

BEFORE THE IDAHO PUBLIC UTILITIES COMMISSION

IN THE MATTER OF ROCKY MOUNTAIN)	CASE NO. PAC-E-22-06
POWER’S APPLICATION FOR APPROVAL)	
OR REJECTION OF THE POWER)	ORDER NO. 35529
PURCHASE AGREEMENT BETWEEN)	
PACIFICORP AND GEORGETOWN)	
IRRIGATION)	
)	

On April 13, 2022, PacifiCorp dba Rocky Mountain Power (“Company”) applied to the Commission for an order approving or rejecting a Power Purchase Agreement (“PPA”) between the Company and Georgetown Irrigation Company (“Seller”) (collectively the “Parties”) for energy generated by a 480-kilowatt (“kW”) hydroelectric facility (“Facility”)—a qualifying facility (“QF”) under the applicable provisions of the Public Utilities Regulatory Policies Act of 1978 (“PURPA”).¹ The Company requested that its Application be processed by Modified Procedure.

On May 12, 2022, the Commission issued a Notice of Application and Notice of Modified Procedure, establishing a June 1, 2022 public comment deadline and a June 8, 2022 Company reply deadline. Order No. 35401. Staff filed comments to which no reply was made by the Company or Seller. No other comments were received during the timeline set by the Commission. Pursuant to the schedule set by Order No. 35401, the record closed on June 8, 2022.

On July 21, 2022, the Seller filed a Petition to Intervene and to allow its late comments. On July 25, 2022, the Seller filed a Corrected Petition to Intervene (“Petition”).

Having reviewed the record, the Commission now issues this final Order approving the PPA as discussed more fully below.

BACKGROUND

The Seller delivered energy from the Facility to the Company in accordance with a one-year extension to a power purchase agreement dated July 2, 1984. The one-year extension was approved by the Commission on August 2, 2021, and allowed the Seller to continue to deliver

¹ The Parties’ 1984 agreement was for a Facility with a 330 kW nameplate capacity despite that the installed generator had a 480 kW nameplate capacity rating, which has not been removed or modified since its installation. In Case. No. PAC-E-21-11, which extended the Parties’ 1984 agreement for one-year to allow the Seller to complete interconnection requirements, also used 330 kW as the nameplate rating of the Facility.

energy to the Company through March 31, 2022. Order No. 35123. The reason for the one-year extension was to allow the Seller to secure “a new stand-alone transmission interconnection agreement acknowledging the completion of the distribution system upgrades replacing the interconnection provisions in the [1984 power purchase agreement].” Application at 4.

THE APPLICATION

The Seller secured a new stand-alone transmission interconnection agreement on September 1, 2021, and provided the necessary information and proof of insurance to support the execution of the renewal PPA by March 24, 2022.

On March 28, 2022, the Company and Seller entered into the 20-year renewal PPA that will remain in effect until March 31, 2042.

The Seller has demonstrated that: (1) the Facility’s net energy will equal the energy delivery schedules for the term of the PPA; and (2) the Facility is unlikely to generate more than 0.48 average-megawatts in any calendar month. *Id.* at 4-5. It is estimated the Facility will generate 1,856 megawatt-hours during the first year of the PPA renewal. *Id.* at 5.

The Company requests approval of a bifurcated rate structure that would last until the Company’s next capacity deficit date in 2029. The proposed rate structure would compensate the Seller for energy and capacity up to 330 kW of output delivered and energy only for any output delivered exceeding 330 kW until 2029. Starting in 2029, the Seller would receive both energy and capacity payments for all output delivered.

The Company requests 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 for recovery in rates in the state of Idaho. *Id.*

STAFF COMMENTS

Staff filed comments recommending Commission approval contingent on the following changes:

1. Use of one set of avoided cost rates, which include capacity payments starting in 2029;
2. Update the provisions associated with the 90/110 Rule to reflect the use of one set of rates;
3. Apply energy payments to the energy generated during the Lapse Period;
4. Update the definition of Contract Year;

5. Improve Section 6.8 to reflect other potential modifications to the Facility, besides project expansions or additions;
6. Improve Section 11.1.2 (g) to reflect other potential modifications to the Facility, besides project expansions or additions; and
7. Update Section 21 of the PPA to ensure that any modification does not become valid without Commission authorization.

