

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. 35384
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 (“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. Staff and the Seller filed comments to which the Company replied.

On January 25, 2022, the Commission approved the PPA conditioned on the Company and Seller executing and filing a conforming amended PPA with certain Commission required terms. *See* Order No. 35303 at 6.

On February 9, 2022, Seller petitioned the Commission to reconsider Order No. 35303 pursuant to *Idaho Code* § 61-626 (“Petition”). Seller specifically requested the Commission reconsider its approval of the PPA with the 90/110 Provision included in it. *See Petition for Reconsideration* at 1. On February 16, 2022, the Company replied to Seller’s Petition. No cross-petitions were received.

On March 9, 2022, the Commission granted the Seller’s Petition to allow for additional consideration of the issues raised by the Seller’s Petition. *See* Order No. 35343. The Commission also found that the existing record was sufficient for it to fully consider the arguments made by the parties in this case. *See Idaho Code* § 626(a). Order No. 35343 at 2. After such consideration, the Commission stated it would issue a final order on the merits of the Seller’s Petition. *Id.*

Having reviewed the record and Seller’s Petition, we deny the Seller’s Petition.

BACKGROUND

Seller owns and operates a hydroelectric facility (“Facility”) on the Portneuf River east of Lava Hot Springs in Bannock County, Idaho with a nameplate capacity of 900 kilowatts (“kW”). The Facility operates as a qualifying facility (“QF”) under the Public Utility Regulatory Policies

Act of 1978 (“PURPA”). The Seller and the Company’s first contract for the sale of energy from the Facility was dated November 12, 1991 (“1991 PPA”). In June 2020, the parties applied to extend the 1991 PPA for one-year, through March 1, 2021, to allow the Seller to make necessary interconnection upgrades. *See* Order No. 34792, Case No. PAC-E-20-09.

The fully executed replacement PPA, submitted with the Application, contains published avoided cost rates for a non-seasonal hydro QF with capacity payments for the entire term of the PPA and no sufficiency period.

The Commission conditionally approved the PPA which included the 90/110 Provision stating:

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 [QF] is eligible for based on its characteristics such as fuel source, project size, and renewal contract status. Additionally, the [QF] has helped meet the Company’s need for additional capacity.

Order No. 35303 at 6. The Commission’s approval was conditional on the Company filing an executed, amended PPA containing: (1) modification of 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 megawatt-hours per year (“MWh/year”); and (2) correction of the inconsistency of “three months” in Section 4.9.2. of the PPA to state “six months.” *See* Order No. 35303 at 6.

On April 27, 2021, the Seller filed a public comment asking the Commission to reject the PPA due to its inclusion of the 90/110 Provision. *See Public Comment* at 3.

SELLER’S PETITION

Seller argued that the Commission did not provide any independent analysis of the 90/110 Provision or the rationale behind it in Order No. 35303.¹ *Petition for Reconsideration* at 3. Seller asserted that it is unaware of any attempt by the Commission to assess the 90/110 from a seller’s perspective and requests that the Commission do so in this case. *Id.* at 4.

Seller acknowledged the 1991 PPA did not include the 90/110 Provision because the contract was entered before that requirement was enacted. *Id.* at 2 citing Order No. 35303. However, Seller argued that the Commission should not allow the Company to fundamentally alter

¹ Seller did not contest the Commission’s assertions about the factual background of the issues in the case. *Petition for Reconsideration* at 2.

the parties' relationship without a basis for doing so. *Id.* at 6. Therefore, Seller reasoned that the 90/110 Provision should not be included in the PPA. *Id.*

Seller also argued that the Commission, Staff, and the Company all rely on Order No. 29632 and "past practice" to justify the imposition of the 90/110 Provision. *Id.* at 5. However, Seller asserted that the facts giving rise to the justification of the 90/110 Provision in Order No. 29632 are not analogous to the facts between Seller and the Company. *Id.* at 5. Seller's argument focuses on size disparity of the generating facility and subsequent alleged unfair treatment of Seller's small hydro Facility and the large geothermal facility described in Order No. 29632. *Id.* Seller "in contrast to Seller's hydroelectric facility, the generators (or at least the geothermal facility) discussed in Order No. 29632 provided much more regular, steady power generation." *Id.* at 6. Seller stated that the 90/110 Provision in Order No. 29632 imposed a proportionately lower effect on larger projects than it would on Seller. *Id.* Seller asserted that the margin for error was narrower for a smaller facility like Seller's, but the financial penalties or liquidated damages would have a greater impact on Seller. *Id.*

Seller requested that the Commission reconsider Order No. 35303 and (1) remove the 90/110 Provision from the PPA altogether because the original 1991 PPA was entered before the 90/110 Provision was adopted; or (2) at least provide an individualized basis for allowing the 90/110 Provision in the PPA. *Id.* at 8.

