BEFORE THE IDAHO PUBLIC UTILITIES COMMISSION

IN THE MATTER OF THE APPLICATION OF PACIFICORP DBA ROCKY MOUNTAIN POWER FOR A DETERMINATION REGARDING A FIRM ENERGY SALES AGREEMENT BETWEEN ROCKY MOUNTAIN POWER AND CEDAR CREEK WIND, LLC (RATTLESNAKE CANYON PROJECT)	CASE NO. PAC-E-11-01
IN THE MATTER OF THE APPLICATION OF PACIFICORP DBA ROCKY MOUNTAIN POWER FOR A DETERMINATION REGARDING A FIRM ENERGY SALES AGREEMENT BETWEEN ROCKY MOUNTAIN POWER AND CEDAR CREEK WIND, LLC (COYOTE HILL PROJECT)	CASE NO. PAC-E-11-02
IN THE MATTER OF THE APPLICATION OF PACIFICORP DBA ROCKY MOUNTAIN POWER FOR A DETERMINATION REGARDING A FIRM ENERGY SALES AGREEMENT BETWEEN ROCKY MOUNTAIN POWER AND CEDAR CREEK WIND, LLC (NORTH POINT PROJECT)	CASE NO. PAC-E-11-03
IN THE MATTER OF THE APPLICATION OF PACIFICORP DBA ROCKY MOUNTAIN POWER FOR A DETERMINATION REGARDING A FIRM ENERGY SALES AGREEMENT BETWEEN ROCKY MOUNTAIN POWER AND CEDAR CREEK WIND, LLC (STEEP RIDGE PROJECT)	CASE NO. PAC-E-11-04
IN THE MATTER OF THE APPLICATION OF PACIFICORP DBA ROCKY MOUNTAIN POWER FOR A DETERMINATION REGARDING A FIRM ENERGY SALES AGREEMENT BETWEEN ROCKY MOUNTAIN POWER AND CEDAR CREEK WIND, LLC (FIVE PINE PROJECT)	CASE NO. PAC-E-11-05 ORDER NO. 32260

On January 10, 2011, PacifiCorp dba Rocky Mountain Power filed five Applications each requesting acceptance or rejection of a 20-year Firm Energy Sales Agreement

("Agreements") between Rocky Mountain Power and Cedar Creek Wind, LLC for its Rattlesnake Canyon, Coyote Hill, North Point, Steep Ridge and Five Pine wind projects. All five projects are located near Bingham County, Idaho, and are managed by Cedar Creek Wind, LLC. The Projects have self-certified as "qualifying facilities" (QFs) under the applicable provisions of the federal Public Utility Regulatory Policies Act of 1978 (PURPA). Rocky Mountain Power requested that its Applications be processed by Modified Procedure.

On February 24, 2011, the Commission issued a Notice of Application and Notice of Modified Procedure setting a March 24, 2011, comment deadline and a March 31, 2011, deadline for reply comments. Comments were filed by the Commission Staff, the Company, and Cedar Creek Wind on behalf of the five projects.[1] Numerous public comments were also received by the Commission. As set out in greater detail below, the Commission declines to approve the Firm Energy Sales Agreements.

BACKGROUND

On November 5, 2010, Idaho Power, Avista Corporation, and PacifiCorp dba Rocky Mountain Power filed a Joint Petition requesting that the Commission initiate an investigation to address various avoided cost issues related to the Commission's implementation of PURPA. Section 210 of PURPA generally requires electric utilities to purchase power produced by QFs at "avoided cost" rates set by the Commission. "Avoided costs" are those costs which a public utility would otherwise incur for electric power, whether that power was purchased from another source or generated by the utility itself." 18 C.F.R. § 292.101(b)(6). Order No. 32176 at 1.

While the Commission pursues its investigation, the utilities also moved the Commission to "lower the published avoided cost rate eligibility cap from 10 aMW to 100 kW [to] be effective immediately. . . ." *Id. citing* Joint Petition at 7. Under PURPA regulations issued by the Federal Energy Regulatory Commission (FERC), the Commission must "publish" avoided cost rates for small QFs with a design capacity of 100 kW or less. Order No. 32176 at 1. However, the Commission has the discretion to set the published avoided cost rate at a higher capacity amount – commonly referred to as the "eligibility cap." 18 C.F.R. § 292.304(c)(1-2). When a QF project is larger than the published eligibility cap the avoided cost rate for the project

[1] The parties in these five cases have all filed consolidated comments because the relevant facts for each of these five projects are substantially similar. Consequently, the Commission finds it reasonable and appropriate to consolidate these cases and issue this consolidated final Order. Rule 247, IDAPA 31.01.01.247.

must be individually negotiated by the QF and the utility using the Integrated Resource Plan (IRP) Methodology. Order No. 32176.