Staff Comments at 7.

Capacity Payments

Staff recommended that capacity payments be denied until 2029—the Company’s next capacity deficit date—along with corresponding changes to the 90/110 Rule and energy payment PPA provisions to reflect one set of rates, because the Seller did not continuously generate energy between April 1, 2022, and May 12, 2022. Staff also recommended the Commission only approve payments for energy during the Lapse Period.

Staff noted that immediate capacity payments for renewal PPAs are conditioned on the Seller continuously operating the Facility that is being renewed and the Seller being paid for capacity at the end of that term. In this case, Staff noted that the Seller was not being paid for capacity during the one-year renewal. *See* Order No. 35123. Staff suggested that the generation interruptions would preclude the Company from immediate capacity payments because “the energy could not be relied upon by the Company.” Staff Comments at 4. Staff believed the project should be treated as a new PPA and only eligible for energy payments for any output delivered until 2029 at which point the Facility’s entire output would be eligible for both energy and capacity payments. Staff recommended that the 90/110 Rule be applied to a single set of avoided cost rates to reflect its position that the Facility was not eligible for any immediate capacity payments. However, Staff also recommended that “if the Commission determines that the Facility is eligible for immediate capacity payments, Staff recommends the bifurcated rates as originally proposed” and that the 90/110 Rule be applied as proposed too. *Id.*

Staff also recommended changing the definition of “Contract Year” in the PPA to reflect the “Initial Delivery Date,” and substitute “April 1, 2022” with “Initial Delivery Date.” Staff recommended that the avoided cost rates be modified to one set of rates, which includes capacity payments starting in 2029 due to the interruption to Facility operation.

Potential Project Modification—Section 6.8, Section 11.1.2(g), and Section 21

Staff also made several recommendations to the PPA’s future modification provisions. Staff recommended that Section 6.8 address other potential modifications to the Facility besides project expansions or additions, including changes to the QF category, primary energy sources, or generator fuel. Staff proposed two options to address this—the first option would require an “as-built” description *and* a provision that any modifications altering the project from the “as-built” description will trigger an amendment to the contract and require Commission approval; and, the second option would list all scenarios that necessitate a PPA amendment and require Commission approval. Staff recommended that Section 11.1.2(g) be modified consistent with the option chosen for Section 6.8.

Staff also recommended that Section 21 be modified to require Commission approval of any modification to the PPA, specifically with the following language: “No modification of this Agreement is effective unless it is in writing and executed by both Parties *and subsequently approved by the Commission.*”

GEORGETOWN IRRIGATION’S PETITION AND COMMENTS

On July 21, 2022, Seller petitioned to intervene in this case to address Staff’s comments on capacity payments. Seller argued that Staff’s recommendation was based on incomplete information about the reasons for the lapse and that eliminating capacity payments “would have a direct, substantial, and adverse financial impact.” Seller Petition at 2. The Seller contended that the Company instructed it to discontinue delivering energy, as is their prerogative under the PPA terms. *Id.* at 5. Seller represented that it would have continued delivering energy had the Company not instructed it to stop. Seller argued that denying capacity payments for a lapse that was not its choice is harsh and unwarranted, and that it relies on capacity payments for servicing debt and planning future upgrades at the Facility.

