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2014 MAY 15 PM 4:35

IDAHO PUBLIC
UTILITIES COMMISSION

Attorneys for Sagebrush Energy, LLC

BEFORE THE
IDAHO PUBLIC UTILITIES COMMISSION

IN THE MATTER OF THE APPLICATION OF)
AVISTA CORPORATION PROPOSING) CASE NO. AVU-E-14-03
REVISIONS TO TARIFF SCHEDULE 62)
"COGEN AND SMALL POWER") COMMENTS OF SAGEBRUSH
) ENERGY, LLC
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_____)

INTRODUCTION AND BACKGROUND

Pursuant to the Idaho Public Utilities Commission's ("IPUC" or "Commission") Notice of Application Order No. 33028, Sagebrush respectfully submits these Comments on Avista's proposed revisions to its Schedule 62 for contracting processes applicable to qualifying facilities ("QF") under the Public Utility Regulatory Policies Act of 1978 ("PURPA"). Sagebrush appreciates the opportunity to comment on Avista's proposed revisions to Schedule 62.

Sagebrush is a Wyoming limited liability company and the owner of several QF projects in various stages of development. Sagebrush's QF projects include projects located within the service territory of utilities that interconnect with Avista Corporation ("Avista"). The projects that Sagebrush owns or plans to develop include wind projects and hydroelectric

projects that are or will be self-certified as small power production facilities under the Public Utility Regulatory Policies Act of 1978 (“PURPA”). *See* 18 C.F.R. § 292.201 *et seq.*

Sagebrush also has interest in selling QF output to other investor-owned utilities in Idaho, and expects that Avista’s filing may set precedent for the policies applicable to those other utilities. Sagebrush is likely to again negotiate for sale of the output of its QFs to Avista or other Idaho utilities impacted by the outcome of this proceeding.

Additionally, Sagebrush has extensive experience attempting to enter into contracts with NorthWestern Energy in Montana under the Montana Public Service Commission’s implementation of PURPA. In Montana, there are very few requirements set by the Montana Public Service Commission governing the negotiation process between QFs and NorthWestern. Sagebrush has first-hand experience with the difficulties and disputes that arise without adequate criteria governing the negotiations.

Sagebrush agrees with the concept advanced by several parties in IPUC Case No. GNR-E-11-03, and identified in Avista’s application here, that it would be in the public interest to develop fair and reasonable contracting procedures and rules for Idaho utilities. As discussed below, Avista has made an effort to develop a fair and reasonable set of contracting procedures, but Sagebrush recommends a limited number of improvements that it is hopeful Avista will agree to implement or the Commission will otherwise adopt.

COMMENTS

Sagebrush has no objection to the overall structure of the Avista’s proposed Schedule 62, but rather recommends several changes to clarify the tariff’s language or ensure that the tariff is fully compliant with applicable law and sound policy.

1. “As Available” or “Short Term” Rate.

Sagebrush supports Avista’s proposal to provide a short-term rate in the tariff, but recommends that the tariff be clarified that the short-term rate is available to all sizes of QFs.

Avista’s tariff filing states:

(3) Short-Term Rate - The Short-Term Rate shall be applicable when the Customer chooses to supply output including energy and capacity at market-based rates under contract. The Short-Term Rate shall be the lower of the applicable Non-Levelized Non-Fueled Rate or the Market Rate. The rate is subject to a Seasonal Factor, a Daily Shape Adjustment, and Integration Charges. The resultant rate shall be applied to the Facility output for all kilowatt-hours up to the Eligibility Cap in any given month.

See Tariff Sheet 62B (underline added). Sagebrush presumes that this rate is the “as available” rate option provided by 18 C.F.R. § 292.304(d). That regulation provides QFs with the option to sell at rates calculated at the time of delivery on an *as available* basis, 18 C.F.R. § 292.304(d)(1), or pursuant to a contract or legally enforceable obligation with rates calculated at the time of delivery, 18 C.F.R. § 292.304(d)(2)(i), or pursuant to a contract or legally enforceable obligation with rates calculated at the time that the obligation is incurred, 18 C.F.R. § 292.304(d)(2)(ii). Federal regulations make all rate options described in the regulation available to all QFs regardless of size, and therefore Sagebrush recommends that the underlined term “up to the Eligibility Cap” be deleted to clarify that this option is available to all QFs.

