manner as it processes other, FERC-jurisdictional applications and studies. The PSC would not have jurisdiction to address the question if presented by any other transmission customer and can identify no reason it obtains jurisdiction over the matter simply because a QF is involved. Whether PacifiCorp's transmission

function is processing interconnection applications and studies, under its OATT, in a reasonable and timely fashion is for FERC to decide.

Because the PSC does not have jurisdiction over the interconnection process enumerated in the OATT, the PSC concludes the language in Schedule 38 that allows for an extension to the Deadlines due to delays “caused by [the] Company,” refers to delays PacifiCorp causes in its capacity as a public utility (acting as RMP), not in its capacity as a transmission service provider (acting as PacTran). That is to say, it refers to those delays RMP may cause when acting within the sphere of the PSC’s jurisdiction. It is not difficult to envision circumstances where such an extension would be warranted. For example, RMP might, due to administrative inefficacy, fail to provide a pro forma contract within seven days of request or to provide indicative pricing within 30 days of request, as the tariff requires.

As the PSC has previously noted, the PSC’s role in implementing PURPA is limited and delineated to perform certain tasks such as (i) setting avoided cost prices; (ii) assessing interconnection costs; and (iii) finding whether a legally enforceable obligation exists. This limited role does not give the PSC carte blanche to insert itself into the regulation of PacifiCorp’s transmission function, which is plainly reserved to FERC. Where PacifiCorp’s transmission function is lagging behind in the processing of interconnection applications or studies, FERC must decide whether the delay is reasonable and what remedy or penalty, if any, should attach to PacTran.

Indeed, even if the PSC were prepared to find PacTran’s delay to be unreasonable, the remedy Clenera seeks would not remediate the problem or expedite completion of the Studies. Rather, it would accept the delay and shift the consequences from the transmission customer, *i.e.*

Clenera, to RMP's ratepayers. The Deadlines, like the other timeframes in Schedule 38, exist to maximize the accuracy of the avoided cost pricing QFs receive, which are costs RMP passes through to its ratepayers. From the time a QF receives indicative pricing, Schedule 38 contemplates a maximum period of approximately 38 months to the QF's commercial operation.[6] Here, Clenera asks the PSC to indefinitely extend this period contingent upon PacTran completing a process over which we have no jurisdiction. To do so would, effectively, excuse PacTran for any problem that might rightly be raised before FERC and foist the consequences on Utah ratepayers who may then be charged outdated prices for Clenera's output. This is an outcome the PSC cannot endorse or facilitate.

5. Order

For the foregoing reasons, the PSC denies Clenera's request for an indefinite, "day for day" extension of the Deadlines.

DATED at Salt Lake City, Utah, February 6, 2018.

/s/ Michael J. Hammer
Presiding Officer

[6] In brief, QFs must request a PPA within 60 days of receiving indicative pricing, the parties must then negotiate and execute a PPA within six months, and the project must achieve commercial operation within 30 months of execution of the PPA. The total contemplated period is approximately 38 months.

Approved and confirmed February 6, 2018 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
PSC Secretary
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CERTIFICATE OF SERVICE

I CERTIFY that on February 6, 2018, a true and correct copy of the foregoing was served upon the following as indicated below:

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