Office of the Secretary
Service Date
December 21, 2011

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 (11-01), COYOTE HILL PROJECT (11-02), NORTH POINT PROJECT (11-03), STEEP RIDGE PROJECT (11-04), AND FIVE PINE PROJECT (11-05)).	**SUPREME COURT DOCKET NO. 39134-2011** **IPUC CASE NOS. PAC-E-11-01 PAC-E-11-02 PAC-E-11-03 PAC-E-11-04 PAC-E-11-05**
CEDAR CREEK WIND, LLC, **Petitioner/Appellant,** **v.** **IDAHO PUBLIC UTILITIES COMMISSION,** **Respondent, Respondent on Appeal,** **and** **PACIFICORP DBA ROCKY MOUNTAIN POWER,** **Respondent.**	**PUC ORDER NO. 32419**

On July 27, 2011, the Commission issued Final Order on Reconsideration No. 32302 affirming its prior decision to not approve five Power Purchase Agreements (PPAs or Agreements) entered into between Cedar Creek Wind and PacifiCorp dba Rocky Mountain Power pursuant to the federal Public Utility Regulatory Policies Act of 1978 (PURPA). Based upon the expressed terms of the five Agreements, the Commission found that the PPAs were not effective prior to December 14, 2010 – the date on which the eligibility for PURPA published avoided cost rates in Idaho changed from 10 average megawatts (aMW) to 100 kilowatts (kW) for wind and solar qualifying facilities (QFs). Order No. 32260. Because each of the PPAs

requested published avoided cost rates but the projects were in excess of 100 kW, the Commission found that the published rate was no longer available to the projects.

On August 5, 2011, Cedar Creek filed a Petition with the Federal Energy Regulatory Commission (FERC) claiming that the Commission's Order No. 32302 was inconsistent with FERC's regulations implementing PURPA. While its Petition to FERC was pending, Cedar Creek, on August 31, 2011, also appealed the Commission's Order to the Idaho Supreme Court. On October 4, 2011, FERC issued an Order concluding that the Commission's Order was inconsistent with PURPA and FERC's PURPA regulations.

On October 24, 2011, the Commission and Cedar Creek filed a Stipulated Motion with the Idaho Supreme Court that the appeal be temporarily suspended and the matter remanded to the Commission.[1] Suspending the appeal would allow the Commission to reconsider its Order No. 32302 in light of the FERC Order and provide the parties with an opportunity to discuss the possibility of resolving the dispute. I.A.R. 13.3. On November 9, 2011, the Court issued an Order suspending the appeal and remanding the matter to the Commission for further review. On remand, the Commission invited settlement of the entire dispute and authorized the Commission Staff to participate in the settlement negotiations. Order No. 32386 *citing* Rules 352 and 353. Cedar Creek, Rocky Mountain and Staff (collectively the "Parties") convened four settlement conferences. On December 15, 2011, the Parties filed a Motion to approve a "Stipulation of Settlement and Request for Approval of Power Purchase Agreements" ("Settlement Stipulation") that proposed to settle all the disputed issues.

Having reviewed the underlying administrative record, the FERC Order and the Settlement Stipulation, the Commission issues this final Reconsideration Order on Remand. As explained in greater detail below, the Commission approves the Settlement Stipulation and approves the three modified PPAs. Accordingly, the Commission amends and clarifies its prior Order No. 32302 to be consistent with this Order. *Idaho Code* § 61-624.

[1] When the Stipulated Motion was filed, Rocky Mountain had not yet been granted intervention by the Court. Nevertheless, Rocky Mountain supported the suspension and remand.

BACKGROUND

A. Eligibility Cap Case

Prior to the filing of the five Cedar Creek PPAs, Avista Corporation, Idaho Power Company, and Rocky Mountain (collectively "the Utilities") petitioned the Commission on November 5, 2010, to initiate a generic investigation to address various PURPA issues. The Utilities also requested that while the investigation was underway, the Commission "immediately" reduce the eligibility cap or ceiling for the "published" avoided cost rate from 10 aMW per month to 100 kW per month. Order Nos. 32212 and 32302.[2] The Commission issued a Notice and Order opening a separate investigation (GNR-E-10-04), solicited initial and reply comments, and convened an oral argument to address the proposed reduction in the eligibility cap. Order No. 32131 at 6-7.

