

**BEFORE THE IDAHO PUBLIC UTILITIES COMMISSION**

**IN THE MATTER OF ROCKY MOUNTAIN ) CASE NO. PAC-E-21-05**  
**POWER’S APPLICATION FOR APPROVAL )**  
**OR REJECTION OF THE POWER )**  
**PURCHASE AGREEMENT WITH ) ORDER NO. 35303**  
**COMMERCIAL ENERGY MANAGEMENT, )**  
**INC. )**  
**)**

---

On March 3, 2021, Rocky Mountain Power, a division of PacifiCorp (“Company”) requested the Commission approve or reject a replacement Power Purchase Agreement (the “PPA”) with Commercial Energy Management, Inc. (“Seller”) for the purchase of energy and capacity.

On March 25, 2021, the Commission set deadlines for interested persons to comment on the Application, and for the Company to reply. *See* Order No. 34975. On April 27, 2021, the Seller filed comments. The Commission Staff (“Staff”) filed comments on April 28, 2021. The Company filed reply comments on May 12, 2021.

**APPLICATION**

The Company asserted that the Seller owns and operates a 900 kilowatt (“kW”) hydroelectric qualifying facility (“QF”) under the Public Utility Regulatory Policies Act of 1978 (“PURPA”). *Application* at 1. The QF is on the Portneuf River east of Lava Hot Springs in Bannock County, Idaho. *Id.* at 1-2. The Seller and the Company’s previous contract for the sale of energy from the QF was dated November 12, 1991. *Id.* at 2. The Company asserts this contract was entered into prior to the Company’s separation of its energy supply and transmission functions as required by FERC and included provisions that addressed both energy sales and interconnection requirements. *Id.* at 3. In June 2020, the Commission approved an extension to this contract that extended its term through March 1, 2021, or upon the replacement date of the new PPA, whichever was sooner. *Id.* citing Order No. 34792, PAC-E-20-09.

**COMMENTS**

**1. Seller’s Comments**

Despite executing the proposed PPA, Seller, through counsel, asked the Commission to reject it because of the process the Company used to obtain Seller’s execution of the PPA and

the inclusion of the 90/110 “concept” in the PPA. *Seller Comments* at 1. Seller claimed that since August 2019 it tried to negotiate the PPA with the Company. *Id.* Seller asserted the Company would not engage with it “for weeks and months at a time.” *Id.* Seller claimed this has the potential to cost the Seller because the Commission’s June 1, 2019, published rates (which are much higher than those subsequently published by the Commission and incorporated into the Agreement) would have applied to the PPA had the Company timely engaged in discussions with the Seller. *Id.* at 2. The Seller speculated that the Company was trying to avoid higher costs by delaying the finalization of the proposed PPA. *Id.* Seller also asserted that the interconnection issues were not timely raised by the Company. *Id.*

Seller asserted that it also had numerous objections to terms of the PPA, but those were ignored by the Company. *Id.* The Seller felt it had no choice to sign the PPA on February 26, 2021, just three days before the extension ended. *Id.*

Seller also asserted that the 90/110 provisions of the PPA were forced on it. *Id.* Seller asserted that the prior 1991 contract with the Company did not include this concept. *Id.*

Seller argued that the Company has used its “size and market dominance” to force Seller to agree to the terms in the proposed PPA. *Id.* at 3. Seller requested that the Commission reject the PPA and “send the parties back for true negotiations that can arrive at a power production agreement that is fair to both the Company and Seller.” *Id.*

### **1. Staff Comments**

Staff’s review of the PPA focused on the 90/110 rule; long-range, day-ahead, and real-time forecasting; eligibility for capacity payments; avoided cost rates; and a lapsed contract period. *Staff Comments* at 2.

Staff confirmed the PPA contains the 90/110 provisions required by Commission Order 29632. Staff also believed that for the purpose of the 90/110 Rule, only the monthly estimates in Section 4.9 of the PPA are used, instead of any of the annual estimates. *Id.* However, Staff was concerned about the definition of the Expected Net Output in the PPA which provides:

“Expected Net Output” means 2300 MWh (depends on run-of-river flow) of Net Output in the first Contract Year, as applicable, by an annual degradation factor of 1% (depends on run-of-river flow) per Contract Year, measured at the Point of Delivery. Seller estimates that the Net Output will be delivered during each Contract Year, measured at the Point of Delivery. Seller estimates that the Net Output will be delivered during each Contract Year

according to the Expected Monthly Net Output provided in Exhibit A-1, as reduced each Contract Year, as applicable, by the annual degradation factor.

