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IDAHO PUBLIC
UTILITIES COMMISSION

Kenneth E. Kaufmann
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September 8, 2011

VIA ELECTRONIC MAIL AND OVERNIGHT DELIVERY

Jean D. Jewell, Secretary
Idaho Public Utilities Commission
472 W Washington Street
Boise, ID 83702-5918

Re: Case No. IPC-E-11-14
IN THE MATTER OF THE PETITION OF IDAHO POWER COMPANY FOR A
DECLARATORY ORDER REGARDING PURPA JURISDICTION

Dear Ms. Jewell:

Enclosed for filing in the above-captioned docket are an original and seven (7) copies of *PETITION TO INTERVENE AND COMMENTS OF ROCKY MOUNTAIN POWER*.

An extra copy of this cover letter is enclosed. Please date stamp the extra copy and return it to me in the envelope provided.

Thank you in advance for your assistance.

Sincerely,



Kenneth E. Kaufmann

cc: IPC-E-11-14 Service List

Enclosures

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IDAHO PUBLIC
UTILITIES COMMISSION

Attorneys for Rocky Mountain Power

BEFORE THE IDAHO PUBLIC UTILITIES COMMISSION

IN THE MATTER OF IDAHO POWER)
COMPANY'S PETITION FOR)
DECLARATORY ORDER)
REGARDING PURPA JURISDICTION)
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Case No. IPC-E-11-14
**PETITION TO INTERVENE AND
COMMENTS OF ROCKY
MOUNTAIN POWER**

Pursuant to Idaho Administrative Rules 31.01.01.331.071 and 31.01.01.331.203, PacifiCorp, dba Rocky Mountain Power (the "Company"), petitions the Idaho Public Utilities Commission (the "Commission") for leave to intervene and to appear and participate as a party in the above-captioned matter. The Company further submits the following comments in support of the petition for declaratory order filed by Idaho Power Company ("Idaho Power") on July 8, 2011. Idaho Power's petition addresses Qualifying Facility ("QF") transactions proposed by Western Desert Energy 1, LLC and Tumbleweed Energy II, LLC (collectively, the "LLCs").

I. Contact Information and Representatives

Copies of all pleadings and other correspondence in this matter should be served upon counsel for Rocky Mountain Power at:

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II. Petition to Intervene

As basis for its petition to intervene, Rocky Mountain Power states as follows:

- (1) The name and address of this intervenor is:

Rocky Mountain Power
201 S. Main St., Suite 2300
Salt Lake City, UT 84111

(2) Rocky Mountain Power has a direct and substantial interest in this proceeding and intends to participate in all respects herein as a party as may be required to represent its interests.

(3) Without the opportunity to intervene herein, Rocky Mountain Power would be without a manner or means of participating in the lawful determination of issues that will affect its obligations to QFs and the rates that Rocky Mountain Power's customers are required to pay for energy from QFs.

(4) Rocky Mountain Power expects in the future to be faced with QFs proposing the same transactional structure proposed by the LLCs.

III. Comments

A. The Commission has jurisdiction over sales of QFs to utilities for which the Commission has ratemaking authority.

Section 210(f) of PURPA authorizes state utility commissions to apply PURPA regulations to utilities for which they have ratemaking authority.¹ Both the Commission and the Public Utility Commission of Oregon (“OPUC”) have jurisdiction over Idaho Power’s PURPA transactions, including the QF transactions proposed by the LLCs. The Commission (citing PURPA Section 210) has recognized that “jurisdiction under PURPA is shared by all state regulatory authorities who exercise ‘ratemaking authority’ over multi-jurisdictional utilities.”²

B. A QF waives its PURPA right to obligate a utility to purchase net output when the QF requires the utility to wheel the QF’s net output.

The LLCs seek to interconnect their projects to Idaho Power in Idaho and to compel Idaho Power to purchase net output from the projects under PURPA in Oregon. In order for the LLCs’ plan to succeed, they must accomplish three things. First, they must compel Idaho Power to interconnect with the LLCs’ projects at a point of interconnection on Idaho Power’s electrical system in Idaho. Second, they must compel Idaho Power to wheel the net output from the point of interconnection in Idaho to a point of delivery on Idaho Power’s electrical system in Oregon. Third, they must compel Idaho Power to purchase the QF net output at that point of delivery in Oregon. The LLCs assert

¹ 18 U.S.C. § 824a-3(f)(1) (“[E]ach State regulatory authority shall, after notice and opportunity for public hearing, implement such rule (or revised rule) for each electric utility for which it has ratemaking authority.”).