The Commission subsequently found that the Utilities had made a convincing case to temporarily "reduce the eligibility cap for published avoided cost rates from 10 aMW to 100 kW for wind and solar [QFs] only while the Commission further investigates" other PURPA issues. Order No. 32176 at 9 (emphasis original). Consistent with its prior Notice, the Commission ordered that the eligibility cap for the published rate be reduced from 10 aMW to 100 kW for wind and solar projects effective December 14, 2010. Order Nos. 32176, 32212, 32302. No party, including Cedar Creek, appealed the Commission's decision to reduce the eligibility cap. Order No. 32302 at 5, 14-15.

B. The Five Original Agreements

The procedural history of this consolidated case is complex and lengthy, but the pertinent points are summarized here. On December 22, 2010, Rocky Mountain Power and Cedar Creek executed five separate PPAs for five wind QF projects.[3] Under the terms of each Agreement, each project agreed to sell energy to Rocky Mountain for a 20-year term using the published avoided cost rate set by the Commission. Taken together, the five projects had a

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[2] Pursuant to FERC's PURPA regulations, state commissions must "publish" an avoided cost rate for small QFs with the design capacity of 100 kW or less. 18 C.F.R. § 292.304(c)(1). However, PURPA regulations also declare that state commissions "may" set standards or published rates at a higher capacity amount. 18 C.F.R. § 292.304(c)(1-2). In February 2008, the Commission established the eligibility cap for published avoided cost rates for each of the three utilities at 10 aMW. Order No. 30488 at 17.

[3] Because of the similarity between each of the five Agreements, the Commission found it reasonable and appropriate to consolidate the cases and issue a consolidated Order. Order No. 32260 at n.1.

nameplate capacity of 133.4 MW.[4] Under normal and/or average conditions, each wind project was to have sold its output of not more than 10 aMW per month to Rocky Mountain at the published rate. The projects all selected October 1, 2012 as the scheduled commercial operation date (COD). Order No. 32302 at 3.

On January 10, 2011, Rocky Mountain filed the Applications requesting that the Commission issue an Order "accepting or rejecting" the five Cedar Creek PPAs. On February 24, 2011, the Commission issued a consolidated Notice of Application and Notice of Modified Procedure for the five Applications. Cedar Creek and Commission Staff filed timely comments in response to the Notice of Modified Procedure. Rocky Mountain and Cedar Creek both filed reply comments.

In its final Order No. 32260 issued June 8, 2011, the Commission declared that "the primary issue to be determined in these [Cedar Creek] cases is whether the Agreements were executed before the eligibility cap for published rates was lowered to 100 kW on December 14, 2010." Order No. 32260 at 9. The Commission found that the five PPAs were not fully-executed (i.e., signed by both parties) prior to December 14, 2010. Relying on the actual terms of the PPAs, the Commission found that each PPA stated that "the 'Effective Date' of [each] Agreement is '<u>after execution by both Parties and after approval by the Commission</u>.'" *Id. citing* PPA ¶¶ 1.13, 2.1. (emphasis added).[5] Because the Commission had previously reduced the eligibility cap for the published avoided cost rate from 10 aMW to 100 kW, the five PPAs "contained an essential term that was no longer available to the Projects." Order No. 32302 at 2.

Cedar Creek timely filed a Joint Petition for Reconsideration of the Commission's final Order No. 32260. On reconsideration, Cedar Creek argued that the Commission's Order was erroneous because a "legally enforceable obligation" existed between Cedar Creek and Rocky Mountain prior to the reduction in the eligibility cap on December 14, 2010. As a result, Cedar Creek maintained that it was entitled to published avoided cost rates and urged the Commission to "expeditiously approve the Agreements as submitted." Order No. 32302 at 2.

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[4] The Applications for Rattlesnake Canyon, Coyote Hill and North Point indicated that each of these projects would have a maximum nameplate capacity of 27.6 MW, while Steep Ridge and Five Pine would each have a maximum nameplate capacity of 25.3 MW.