*Id.* at 3. Contrary to this definition, in response to Staff’s Production Request No. 4, the Company stated that the Expected Net Output definition is the initial forecast of generation, meant to inform expectations of generation at the time of contracting, and this forecast is not updated after contracting. *Id.* Staff believed that if the definition of Expected Net Output is necessary in the PPA, it should be modified to reflect that the forecast is not updated after contracting and should use the correct amount of 2,310 megawatt-hours (“MWh”) per year.

Staff noted the PPA uses a 10-day advanced notice to revise future monthly estimates. *Id.* Staff stated that if the Company develops a web-based or other electronic noticing or scheduling system for the Seller to provide estimates, the timeframe will be revised to a 5-day advanced notice. *Id.* Staff believed any timeframe between a month in advance and 5 days in advance is reasonable. *Id.*

In addition to the 10-day advanced notice, the PPA requires that beginning the end of the ninth full calendar month after the “Effective Date”, and at the end of every third month thereafter, Seller shall supplement the Energy Delivery Schedule with three additional months of forward estimates, such that the Energy Delivery Schedule will provide at least three months of scheduled energy estimates. *See* Section 4.9.2. of the PPA. Staff believed the statement should be changed to “at least six-months of scheduled energy estimates at all times” to resolve the inconsistency. *Id.* at 3-4. For example, at the end of the ninth full month after the Effective Date, the Seller may provide three additional months of estimates for January, February, and March of the following year. *Id.* at 4. This effectively provides six months of estimates, including October, November, and December of the first year and January, February, and March of the second year. Staff recommends this inconsistency be corrected in the PPA. *Id.*

Staff asserted that the Company uses the Palo Verde Hub to establish market prices for the purpose of the 90/110 Rule. *Id.* Staff believed the Company’s determination of market prices is fair and reasonable.

In the PPA Staff noted the Seller agreed to provide an annual update to the 12X24 generation profile in Section 6.7.1. *Id.* Although the Commission does not require 12X24 generation profiles for contracts that use published rates, Staff did not oppose this provision agreed upon by the parties. *Id.* The Seller also agrees to pay for the day-ahead and real-time forecasting

services in Section 5.7.2. Although the Commission does not require day-ahead and real-time forecasting services, Staff did not oppose this provision agreed upon by the parties. *Id.*

Staff stated that the Seller was paid for capacity at the end of the original contract, and during the original contract term, the Company has added significant resources to meet its capacity deficiencies. *Id.* Therefore, Staff is confident that the Facility has contributed to meeting the Company's need for capacity during the term of the original 1991 contract and should receive full capacity payments in the proposed PPA. *Id.* at 5.

Staff also reviewed the non-seasonal hydro avoided cost rates contained in the PPA and verified that the rates are correct. *Id.*

Last, the original contract expired on March 1, 2021, and the initial delivery date in the PPA is on the same date. *Id.* However, the proposed effective date of the PPA would be after any Commission approval of the PPA. *See* Section 2.1 of the PPA. Therefore, Staff asserted there is a lapsed contract period between March 1, 2021, and the effective date (the "Lapse Period"). Staff noted that in Case No. AVU-E-19-16, the Commission approved both energy and capacity payments during a Lapse Period for the owner of the QF in that case. Staff verified with the Company that the Facility in this case has continued to be operational; thus, Staff recommended energy and capacity payments during the Lapse Period using published rates in the PPA.

Staff recommended the parties file an amended PPA that includes the following updates:

1. The definition of Expected Net Output should be modified to reflect that the forecast is not updated after contracting and should use the correct amount of 2,310 MWh/year.
2. The inconsistency of "three months" in Section 4.9.2. of the PPA should be corrected to six months. Staff recommended approval of an amended PPA with these updates and also recommended that, if the updates described above are made by the Company, the Commission declare that the avoided cost prices set forth in the PPA are just and reasonable, in the public interest, and that the Company's incurrence of such costs are legitimate expenses.

## **2. Company Reply Comments**

In its Reply Comments, the Company represented it is willing to make the modifications to the PPA as recommended by Staff in its Comments. *Company Reply Comments* at 2.