The purpose of utilizing the IRP Methodology for large QF projects is to more precisely value the energy being delivered. *Id.* at 10. The IRP Methodology recognizes the individual generation characteristics of each project by assessing when the QF is capable of delivering its resources against when the utility is most in need of such resources. The resultant pricing is reflective of the value of QF energy to the utility. Utilization of the IRP Methodology does not negate the requirement under PURPA that the utility purchase the QF energy.

On December 3, 2010, the Commission issued Order No. 32131 declining the utilities' motion to immediately reduce the published avoided cost rate eligibility cap from 10 aMW to 100 kW. Order No. 32131 at 5. However, the Order did notify parties that the Commission's decision regarding the motion to reduce the published avoided cost eligibility cap would become effective on December 14, 2010. *Id.* at 5-6, 9.

Based upon the record in the GNR-E-10-04 case, the Commission subsequently found that a "convincing case has been made to temporarily reduce the eligibility cap for published avoided cost rates from 10 aMW to 100 kW for wind and solar only while the Commission further investigates" other avoided cost issues. Order No. 32176 at 9 (emphasis original). On reconsideration, the Commission affirmed its decision to temporarily reduce the eligibility cap for published avoided cost rates from 10 aMW to 100 kW. Order No. 32212. Thus, the eligibility cap for the published avoided cost rate for wind and solar QF projects was set at 100 kW effective December 14, 2010.

THE AGREEMENTS

On December 22, 2010, Rocky Mountain Power and each of the five wind projects entered into their respective Agreements. Under the terms of the Agreements, each wind project agrees to sell electric energy to Rocky Mountain Power for a 20-year term using the 10 aMW non-levelized published avoided cost rates. Applications at 8-9. The Applications recite that Rattlesnake Canyon, Coyote Hill and North Point will each have a maximum capacity amount of 27.6 MW, and Steep Ridge and Five Pine will each have a maximum capacity of 25.2 MW. Under normal and/or average conditions, each QF will not generate more than 10 aMW on a monthly basis. Rocky Mountain Power warrants that the Agreements comport with the terms

and conditions of the various Commission Orders applicable to PURPA agreements for a wind resource. *Id.* at ¶ 6 *citing* Order Nos. 30415, 30488, 30738 and 31025.

The projects have all selected October 1, 2012, as the Scheduled Commercial Operation Date. Applications at 9. Rocky Mountain Power asserts that various requirements have been placed upon the Facilities in order for Rocky Mountain Power to accept the Facilities' energy deliveries. Rocky Mountain Power states that it will monitor each Facility's compliance with initial and ongoing requirements through the term of the Agreements. Rocky Mountain Power asserts that it has advised each Facility of the Facility's responsibility to work with Rocky Mountain Power's transmission unit to ensure that sufficient time and resources will be available for delivery to construct the interconnection facilities, and transmission upgrades if required, in time to allow each Facility to achieve its October 1, 2012, Scheduled Commercial Operation Date.

Rocky Mountain Power asserts that each Facility has been advised that delays in the interconnection or transmission process do not constitute excusable delays and if a Facility fails to achieve its Scheduled Commercial Operation Date delay damages will be assessed. *Id.* at 11. The Applications further maintain that each Facility has acknowledged and accepted the risk inherent in proceeding with its Agreement without knowledge of the requirements of interconnection and possible transmission upgrades. *Id.* The parties have each agreed to delay liquidated damages and security provisions. Agreements ¶¶ 2.5.1, 11.1.2. Rocky Mountain Power states that each Facility has also been made aware of and accepted the provisions in each Agreement regarding curtailment or disconnection of its Facility should certain operating conditions develop on Rocky Mountain Power's system. Agreements ¶ 6.3.