Further, Seller contended that Order No. 35401 only provided the Company with a reply period, and it did not reasonably believe it had the opportunity to reply. After being notified that the Company would not, and did not, file reply comments to counter Staff’s position, Seller was unsure on how to offer counterpoints to Staff on the record, because it did not believe it was not a party to the proceeding under Rule 31, IDAPA 31.01.01.31 or an “Interested Person” under Rule 59, IDAPA 31.01.01.59. Finally, Seller argued that allowing its comments “will eliminate serious due process of law problems and will not prejudice the parties, burden the Commission or

delay issuance of the final order.” *Id.* The Seller also explained that Covid-19 and the lack of its board’s technological sophistication contributed to the delays of its Transmission Interconnection Agreement. The Seller deferred to the Company and Staff on the remaining recommendations.

COMMISSION FINDINGS AND DECISION

The Commission has jurisdiction over this matter under *Idaho Code* §§ 61-501, -502, and -503. *Idaho Code* § 61-501 authorizes the Commission to “supervise and regulate every public utility in the state and to do all things necessary to carry out the spirit and intent of the [Public Utilities Law].” 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 -503. In addition, the Commission has authority under PURPA and Federal Energy Regulatory Commission (“FERC”) regulations to set avoided costs, to order electric utilities to enter fixed-term obligations for the purchase of energy and capacity from QFs, and to implement FERC rules. The Commission may enter any final order consistent with its authority under Title 61 and PURPA.

Having reviewed the record, we now deny the Seller’s petition for intervention, accept the Seller’s late comments for consideration, and approve the Company’s Application with immediate capacity payments available for output delivered by the Seller as proposed in the Application.

Seller’s Petition to Intervene

According to the Commission’s Rules of Procedure, a petition for intervention will be granted if it “shows direct and substantial interest in any part of the subject matter of a proceeding and does not unduly broaden the issues.” IDAPA 31.01.01.074. Late petitions must state a substantial reason for the delay in filing. *Id.* The threshold for intervention traditionally has been liberally construed by the Commission to allow a fair opportunity to all interested parties to participate in a proceeding. Order No. 27019. However, the Commission has previously addressed the status of an ESA’s² counter-party (e.g. a Seller in an ESA or PPA) in Order No. 34909, and determined that the ESA counter-party is a party to the case. Most recently this Commission opined:

² ESA and PPA are both used by regulated utilities in Idaho to describe PURPA agreements entered into between utilities and a seller.

If a utility applies for consideration of an ESA, the Commission routinely treats the ESA's counter-party as a party to the case because, by signing the ESA, that party has at least impliedly asked the Commission to approve the ESA. *See e.g.*, ESA p. 31, § 21.1 (noting the ESA will not take effect until approved by the Commission). *See also* Rules 31 and 32 of the Commission's Rules of Procedure, IDAPA 31.01.01.031 and .032 (listing "parties" to proceedings, including "applicants," which are persons "who see any right, license, award or authority" from the Commission).

Order No. 34909 at 3.

In Order No. 34909, the Commission denied the seller's request for intervenor status, but granted its petition for reconsideration, and agreed to consider the arguments raised in the seller's petition.

Following this reasoning, we find that a Seller is a party to the case as the PPA's counter-party. The Seller was entitled to present its arguments before the Commission under the Commission's Rules of Procedure as a party who would realize a "any right, license, award or authority" with approval or rejection of the PPA, but relied on the Company to navigate the application process. IDAPA 31.01.01.032. Indeed, it has been a common practice for PPA counter-parties to rely on the PPA petitioner (utility) to handle the Commission proceedings, but this practice should not be construed to preclude a seller from advocating for its best interest.

Late Comments

The Seller contends that Order No. 35401 did not provide it a reply period—only the Company—and that fairness and due process require the Commission to consider its arguments on the record. We reject this position as discussed above. Here, however, the Seller has supplemented the record with its late comments by clarifying the reason for the lapse from its perspective. The Commission is permitted latitude to deviate from its Rules of Procedure when it determines such deviation necessary, unless prohibited by statute. IDAPA 31.01.01.013. We find it would be unfair to ignore the Seller's uncontested information discussing why the lapse occurred because of the dramatic impact it would have on the capacity payments to Seller. Staff did not have Seller's perspective on the lapse when making its recommendations, and the Seller's description of the events ultimately aides our decision and supports a more just outcome. We understand that often the utility and seller are aligned when a PPA or ESA is submitted for approval or rejection; however, we note the general practice of relying on the utility to manage proceedings is less effective when the parties' interests diverge during the proceedings or the utility is indifferent to an alternative position presented by Staff. Seller's confusion on how to proceed was

understandable in this case. Therefore, although we deny Seller's Petition to Intervene, the Commission will take the Seller's comments under advisement as they effectively complete a portion of the record that was missing context.