THE COMPANY'S ANSWER

The Company responded to Seller's Petition by arguing that the 90/110 Provision is well established and has been a standard provision in Idaho QF contracts, including several hydro contracts recently approved by the Commission. *Company's Answer to Petition for Reconsideration* at 2 (citing Order No. 34956 which included the 90/110 Provision in an energy sales agreement between Idaho Power Company and the owner of 575-kilowatt hydroelectric facility).

The Company asserted that the 90/110 Provision was rightly included in the PPA. *Id.* at 3. The Company disagreed with Seller's argument that the 90/110 Provision should not be applicable because it was not included in the 1991 PPA, arguing that the current PPA is a new agreement and was not entered into by the parties until February 26, 2021. *Id.* The Company asserted "the fact that the parties had a previous PPA does not entitle [Seller] to the same terms as the earlier agreement." *Id.*

Finally, the Company argued that Seller had no grounds for reconsideration because it agreed to the 90/110 Provision when it signed the PPA. *Id.* The Company argued that it is inappropriate for Seller to challenge the PPA it signed, particularly when it delivered energy to the Company under that PPA while pending Commission approval. *Id.* The Company argued that there is no operative PPA now for the Commission to consider unless the Seller signs the amended PPA that includes the terms the Commission conditioned its approval on. *See* Order No. 35343.

STANDARD OF REVIEW

A person may petition the Commission to reconsider its orders. *See Idaho Code* § 61-626; Rules 331-333 (IDAPA 31.01.01.331-.333). Reconsideration allows the petitioner to bring to the Commission’s attention any question previously determined and affords the Commission an opportunity to rectify any mistake or omission. *Washington Water Power Co. v. Kootenai Environmental Alliance*, 99 Idaho 875, 879, 591 P.2d 122, 126 (1979); Rule 325. The petitioner has 21 days from the date of the final order in which to ask for reconsideration. *Idaho Code* § 61-626(1). The petition must specify why it “contends that the order or any issue decided in the [o]rder is unreasonable, unlawful, erroneous, or not in conformity with the law.” Rule 331.01. Further, the petition “must state whether the petitioner . . . requests reconsideration by evidentiary hearing, written briefs, comments, or interrogatories.” Rule 331.03. Any answers or cross-petitions must be filed within seven days after the petition was filed. Rule 331.02 and .05.

Once a petition is filed, the Commission must issue an order saying whether it will reconsider the parts of the order at issue and, “[i]f reconsideration be granted, said order shall specify how the matter will be reconsidered and whether any cross-petitions for reconsideration will be granted.” *Idaho Code* § 61-626(2). If reconsideration is granted, the Commission must complete its reconsideration within 13 weeks after the date for filing petitions for reconsideration. *Idaho Code* § 61-626(2). The Commission must issue its order on reconsideration within 28 days after the matter is finally submitted for reconsideration. *Id.* “If after reconsideration, including consideration of matters arising since the making of the order, the [C]ommission shall be of the opinion that the original order or any part thereof is in any respect unjust or unwarranted or should be changed, the commission may abrogate or change the same.” *Idaho Code* § 61-626(3). An order made after reconsideration abrogating or changing the original order has the same force and effect as an original order. *Id.*

COMMISSION FINDINGS AND DISCUSSION

The Commission has jurisdiction over this matter under *Idaho Code* §§ 61-501, -502, and -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 has been granted authority to implement PURPA and is the appropriate state forum to review contracts between QFs and electric utilities. *Idaho Code* §§ 61-502 and -503; *A.W. Brown v. Idaho Power Co.*, 121 Idaho 812, 816, 828 P.2d 841, 845 (1992); *Empire Lumber Co. v. Washington Water Power Co.*, 114 Idaho 191, 755 P.2d 1229 (1987); *see also* 16 U.S.C. § 824a-3(b) and 18 C.F.R. § 292.304 and § 292.602. Moreover, the Commission has the authority to engage in case-by-case analysis in setting its standards and requirements for implementation of PURPA. *Power Resources Group v. PUC of Texas*, 422 F.3d 231, 237 (5th Cir. 2005) citing *Policy Statement Regarding the Commission's Enforcement Role Under Section 210 of [PURPA]*, 23 FERC ¶ 61,304, 1983 WL 39627 (May 31, 1983); *Rosebud Enterprises v. Idaho PUC*, 128 Idaho 609, 917 P.2d 766 (1996). The Commission has authority to set general principles and regulatory framework for power purchasing agreements between electric utilities. *Rosebud*, 128 Idaho at 614, 917 P.2d at 771. Thus, it is up to the States, not FERC, to determine the specific parameters of individual QF power purchase agreements. *Idaho Power Company v. Idaho Public Utilities Commission*, 155 Idaho 780, 316 P.3d 1278 quoting *Power Resource Group*, 422 F.3d at 238; *accord Rosebud*, 128 Idaho at 623-24, 917 P.2d at 780-81. Similarly, whether the particular facts applicable to an individual QF necessitate modifications of other terms and conditions of the QF's contract with the purchasing utility is a matter for the states to determine. *West Penn Power Co.*, 71 FERC ¶ 61153 at 61495 (1995), *Accord: Jersey Central Power & Light Co.*, 73 FERC ¶ 61092 at 61297-61298 (1995); *Metropolitan Edison Co.*, 72 FERC ¶ 61015 at 61050 (1995). The Idaho Supreme Court has observed that the Commission has the authority to implement PURPA and that this grant of authority is broad. *Idaho Power Company*, 155 Idaho at 787, 316 P.3d at 1285, *Rosebud*, 128 Idaho at 627, 917 P.2d at 784, *A.W. Brown*, 121 Idaho at 814, 828 P.2d at 843.