² *In the Matter of the Application of Idaho Power Co. for a Determination Regarding the Firm Energy Sales Agreement with Clark Canyon, LLC for the Sale and Purchase of Electric Energy*, Order No. 32294, 5-7 (2011).

that PURPA allows for such a contrivance. In fact, the novel transaction proposed by the LLCs is not authorized by FERC's PURPA regulations.

FERC's implementation of PURPA in 18 C.F.R. Part 292 provides two ways a QF may impose a PURPA purchase obligation on a utility. QFs have the right to interconnect with a public utility and sell the net output of the QF to the directly interconnected utility.³ Alternatively, a QF may forego the right to sell to the directly interconnected utility and instead compel another utility to purchase its net output if the QF can wheel its net output to the second utility.⁴ The LLCs do not propose either of these outcomes. Rather, they propose a third transactional structure, a structure that has no basis in FERC's implementation of PURPA.

The relevant regulation is 18 C.F.R. § 292.303. Paragraph (a) of the regulation provides the QF with alternative options for selling its output:

(a) *Obligation to purchase from qualifying facilities.* Each electric utility shall purchase ... any energy and capacity which is made available from a qualifying facility:

- (1) Directly to the electric utility; or
- (2) Indirectly to the electric utility in accordance with paragraph (d) of this section.⁵

Option (a)(1) in FERC's rule is *direct* sale to the electric utility with which a QF is interconnected.

Indirect sales under option (a)(2) are provided for in paragraph (d):

(d) *Transmission to other electric utilities.* If a qualifying facility agrees, *an electric utility which would otherwise be obligated to purchase energy or capacity from such qualifying facility may transmit the energy or capacity to any other electric utility.* Any

³ 18 C.F.R. § 292.303(a)(1).

⁴ 18 C.F.R. § 292.303(a)(2).

⁵ 18 C.F.R. § 292.303(a).

electric utility to which such energy or capacity is transmitted shall purchase such energy or capacity under this subpart as if the qualifying facility were supplying energy or capacity directly to such electric utility...⁶

Option (a)(2), as explained in paragraph (d) of the regulation, explicitly applies to sales to “any other electric utility” other than the transmitting utility. In other words, the indirect purchase obligation in paragraph (a)(2) only applies to a utility other than the wheeling utility.⁷ Furthermore, paragraph (d) provides that the wheeling utility is relieved of its purchase obligation.⁸ Thus, not only does the indirect purchase obligation only arise for sales to third-party (non-wheeling) utilities, but by choosing to have a directly interconnected utility wheel net output, the QF developer thereby waives its right to obligate the directly interconnected utility to purchase net output. In sum, under FERC’s implementation of PURPA, a QF developer cannot obligate a utility to wheel its net output *and* purchase its net output. Yet that is exactly what the LLCs propose to do here.⁹

FERC’s implementation of uniform federal interconnection rules in Order No. 2003 and Order No. 2006 are consistent with the plain-language of 18 C.F.R. § 292.303.¹⁰ In Order No. 2003 and Order No. 2006, FERC sought to establish uniform

⁶ 18 C.F.R. § 292.303(d) (emphasis added).

⁷ See e.g. *ExxonMobil Chemical Co. v. Entergy Gulf States, Inc.*, 91 FERC ¶ 61,106, 61,383 (2000) (finding 292.303(d) not relevant where QF sells to directly interconnected utility); see also *Pub. Serv. Co. of New Hampshire v. New Hampshire Elec. Coop., Inc.*, 83 FERC ¶ 61,224, 61 (1998) (applying 292.303(d) in context of QF wheeling net output to third-party (not directly interconnected) utility).

⁸ “[A]n electric utility which *would otherwise be obligated to purchase energy...* may transmit the energy or capacity to any other electric utility...” 18 C.F.R. § 292.303(d) (emphasis added).

⁹ The LLCs assert that FERC rules require utilities to wheel QF output to *third parties* but do not explain in their Answer how this requirement applies to their proposed transaction, where there will be no wheel to a third party. LLCs Answer at 10 (under the heading “FERC RULES SPECIFICALLY REQUIRE UTILITIES TO WHEEL QF OUTPUT TO THIRD PARTY PURCHASERS”).