By their own terms, the Agreements will not become effective until the Commission has approved all of the terms and conditions and declares that all payments made by Rocky Mountain Power to the Facilities for purchases of energy "are just and reasonable, in the public interest, and that the costs incurred by [Rocky Mountain Power] for purchases of capacity and energy from [Cedar Creek] are legitimate expenses, all of which the Commission will allow [Rocky Mountain Power] to recover in rates in Idaho in the event other jurisdictions deny recovery of their proportionate share of said expenses." Agreements ¶ 2.1.

THE COMMENTS

A. Staff Comments

Staff observed that the five Agreements are nearly identical. All five of the projects are proposed to be built in the same general vicinity. Staff calculated that the five projects collectively are expected to generate 375,503 MWh annually. Under the non-levelized rates in the Agreements, the annual energy payments by Rocky Mountain Power for the expected generation will be approximately $23.6 million in 2013 increasing to approximately $45.2 million in 2031, or a cumulative total of $685.4 million over the 20-year term of the Agreements. The collective net present value of the energy payments over the life of the Agreements will be approximately $265.2 million.

The five Agreements were signed by the project developer on December 13, 2010, and signed by Rocky Mountain Power on December 22, 2010. The Agreements were filed with the Commission on January 10, 2011. The Agreements contain the published avoided cost rates from Order No. 31025. However, Staff observed that Order No. 32176 lowered the availability of published avoided cost rates for wind and solar QF projects to 100 kW, effective December 14, 2010. As a matter of law, Staff considers the effective date of the contract to be the date upon which both parties signed the agreement. A signature by only one party, Staff believes, does not create an enforceable contract nor establish the effective date of the Agreement. Consequently, Staff considers the effective date for the five Agreements to be December 22, 2010.

Staff acknowledged the comments submitted by Cedar Creek in support of the Agreements, as well as the affidavit of Dana Zentz, filed with the Commission on January 26, 2011. The comments and affidavit allege that the parties had reached full agreement as to the rates, terms and conditions of a PPA for the projects on November 29, 2010, and that Cedar Creek signed and delivered copies of the Agreements to Rocky Mountain Power on December 13, 2010. Nevertheless, the effective date of each Agreement is shown as December 22, 2010, on page 1 of each Agreement, clearly after the December 14, 2010, effective date established by Order No. 32176.

Because the Agreements were executed after the date upon which the 100 kW eligibility cap became effective for wind and solar projects and because the size of each proposed wind project clearly exceeds 100 kW, Staff maintains that approval of the Agreements

is prohibited by Order No. 32176. Staff believes that the avoided cost rate for these Agreements must be negotiated using the IRP methodology. Consequently, Staff recommended denial of the Agreements as submitted.

B. Cedar Creek Wind Comments and Reply

Cedar Creek states that after it unsuccessfully bid in Rocky Mountain Power's 2008/2009 Request for Proposal (RFP), Cedar Creek and Rocky Mountain Power discussed the possibility of two 78 MW PURPA wind projects. Cedar Creek determined that the avoided cost calculated by Rocky Mountain Power's integrated resource model was "uneconomic and un-financeable for purposes of developing the Cedar Creek" wind projects. Comments at 2. Cedar Creek subsequently decided to "reduce the amount of gross generation and sacrifice the economies of scale associated with two 78 MW wind projects and reconfigure into five separate PURPA projects not greater than 10 aMW, in order to qualify for Surrogate Avoided Resource ("SAR") based avoided cost rates." *Id.* at 2, 3.

Cedar Creek argued that each of its five Agreements were mature contracts with a meeting of the minds between the parties prior to December 14, 2010. The Projects maintain that they had fully perfected their right to a published avoided cost rate power purchase agreement with Rocky Mountain Power prior to the Commission's reduction of the eligibility threshold for wind and solar projects.

On April 5, 2011, Cedar Creek filed reply comments.[2] Cedar Creek asserted that "[t]he standard articulated by Staff – that December 14, 2010 is an 'absolute' cut-off date – is both a misreading of the Commission Order 32176 in Case No. GNR-E-10-4 and is contrary to established law regarding PURPA rates and contract requirements." Reply at 4. Cedar Creek argues that the Commission does not require, or even speak to, December 14 as the date by which both counterparties must have signed an agreement. *Id.* Cedar Creek maintained that, because Rocky Mountain Power and Cedar Creek agreed that the five projects were eligible for published rates prior to December 14, 2010, and both parties agreed that all contract terms and conditions, including price, had been agreed to prior to that date, Cedar Creek has proven entitlement to published avoided cost rates. *Id.*

Cedar Creek states that Staff's recommendation is wrong, misguided, bad public policy and "contrary to PURPA's federal mandate that utilities execute power purchase

[2] Pursuant to Commission Order No. 32192, reply comments were to be filed no later than March 31, 2011.

agreements with QF projects that are mature and are ready, willing and able to deliver qualifying power to the utility at the avoided cost applicable at that time." *Id.* at 6.