The Company also disagreed with the Seller’s objection to the 90/110 provision in the PPA asserting that this provision has been approved by the Commission in previous cases and is consistent with law and past practice, as detailed in Staff Comments. *Id.* Further, the Company asserted that there is no evidence that the Company engaged in any gamesmanship to delay the execution of the Agreement. *Id.* The Company first requested a Voluntary Consent from the Seller to determine transmission interconnection progress of the facility in September 2019. *Id.* The Company asserted it provided Seller with a draft PPA before the expiration of the original contract between the parties. *Id.* At the request of the Seller, the Company stated it extended the original PPA so that Seller would have time to resolve necessary interconnection issues. *Id.* at 3. The Company represented the extension was signed on March 20, 2020. *Id.* Four days after the extension was signed, the Company executed the small generator interconnection agreement (“SGIA”), which resolved the interconnection issues. *Id.* After the SGIA was signed, the Company asserted that nothing prevented Seller from working with the Company to finalize the February 3, 2020, PPA. After a period of silence, the Company claimed to have made a concerted effort to reengage the Seller in negotiations in November 2020 by providing the Seller with a draft PPA. *Id.* Contrary to Seller’s assertions, the Company asserted it made every effort to negotiate the PPA in a timely fashion. *Id.* Throughout its comments, Seller makes allegations that the Company delayed negotiations for its own “advantage,” but provides no proof of Company-caused delay or Company benefit from the delay. *Id.*

The Company asserted that the cost of PPAs are passed directly to customers, there is no benefit to the Company for delaying the negotiation of a PPA. *Id.* For these reasons, and with Staff’s proposed modifications to the PPA noted above, the Company respectfully requests that the Commission approve or reject the PPA as requested in the Company’s Application, subject to the execution of an amendment consistent with Staff’s Comments.

### **COMMISSION FINDINGS AND DECISION**

The Commission has jurisdiction over this matter under *Idaho Code* §§ 61-502 and 61-503. The Commission is empowered to investigate rates, charges, rules, regulations, practices, and contracts of public utilities and to determine whether they are just, reasonable, preferential, discriminatory, or in violation of any provision of law, and to fix the same by order. *Idaho Code* §§ 61-502 and 61-503. The Commission also has authority under PURPA and FERC regulations to set avoided cost rates, to order electric utilities to enter fixed-term obligations for the purchase

of energy from QFs, and to implement FERC rules. The Commission may enter any final order consistent with its authority under Title 61 and PURPA.

The Commission has reviewed the record, including the Application, the PPA, and the comments of Staff, the Seller and the Company. Based on our review, we find it reasonable to approve the PPA conditionally on the Company and Seller entering and filing an amended PPA containing the modifications discussed below. With regard to the remainder of the content of the PPA, because it contains Commission-approved terms that the Facility is eligible for based on its characteristics such as fuel source, project size, and renewal contract status. Additionally, the Facility has helped meet the Company's need for additional capacity.

The Commission also finds it appropriate for the Company to pay the Seller for capacity and energy deliveries during the Lapse Period—the time between the prior power purchase agreement's March 1, 2021, expiration and the day before the service date of this Order—at the published avoided cost rates using published rates in the PPA. This treatment is consistent with prior Commission decisions. However, at some point after a contract expires, the lack of further contractual commitment could create uncertainty for the Company's resource planning. Moreover, payment of capacity relies on continuous operation under a valid power purchase agreement. *See* Order 33357 at 25-26.

The Commission conditions its approval of the Application on the Company filing an amended PPA, executed by the Company and Seller that includes: 1) modifying the definition of Expected Net Output to reflect that the forecast is not updated after contracting and should use the correct amount of 2,310 MWh/year; and 2) the inconsistency of “three months” in Section 4.9.2. of the PPA should be corrected to “six months”.

The Commission also finds it just and reasonable to include capacity payments for the duration of the PPA. Last, the Commission finds the Company's payments for purchases of energy and capacity under the PPA are prudently incurred expenses for ratemaking purposes.

### **ORDER**

IT IS HEREBY ORDERED that the Company's PPA is approved conditioned upon the Company and Seller executing and submitting an amended PPA to the Commission that contains: 1) modification to the definition of Expected Net Output to reflect that the forecast is not updated after contracting and should use the correct amount of 2,310 MWh/year; and 2) correcting the inconsistency of “three months” in Section 4.9.2. of the PPA to state “six months”.

IT IS FURTHER ORDERED that the Company's payments for energy and capacity under the renewal PPA and the Lapse Period shall be allowed as prudently incurred expenses for ratemaking purposes.

THIS IS A FINAL ORDER. Any person interested in this Order may petition for reconsideration within twenty-one (21) days of the service date of this Order regarding any matter decided in this Order. Within seven (7) days after any person has petitioned for reconsideration, any other person may cross-petition for reconsideration. *See Idaho Code § 61-626.*

DONE by order of the Idaho Public Utilities Commission at Boise, Idaho this 25<sup>th</sup> day of January 2022.

  
\_\_\_\_\_  
ERIC ANDERSON, PRESIDENT

  
\_\_\_\_\_  
JOHN CHATBURN, COMMISSIONER

ATTEST:

  
\_\_\_\_\_  
Jan Noriyuki  
Commission Secretary

I:\Legal\ELECTRIC\PAC-E-21-05\orders\PACE2105\_final\_jh.docx