¹⁰ *Standardization of Generator Interconnection Agreements and Procedures*, Order No. 2003, 104 FERC ¶ 61,103 (2003), *order on reh'g*, Order No. 2003-A, 106 FERC ¶ 61,220 (2004), *order on reh'g*, Order No.

rules for all interconnections subject to federal jurisdiction.¹¹ In addressing QF interconnections, FERC described the universe of QF interconnections where the QF sells pursuant to the PURPA purchase obligation, referring to 18 C.F.R. § 292.303. According to FERC, QFs interconnect to sell directly (without wheeling) to the interconnected utility *or* QFs interconnect and wheel to third-party (non-wheeling) utilities.¹² The distinction between the two forms of transaction creates a jurisdictional boundary between FERC and state regulatory entities. FERC asserts jurisdiction over interconnections resulting in QF sales where the QF's net output is wheeled to a third-party utility; states retain jurisdiction over interconnections resulting in QF sales to the directly interconnected utility.¹³ FERC did not consider, and has not considered, the scenario proposed by the LLCs where a QF sells net output to the directly interconnected utility pursuant to a PURPA purchase obligation after having the directly interconnected utility wheel the net output to itself at an alternate point of delivery. Consistent with the plain language of 18 C.F.R. § 292.303 and Order Nos. 2003 and 2006, a QF may invoke

2003-B, 109 FERC ¶ 61,287 (2004), *order on reh'g*, Order No. 2003-C, 111 FERC ¶ 61,401 (2005); Standardization of Small Generator Interconnection Agreements and Procedures, Order No. 2006, FERC Stats. & Regs. ¶ 31,180, *order on reh'g*, Order No. 2006-A, FERC Stats. & Regs. ¶ 31,196 (2005), *order granting clarification*, Order No. 2006-B, FERC Stats. & Regs. ¶ 31,221 (2006). Order No. 2003 addresses interconnection of generators with a capacity over 20 MW; Order No. 2006 addresses interconnection of smaller generators. Both orders apply the same jurisdictional analysis to QFs.

¹¹ FERC has jurisdiction over all interconnections relating to transmission in interstate commerce or sales for resale (wholesale sales) of electric power. *See* 16 U.S.C. §§ 824d, 824e. Because FERC perceives that generator interconnection service is an integral part of transmission service, FERC regulates interconnections where the generator would wheel power. *See* Order No. 2003 at ¶¶ 10-11.

¹² Order No. 2003 at ¶¶ 813-815; Order No. 2006 at ¶¶ 516-518.

¹³ Order No. 2003 at ¶ 813 (“[FERC’s] Regulations govern a QF’s interconnection with most electric utilities in the United States, including normally nonjurisdictional utilities. When an electric utility is obligated to interconnect under Section 292.303 of the Commission’s Regulations, that is, when it purchases the QF’s total output, the relevant state authority exercises authority over the interconnection and the allocation of interconnection costs. But when an electric utility interconnecting with a QF does not purchase all of the QF’s output and instead transmits the QF power in interstate commerce, the Commission exercises jurisdiction over the rates, terms and conditions affecting or related to such service, such as interconnections.” (internal citations omitted)).

the PURPA purchase obligation by interconnecting and selling directly (without wheeling) to the interconnected utility *or* by wheeling through the interconnected utility and selling to a third-party utility. Nothing in PURPA or Order Nos. 2003 and 2006 gives a QF the right to require the directly interconnected utility to both wheel and purchase the QF output.

The transaction proposed by the LLCs does not invoke the PURPA mandatory purchase obligation. The LLCs do not propose to interconnect with *and* sell directly to Idaho Power (without a wheel) under 18 C.F.R. § 292.303(a)(1). Nor do the LLCs propose to have Idaho Power, the directly interconnected utility wheel the net output so that the QF can sell to another utility under 18 C.F.R. § 292.303(a)(2) and (d). A QF that interconnects to a utility's system in one state and buys point-to-point transmission from that utility to deliver net output to the utility's system in a different state is an unauthorized combination of two well-defined and mutually exclusive legal options. Neither FERC's regulations implementing PURPA nor its regulations implementing its OATT¹⁴ recognize the fanciful creature proposed by the LLCs. There is simply no right under FERC's PURPA regulations to require the same utility to wheel *and* purchase the QF's net output. Because PURPA only requires a utility to purchase QF net output at the point of interconnection or wheel the net output to a different utility, the Commission should declare that the LLCs would waive their rights to obligate Idaho Power to purchase net output unless they deliver net output to Idaho Power at the point of interconnection with Idaho Power.

¹⁴ Although not an issue currently before this Commission, whether the LLCs are eligible for the benefits of Idaho Power's OATT is another open question requiring resolution if the LLCs are to sell net output to Idaho Power in Oregon.

C. In the alternative, PURPA does not give QFs delivering to the second state the right to have the second state determine the avoided cost rates.

If the Commission were to find that the PURPA purchase obligation exists for Idaho Power under the proposed transaction, the LLCs should receive the avoided cost rate they would have received if they sold to Idaho Power in Idaho because the wheel from the point of interconnection in Idaho to the point of delivery in Oregon is a contrivance aimed only at obtaining Oregon's avoided cost rates. The LLCs admit they plan to wheel from the point of interconnection to Oregon in order to obtain Oregon standard prices, which they perceive to be more favorable than prices made available by the Commission in Idaho.¹⁵ As between the point of delivery and the point of interconnection, there can be no question that the avoided cost applicable to the output at the point of interconnection (the point where it first reaches Idaho Power's system) better represents Idaho Power's true avoided cost than does the avoided cost at a distant point of delivery on Idaho Power's system selected solely to boost the LLCs' profit. A transaction that is done for the express purpose of boosting a QF's profit at the expense of utility ratepayers is not authorized by PURPA.