In Case No. IPC-E-04-08 the Commission required utility energy agreements to include the 90/110 Provision² with QFs for the first time after considering an extensive record.³ In that case, John R. Gale, Vice President of Regulatory Affairs for Idaho Power Company (“Idaho Power”) testified that Idaho Power was proposing the use of a standardized contract for QFs:

The Company has developed a standardized contract approach that can be applied uniformly to all QF projects with a capacity smaller than 10 MW regardless of generation technology. It works equally well for intermittent resources like wind and solar, resources with seasonal variations, like hydro and geothermal, and process-driven resources such as industrial cogeneration and biomass. This standardized approach simplifies the contracting process and provides economic incentives for the QF developer to accurately estimate the amount of energy it will provide each month. By providing economic incentives for QF developers to more accurately estimate the amounts of firm energy they will deliver each month, the Company is hoping to encourage QF developers to deliver firm energy rather than non-firm energy. Obtaining better estimates of the monthly amounts of firm energy be provided will improve Idaho Power's ability to integrate QF resources into its resource planning and acquisition process as firm resources.

Direct Testimony of John R. Gale at 309-322, (Case No. IPC-E-04-08). In Order No. 29632 in Case No. IPC-E-04-08 the Commission noted that a legally enforceable obligation arising from a QF PURPA agreement translates into reciprocal contractual obligations for both parties, it is not just a lock-in of avoided cost rates but is also an obligation to deliver its estimated monthly production. *See* Order No. 29632 at 13 and 20. As part of those obligations the Commission found the 90/110 Provision to be reasonable. *Id.* The Commission recognized that “excess energy is not accepted by the Company without consequence. If unplanned for and not easily integrated the energy may as suggested by the Company have to be sold in the surplus market or other more economic resources of the Company backed down.” *Id.* On reconsideration of Order No. 29632 the Commission found that its “reasoning regarding the 90/110 [Provision] and shortfall pricing structure to be sound, in furtherance of the ends of PURPA and supported by the record.” Order No. 29682 at 9.

In Case No. PAC-E-05-09, the Commission decided in part to reject a QF agreement that did not include the 90/110 Provision. *See* Order No. 29880. The Commission found that a QF agreement without the 90/110 Provision “fails to sufficiently protect ratepayers from overpaying.”

² Idaho Power calls its agreements with QFs “Energy Sales Agreements and PacifiCorp calls its agreements with QFs “Power Purchase Agreements.”

³ Several parties provided input in this case including those that operated or were associated with QFs.

Id. at 1 and 11. Further, the Commission found that a QF agreement without the 90/110 Provision is neither reasonable nor in the public interest. *Id.* The Commission stated it had required QFs to meet certain performance criteria, like that required by the 90/110 Provision, to be eligible for published avoided cost rates. Order No. 29880 at 2. The Commission found these criteria were necessary to establish “‘firmness’ or predictability, which is a measure of monthly production.” *Id.* The Commission found that discounted pricing outside the 90/110 Provision’s performance band served as an incentive for a QF to make the most reliable estimates possible while also compensating the utility when a QF delivers less reliable or non-firm energy. *Id.* The Commission also recognized that in meeting its duties under PURPA and FERC’s regulations, the Commission had to ensure PURPA rates were just and reasonable to the utility’s customers, as well as in the public interest. *Id.* at 11 citing 16 U.S.C. § 824a-3(b); 18 C.F.R. § 292.304. In that role the Commission found that the 90/110 Provision defined a “minimum degree of predictability” necessary to qualify for the published rates for firm energy. *Id.* The Commission also found that the purpose of the 90/110 Provision is to more fairly match the price paid to the value of the product provided as measured by reliability and predictability. *Id.*