[5] The Commission also observed that the opening paragraph of each Agreement states that the Agreement is "entered into this 22nd day of December 2010." *Id.*

On reconsideration, the Commission affirmed its prior decision that the five PPAs all contained express language that the effective date of each Agreement is when both parties signed the PPAs – December 22, 2010. The Commission noted that it was undisputed that Cedar Creek signed the PPAs on December 13, 2010, and Rocky Mountain signed on December 22, 2010. *Id.* Agreements ¶¶ 1.13, 2.1, Order No. 32302 at 4, 6, 8. Given the agreed upon effective date, the Commission affirmed that each Agreement did not become effective until after execution by both Parties. Order No. 32302 at 9. The Commission also found 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, and thus published rates, that are no longer applicable. Order No. 32302 at 12, 16.

D. The FERC Case and the Appeal

On August 5, 2011, Cedar Creek filed a Petition with FERC requesting that the federal agency bring an enforcement action against the Commission pursuant to 16 U.S.C. § 824a-3(h)(2) or, in the alternative, to make certain findings related to the Commission's decision. Cedar Creek claimed that the Commission's Order is inconsistent with FERC's regulations implementing PURPA. On October 4, 2011, FERC issued an Order declining to bring an enforcement action against the Commission. However, FERC determined that the Commission's Order was inconsistent with PURPA and FERC's implementing regulations. *Notice of Intent not to Act and Declaratory Order*, 137 FERC ¶ 61,006 (Oct. 4, 2011). In particular, FERC construed the Commission's final Order No. 32260 as "limiting the creation of a legally enforceable obligation only to QFs that have [PPAs] . . . signed by both parties to the agreement." *Id.* at ¶ 26. FERC interpreted the Commission's Order as requiring a fully-executed contract as a condition precedent to the creation of a legally enforceable obligation between the parties. *Id.* at ¶¶ 30, 35. Although this Commission has a long line of cases to the contrary, FERC concluded that the Commission did not recognize that "a legally enforceable obligation may be incurred before the formal memorialization of a contract to writing." *Id.* at ¶ 36.

FERC did not rule whether Cedar Creek had perfected a legally enforceable obligation for the five projects. *Id.* at ¶¶ 38 (whether there is a "legally enforceable obligation . . . is not before us."); 39. Given the issuance of the FERC Order and Cedar Creek's appeal to the Idaho Supreme Court, Cedar Creek and the Commission filed a Stipulated Motion for the appeal to be temporarily suspended and the matter remanded to the Commission.

THE SETTLEMENT STIPULATION

Cedar Creek, Rocky Mountain and Staff (collectively the "Parties") convened four settlement conferences on October 20 and 27, November 16, and December 1, 2011. As a result of these settlement discussions, the Parties on December 15, 2011, filed a Motion to Approve the Settlement Stipulation and Request for Approval of Power Purchase Agreements (the "Settlement Stipulation"). The Parties disclosed that they have resolved all disputes between and among themselves.

The Parties requested that the Commission modify its Order on Reconsideration No. 32302 and approve three of the five original PPAs as amended in the Settlement Stipulation. More specifically, the Parties requested that the Commission approve the amendments to the North Point project (Case No. PAC-E-11-03); the Five Pine project (Case No. PAC-E-11-05); and the Coyote Hill project (Case No. PAC-E-11-02) (together, the "Agreements"). In addition, Cedar Creek and Rocky Mountain agreed to withdraw the remaining two Applications and accompanying PPAs. Stipulation at § 2.[6]

The Parties agreed that Cedar Creek had established a legally enforceable obligation under PURPA no later than December 13, 2010. Stipulation at §§ 1, 4. Because such obligation arose prior to December 14, 2010, the Parties agree that the surviving PPAs should be approved by the Commission at the avoided cost rates contained in the Original Agreements. *Id.* at § 5. Thus, Cedar Creek and Rocky Mountain are restored to their relative positions under the original PPAs. The three surviving PPAs will have a combined nameplate capacity not to exceed 133.4 MW and Rocky Mountain shall not be required to purchase more than 438,000 MWh (i.e., approximately 50 aMW) of output in any given calendar year. *Id.* at § 7; PPAs at 1.30, 1.43, 4.1. The North Point PPA will be modified to have an 80 MW nameplate capacity, while the Five Pine and Coyote Hill PPAs will have a total nameplate capacity not to exceed 53.4 MW. Stipulation, Exh. A, B, C.