C. Rocky Mountain Power Reply

Rocky Mountain Power filed reply comments on April 11, 2011.[3] Rocky Mountain Power acknowledged that it had completed negotiation of all terms of the Agreements for Cedar Creek's five projects prior to December 14, 2010. Reply at 2. Rocky Mountain explained that the Company's review and execution procedures must comply with Sarbanes Oxley ('SOX') regulatory requirements. "Once the parties agree to a final draft, the final draft then undergoes a detailed review and sign-off by management, merchant transmission, accounting, financial reporting (FAS133, Fin 46, etc.), credit, legal, billing, and delegation of signing authority by the appropriate Company executive for execution of the agreement." *Id.* at 3. Rocky Mountain Power asserted that it acted "with reasonable speed to execute the PPAs given the number of documents and complexity of review of the multiple transactions requested by Cedar Creek Wind." *Id.*

Rocky Mountain Power stated that Cedar Creek returned signed Agreements to Rocky Mountain's Portland office "late on the afternoon of December 13, 2010. Cedar Creek did not deliver final conformed exhibits for each PPA until December 14, 2010. . . . During the review, the Company identified discrepancies in several of the PPA exhibits which were corrected and confirmed by Cedar Creek Wind on December 16, 2010." *Id.* at 3, 4. Rocky Mountain completed its final review and received executive approval of the Agreements on December 22, 2010. *Id.* "It is unlikely that Rocky Mountain Power could have completed its review in a timelier manner and in no event could the Company have been diligent and still executed the contracts prior to December 14, having received signed PPAs with no conformed exhibits from Cedar Creek Wind at the end of the business day on December 13, 2010." *Id.*

Rocky Mountain notes that, by their own terms, the Agreements are not effective until approved by the Commission. *Id.* at 6. Rocky Mountain also maintains that, although Cedar Creek argues for "grandfathering" treatment, the Projects do not meet the bright line rule for grandfathering – a fully executed PPA by December 14 or a meritorious complaint filed with

[3] Rocky Mountain acknowledged that its reply, as well as Cedar Creek's reply, was untimely. As a result, Rocky Mountain requested that the Commission either strike both replies or accept both replies.

the Commission by December 14. *Id.* at 7. Rocky Mountain concedes that the parties reached agreement on all terms of their Agreements prior to December 14, 2010. "This fact alone does not, however, compel the Commission to approve those contracts." *Id.* at 8.

D. Public Comments

More than 40 public comments were received regarding the Cedar Creek projects. Approximately 36 comments supported approval of the 5 wind projects. The majority of commenters who support approval believe that the projects would stimulate the local economy and provide economic growth at a time when jobs and industry is greatly needed. Several commenters stressed the need for Idaho to capture and develop its natural resources. A few commenters believed that utilizing wind energy would reduce the cost of electricity to Idahoans.

Approximately seven comments opposed the five wind projects. Commenters in opposition stated that utility customers cannot afford another increase in electricity rates. Several commenters cited the intermittent nature of wind as being an unreliable resource that is heavily subsidized to make it economically feasible.

DISCUSSION AND FINDINGS

The Commission has jurisdiction over Rocky Mountain Power, an electric utility, and the issues raised in this matter pursuant to the authority and power granted it under Title 61 of the Idaho Code and the Public Utility Regulatory Policies Act of 1978 (PURPA). The Commission has authority under PURPA and the implementing regulations of the Federal Energy Regulatory Commission (FERC) to set avoided cost rates, to order electric utilities to enter into fixed-term obligations for the purchase of energy from qualified facilities (QFs) and to implement FERC rules. *Rosebud Enterprises, Inc., v. Idaho Public Utilities Commission*, 128 Idaho 609, 612, 917 P.2d 766, 769 (1996).