Because the transaction proposed by the LLCs is contrary to PURPA—a federal statute—Idaho Power's Oregon avoided cost rates are preempted. The Oregon PUC has approved, under authority of PURPA, Idaho Power's avoided cost rates for projects with a capacity of 10 MW or less in Idaho Power's Oregon Schedule 85. Idaho Power's

¹⁵ LLCs Answer at 10 (“[T]here is nothing unjust about an Idaho based QF seeking the best available market for its power.”). What the LLCs seek to do is to receive published rates notwithstanding the Commission's recent decision that wind and solar QFs with capacity above 100 kW are ineligible for published avoided cost rates.

Schedule 85 is subject to federal preemption to the extent it conflicts with PURPA.¹⁶ Here, because the LLCs' proposed transaction is not authorized by PURPA, Idaho Power's Oregon Schedule 85 is preempted. Consequently, the LLCs may not obtain the benefits of Idaho Power's Oregon Schedule 85 with the transaction they propose. The LLCs remain eligible for Idaho state avoided costs.

Policy considerations also favor Idaho asserting primary jurisdiction over the transaction proposed by the LLCs. As noted above, the transaction would have a more substantial impact on Idaho than on Oregon because the vast majority of Idaho Power's expenditures on output from the LLCs will be borne by its Idaho customers. The LLCs' proposed transaction would also complicate the administrative process for utilities and regulators. As explained in Section II.B, *supra*, jurisdiction over the generator interconnections in the proposed transactions is uncertain at best. Because FERC did not conceive that a QF may wheel to the directly interconnected utility and obligate the same utility to purchase net out in Order No. 2006, it did not specify whether such an interconnection is subject to FERC jurisdiction or state jurisdiction.

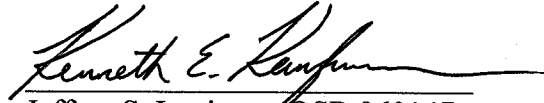
IV. Conclusion

Rocky Mountain Power respectfully requests that the Commission grant Rocky Mountain Power intervenor status in this proceeding. Furthermore, Rocky Mountain Power respectfully requests that the Commission declare that the LLCs have no PURPA right to interconnect to Idaho Power in Idaho and sell to Idaho Power in Oregon and to declare that, in the alternative, if the LLCs did have such a right, the Commission would assert primary jurisdiction over the sale to Idaho Power in Oregon and declare that the

¹⁶ *Gade v. National Solid Wastes Management Ass'n*, 505 U.S. 88, 92, 112 S. Ct. 2374 (1992) (conflict preemption exists when it is impossible to comply with both state and federal regulations)..

applicable avoided cost for net output is Idaho Power's avoided cost at the point of interconnection in Idaho.

DATED this 8th day of September 2011.



Jeffrey S. Lovinger, OSB 960147
Kenneth E. Kaufmann, OSB 982672
Lovinger Kaufmann LLP

Attorneys for Rocky Mountain Power


CERTIFICATE OF SERVICE

I HEREBY CERTIFY that, on the 8th day of September, 2011, a true and correct copy of the foregoing *PETITION TO INTERVENE AND COMMENTS OF ROCKY MOUNTAIN POWER* in Case No. IPC-E-11-14 was served in the manner shown to:

<p>Jean Jewell Commission Secretary Idaho Public Utilities Commission 472 West Washington Street Boise, ID 83702-5918 jean.jewell@puc.idaho.gov (Overnight Delivery and electronic mail)</p>	<p>Donovan E. Walker Jason B. Williams Idaho Power Company PO Box 70 Boise, ID 83707-0070 dwalker@idahopower.com jwilliams@idahopower.com (First Class Mail and electronic mail)</p>
<p>Daniel E. Solander Rocky Mountain Power 201 South Main Street, Suite 2300 Salt Lake City, UT 84111 daniel.solander@pacificorp.com (First Class Mail and electronic mail)</p>	<p>Peter J. Richardson Gregory M. Adams Richardson & O'Leary, PLLC 515 N 27th Street Boise, ID 83702 peter@richardsonandoleary.com greg@richardsonandoleary.com (First Class Mail and electronic mail)</p>

DATED this 8th day of September, 2011.

LOVINGER KAUFMANN LLP



Kenneth E. Kaufmann, OSB 982672
Attorney for Rocky Mountain Power