Additionally, Sagebrush believes it would be beneficial for Avista to provide standard short-term, “as available” tariff contract to facilitate execution of market based pricing sales. While QFs generally opt to have rates calculated at the time the obligation is incurred, it is possible for negotiation of a contract to break down to the point where a QF may need a short-term or “as available” agreement to sell to the utility until negotiations can be completed. Idaho

Power possesses a “non-firm” tariff contract in its Schedule 86, which could serve this purpose. Arguably, FERC’s regulation does not even require a QF to execute a contract to exercise the right to make “as available” sales pursuant to 18 C.F.R. § 292.304(d)(1) because the regulation only mentions the signing of a contract with reference to sales made pursuant to 18 C.F.R. § 292.304(d)(2). Sagebrush therefore submits that if a contract is required it is reasonable to provide a tariff contract that can be entered into without protracted negotiations. Nothing would preclude parties to negotiate different terms from the tariff if they mutually agreed to do so.

2. Integrated Resource Plan Methodology Rates

Avista has included five rate options on Tariff Sheet 62B for projects below the Eligibility Cap, but the tariff does not set forth the rate option available for projects above the Eligibility Cap. This omission could lead to confusion, and Sagebrush therefore recommends including a sixth entry on that sheet of the tariff that indicates that projects above the Eligibility Cap may obtain rates based on the Integrated Resource Plan (“IRP”) Methodology.

3. Information to Obtain Indicative Pricing and a Draft Contract

Sagebrush recommends a limited number of changes to the Avista’s list of materials the QF must supply to obtain an indicative pricing proposal or draft contract.

First, the proposed Tariff Sheet 62C states:

A. To obtain an indicative pricing proposal for a proposed Qualifying Facility, the Customer shall provide the Company information that is reasonably required to develop such a proposal. General information regarding a Qualifying Facility shall include, but not be limited to:

Avista’s Tariff Sheet 62D contains the same expanding term, “but not limited to,” in subpart E, which lists criteria to receive a draft contract after receiving the pricing. Avista’s lists are exhaustive, but the underlined language inserts confusion by implying that the list could include

more information. Sagebrush recommends that Avista should delete the highlighted language.

Second, Avista's proposed Tariff Sheet 62C lists the following as among the material necessary obtain an indicative pricing proposal:

iv) schedule of estimated Qualifying Facility electric output, in an 8,760-hour electronic spreadsheet format;

Avista will need a 8,760-hour generation output profile (commonly referred to as a "12x24 profile") to generate IRP Methodology rates, but Sagebrush sees no reason to require a 12x24 generation profile for projects that seek published rates. The Eligibility Cap for wind and solar resources in Idaho is now set at 100 kilowatts. In Sagebrush's experience, projects even up to 10,000 kW, or 10 megawatts ("MW") may not typically develop a 12x24 profile due to the expense of doing so. Certainly, projects sized 100 kW do not typically produce a 12x24.

Sagebrush recommends the following underlined insertion:

iv) if the Qualifying Facility's size is above the Eligibility Cap, schedule of estimated Qualifying Facility electric output, in an 8,760-hour electronic spreadsheet format;

In the event that the QF under the Eligibility Cap has developed a 12x24 generation profile, Sagebrush expects that the QF would happily share it with the utility, subject to any confidentiality protections, but doing so should not be a requirement to obtain published rates.

4. Timelines for Negotiations

Sagebrush recommends a few additional changes to the timelines for contract negotiations.

First, once the QF has attempted to provide the listed information necessary to receive indicative pricing, Avista's proposed Tariff Sheet 62C states:

B. Where the Company determines that the Customer has not provided sufficient

information as required by Section (1)A, the Company shall, within ten (10) business days, notify the Customer in writing of any deficiencies.

(underline added).

Likewise, once the QF has attempted to provide the listed information necessary to receive a draft contract, Avista's proposed Tariff Sheet 62E states:

F. If the Company determines that the Customer has not provided sufficient information as required by Section (1)E, the Company shall, within ten (10) business days, notify the Customer in writing of any deficiency.

(underline added).

In Sagebrush's experience, two weeks is longer than it should take for a utility to merely let the QF know if the information provided by the QF is complete. Avista's tariff provides the utility with additional time to provide draft contracts to the QFs seeking published rates, which Sagebrush believes is reasonable so long as the utility can at least confirm the information provided is sufficient to keep the process moving forward more quickly than in two weeks. Sagebrush recommends that Avista should reduce this time and change the underlined words to five (5) business days.

Next, Sagebrush recommends a reduction in the time that Avista proposes for providing indicative pricing for projects above the Eligibility Cap. Avista's Tariff Sheet 62D states:

C. Following satisfactory receipt of all information required in Section (1)A, the Company shall, within twenty five (25) business days, provide the Customer with an indicative pricing proposal containing terms and conditions tailored to the individual characteristics of the proposed Qualifying Facility; provided, however, that for Qualifying Facilities eligible for Published Rates pursuant to the Idaho Public Utilities Commission's eligibility requirements, the Company will provide such indicative pricing proposal within ten (10) business days.