The Commission has reviewed the record in this case, including the Applications, the Firm Energy Sales Agreements, and the comments of Commission Staff, Rocky Mountain Power, the wind projects, and the public. It is clear from the record that extensive review of PPAs is conducted by both parties prior to signing an agreement. From the Commission's perspective, a thorough review is appropriate and necessary prior to signing Agreements that obligate ratepayers to payments in excess of $685 million over the 20-year term of these Agreements. Indeed, the Commission has directed the utilities to assist the Commission in its gatekeeper role when reviewing QF contracts.

The primary issue to be determined in these cases is whether the Agreements – which utilize the published avoided cost rate – were executed before the eligibility cap for published rates was lowered to 100 kW on December 14, 2010, for wind and solar projects. "According to the FERC, 'it is up to the States, not [FERC] to determine the specific parameters of individual QF power purchase agreements, including the date at which a legally enforceable obligation is incurred under State law.'" *Rosebud Enterprises,* 128 Idaho at 780-781, 917 P.2d at 623-624, *citing West Penn Power Co.*, 71 FERC ¶ 61, 153 (1995). We find that the Agreements were not fully executed (signed by both parties) prior to December 14, 2010. More specifically, each Firm Energy Sales Agreement states that the "Effective Date" of the Agreement is "after execution by both Parties and after approval by the Commission." Agreements ¶¶ 1.13, 2.1. The opening paragraph is dated "this 22nd day of December, 2010." Agreements at 1. It is not disputed that the projects signed the Agreements on December 13, and Rocky Mountain Power signed on December 22, 2010. Thus, on the date the five Agreements became effective, published avoided cost rates were available only to wind and solar projects with a design capacity of 100 kW or less.

The proposed change in the eligibility cap was clearly noticed in our Order No. 32131 issued on December 3, 2010. As we observed in Order No. 32176: "One need look no further than the abundance of firm energy sales agreements filed with the Commission [between the notice and December 14] to realize that the parties took the Commission's notice of its effective date seriously." Order No. 32176 at 11. The Commission does not consider a utility and its ratepayers obligated until both parties have completed their final reviews and signed the agreement. In other words, in order for the 10 aMW eligibility cap to be available to wind and solar QFs, the agreement must have been effective prior to December 14, 2010. The Idaho Supreme Court has recognized that "a balance must be struck between the local public interest of a utility's electric consumers and the national public interest in development of alternative energy sources." *Rosebud Enterprises*, 128 Idaho at 613, 917 P.2d at 770. We find that it is not in the public interest to allow parties with contracts executed on or after December 14, 2010, to avail themselves of an eligibility cap that is no longer applicable.

The published avoided cost rates established in Order No. 31025 have not changed. What has changed is the size at which wind and solar projects can avail themselves of the published avoided cost rates. Consistent with FERC regulations, and as set out in Order No.

32176, published rates are available to wind and solar QFs with a design capacity of 100 kW or less. 18 C.F.R. § 292.304(c)(1-2). Wind and solar projects larger than 100 kW are still entitled to PURPA contracts at avoided cost rates calculated using the IRP Methodology. Because published avoided cost rates remain unchanged and only the eligibility size has changed, grandfathering criteria applied to rate changes are not applicable here. Regarding the application of a change in the eligibility cap, we adopt a bright line rule: a Firm Energy Sales Agreement/Power Purchase Agreement must be executed, i.e., signed by both parties to the agreement, prior to the effective date of the change in eligibility criteria.

The Firm Energy Sales Agreements between Rocky Mountain Power and the five projects were executed on December 22, 2010. The Agreements recite that Rattlesnake Canyon, Coyote Hill and North Point will each have a maximum capacity amount of 27.6 MW, and Steep Ridge and Five Pine will each have a maximum capacity of 25.2 MW. Because the size of each of these wind projects exceeds 100 kW, they are not eligible to receive published rate contracts. Simply put, the rates contained in the Agreements do not comply with Order No. 32176. Therefore, we disapprove the five Firm Energy Sales Agreements.

ORDER

IT IS HEREBY ORDERED that the five December 22, 2010, Firm Energy Sales Agreements between Idaho Power and Cedar Creek Wind, LLC (for its Rattlesnake Canyon, Coyote Hill, North Point, Steep Ridge and Five Pine projects) are disapproved.

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. 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 8th day of June 2011.

PAUL KJELLANDER, PRESIDENT

MACK A. REDFORD, COMMISSIONER

MARSHA H. SMITH, COMMISSIONER

ATTEST:

Jean D. Jewell
Commission Secretary

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