The PPA

Staff's comments and resulting recommendations were based on an incomplete understanding of the reasons for the brief Lapse Period that began on the date of the renewal PPA. The Seller contends that Staff's comments incorrectly portrayed the lapse as being its prerogative or related to the delayed transmission interconnection agreement. The Seller explained that this interruption was at the Company's insistence, and for reasons other than its inability or refusal to continuously deliver energy to the Company. The Seller correctly argues that denying capacity payments for a lapse that was not its choice is harsh and unwarranted under the facts of this case. We agree with the Seller that denying its immediate capacity payments under the circumstances would have a direct, substantial, and adverse financial impact on Seller.

This matter presents a unique situation the Commission has not directly addressed before—how to treat capacity payments in a contract renewal when there was a lapse due to reasons independent of the Seller, and where the Seller was willing and able to deliver the energy during the temporary short term lapse. While we appreciate Staff's careful examination of the terms of the renewal contract, we cannot ignore the facts—unavailable to Staff at the time of its recommendation—that the Seller was willing and able to deliver energy during the short Lapse Period. It would be unjust, and potentially introduce utility gamesmanship into contractual dealings, to financially penalize the Seller in this case. We therefore find that capacity payments should continue under the narrow circumstances at issue here.

The bifurcated rate structure follows past Commission decisions where the nameplate capacity installed and the nameplate capacity included in an original agreement differ. The Commission therefore finds it appropriate for the Company to pay the Seller capacity based on the bifurcated rate structure as proposed in Exhibit K of the PPA for the term of the PPA and the Lapse Period. Additionally, the Commission finds it appropriate for the Parties to apply the 90/110 Rule to the bifurcated rate structure that will be operative until the Company's next capacity deficit date in 2029.

Modifications

We understand that the Company and the Seller did not lodge any disagreements with Staff's recommendations to address Facility modifications or PPA amendments in principle but would like to address those recommendations in this Order. The Commission finds that Section 6.8 should be updated to reflect potential modifications to the Facility as discussed in Staff's comments and Section 11.1.2(g) should be modified to reflect the updates to Section 6.8. Additionally, Section 21 should be modified so that Commission approval of any modification to the PPA is required.

The Commission also finds that changing the definition of "Contract Year" in the PPA to reflect the "Initial Delivery Date," and substituting "April 1, 2022" with "Initial Delivery Date" is appropriate.

We direct the Parties to update their PPA as discussed above and file the updated PPA with the Commission within 15 days of the service date upon this Order. We find the Company's payments for purchases of energy and capacity under the PPA to be prudently incurred expenses for ratemaking purposes.

ORDER

IT IS HEREBY ORDERED that the Seller's Petition to Intervene is denied.

IT IS FURTHER ORDERED that the Commission accepts the Seller's late filed comments.

IT IS FURTHER ORDERED that the Parties' PPA is approved, provided the Parties update the PPA as described above in the "***Modifications***" Section of this Order. The Parties are directed to provide the Commission with an updated PPA as a compliance filing within 15 days of this Order being issued.


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. *Idaho Code* § 61-626.

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DONE by order of the Idaho Public Utilities Commission at Boise, Idaho this 9th day of September 2022.


ERIC ANDERSON, PRESIDENT


JOHN CHATBURN, COMMISSIONER


JOHN R. HAMMOND, JR., COMMISSIONER

ATTEST:


Jan Noriyuki
Commission Secretary

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