The Commission has reviewed the record in Case Nos. PAC-E-21-05. Since 2004 the Commission has consistently required inclusion of the 90/110 Provision in QF PURPA agreements. Based on its past practices and authority to implement PURPA, the Commission finds that requiring that the 90/110 Provision in power purchase agreements like the PPA in this case is fair, just, and reasonable regardless of QF resource type. The 90/110 Provision helps to ensure that the product which Seller delivers to the Company is firm and predictable. Delivering generation output between the 90/110 markers provides a purchasing utility and its customers with reliable energy at a fair, just, and reasonable price. Deliveries outside the 90/110 boundaries are generally unplanned for and not easily integrated into its system. The 90/110 Provision protects customers from incurring costs to balance unpredictable deliveries from QFs on the Company’s system.

Further, the Seller’s arguments do not differentiate its situation from similarly situated QFs. There are numerous cases where the 90/110 Provision has been required to be included in power purchase agreements to help ensure that the generation delivered from QFs is firm and reliable.⁴ Section 4.9.3 of the PPA also provides the Seller with the ability to adjust the amount of

⁴ For example, *see* Order No. 35146, PAC-E-21-13, Order No. 35223, PAC-E-21-14, Order No. 34961, IPC-E-21-01, Order No. 34875, IPC-E-20-34, Order No. 34711, IPC-E-20-22, Order No. 34688, IPC-E-20-12. Recently, the

its estimated deliveries upon short notice and the ability to remain within the 90/110 performance band if its circumstances changes, including periods of high- and low-water.⁵

We are unpersuaded by Seller's position that the Commission should not alter the parties' relationship without a basis for doing so. The Commission is unaware of any requirement that contracting parties must be bound in the future to terms of an expired contract. Finally, the Commission disagrees with Seller's argument that the Commission has not assessed the 90/110 Provision from a seller's perspective. The Commission has had the opportunity to review the 90/110 Provision where differing positions, including those associated with QFs, were evaluated and factored into its findings. *See* Order Nos. 29632 and 29682 at 7 (the Commission denied Idaho Power's request for a proposed shortfall remedy due to its possible harsh impact on QFs).

Based on the foregoing, the Commission finds that requiring the PPA to include the 90/110 Provision—which the parties executed—remains fair, just, and reasonable. We further find that Seller has failed to establish that the Commission's decision in Order No. 35303 is unreasonable, unlawful, erroneous or not in conformity with law and thus the Seller's Petition is denied. Commission Rule of Procedure 331.01.

Finally, to operate under an approved power purchase agreement, the Parties must file a fully executed, amended PPA adding the matters set forth by the Commission in Order No. 35303 within 30 days of the issuance of this Order.

ORDER

IT IS HEREBY ORDERED that the Seller's Petition for Reconsideration is denied.

ITS IS FURTHER ORDERED that to operate under an approved power purchase agreement, the Parties must file a fully executed, amended PPA adding the matters set forth by the Commission in Order No. 35303 within 30 days of the issuance of this Order.

Commission did not require the inclusion of the 90/110 Provision in a short-term arrangement but explicitly stated that, "[w]e anticipate that the replacement contract will contain terms substantially [similar] to approved terms in similar PPAs." Order No. 34792 at 2 (emphasis added).

⁵ *See* PPA at p. 16 at § 4.9.3 which provides in pertinent part:

On and after March 1, 2021 (first month), the Seller may revise any future monthly Energy Delivery Schedule with additional forward estimates (which shall be the "Subsequent Energy Delivery Schedule") by providing written notice no later than 5 PM Mountain Standard time on the 20th day of the month that is prior to the month to be revised. . . . For example, if the Seller would like to revise the Energy Delivery Schedule for October, Seller must submit a revised schedule no later than September 20th or the last business day prior to September 20th.

THIS IS A FINAL ORDER ON RECONSIDERATION. Any party aggrieved by this Order may appeal to the Supreme Court of Idaho pursuant to the Public Utilities Law and the Idaho Appellate Rules. *See Idaho Code* § 61-627.

DONE by Order of the Idaho Public Utilities Commission at Boise, Idaho this 25th day of April 2022.



ERIC ANDERSON, PRESIDENT

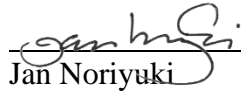


JOHN CHATBURN, COMMISSIONER

//ABSTAIN TO AVOID CONFLICT//

JOHN R. HAMMOND, JR., COMMISSIONER

ATTEST:



Jan Noriyuki
Commission Secretary

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