(underline added).

Sagebrush believes that the ten business days to provide specific pricing adjustments for

published rates (to take into account time-of-day and time-of-year adjustments, etc.) is reasonable in the overall scheme of the process proposed by Avista. But Sagebrush believes a utility could easily provide the indicative prices for IRP Methodology rates more quickly than twenty-five business days, which is well over a month in time. Sagebrush recommends that Avista should change the underlined language to twenty (20) business days for IRP methodology rates. That period of time is consistent with Idaho Power Company's current tariffs in Oregon, which provide for 30 calendar days to provide indicative pricing for projects above the eligibility cap in that state.¹ In Sagebrush's experience, a month should be more than enough time, and a period any longer than that will leave the QF wondering if the utility is still processing its request or intentionally delaying progress.

5. Legally Enforceable Obligation

Avista has proposed to create a new set of criteria for how a QF may create a legally enforceable obligation ("LEO") under 18 C.F.R. § 292.304(d)(2). Specifically, Avista's Tariff Language at Sheet 62D states as follows:

- D. The indicative pricing proposal provided to the Customer pursuant to Section (1)C will not be final or binding on either party. Prices and other terms and conditions will become final and binding on the parties under only two conditions:
 - i) The prices and other terms contained in a power purchase agreement shall become final and binding upon full execution of such power purchase agreement by both parties and approval by the Idaho Public Utilities Commission, or
 - ii) The applicable prices that would apply at the time a complaint is filed by a Qualifying Facility with the Idaho Public Utilities Commission shall be final and binding upon approval of such prices by the Idaho Public Utilities

¹ <https://www.idahopower.com/AboutUs/RatesRegulatory/Tariffs/tariffPDF.cfm?id=269>.

Commission and a final non-appealable determination by the Idaho Public Utilities Commission that:

- a. a "legally enforceable obligation" has arisen and, but for the conduct of the Company, there would be a contract, **and**
- b. the Qualifying Facility can deliver its electrical output within 180 days of such determination.

(underline and bold added).

This tariff language, if approved by the Commission, could constitute a major policy change in the Commission's implementation of PURPA and determination of how a QF may create a LEO. Under FERC's regulations implemented by the IPUC, "if the electric utility refuses to sign a contract, the QF may seek state regulatory authority assistance to enforce the PURPA-imposed obligation on the electric utility to purchase from the QF, and a non-contractual, but still legally enforceable, obligation will be created pursuant to the state's implementation of PURPA." *JD Wind 1, LLC*, 129 FERC ¶ 61,148, at ¶ 25 (November 19, 2009). Existing IPUC decisions establish that the Commission will find that the QF created a LEO if the QF can "demonstrate that 'but for' the actions of [the utility, the QF] was otherwise entitled to a power purchase contract." *Earth Power Resources, Inc. v. Washington Water Power Company*, Case No. WWP-E-96-6, Order No. 27231 (1997); *see also Blind Canyon Aquaranch v. Idaho Power Company*, Case No. IPC-E-94-1, Order No. 25802 (1994). The Commission has also used other tests, including the pre-filed complaint test, under which the QF can file a complaint with the Commission, at which time the Commission will make a determination as to whether and when a legally enforceable obligation arose. *See A.W. Brown v. Idaho Power Co.*, 121 Idaho 812, 816, 828 P.2d 841, 845 (1992).

However, the underlined and bolded "and" in Avista's proposed tariff language appears

to suggest that, in the absence of a fully executed contract, the QF must not only prove that it obligated itself to sell to the utility but must to also prove that it could start delivering power within 180 days. This has never been a requirement in Idaho. This new requirement would frustrate QF development because most QFs rely on the contract to finance and then build the project. It is rare for an un-built project to commence operations within 180 days of Commission-approval of the contract. Even with resource types that could be constructed within 180 days, there are many legitimate reasons that the contract may be signed well prior to the project planned to actually commence construction, including financing processes and availability of generation or interconnection equipment and construction crews. Additionally, in the circumstance of having the entire development process halted by the uncertainty that arises when a complaint must be filed against the utility, the QF's ability to commence deliveries within 180 days would be even further compromised.

In sum, Avista's proposal may be acceptable if demonstrating ability to deliver within 180 days were one way, *but not the only way*, to create a non-contractual LEO. However, Sagebrush doubts very many QFs would seek to create a LEO by commencing deliveries unless they were already built. Thus, Sagebrush recommends that Avista should delete the entire underlined language or at the bare minimum delete the underlined and bolded "and" and replace it with an "or."