Both the North Point and Five Pine PPAs provide that these PPAs may be assigned to Ridgeline at its Meadow Creek site. *Id.* at § 21.2. Because the Meadow Creek facility already has its transmission interconnection with PacifiCorp, assignment to Ridgeline would allow the scheduled commercial operation date (COD) for both facilities to be December 31, 2012.

[6] The two Applications and PPAs to be withdrawn are: the Steep Ridge project (Case No. PAC-E-11-04) and the Rattlesnake Canyon project (Case No. PAC-E-11-01) (together, the "Withdrawn Agreements"). Stipulation at 2.

Utilizing the Meadow Creek facility would allow Cedar Creek/Ridgeline to obtain Treasury grants and other tax incentives before they are set to expire on December 31, 2012. Any assignment of North Point and Five Pine to Ridgeline must occur within 90 days of the effective date of the PPAs as modified, approximately on or before March 31, 2012. Exh. A, B, C § 21.2.[7] The Coyote Hill project is contemplated at the original Cedar Creek site.

In addition, the PPAs further provide that Cedar Creek and Rocky Mountain shall share the "Environmental Attributes" (including but not limited to renewable energy credits (RECs) and Green Tags) attributed to the surviving PPAs. More specifically, Cedar Creek shall be entitled to the environmental attributes for the first 10 years of operation, while Rocky Mountain shall be entitled to the environmental attributes for the last 10 years of the 20-year Agreements. Exh. A, B, C at §§ 1.17, 1.26, 4.6.

The Parties assert that the settlement of their dispute including the modifications of the surviving PPAs represents a fair, just and reasonable resolution of the disputed claims, and are consistent with applicable law and regulatory policies. Stipulation at §§ 1, 6, 12. The Parties further maintain that the settlement represents a negotiated compromise between the Parties and is in the public interest. The Parties agree that the Settlement Stipulation "resolves all issues raised by any party in the captioned [Commission] dockets, in the FERC Proceeding, and in Cedar Creek's appeal to the Idaho Supreme Court. If the Commission adopts the Settlement Stipulation, each waives, releases and discharges the other Parties from any and all causes of action, suits, claims, demands, and liability whatsoever in law or equity." *Id.* at § 17. The Parties urge the Commission to approve this Settlement Stipulation and the PPAs in their entirety and they stand ready to support the Stipulation. *Id.* at § 13.

COMMISSION FINDINGS

At the outset, we commend the Parties for their diligence and efforts at resolving the underlying disputes. Consistent with our authority under *Idaho Code* § 61-624 and Rules 352 and 353, we invited settlement of all of the disputes arising from our Order Nos. 32260 and 32302. Order No. 32386 at 2.

[7] Although the Ridgeline/Meadow Creek transmission line is already completed, this line may have capacity limitations. Consequently, the PPAs allow for a combination of generation sizes at the Five Pine and Coyote Hill projects so long as the total generation for all the projects not exceed 438,000 MWh. This purchase cap shall be trued-up annually. Stipulation at § 7.

Rule 356 provides that the Commission is not bound by the Parties' Settlement Agreement. IDAPA 31.01.01.356. The Commission will "independently review any settlement proposed to it to determine whether the settlement is just, fair and reasonable, in the public interest or otherwise in accordance with law or regulatory policy." *Id.* The Commission may accept, reject, or modify settlement provisions. Moreover, proponents of settlements on appeal carry the burden of showing that the settlement is reasonable and in the public interest. Rule 355. When a settlement of an appeal – such as this case – calls for Commission action, the Commission will prescribe an appropriate procedure to examine a proposed settlement. In this case, the Parties to the appeal have asked the Commission to amend Reconsideration Order No. 32302 issued July 27, 2011, and approve three modified PPAs. *Idaho Code* § 61-624 provides that the Commission "may at any time, upon notice to the public utility affected, . . . rescind, alter or amend any order or decision made by it."

After having reviewed the record in this case, the FERC Order, the Stipulation of Settlement and Request for Approval of Power Purchase Agreements, and the modified PPAs, we find the record is comprehensive and further proceedings are not necessary. Rule 354. Based upon our review of the entire record and the particular facts of this case, we find that the Settlement is fair, just and reasonable, and in the public interest. As noted by the Parties, the Stipulation represents a reasonable compromise of the positions held by the Parties.

In our initial decision, this Commission made a determination about whether to approve the Agreements based on the express terms contained within each Agreement. In our past experience, when a QF wants a determination that there is a legally enforceable obligation, it files a complaint against a utility that it alleges has failed to negotiate. This is the first time the Commission has reviewed the facts of this case for evidence regarding the existence of a legally enforceable obligation outside the express terms of the original five Agreements entered into by Rocky Mountain and Cedar Creek.

There are several reasons supporting our determination that the settlement is fair and reasonable to Cedar Creek, Rocky Mountain, and ratepayers. First, the Stipulation returns Cedar Creek and Rocky Mountain to their respective positions prior to the issuance of our Orders disapproving the PPAs. Based upon the Parties' assertions in the Settlement Stipulation and our review of the record, we find that the record reveals that Cedar Creek had perfected a legally enforceable obligation no later than December 13, 2010. As such, Cedar Creek was entitled to

the published avoided cost rates available to 10 aMW QFs in effect as of December 13, 2010. The three modified PPAs equate to the original five PPAs.

Second, PacifiCorp and ratepayers are protected under the settlement and the three modified PPAs by being obligated to purchase no more than the total equivalent of 50 aMW of net output as originally contemplated under the five PPAs. Assignment also allows the COD date to advance, thereby providing benefit to Cedar Creek.

Third, ratepayers and Rocky Mountain are further advantaged because the modified PPAs recognize that the environmental attributes produced by the three modified projects will be equally apportioned between Rocky Mountain and Cedar Creek. Under the PPAs, Cedar Creek will be entitled to the environmental attributes for the first 10 years of the Agreements and Rocky Mountain will be entitled to the environmental attributes for the last 10 years of the Agreements. This is an improvement over the original PPAs because the assignment of the environmental attributes or RECs was not clearly delineated in the original Agreements. Moreover, subsequent revenues derived from the environmental attributes will offset Rocky Mountain's purchase of the output from the surviving PPAs over the last 10 years of the Agreements.

Finally, we find that resolution of this matter will avoid uncertainty and conserve resources (both time and money). This is beneficial to Cedar Creek, Rocky Mountain and ratepayers. The settlement avoids the likelihood of litigation in multiple forums and represents a significant benefit to all Parties. Here the settlement brings the dispute to a reasonable conclusion and benefits Cedar Creek, Rocky Mountain and ratepayers. Rules 354-355; *Aguirre v. Hamlin*, 80 Idaho 176, 327 P.2d 349 (1958).

ORDER

IT IS HEREBY ORDERED that the Motion for Approval of the Stipulation of Settlement and Request for Approval of Power Purchase Agreements filed by the Parties is granted. In addition, we approve the three modified Agreements identified in Exhibit A (North Point), Exhibit B (Five Pine), and Exhibit C (Coyote Hill).

IT IS FURTHER ORDERED that Rocky Mountain Power's request to withdraw the Steep Ridge Application and Agreement (Case No. PAC-E-11-04) and the Rattlesnake Canyon Application and Agreement (Case No. PAC-E-11-01) is granted.

IT IS FURTHER ORDERED that Order No. 32302 issued July 27, 2011, is amended consistent with the findings and discussions set out in this Order pursuant to *Idaho Code* § 61-624.

THIS IS A FINAL RECONSIDERATION ORDER ON REMAND. Any party aggrieved by this Order may appeal to the Supreme Court of Idaho as provided by 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 21st day of December 2011.

PAUL KJELLANDER, PRESIDENT

MACK A. REDFORD, COMMISSIONER

MARSHA H. SMITH, COMMISSIONER

ATTEST:

Barbara Barrows
Assistant Commission Secretary

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