6. Interconnection Study Requirement

Sagebrush recommends revisions to the requirements for completion of interconnection studies. Avista's proposed Tariff Sheet 62E states that to obtain a draft contract, the QF must provide:

iv) evidence that interconnection studies have been completed, and a demonstration that Qualifying Facility interconnection is to occur on or prior to the requested first delivery date

Because the IPUC has never required QFs to progress through the interconnection process prior to executing a contract, let alone receiving a draft contract, this section of Avista's tariff would impose a new requirement upon QFs. The Commission's PURPA implementation already requires QFs to keep the utility and its customers whole by including liquidated damages provisions and termination damages provisions in Idaho PURPA contracts.

Interconnection studies provide non-binding construction time and cost estimates by the utility. While Sagebrush generally agrees that a responsible developer will have obtained interconnection studies to the point where it is confident it can achieve its online date, imposing this as a requirement to receive a *draft* contract will be an unnecessary hurdle in many circumstances. For example, a project's configuration could change slightly from that proposed in a prior interconnection request with which the developer possesses a study with acceptable cost and time estimates. While the slight modification may render the existing study invalid for the project, the developer may still be reasonably certain of the costs and time to construct, particularly if the modification reduces the size of the project.

This language is also ambiguous as to what kind of interconnection study the QF must obtain. Typically, the process includes a feasibility study first, then only for some but not all projects a system impact study, and finally a facilities study. The ambiguity in Avista's proposal would likely lead to disputes over how far the QF must progress through the interconnection process. Thus, Sagebrush recommends that Avista should delete this requirement, or if the Commission is inclined to adopt this new requirement, Sagebrush recommends it be a

requirement to *execute* a contract, and that the requirement be more specific to require that the QF has obtained a *feasibility* study.

7. Time to Execute Agreement

Finally, Sagebrush recommends further clarity with regard to the time periods set for the execution of the final agreement. Avista's proposed Tariff Sheet 62F provides:

L. The Customer shall, within five (5) business days, execute and return the final power purchase agreement to the Company

(underline added). Under this requirement, the following events must occur within five business days: (1) the contract must travel through the mail or delivery service from Avista to the QF; (2) the individual with signing authority and likely others in the development team must review the contract; (3) legal counsel (if any) for the QF must review the contract; (4) the individual with signing authority must sign the contract; and (5) the QF must "return" the contract to Avista, which could be read to mean the contract must travel through the mail or delivery service from the QF to Avista.

Sagebrush appreciates Avista's concern that a QF might "sit" on a pending final offer for too long, but in many cases five days will simply be too short of a time to complete all of the steps necessary to execute and return the contract. If the contract happens to be sent while the individual with signing authority is on business or vacation travel, the QF could easily have the entire process re-set and face months of additional delay in getting a contract executed for its project. Such a delay could easily kill a project, given the timing of other necessary agreements underlying the project, and transience of financing options and available tax benefits. By way of example, Section 17.6 of Avista's Open Access Transmission Tariff provides transmission customers with 15 calendar days to review and sign a much less complicated point-to-point

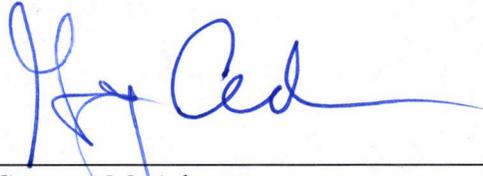
transmission agreement.² Sagebrush therefore recommends that Avista should change the underlined language to ten (10) business days, and replace the word “return” with the word “forward.”

CONCLUSION

Sagebrush appreciates the opportunity to comment on Avista’s proposed Schedule 62, and recommends the clarifications and changes set forth herein.

RESPECTFULLY SUBMITTED this 15th day of May, 2014.

RICHARDSON ADAMS, PLLC

By 

Gregory M. Adams
Of Attorneys for Sagebrush Energy, LLC

² Available online at:
http://www.oasis.oati.com/AVAT/AVATdocs/Avista_Corp_OATT_effective_12-27-13.pdf.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the ^{15th} day of May, 2014, a true and correct copy of the within and foregoing COMMENTS OF SAGEBRUSH ENERGY, LLC was served as shown to:

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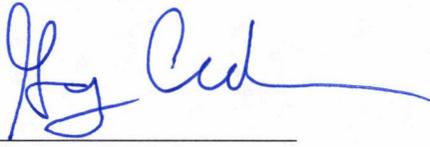
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